

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2019-UP-308 (S.C. Ct. App. Filed August 28, 2019)

Edward R. Kelly and Deirdre O. Kelly Petitioners

v.

Allen S. McCombs and Benjamin James Russell Respondents

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-002176

Edward R. Kelly and Deirdre O. Kelly.....Appellants

v.

Allen S. McCombs and Benjamin James Russell.....Respondents

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-46-870

EDWARD R. KELLY and DEIRDRE O.
KELLY,

Plaintiffs,

vs.

ALLEN S. McCOMBS and BENJAMIN
JAMES RUSSELL.

Defendants.

**ORDER FOR
SUMMARY JUDGMENT**

This matter came before me on September 7, 2016, upon Defendants' Motion for Summary Judgment and Motion to Dismiss.¹ Present and representing the parties at the hearing were: Brian S. McCoy for Plaintiffs; W. M. Brice, III, for Defendant Benjamin James Russell; and, Elizabeth R. Faulkner for Defendant Allen S. McCombs. Based on the record before the court, the applicable law, and the arguments of counsel, I make the following findings and conclusions.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Cl.App.1999); Rule 56(c), SCRPC. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Cl.App. 1997).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874.

¹ As the parties have all submitted affidavits and documents in support of their respective positions, I am treating the matter as a motion for summary judgment, and applying the standard of review for such motions.

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(2001); *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). "Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). Summary judgment is inappropriate where further inquiry into the facts of the case is necessary to clarify the application of law. *Gadson v. Hembree*, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); *Wogan v. Kunze*, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004).

FACTUAL BACKGROUND

This case involves a 37-acre tract of real estate located in York County ("the Property"), which was part of a 100+-acre tract owned by Plaintiffs. Henry L. McCombs ("Henry") wanted to purchase part of the 100+-acre tract, which adjoined his property.

In 1995, Plaintiffs contracted to sell the 37-acre tract to Henry. In 1996, the transaction was completed, and Henry received fee simple title to the tract. As part of the transaction, Plaintiffs reserved a first right of refusal ("FROR") in their deed to Henry. The FROR simply stated: "[t]he grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same."

Defendants assert that on at least two occasions prior to 2001, Henry informed Plaintiffs, pursuant to the FROR, that he had received, or might receive, an offer to purchase the Property, and asked if Plaintiffs would match the price of the offer. Plaintiffs expressed their interest in exercising the FROR; however, Henry never provided either offer, and no sale of the Property occurred.

In April, 2012, more than sixteen years after the sale to Henry, Henry deeded the property to his son, Defendant Allen S. McCombs ("Allen"), by quitclaim deed for a consideration of "... \$5 and love and affection." Plaintiffs were not informed of the transfer, and assert that they were not aware of it until early 2016. Henry died in June, 2015. Subsequently, in November, 2015, more than nineteen years after the sale to Henry, Allen sold the Property to Defendant Benjamin James Russell ("Russell") for \$125,000.00. Allen did not notify Plaintiffs of the proposed sale.

PROCEDURAL BACKGROUND

Plaintiffs filed this action on March 21, 2016. They seek rescission of the sale to Russell, and enforcement of the FROR, so that they can exercise their asserted right. They also seek damages against both Defendants as an alternative remedy. Defendants filed a Motion for

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Summary Judgment and a Motion to Dismiss Plaintiff's claims.

DISCUSSION

Based on the record presented, I make the following conclusions of law.

"The construction of a clear and unambiguous deed is a question of law for the court." *Bennett v. Investors Title Ins. Co.*, 370 S.C. 561, 570, 635 S.E.2d 660, 665 (Ct.App. 2006), quoting *Hammond v. Lindsay*, 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981). The role of the court is to ascertain the intent of the grantor from the deed as a whole. *Wayburn v. Smith*, 270 S.C. 38, 239 S.E.2d 890 (1977). That underlying principle is subject to the caveat that the grantor's intention must not contravene other established principles of law. *Id.*

Historically, South Carolina has disfavored clauses in deeds that have the effect of diminishing a conveyance of fee simple title. "An attempt to convey an estate in fee simple and deprive the purchaser of the incident of ownership is not effective in law." See *Sandford v. Sandford*, 106 S.C. 304, 306, 91 S.E. 294, 295 (1917). A second principle is that any restraint on alienation in the form of a right of first refusal that is not specific in all required elements runs counter to the general rule in this state that fee simple ownership carries with it the ability to convey freely, with few restrictions. See, e.g., *Shealy v. South Carolina Elec. and Gas Co.*, 278 S.C. 132, 293 S.E.2d 306 (1982); *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 159 S.E.2d 46 (1968); and, *Sandford v. Sandford*, 106 S.C. 304, 91 S.E. 294 (1917).

I. FROR as vague and indefinite.

The initial issue presented is whether the FROR, as written, is so vague and indefinite as to be unenforceable. A right of first refusal to repurchase property held by a grantor is a non-vested, contingent interest, because the grantee may choose never to sell the subject property. *Webb v. Reames*, 326 S.C. 444, 446 485 S.E.2d 384, 385 (1997). As such, it represents a restraint on alienation, but is enforceable so long as both the price term, and the time within which the right may be exercised are reasonable. 61 Am.Jur.2d *Perpetuities and Restraints on Alienation* § 110 (2002).

"Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right." Restatement (Third) of Property, *Servitude* § 3.4 comment (f) (2000, update to June, 2016). According to the record here, the purpose of the restriction in this case was primarily to retain the property in the family, which is a legitimate purpose. By reasonable inference, the language

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contained in the operative deed dictates that the price to be paid in repurchasing the Property would be the same as the sale price contained in the offer from a potential third party purchaser. However, the procedures for exercising the right of first refusal are not specifically stated in the grant itself.

In the present case, the FROR contains no specification for giving notice of a third party's offer to purchase, no specification of time after notice within which the FROR must be exercised by Plaintiffs, no specification of the time within which Plaintiffs must pay the consideration for repurchase, or any other terms by which the reasonableness of the servitude imposed by the FROR may be assessed. Nor are any such procedures otherwise specified in the deed to Henry. Thus, I conclude that on the facts of this case, the FROR is an unreasonable restraint on alienation, and is unenforceable.

II. Enforcement of FROR.

The FROR as contained in the deed to Henry states: "[t]he grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same." On its face, the FROR contains no language making it binding on the heirs or assigns of Henry. This is in contrast to a previous provision of the deed placing a restriction on the property pertaining to mobile homes. That provision states:

The above described property is also subject to the restriction that neither the *grantee nor any of his successors or assigns or heirs* will place more than one mobile home on the above described property for a period of 45 years, that being from August 29, 1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved. (Emphasis added.)

This restriction is clearly made binding on the successors in title to Henry for a definite period. No such intent is expressed, or can be reasonably inferred, from the language of the FROR. Thus, upon Henry's conveyance of the property, or upon his death, the FROR would expire, and have no effect going forward.

After Henry conveyed the subject property to Allen in 2012, some sixteen years after he received title, the FROR was no longer binding. Even if it is assumed that the donative transfer to Allen would not operate to extinguish the FROR, as argued by Plaintiffs, Henry's death would. His heirs would not be bound by its provisions, as the language of the FROR simply did not contain any such provision or language.

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Thus, I conclude that the FROR was enforceable only between Henry and Plaintiffs, and expired either upon Henry's conveyance to Allen, or Henry's death.

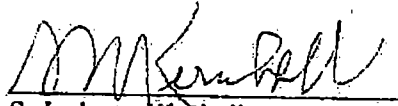
CONCLUSION

The right of first refusal in this case constitutes an unreasonable limitation upon the power of alienation, it is therefore violative of the applicable case law and public policy of this state, and is unenforceable. See *McCravey v. Otis*, 90 S.C. 447, 452, 74 S.E. 142, 143 (1912); and, *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct.App.1984). Further, the right of first refusal was binding only as between Plaintiffs and Henry McCombs, as it contained no language making it binding on Henry's heirs and assigns.

Therefore, it is ordered that Defendants' Motion for Summary Judgment be granted, and Plaintiffs' Complaint be dismissed with prejudice.

AND IT IS SO ORDERED.

September 28, 2016


S. Jackson Kimball
Special Circuit Court Judge
York County



STATE OF SOUTH CAROLINA

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COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-46-870

EDWARD R. KELLY and DEIRDRE O.
KELLY,

Plaintiffs,

vs.

COMPLAINT

ALLEN S. MCCOMBS and BENJAMIN
JAMES RUSSELL,

Defendants.

The Plaintiffs, Edward R. Kelly and Deirdre O. Kelly, through their undersigned attorney, hereby submit their Complaint against the defendants above named, and allege:

1. The plaintiffs are citizens and residents of York County, South Carolina,
2. Upon information and belief, both Allen S. McCombs and Benjamin James Russell are citizens and residents of York County, South Carolina.
3. This lawsuit involves a 36-acre tract of real estate located in York County, South Carolina, and more particularly described as follows:

All that certain piece, parcel or lot of land being situated along SC Highway No. 49 in the Bullocks Creek Township, York County, South Carolina, and more fully shown on a plat entitled Boundary Survey for Henry L. McCombs recorded on March 22, 1996 in Plat Book A-87 at page 3 in the Office of the Clerk of Court for York County, South Carolina, and containing 36.00 acres more or less and having such courses and distances, metes and bounds, as will appear by reference to the above plat, said plat being incorporated herein by reference.

DERIVATION: This being the identical real property conveyed to Allen S. McCombs by deed recorded April 11, 2012 in Book 12552, page 91, RMC office for York County, SC, and conveyed by Allen S. McCombs by deed recorded November 20, 2015 in Book 15286 at Page 201 in the RMC office for York County, SC,

Tax Map No.: 133-00-00-012 (the "Property")

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4. In 1995, the Plaintiffs purchased certain property in York County from Henry L. McCombs. The parties entered into a Contract of Purchase and Sale ("Contract") relating to the property. The Contract provided that the Plaintiffs would retain a one-acre tract from the property purchased, and would sell back to Henry L. McCombs the 37-acre tract that is the Property in issue. The parties had extensively discussed that if the Plaintiffs agreed to sell the Property back to McCombs without cash, McCombs would have to agree to allow Plaintiffs and their heirs a first right of refusal to match any offer that McCombs or his heirs would receive on the Property. Accordingly, Paragraph 11 of the Contract provides:

The purchaser (Plaintiffs) will have the first right of refusal if the seller (McCombs) ever decides to sell the 37 acres or any portion (sic) thereof. The first right of refusal shall be binding upon the heirs of the seller and the right of first refusal shall inure to (sic) the heirs of the purchasers.

5. In 1996, Henry L. McCombs completed the purchase of the Property and received a deed for the Property.

6. The deed back to Henry L. McCombs for the Property was recorded March 22, 1996 in Book Vol 1481 at Page 125 in the Office of the York County Clerk of Court. The Deed expressly includes a first right of refusal, as follows:

The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion or partial of the same.

7. Subsequently, on at least two occasions prior to 2001, Henry L. McCombs informed the Plaintiffs, pursuant to the first right of refusal, that he had received an offer to purchase the Property and asked if they would match the price of the offer. On both occasions Plaintiffs requested a copy of the offer or contract, and expressed their interest to exercise the right and repurchase the Property. However, Mr. McCombs failed to provide the offer or contract on either occasion, and no sale occurred.

8. By Quitclaim Deed recorded April 11, 2012 in Book 12552 at Page 91 in the Office of the York County Clerk of Court, Henry L. McCombs purported to convey the Property to his son, Defendant Allen S. McCombs for \$5 and "Love and Affection." The Plaintiffs were not informed of the transfer, and were not aware that it occurred until early 2016.

9. Henry L. McCombs died in June 2015.

10. By Deed recorded November 20, 2015 in Book Vol. 15286 at Page 201 in the Office of the York County Clerk of Court, Defendant Allen S. McCombs purported to convey the Property to Defendant Benjamin James Russell for \$125,000.00. The Plaintiffs were not given a right of first refusal and were not aware of the transaction until early 2016.

11. Plaintiffs would have exercised the right of first refusal, and would have promptly purchased the Property at the sale price. Plaintiffs were ready, able, and willing to exercise the right of first refusal contained in the 1996 Deed. Defendant Allen S. McCombs had actual knowledge how to contact Plaintiffs.

12. Each Defendant had actual knowledge and record knowledge of the first right of refusal, but failed to comply with the requirements thereof. Each Defendant closed the sale referenced in paragraph 9 with actual knowledge of the first right of refusal in the deed, but proceeded with the knowledge that the right was not provided to the Plaintiffs.

13. By letter dated January 19, 2016, counsel for Plaintiffs informed each of Defendant Allen S. McCombs and Defendant Benjamin James Russell regarding their violation of the first right of refusal, and the Plaintiffs' intent to exercise the right and seek compliance by judicial intervention.

14. The first right of refusal does not involve a "property interest," and therefore S.C. Code section 27-6-20 *et seq.* does not apply. Alternatively, S.C. Code section 27-6-50(1) expressly

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excludes a nondonative transfer from the invalidity provision of 27-6-20. The court of appeals case of *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997) does not control and is distinguishable, or alternatively is not a correct statement of the law and should be corrected.

15. Plaintiffs are entitled to have the first right of refusal provision in the Deed enforced, to specific performance thereof, to rescission of the Deed between the Defendants, and to equitable and legal relief available under South Carolina law. Alternatively, Plaintiffs are entitled to a judgment against the Defendants for damages suffered by violation of the first right of refusal.

FIRST CLAIM FOR RELIEF
(Specific Performance and Rescission)

16. To the extent not inconsistent with the remaining allegations herein, Plaintiffs re-allege and incorporate by reference the preceding paragraphs.

17. The 1996 Deed contains a valid and enforceable first right of refusal.

18. The Defendants breached and violated the provision in the Deed by failing to provide Plaintiffs the right to purchase the Property at the sale price offered to Defendant McCombs by Defendant Russell.

19. Plaintiffs would have exercised the right and purchased the Property from McCombs for the \$125,000.00 sale price to Russell.

20. Plaintiffs are entitled to specific performance of the first right of refusal, including an Order of the Court rescinding the Deed from Defendant McCombs to Defendant Russell, and requiring Plaintiffs to purchase the Property from McCombs at the sale price within a reasonable time.

SECOND CLAIM FOR RELIEF
(Equitable Relief/Constructive Trust)

21. To the extent not inconsistent with the remaining allegations herein, Plaintiffs re-allege and incorporate by reference the preceding paragraphs.

22. As set forth above, the Defendants were aware of the first right of refusal in favor of the Plaintiffs that was in the Deed directly in the Defendants' chain of title. The Defendants decided not to provide the Plaintiffs with the first right of refusal to which they were entitled in the Deed. Defendant McCombs would have received the exact same sale price from the Plaintiffs, and Defendant Russell would not have been damaged because he would not have been required to pay the agreed upon price for the Property. Plaintiffs are damaged by the actions of the Defendants, which action involves real estate with particular value to Plaintiffs.

23. The conduct of the Defendants was wrongful in that they were aware of the requirements of the Deed, but failed to give Plaintiffs any notice of the transaction either before or after the closing of the sale to Defendant Russell.

24. Defendant Russell is unjustly enriched by having legal title to the Property for which Plaintiffs expressly reserved a first right of refusal, of which Defendant Russell was aware.

25. Under the equitable principles recognized in South Carolina that Equity will not suffer a wrong to be without a remedy and Equity regards as done what ought to be done, the Court should require the Property to be transferred to Plaintiffs in exchange for payment to Defendant Russell of the amount he paid therefor, as if the Defendants had complied with the provision in the Deed.

THIRD CLAIM FOR RELIEF
(Breach of Contract)

26. To the extent not inconsistent with the remaining allegations herein, Plaintiffs re-allege and incorporate by reference the preceding paragraphs.

27. In the alternative to specific performance, the provision in the Deed constitutes a contract between Plaintiffs and Henry L. McCombs and his heirs and successors, until the first

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right of refusal had been actually offered and either accepted or rejected, to comply with the requirements thereof.

28. Defendants breached the contract by failing to provide Plaintiffs with the first right of refusal, and Plaintiffs have been damaged by the breach in an amount to be proven at trial.

WHEREFORE, having set forth its Complaint, the Plaintiffs pray that the Court inquire into the matters set forth herein and:

1. Order specific performance of the first right of refusal and order all actions, including rescission, to effectuate the specific performance, as a matter of law or as a matter of equity;

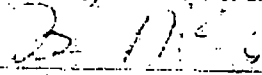
2. Alternatively, award Plaintiffs damages in an amount to be proven for the Defendants breach of the first right of refusal provision;

3. For Plaintiffs' costs and attorneys' fees; and

4. For such further and other relief as the Court deems just and appropriate.

Respectfully submitted this 11 day of March 2016.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-46-870

Edward R. Kelly, et. al.,)
)
Plaintiff,)

Vs.)

Benjamin James Russell, et. al)
)
_____)

ANSWER OF BENJAMIN JAMES RUSSELL

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Benjamin James Russell, through his attorney, does answer the Complaint as follows:

1. Admitted, to the information and belief of the Defendant.
2. Admitted as to the within Defendant.
3. Denied as to Plaintiff's right to bring a real property based action, but admitted for limited purposes only that the transfer of the described tract is the basis of Plaintiff's action.
4. Denied and Strict Proof required, and further answered and defended that such alleged contract is not of public record, nor are either of the Defendants herein parties to such contract, nor did Defendant herein have any notice of same and further answered that should such contract have actually existed, it would have been fully extinguished by the effect of the South Carolina Merger Doctrine which states in part that the rights of the parties are fixed by the terms of the deed even if same vary from the terms of the antecedent contract.
5. Admitted that Mr. Henry McCombs, did purchase the property.

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6. Admitted that Mr. Henry McCombs did receive a recorded deed with that specific language included therein, but further answered and defended that while that specific language is as follows:

"The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above property or any portion or partial of the same"

that this language was specific to Henry McCombs only and does not properly state the normal and customary words that it binds the grantee's heirs or assigns, nor give any notice or indication that it runs to or impacts any person other than Henry McCombs, nor that it runs with the land, but by its very wording, the provision limits its own scope to Henry McCombs only as the initial Grantee, and same cannot be considered an oversight because it does specifically run to the benefit of the heirs and assigns of the Plaintiff and is so worded, therefore it is not binding on either Defendant herein, both of whom are assignees, once and then twice removed from Henry McCombs, and therefore Plaintiff's action, both as to them, and as to this property, should fail.

7. Denied and strict proof demanded, and further answered that Henry McCombs is deceased and therefore such an allegation cannot be verified or defended by this Defendant and absent some direct physical evidence of same, it should not be admissible if so attempted, but in any event further answered that same is immaterial if the wording of the provision limits its enforceability to Henry McCombs who is deceased and neither he, nor his estate is a party hereto.
8. Admitted as to the transfer, but denied as to the Plaintiff's lack of knowledge and further Answered that this Defendant is informed and believes that the other

Defendant herein was present for a meeting in which Mr. Henry McCombs and Plaintiff discussed in advance the specific transfer between Henry McCombs and Allen McCombs.

9. Admitted as to the death of Mr. Henry McCombs, but this Defendant is not personally aware of the actual date.
10. Admitted as to the transfer, but denied that Plaintiffs were unaware and further denied that they were entitled to any right of refusal to purchase.
11. Denied in that Defendant has no way to reply to any allegation as to what Plaintiffs would or would not have done, nor as to their ability to do so.
12. Denied and strict proof demanded and further denied as to the existence of a valid first right of refusal.
13. Admitted
14. Denied and further answered that South Carolina case law is clear and specific that a first right of refusal is a non-vested property interest subject to the Rule Against Perpetuities and further answered that South Carolina Case Law and Code Section 27-6-20 and Webb v. Reames, as well as other cases, make clear that the law of South Carolina is that language such as was included in this deed does in fact violate the rule against perpetuities and as such, South Carolina has deemed them not simply voidable, but in fact void from the outset.
15. Denied as to all allegations and strict proof demanded.
16. No answer required and therefore denied to the extent same is consistent with the other answers herein.
17. Denied for the reasons set forth otherwise within this answer.

18. Denied for the reasons set forth otherwise within this answer, including the lack of applicability to this Defendant as a second level removed assignee of the originally grantee.
19. Defendant has no actual knowledge to reply to what the Plaintiff would or would not have done.
20. Denied for the reasons set forth otherwise within this answer.
21. No answer required and therefore denied to the extent same is consistent with the other answers herein.
22. Denied and strict proof demanded as to notice and requirement of notice, and further answered that the provision itself has no element discussing notice or even requiring same in writing and Defendant is informed and believes that Plaintiff was given verbal notice, in advance, of Henry McCombs intention to transfer the property to Allen McCombs.
23. Denied for reasons set forth above, and further answered that there is no requirement of any sort that Defendant Russell communicate with Plaintiffs, nor is there any contractual relationship between them in any manner.
24. Denied and further answered that Defendant is not unjustly enriched and did pay full consideration for the property.
25. Denied as to any wrong in general due to the unenforceable nature of the wording specifically as to this Defendant and generally under the Rule Against Perpetuities under both case law and statutory law.
26. No answer required and therefore denied to the extent same is consistent with the other answers herein.

27. Denied and specifically answered that this paragraph alleges the provision is binding on the "heirs and assigns" of Henry McCombs but the wording of the provision is specifically lacking those necessary words that would be mandatory in order to extend that provision past Henry McCombs.

28. Denied.

BY WAY OF FIRST DEFENSE:

(Rule against Perpetuities)

29. All matters alleged above, not inconsistent herewith, are to be considered as restated as necessary or appropriate.
30. That the case law in South Carolina is clear that a right of first refusal is a contingent non-vested interest that must absolutely vest within a life in being at the time of creation or within 21 years thereafter.
31. That S.C. Code Section 27-6-20 codifies the Rule and further does add an alternative that is must vest within 90 years of creation.
32. That the wording of this provision is open ended and purports to last for the benefit of the Grantor and Grantor's heirs and assigns until a sale occurs and because, at the time of the creation of the document, it was possible for the property have passed for generations without a sale, it is therefore, under established South Carolina law, void from inception.

33. That case law is clear that if a perpetuities issue exists then the right is not voidable, but is in fact void from inception and unenforceable.

BY WAY OF SECOND DEFENSE:

(Lack of Contractual Relationship to Defendant)

34. All matters alleged above, not inconsistent herewith, are to be considered as restated as necessary or appropriate.

35. That the provision in question lacks even the most basic wording to make it extend beyond the original grantee, Henry McCombs

36. Absent the allegation that it is void from inception under the settled law of South Carolina, it is also unenforceable against the Defendants herein because both are assigns of Henry McCombs and as such are not bound by the actual wording of the provision.

37. That this lack of necessary language only appears in the provision herein. The deed itself, paragraph immediately above this provision, set a specific restriction against mobile home for 45 years and does specifically make it binding on the "grantee and his successors or assigns or heirs" so Defendant believes that the intent of the following provision, which specifically does not contain that same wording, was to only last the lifetime of Henry McCombs.

38. That regardless of the intention, the wording, or lack thereof, limited the provision to the lifetime of Henry McCombs, whom Plaintiff has correctly alleged died in 2015.

BY WAY OF FOURTH DEFENSE:

(Unenforceability due to Vagueness)

39. All matters alleged above, not inconsistent herewith, are to be considered as restated as necessary or appropriate.
40. The provision herein is lacking in most of the basic elements that would be required to meet even a minimal standard of enforceability, including but not limited to how notice would be given, how notice would be proven, how notice would be waived, what the terms of repurchase would be, how long compliance would be required, how it would be determined who had priority of rights should multiple heirs of Plaintiff exist.
41. That it would be unjust for the court to enforce a provision that by its own inadequacy lacks enough information to give sufficient notice of its own requirements

BY WAY OF FIFTH DEFENSE

(Statute of Limitation)

42. All matters alleged above, not inconsistent herewith, are to be considered as restated as necessary or appropriate.

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43. That Henry McCombs transferred the property to Allen McCombs in April of 2012 and such transfer is of record and has been for a period exceeding three years.

44. That this Defendant (Russell) is informed and believes that the McCombs gave specific notice to Plaintiff, prior to April of 2012 of their intended transfer between themselves and Plaintiff indicated at that time to McCombs that Plaintiff had no interest in reacquiring the property and that Defendant Russell is informed and believes that McCombs considered this a proper waiver, that the deed provision does not require a written waiver, and that in any event that deed transfer from Henry McCombs to Allen McCombs occurred more than three years prior to the filing of this lawsuit or to the execution of a deed from Allen McCombs to Russell and as such Plaintiff is barred by the Statute of Limitations from prosecuting this action.

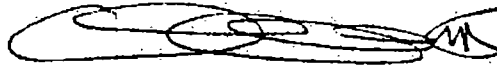
45. Any matter not otherwise answered or addressed above is to be considered denied and strict proof thereof demanded.

WHEREFORE, DEFENDANT HAVING ANSWERED, does request that this Court, after due deliberation and proper hearing, issue its ORDER:

1. That the Complaint of the Plaintiff be dismissed for the reasons set forth above, or for any one of them.
2. That the provision in question be determined to be void from inception as a violation of the Rule against Perpetuities, under case law or under statutory law, either or both.

3. That, in the alternative or together with any other relief, that if the provision is upheld in part or in whole, that no relief be granted against Defendant Russell in that the provision is not binding upon the assigns of Henry McCombs, of whom he is one, and therefore he has no contractual or other relationship with the Plaintiff which would give them standing to seek relief against him.
4. That, in the alternative or together with any other relief, that the provision be held unenforceable due to lack of specificity and vagueness.
5. That, in the alternative or together with any other relief, that any request for relief by the Plaintiff be barred by the Statute of limitations.
6. For such other relief as the court deems necessary and proper.

Respectfully submitted.



William M. Brice, III
Brice, Law Firm, LLC
P. O. Box 300
9 North Roosevelt Street
York, S.C. 29745
803-684-4462
mac@thebricelawfirm.com

May 12, 2016

Appendix-022

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Edward R. Kelly and Deirdre O. Kelly,

Plaintiffs,

vs.

Allen S. McCombs and Benjamin James Russell,

Defendants.

**ANSWER and COUNTERCLAIM of
ALLEN MCCOMBS**

Case No. 2016-CP-46-870

2016-07-27 Fri 14:52

COMES NOW the Defendant, Allen McCombs, by and through his undersigned attorney,
and answering the Plaintiffs' Complaint, would show unto the Court and allege that:

FOR A FIRST DEFENSE.

(Qualified General Denial)

The Defendant denies each and every allegation contained in the Plaintiffs' Complaint unless expressly admitted, acknowledged, or qualified herein.

1. The Defendant **admits** the allegation of **Paragraph 1**.
2. In answering the allegations of **Paragraph 2**, the Defendant **admits** that he is a resident of York County, South Carolina.
3. In answering the allegations of **Paragraph 3**, the Defendant only **admits** that the transfer of the described tract is the subject of Plaintiffs' action, but denies Plaintiffs have any cause of action involving this tract of land.
4. The Defendant **denies** the allegations of **Paragraph 4** and demands strict proof thereof.
5. The Defendant **admits** the allegations of **Paragraph 5**.
6. In answering the allegations of **Paragraph 6**, the Defendant **admits** that Henry

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- McCombs did receive a recorded deed with the specific language as set forth in Paragraph 6, but denies that this recorded deed reserved a valid first right of refusal.
7. The Defendant **denies** the allegations of Paragraph 7 and demands strict proof thereof.
 8. In answering the allegations of Paragraph 8, the Defendant **admits** that Henry McCombs purported to convey the property to his son by Quitclaim deed recorded April 11, 2002 in Book 2552 at Page 91. The Defendant **denies** the remaining allegations of Paragraph 8 and demands strict proof thereof.
 9. The Defendant **admits** the allegations of Paragraph 9.
 10. In answering the allegations of Paragraph 10, the Defendant **admits** that he conveyed his interest in the property to Benjamin James Russell for \$125,000. The Defendant **denies** the remaining allegations of Paragraph 10 and demands strict proof thereof.
 11. In answering the allegations of Paragraph 11, the Defendant has insufficient knowledge as to what the Plaintiffs would have done. The Defendant **denies** the remaining allegations of Paragraph 11 and demands strict proof thereof.
 12. In answering the allegations of Paragraph 12, the Defendant **denies** the existence of a valid first right of refusal and further **denies** the remaining allegations of Paragraph 12 and demands strict proof thereof.
 13. The Defendant **admits** the existence of such letter in the allegations of Paragraph 13.
 14. The Defendant **denies** the allegations of Paragraph 14 and demands strict proof thereof.
 15. The Defendant **denies** the allegations of Paragraph 15 and demands strict proof thereof.
 16. Paragraph 16 does not require a response.
 17. The Defendant **denies** the allegations of Paragraph 17 and demands strict proof thereof.
 18. The Defendant **denies** the allegations of Paragraph 18 and demands strict proof thereof.
 19. In answering the allegations of Paragraph 19, the Defendant has insufficient knowledge
- Appendix-024

- as to what the Plaintiffs would have done and accordingly denies the allegations.
20. The Defendant denies the allegations of Paragraph 20 and demands strict proof thereof.
 21. Paragraph 21 does not require a response.
 22. The Defendant denies the allegations of Paragraph 22 and demands strict proof thereof.
 23. The Defendant denies the allegations of Paragraph 23 and demands strict proof thereof.
 24. The Defendant denies the allegations of Paragraph 24 and demands strict proof thereof.
 25. The Defendant denies the allegations of Paragraph 25 and demands strict proof thereof.
 26. Paragraph 26 does not require a response.
 27. The Defendant denies the allegations of Paragraph 27 and demands strict proof thereof.
 28. The Defendant denies the allegations of Paragraph 28 and demands strict proof thereof.

BY WAY OF FIRST DEFENSE

(Rule Against Perpetuities)

29. Each and every allegation set forth in the preceding paragraphs is re-alleged and incorporated herein by reference as fully as if repeated here verbatim to the extent not inconsistent herewith.
30. Case law in South Carolina clearly sets forth the Rule Against Perpetuities in that a first right of refusal is a contingent, non-vested interest that is invalid unless it is certain to vest within a life in being at the time of creation or within twenty-one (21) years thereafter.
31. S.C. Code Section 27-6-20 codifies the Rule Against Perpetuities and further does add an alternative that a first right of refusal may also vest within ninety (90) years of creation.
32. The provision as alleged to be a first right of refusal in paragraph 4 of Plaintiffs' complaint is open ended and purports to last for the benefit of the Grantor and Grantor's heirs and assigns until a sale occurs and because, at the time of the creation of the

Appendix-025

document, it was possible for the property to have passed for generations without a sale, the provision was invalid at the time of execution of the deed.

33. Case law is clear that if a perpetuities issue exists then the right void from inception and unenforceable.

BY WAY OF SECOND DEFENSE

(Statute of Limitations)

34. All matters alleged above, not inconsistent herewith, are to be considered as restated as necessary or appropriate.
35. That Henry McCombs transferred the property to Allen McCombs in April of 2012 and such transfer is of record and has been for a period exceeding three years.
36. That the Defendant McCombs gave specific notice to the Plaintiffs, prior to April of 2012 of his intent to transfer the property to the Defendant Russell and the Plaintiffs indicated at that time to Defendant McCombs that the Plaintiffs had no interest in reacquiring the proper and that the Defendant McCombs considered this a proper waiver, that the deed provision does not require a written waiver, and that in any event that deed transfer from Henry McCombs to Allen McCombs occurred more than three years prior to the filing of this lawsuit or to the execution of a deed from the Defendant McCombs to the Defendant Russell and as such the Plaintiffs are barred by the Statute of Limitations from prosecuting this action.
37. Any matter not otherwise answered or addressed above is to be considered denied and strict proof thereof demanded.

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BY WAY OF THIRD DEFENSE

(Lack of Contractual Relationship to Defendant)

38. Each and every allegation set forth in the preceding paragraphs is re-alleged and incorporated herein by reference as fully as if repeated here verbatim to the extent not inconsistent herewith.
39. The provision as alleged to be a first right of refusal in paragraph 4 of Plaintiffs' complaint lacks even the most basic wording to make it extend beyond the original grantee, Henry McCombs.
40. Absent the allegation that it is void from inception under the law of South Carolina, it is also unenforceable against the Defendants herein because both are assigns of Henry McCombs and as such are not bound by the actual wording of the provision.
41. The absence of necessary language only appears in the provision in question. In the deed itself, in the paragraph immediately above the provision in question, is a specific restriction against mobile homes for forty-five (45) years, and that provision does specifically make it binding on the "grantee and his successors or assigns or heirs" so the Defendant believes that the intent of the provision in question, which specifically does not contain that same wording, was to only last the lifetime of Henry McCombs.
42. Regardless of the intention, the wording, or lack thereof, limited the provision to the lifetime of Henry McCombs, whom Plaintiff has correctly alleged died in 2015.

BY WAY OF FOURTH DEFENSE

(Unenforceability due to Vagueness)

43. Each and every allegation set forth in the preceding paragraphs is re-alleged and incorporated herein by reference as fully as if repeated here verbatim to the extent not inconsistent herewith.

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44. The provision as alleged to be a first right of refusal in paragraph 4 of Plaintiffs' complaint lacks basic minimum elements required for enforceability, including but not limited to, how notice would be given, how notice would be proven, how notice would be waived, what the terms of repurchase would be, how long compliance would be required, and how it would be the determination would be made regarding who has priority of rights should multiple heirs of the Plaintiffs exist.
45. It would be unjust for this Court to enforce a provision that, by its own inadequacy, lacks enough information to give sufficient notice of its own requirements.

BY WAY OF FIFTH DEFENSE AND BY WAY OF COUNTERCLAIM

(Attorney's Fees)

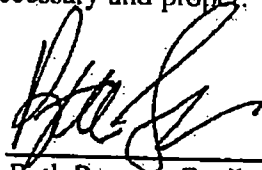
46. Each and every allegation set forth in the preceding paragraphs is re-alleged and incorporated herein by reference as fully as if repeated here verbatim to the extent not inconsistent herewith.
47. The Defendant cannot afford to pay his attorney. The Plaintiffs do not have a valid cause of action and this action is frivolous. Defendant requests the Court to require Plaintiffs to pay his attorney's fees and costs.

WHEREFORE, the Defendant Allen S. McCombs prays for the dismissal of the Plaintiffs' Complaint, and for the following permanent ancillary and collateral relief:

1. That the provision in question be determined to be void and invalid from inception as a violation of the Rule against Perpetuities, under case law and/or under statutory law;
2. That, in the alternative or together with any other relief, any request for relief by the Plaintiffs be barred by the Statute of Limitations;

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3. That, in the alternative or together with any other relief, if the provision is upheld in part or in whole, that no relief be granted against the Defendant McCombs in that the provision is not binding upon the assigns of Henry McCombs, of whom he is one, and therefore he has no contractual or other relationship with the Plaintiffs which would give them standing to seek relief against him;
4. That, in the alternative or together with any other relief, the provision be held unenforceable due to lack of specificity and vagueness;
5. That Plaintiffs be required to pay Defendant's attorney's fees and costs; and
6. For such other relief as the court deems necessary and proper.



Beth Ramsey Faulkner
Attorney for Defendant Allen S. McCombs
Faulkner Law Firm, LLC
P.O. Box 1030
616 East Liberty Street
York, South Carolina 29745
(803) 818-5700

York, South Carolina
May 27, 2016

Appendix-029

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2016-CP-46-870

Edward R. Kelly and Deirdre O. Kelly,

Plaintiffs,

v.s.

Allen S. McCombs and Benjamin James
Russell,

Defendants.

PLAINTIFF'S REPLY TO
COUNTERCLAIM
OF DEFENDANT

The Plaintiffs, replying to the Counterclaim of the Defendants Allen S. McCombs,
would respectfully show unto the Court and allege:

FOR A FIRST DEFENSE

The Counterclaim fail to state facts sufficient to constitute a cause of action

FOR A SECOND DEFENSE

The allegations of Plaintiff's Complaint are realleged and incorporated herein to the extent they are not inconsistent with the allegations set forth in this Reply. Plaintiff hereby responds to allegations in the Counterclaim. All of the allegations of Defendants' Defense are denied. All allegations of the Counterclaim not expressly admitted herein are denied. Plaintiff responds to the numbered paragraphs under the Counterclaim as follows:

47. The allegations of paragraph 47 are denied. No such relief is available as the counterclaim is frivolous.

WHEREFORE, having fully responded to the Counterclaim herein, Plaintiff prays that said Counterclaim be dismissed, that Plaintiff recover his attorney fees and costs, and for such other and farther relief as may be just and proper.

Respectfully submitted this 13th day of June 2016.

Benjamin James Russell
McCOMBS & RUSSELL
578 East Main Street
Rock Hill, South Carolina 29730
TEL: (803) 366-2280

Appendix-030

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE BY MAILING

The undersigned does hereby certify that a copy of the foregoing and attached REPLY TO COUNTERCLAIM upon the Defendants in this action by depositing a copy thereof enclosed in a pre-paid envelope, in an official depository under the exclusive care and custody of the United States Postal Service, properly addressed as follows:

Beth Ramsey Faulkner, Esq.
Faulkner Law Firm, LLC
P.O. Box 1030
York, SC 29745

William M. Brice, III, Esq.
Brice Law Firm, LLC
P.O. Drawer 300
York, SC 29745

2016 JUN 17 AM 11:13

This the 15th day of June, 2016

McCoy Law Firm, LLC

By: _____
Brian S. McCoy
Attorney for Plaintiff
1784 West Main Street
Rock Hill, SC 29730
Tel: (803) 366-2800

Appendix-031

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2016-CP-46-870
COUNTY OF YORK	)	
Edward R. Kelly, et. al.	)	
	)	
Plaintiff,	)	
Vs.	)	MOTION(S)
	)	
Allen S. McCombs, et. al.	)	
	)	
Defendant.	)	
_____	)	

The undersigned William M. Brice, III, attorney for Benjamin Russell, Defendant herein, moves that the Court for an Order of Summary Judgment and or an Order of Dismissal as follows:

Defendant is entitled to a summary judgment and or a Dismissal as a matter of law because the language and unambiguous wording in question in the Deed of Plaintiff to Defendants' predecessors in title does not create a first right of refusal, and further is insufficient to be enforceable, and further it does not give rise to a cause of action as to this Defendant, nor does it set forth sufficient facts as to Benjamin J. Russell, all for the reasons set forth below and as will be further set forth the Defendants' Trial Brief; therefore no genuine issue of material fact exists.

DISMISSAL UNDER 12 (b) (6) AND
RULE AGAINST PERPETUITIES.

Plaintiff's action is to attempt to enforce what it alleges is a first right of refusal contained in deed from Plaintiffs to Henry L. McCombs, same recorded March 22, 1996 in Deed Book 1484, Page 125, copy attached hereto.

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Such deeds contains two paragraphs that impact this matter.

The first one, which is **not** at issue herein, but is important due to its specific and detailed language, wording and limitations does state:

"The above described property is also subject to the restriction that neither the grantee, **nor any of his successors or assigns or heirs** will place more than one mobile home on the above described property for a period of 45 years, that being from August 29, 1995 until August 29, 2040".

This sentence contains both a specific termination point and language that make it binding upon the "successors or assigns or heirs" of the grantee. The following provision in the deed contains neither of these elements:

The second sentence, which is the issue herein, does state:

"The grantors reserve until **themselves, their heirs and assigns** a first right of refusal as to the sale of the above described property or any portions or partial of the same"

This sentence is distinguished in that it has no termination but is rather an improper and unlimited grant to the "grantors...their heirs and assigns", in violation of the Rule Against Perpetuities.

This sentence is also distinguishable in that it has no language making it binding on anyone beyond the original grantee, Henry L. McCombs. It contains no language as to the Grantor's heirs, successors and assigns, nor even a basic "runs with the land" style of statement. Absent the fact that this language is void as a violation of the "rule against perpetuities", both in common law and in statutory form, then the maximum impact of this wording would have been to create some claim as to Henry L. McCombs only.

This cannot be justified a simple or clerical mistake in that the immediately preceding paragraph of the deed does contain both a fixed termination point and the

normal and appropriate language as to "heirs and assigns" of the Grantee, but both were specifically not included in the second paragraph.

The Rule Against Perpetuities is a long held and well established principal in South Carolina, both in Case Law and in Statutory Form.

Section 12-6-20, S.C. Code of Laws, sets for in (A) (1) and (2):

(A) A non-vested property interest is invalid unless:

- (1) When the interest is created it is certain to vest or terminate no later than 21 years after the death of an individual then alive OR
- (2) The interest vests or terminates within ninety years after its creation.

Common Law, as set forth in case law, including but not limited to Queens Grant and its predecessor cases, has been clear that an alleged first right of refusal which does not comply with the Rule Against Perpetuities is not simply voidable, but is absolutely void from creation.

This provision does not contain sufficient language to either vest it or not vest it within required period. This common law "void from inception" concept is mirrored by the statutory language that sets forth that it must be valid "when the interest is created" or it fails and is void.

Also importantly, the wording used in the deed is lacking any determination as to whether they intended that this would be effective as to only the first transfer or as to every transfer or even every subsequent transfer. It is lacking as to any determination as to whether a waiver as to a sale of some portion of the property would forever waive a right of repurchase as to that portion or if it would pick back up and still apply if that initial grantee then re-sold some or all of the initially acquired property. This creates a

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situation where it can be alleged there is no ending point to the time in which the Grantors "themselves and their heirs and assigns" could forever keep demanding some right of repurchase.

By its wording, it appears that the Grantor's heirs can claim to enforce a right to re-purchase "any portion or parcel" ever sold by any person until the end of time and there can be no clearer violation of the Rule Against Perpetuities than such a situation.

By its very language, it does not necessarily ever terminate. The case law is clear that it is not enough that an event "may" or "could" occur, but rather it must set forth that it shall occur, and therefore the provision is void from creation and this action therefore does not create facts sufficient to constitute a cause of action and therefore must be dismissed under Rule 12 (b) (6) and further must be dismissed as a violation of the Rule against Perpetuities.

DISMISSAL AS TO 12(b) (2)

All matters set forth above are re-alleged so long as not inconsistent herewith.

Allen S. McCombs was the first grantee of Henry L. McCombs by way of a deed recorded April 11, 2012 in Book 12552 at Page 91, some sixteen years after the initial conveyance. Additionally, Henry L. McCombs is deceased and his estate is not made a party to this action.

Benjamin J. Russell is the second grantee after Allen S. McCombs, having received a deed from Allen S. McCombs, recorded November 11, 2015 in Record Book 15286 at Page 201.

If any rights were afforded- Defendants believes that none were so afforded in that the Perpetuities Rule makes it void from inception- by the wording of the second sentence in question; then by the very wording used, such rights were limited by the Plaintiff's (as Grantors) to a personal right against Henry L. McCombs and were not effective against anyone taking after him. The Plaintiffs have no rights or other contractual relationship with Benjamin J. Russell afforded to them by this sentence. Benjamin J. Russell is neither Henry L. McCombs, nor a party bound by the wording of the second sentence referred to above and therefore this action should fail as to Benjamin J. Russell under Rule 12(b) (2) for lack of jurisdiction over him as a party, and likewise should fail as to Allen S. McCombs for the same reason and be dismissed.

DISMISSAL FOR STATUTE OF LIMITATIONS:

For the reasons set forth above, the wording that is the issue of this action did not create any possible rights beyond a personal claim against the Grantee, Henry L. McCombs. The wording in question was created by the Plaintiff's and by their attorney in the deed that they presented to Henry L. McCombs. Sufficient, but unrelated language contained in other places in the deed that bound Mr. McCombs heirs and assigns, but same was specifically not included in that paragraph.

This first conveyance (April of 2012) was more than three years prior to the filing of this lawsuit, was known to the Plaintiffs, is of public record, and therefore this action is barred by the Statute of Limitations.

DISMISSAL DUE TO VAGUENESS AND UNENFORCEABILITY
OF TERMS OF REPURCHASE

The wording in question, purported to be a "first right of refusal" as exists would be a covenant and restriction on title and same are disfavored in the law unless clear and concise and the wording of this provision lacks even enough basic information to allow enforcement.

It lacks a determination of how notice must be given.

It lacks a determination of how either price or value are to be determined

It lacks any determination as to how long either party, if notice is given, has to reject or accept the right of refusal or any determination of the timing of closing.

It lacks any determination as to some order of priority for enforcement by the "first".

It lacks most importantly, any determination as to whether this is only good for the first transfer, or if it is effective for every transfer that ever occurs as to any portion of the property, which is also a violation of the Rule Against Perpetuities.

In general it lacks every necessary element to establish terms to reasonably enforce and claim of repurchase

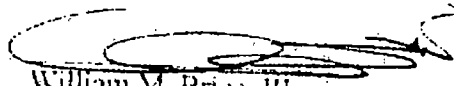
WHEREFORE, Defendant, Benjamin F. Russell, hereinafter referred to as "Defendant", does pray that this Court, after due deliberation and proper hearing, issue its Order.

1. That Defendant be granted Summary Judgment as to all causes of actions alleged by the Plaintiff.
2. That all allegations of the Plaintiff as to this Defendant be dismissed with Prejudice under Rules 12(b)(2) and (6) and further

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for failure to file within the Statute of Limitations and further for violation of the Rule Against Perpetuities, therefore no genuine issue of material fact can exist.

3. That Defendant be granted a Dismissal and Summary Judgment on the grounds that nothing in the deed from Plaintiffs to Henry L. McCombs is binding upon Benjamin J. Russell and that the Plaintiffs specifically failed to make it binding on any party beyond Henry L. McCombs and should not be allowed to extend or create rights that they themselves failed to reserve.
4. That, in the alternative, the provision is unenforceable due to insufficient specificity to allow reasonable enforcement.
5. For such other relief as the Court deems appropriate.



William M. Brice, III
Attorney for Defendant
P.O. Box 300
York, S.C. 29745

June 29, 2016
York, S.C.

Prepared by Melvin J. Barts & Associates

11/20/73
S. C. 29773

STATE OF SOUTH CAROLINA

COUNTY OF YORK

TITLE TO REAL ESTATE
GENERAL WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, That we, Edward R. Kelly and Deloris M. Kelly, in the State and County aforesaid, for and in consideration of Seven Thousand Five Hundred Sixty and No/100 (\$7,560.00) Dollars, to us in hand paid at and before the sealing of these presents by Henry L. McCombs, Route 1, SC Highway 43 (Lockhart Rd.), Sharon, SC 29742, receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell and release unto the said Henry L. McCombs, his heirs and assigns forever the following described property:

DESCRIPTION: All that certain piece, parcel or lot of land and being situated along SC Highway No. 43 in the 3rd Civil District Township York County, South Carolina and more fully shown on a plat entitled boundary survey for Henry L. McCombs recorded on March 22, 1971 1996 in Plat Book 8-17 at page 3 in the Office of the Clerk of Court for York County, South Carolina, and containing 12.00 acres more or less and having such courses and distances, eases and bounds, as will appear by reference to the above Plat, said Plat being incorporated herein by reference.

DEED: This being a portion of the same property conveyed by Henry L. McCombs to Edward R. Kelly and Deloris M. Kelly by deed dated August 20, 1968 and recorded in Record Book 10-1 at page 111 in the Office of the Clerk of Court for York County, South Carolina.

THE ABOVE DESCRIBED PROPERTY IS CONVEYED SUBJECT TO ALL easements, rights of way, or restrictions appearing of record in the chain of title shown on the above-referenced survey or visible on an actual physical examination of the subject premises. The above described property is also subject to the restriction that neither the grantee nor any of his successors or assigns or heirs will place more than one mobile home on the above described property for a period of 4 years that being from August 20, 1973 until August 20, 1977 and this restriction is as to the above described property as well as the property from which the above was derived.

The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion or part thereof of the same.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances whatsoever, to the said premises belonging, or in any wise incident or appertaining.

11/20/73

1481 125

TO HAVE AND TO HOLD, all and singular the said premises above-mentioned, unto the said Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever

And we, do hereby bind our heirs, executors, administrators, successors, and assigns to warrant and forever defend all and singular the premises unto the said, Henry L. McCombs, his heirs, executors, administrators, successors, and assigns, against myself and my heirs, executors, administrators, successors, and assigns, and all other persons whosoever lawfully claiming, or to claim the same, or any part thereof.

Witness My Hand and Seal this 17 day of March, 1936

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

John R. Test Edw. L. G. Test (Seal)

John R. Test Edw. L. G. Test (Seal)

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Personally appeared before me John R. Test
and made oath that (s)he saw the within signed grantors, s. j. n.
and as his act and deed, deliver the within written
Deed, and that (s)he with Edw. L. G. Test
witnessed the execution thereof.

John R. Test

Sworn to before me this
17 day of March, 1936
John R. Test
Notary Public for South Carolina
My Commission Expires March 1, 1937

After Recording Mail To:
LegalZenin - 502799684
9041 South Pecos Road, Suite 3900
Henderson, NV 89074

Reviewed By:
Lloyd T. Kelso, Esquire
123 E. Garrison Boulevard, Suite A
Gastonia, NC 28054

201200167324
Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON, CLERK OF COURTS
04-11-2012 AT 09:05 am.
DEED QC INT 10.00
State Tax .00
County Tax .00
OF Vol 12552 Page 91 8.

RECORDED

YORK COUNTY

TAX ASSESSOR'S OFFICE

DATE 4-11-12
TAX MAP NO. 133-12
INITIALS CAK/TB

SPACE ABOVE THIS LINE FOR RECORDER'S USE

QUITCLAIM DEED

TITLE OF DOCUMENT

STATE OF SOUTH CAROLINA:

KNOW ALL MEN BY THESE PRESENTS, THAT

Henry L. McCombs, a married man (Hereinafter whether singular or plural the "GRANTOR")

Wife making address is 5411 Lockhart Road, Sharon, South Carolina 29745.

FOR AND IN CONSIDERATION of the sum of FIVE AND NO/10 DOLLARS (\$5.00) in hand paid by the GRANTEE to the GRANTOR as part of the

Allen S. McCombs, a single man (Hereinafter whether singular or plural the "GRANTEE"),

Wife making address is 5411 Lockhart Road, Sharon, South Carolina 29745.

GRANTOR has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release all right, title and interest unto the said GRANTEE the following described property

SET FORTH IN ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HERE OF

in York County, South Carolina

Tax Map Number: Part of Section 133-12

Derivation Statement:

This deed is derived from the deed to the GRANTOR herein, General Warranty Deed from Edward R. Kelly and Delidre O. Kelly dated March 18, 1996, recorded March 22, 1996 and filed in Record Book 1481 Page 125

BX12552 PG0091

TOGETHER WITH all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining HOWEVER, subject to any Restrictions, Conditions, Covenants, Eights, Rights of Way, and Easements now of record, if any TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE, GRANTEE'S heirs and assigns forever.

WITNESS the hand and seal of the GRANTOR this 23 day of March 2012.

Henry L. McCombs
Henry L. McCombs

Signed, Sealed and Delivered in the Presence of

Witness #1: Yvonne Miskelly

Witness #2: Charlene Pharr

Printed Name: YVONNE Miskelly

Printed Name: CHARLENE PHARR

STATE OF SC

COUNTY OF YORK

The foregoing instrument was acknowledged before me this 23 day of March 2012, by Henry L. McCombs

NOTARY STAMP/SEAL

Maria C. Sanders
Notary Public

Maria C. Sanders
Printed Notary Name
My Commission Expires 2-24-2020

6X12552 PG0092

EXHIBIT "A"
LEGAL DESCRIPTION

ALL INTEREST IN THE FOLLOWING DESCRIBED REAL ESTATE SITUATED IN THE COUNTY
OF YORK, STATE OF SOUTH CAROLINA, TO WIT:

ALL THAT CERTAIN PIECE, PARCEL OR LOT OF LAND BEING SITUATED ALONG SC
HIGHWAY NO. 49 IN THE BULLOCKS CREEK TOWNSHIP, YORK COUNTY, SOUTH CAROLINA
AND MORE FULLY SHOWN ON A PLAT ENTITLED BOUNDARY SURVEY FOR HENRY L.
MCCOMBS RECORDED ON MARCH 22, 1996, IN PLAT BOOK A-87 AT PAGE 3 IN THE
OFFICE OF THE CLERK OF COURT FOR YORK COUNTY, SOUTH CAROLINA, AND
CONTAINING 36.00 ACRES MORE OR LESS AND HAVING SUCH COURSES AND DISTANCES,
METES AND BOUNDS, AS WILL APPEAR BY REFERENCE TO THE ABOVE PLAT, SAID PLAT
BEING INCORPORATED HEREIN BY REFERENCE

3A12552 PB0093

Appendix-043

STATE OF SOUTH CAROLINA
COUNTY OF YORK

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at (36 AC) Highway 49, Lockhart Road, bearing York County Tax Map Number 1330000012, was transferred by Henry L. McCombs, a married man to Allen S. McCombs, a single man on MARCH 23, 2012.

3. Check one of the following. The deed is

- (a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
- (b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
- (c) XX ☒ exempt from the deed recording fee because (See Information section of affidavit):
a) Transfer between parent and child for love and affection
(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes ☐ or No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):

- (a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____.
- (b) ☐ The fee is computed on the fair market value of the realty which is _____.
- (c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____.

5. Check Yes ☐ or No ☐ to the following: When an encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____.

6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here: _____.
- (b) Place the amount listed in item 5 above here: _____.
(If no amount is listed, place zero here.)
- (c) Subtract line (b) from line (a) and place result here: _____.

7. The deed recording fee due is based on the amount listed on line (c) above and the deed recording fee due is: _____.

8. As required by Code Section 12-24-50 I state that I am a responsible person who was connected with the transaction as:

Henry L. McCombs

I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

SWORN to before me this 23
day of March, year of 2012

Notary Public
Grantor

Henry L. McCombs
Print or type the above name here

Linda L. Thomas
Notary Public for South Carolina
My Commission Expires 2/22/2015

3K12552 PG0094

326-14
12-11-15

Brice Law Firm, LLC
P. O. Drawer 300
York, SC 29745



RECORDED
YORK COUNTY
TAX ASSESSOR'S OFFICE
DATE 11/20/15
TAX MAP NO. 133-12
INITIALS ETH

201500321812
Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON, CLERK OF COURTS
11-20-2015 AT 12:01 PM.
DEED
State Tax 10.00
County Tax 325.00
County Tax 137.50
OR Vol 15286 Page 201 - 202

STATE OF SOUTH CAROLINA)
COUNTY OF YORK) TITLE TO REAL ESTATE.

KNOW ALL MEN BY THESE PRESENTS that Allen S. McCombs hereinafter referred to as "Grantor", in the State and County aforesaid, for and in Consideration of One Hundred Twenty Five Thousand and 00/100 (\$125,000.00) Dollars paid by Benjamin James Russell

3784 Wilson Chapel Rd
Sharon SC 29742 hereinafter the "Grantee", has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the Grantee, his heirs and assigns forever, the following described real property, to wit:

All that certain piece, parcel or lot of land being situated along SC Highway No. 49 in the Bullocks Creek Township, York County, South Carolina, and more fully shown on a plat entitled Boundary Survey for Henry L. McCombs recorded on March 22, 1996 in Plat Book A-87 at page 3 in the Office of the Clerk of Court for York County, South Carolina, and containing 36.00 acres more or less and having such courses and distances, metes and bounds, as will appear by reference to the above plat, said plat being incorporated herein by reference.

DERIVATION: This being the identical real property conveyed to Allen S. McCombs by deed recorded April 11, 2012 in Book 12552, page 91, RMC office for York County, SC.

The within property is conveyed subject to all existing easements and restrictions appearing in the chain of title, which said easements and restrictions are not intended to be relinquished hereby.

TO HAVE WITH ALL AND SINGULAR, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

Instrument
201500321812 OR 15286 201

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, his heirs and Assigns forever.

And the Grantor does hereby bind his heirs, Executors, Personal Representatives, and Administrators to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's Heirs and Assigns, against the Grantor and the Grantor's heirs and assigns and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof

WITNESS the Hand and Seal of The Grantor(s) this the 19 day of November, 2015

Signed, Sealed, and Delivered
in the presence of:

Chaurin K. Kitch
Witness A

Allen S. McCombs (Seal)
Allen S. McCombs

Brittany New
Witness B

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of South Carolina do hereby certify that Allen S. McCombs, personally appeared before me this day and acknowledge the due execution of this foregoing instrument.

Witness my hand and seal this 19 day of November, 2015.

Brittany New (Seal)
Notary Public for South Carolina
My Commission Expires 10-09-2017

Instrument
20150021812 GR 15286 202
Vol Page

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Edward R. Kelly, et. al.,

Plaintiff,

vs.

Allen S. McCombs, et. al.,

Defendant,

) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
)

) Case No. 2016-CP-46-870
)

) NOTICE OF MOTION AND MOTION
) FOR SUMMARY JUDGMENT AND
) MOTION TO DISMISS UNDER RULES
) 12(b)(2) and 12(b)(6), SCRCP; AND
) ALSO FOR STATUTE OF
) LIMITATIONS AND FOR
) UNENFORCEABILITY DUE TO
) VAGUENESS
)

Please take note that the undersigned, Beth Ramsey Faulkner, attorney for Defendant Allen S. McCombs, will move before the Court of Commons Pleas in the Sixteenth Judicial Circuit on **September 7, 2016 at 11:00 a.m.** to join Defendant Benjamin J. Russell and seek relief as set forth in and based on Defendant Benjamin J. Russell's Notice of Motion and Motion for Summary Judgment and Motion to Dismiss Under Rules 12(b)(2) and 12(b)(6); Also for Statute of Limitations and For Unenforceability Due to Vagueness, dated June 29, 2016, and accompanying Motion, dated June 29, 2016.

WHEREFORE, Defendant Allen S. McCombs prays for the Court to grant the following relief:

1. The Defendant Allen S. McCombs be granted Summary Judgment as to all causes of action alleged by the Plaintiff;
2. The allegations of the Plaintiff as to Defendant Allen S. McCombs be dismissed with prejudice under Rules 12(b)(2) and (6) of the South Carolina Rules of Civil Procedure and further, based upon the failure to file within the Statute of Limitations and further based on violation of the Rule Against Perpetuities, and therefore no genuine issue of material fact can exist;
3. The Defendant Allen S. McCombs be granted a Dismissal and Summary Judgment on the grounds that nothing in the deed from Plaintiffs to Henry L. McCombs is binding upon Allen S. McCombs or Benjamin J. Russell and that the Plaintiffs specifically failed to make it binding on any party beyond Henry L. McCombs and should not be allowed to extend or

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create rights that they themselves failed to reserve;

4. In the alternative, the provision be declared unenforceable due to insufficient specificity to allow reasonable enforcement; and
5. For such other relief as the Court deems appropriate.

1 SO MOVE.

York, South Carolina
August 26, 2016



Beth Ramsey Faulkner
Attorney for Defendant Allen S. McCombs
Faulkner Law Firm, LLC
P.O. Box 1030
616 E. Liberty Street
York, South Carolina 29745
(803) 818-5700

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-46-870

EDWARD R. KELLY and DEIRDRE O.
KELLY,

Plaintiffs,

vs.

ALLEN S. McCOMBS and BENJAMIN
JAMES RUSSELL,

Defendants.

**PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANTS' MOTIONS TO
DISMISS AND FOR SUMMARY
JUDGMENT**

INTRODUCTION

In 1995, the Plaintiffs contracted to sell a portion of their property to Henry McCombs but only if they would receive a first right of refusal on the property¹. In 1996, the transaction was completed, and the Plaintiffs bargained for, paid for, and received a first right of refusal in the deed to McCombs. The terms and requirements of the first right of refusal were standard, and were understood by the parties.

Henry McCombs died in June 2015. Several months later in early 2016, Plaintiffs learned of his death and discovered that (1) McCombs assigned the property to his son, Allen McCombs, by quitclaim deed in April 2012 for love and affection, and (2) Allen McCombs sold the property to Benjamin James Russell in November 2015 for \$125,000.00. Inexplicably, Allen McCombs failed to notify Plaintiffs of the offer from Russell, as required. Also, Russell proceeded with the purchase with full knowledge of the right of refusal. The Defendants cannot show any basis that the provision is not enforceable, and certainly cannot satisfy the high threshold for Rules 42 and 56 motions.

¹ The provision here is called a first right of refusal, although it is often referred to as a right of first refusal. The terms are used interchangeably.

BACKGROUND

Defendants filed a Motion for Summary Judgment and a Motion to Dismiss Plaintiff's claims. Plaintiffs submit their brief in opposition, as set forth below.

This case involves a 37-acre tract of real estate ("Property") located in York County, South Carolina. (Kelly Aff. ¶ 3). Henry L. McCombs wanted to purchase part of a 100+ acre-tract of property next to his property, but he could not afford the purchase price. Plaintiffs financed the purchase of the tract and sold a portion back to McCombs. (Kelly Aff. ¶ 3(a)). The parties entered into a Contract of Purchase and Sale ("Contract") relating to the sale of the 37-acre tract to McCombs. (Kelly Aff. ¶ 3). The Contract included a first right of refusal ("FROR") for the Plaintiffs binding on both parties' heirs and assigns. (Kelly Aff. ¶ 3; Exhibit A). The parties extensively discussed the FROR and agreed that the provision would allow the Plaintiffs to match any offer that McCombs or his heirs would receive on the Property. (Kelly Aff. ¶ 3). Plaintiffs conveyed the property to McCombs by deed including the FROR, which was recorded on March 22, 1996. (Kelly Aff. ¶ 5).

On at least two occasions prior to 2001, Henry McCombs informed the Plaintiffs, pursuant to the FROR, that he had received (or might receive) an offer to purchase the Property and asked if they would be interested to match the price of the offer. (Kelly Aff. ¶ 6). Plaintiffs requested a copy of the offer on both occasions and expressed their interest to exercise their right to purchase the Property. (Kelly Aff. ¶ 6; Exhibit B). McCombs failed to provide either offer and no sale of the Property occurred. (Kelly Aff. ¶ 6).

On April 11, 2012, McCombs conveyed the property by Quitclaim Deed to his son, Defendant Allen S. McCombs for \$5 and love and affection. (Kelly Aff. ¶ 7).

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Quitclaim Deed p.1 - an exhibit to Russell Motion). The Plaintiffs were not informed of the transfer and were not aware that it occurred until early 2016. (Kelly Aff. ¶ 7). Henry McComb died in June 2015. (Kelly Aff. ¶ 7).

On November 20, 2015 Defendant Allen S. McCombs conveyed the Property to Defendant Benjamin James Russell for \$125,000. (Kelly Aff. ¶ 9; Deed is an exhibit to Russell Motion). The Plaintiffs were not given a first right of refusal and were not aware of the transaction until early 2016. (Kelly Aff. ¶ 9). Plaintiffs would have exercised the F.R.O.R. and would have promptly purchased the Property at the sale price. (Kelly Aff. ¶ 10). Both Allen S. McCombs and Russell had actual knowledge and record knowledge of the F.R.O.R. but failed to comply with the requirements thereof. (Kelly Aff. ¶ 11; A McCombs Interrogatory Response No. 8; Russell Interrogatory Response No. 5, 8). Plaintiffs filed this action on March 21, 2016.

STANDARDS FOR RULES 12(b) AND 56

When the allegations (e.g., such in the complaint) may be viewed when ruling on a 12(b) motion to dismiss. *Stokely v. Med. Examiners, P.C.*, 368 S.C. 274, 276, 387 S.E.2d 458, 459 (1990) (quoting *Foussaint v. Ham*, 292 S.C. 415, 357 S.E. 2d 8 (1987)). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). Novel issues should not be decided by a 12(b) motion to dismiss. *Evans v. State*, 344 S.C. 60, 464 S.E.2d 847, 851 (2004).

When ruling on a 12(b)(2) motion to dismiss for lack of personal jurisdiction, the

court may consider the allegations in the complaint, affidavits, and other evidence. *Cribb v. Sputholt*, 382 S.C. 490, 676 S.E.2d 714, 718 (S.C. App. 2009). "The concept of [personal] jurisdiction refers to the authority of a court over a particular person . . . but the concept does not refer to the validity of the claim on which an action against a person is based." *Boan v. Jacobs*, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (S.C. App. 1988).

Summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), S.C. RCP. When determining whether summary judgment is proper, the court must view the evidence in the light most favorable to the non-moving party. *Hancock v. Mid-South Mgt. Co.*, 381 S.C. 326, 673 S.E.2d 801, 802 (2009). Summary judgment should be denied if there is any dispute as to the facts of the case or if different conclusions can be drawn from undisputed facts. *Koester v. Carolina Rental Cr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

ARGUMENT

I. THE FROR DOES NOT VIOLATE THE STATUTORY RULE AGAINST PERPETUITIES, AND THEREFORE IS VALID.

A. S.C. Code of Laws § 27-6-10 et seq. expressly supersedes the common law Rule Against Perpetuities.

South Carolina adopted the Uniform Statutory Rule Against Perpetuities in section 27-6-10 et seq. of the South Carolina Code of Laws in 1987. Therefore, the common law Rule Against Perpetuities no longer governs in this state. S.C. Code § 26-6-80. Rather, the adoption of the statutory rule expressly supersedes its common law counterpart. Section 27-6-80 of the statutory Rule Against Perpetuities unambiguously states "[t]his chapter supersedes the common law rule against perpetuities." The notes

and comments regarding the Uniform Statutory Rule Against Perpetuities made by the National Conference of Commissioners on Uniform State Laws states "the Statutory Rule and the other provisions of the Act supersede the Common-law Rule Against Perpetuities and replace any statutory version or variation thereof." Unif. Stat. R. Against Perpetuities, prefatory note at Nat'l. Conf. of Comm'rs 1999a.

B. By its terms, the invalidating provision of the statute does not apply to the FROR.

South Carolina Code § 27-6-20 provides:

- (A) A nonvested property interest is invalid unless:
- (1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or
 - (2) the interest either vests or terminates within ninety years after its creation.

Subsection (1) of the statutory rule is the invalidating provision, and it essentially restates the common-law rule against perpetuities. Subsection (2) is very different from the common law, and it provides for a "wait-and-see" provision, discussed below.

1. Because the FROR actually vested or terminated within 90 years, it is valid under the wait-and-see provision of 27-6-20(A)(2).

Unlike the common law Rule Against Perpetuities, which invalidated a nonvested property interest unless the interest was *certain* to vest within the required time period when the interest was created, the statute provides a "wait-and-see" element in § 27-6-20(A)(2). This statutory provision considers what *actually* happens. Unif. Stat. R. Against Perpetuities, prefatory note at 1. Therefore, the wait-and-see provision of (A)(2) saves a

The Uniform Statutory Rule Against Perpetuities follows the lead of the American Law Institute's Restatement (Second) of Property (Donative Transfers) § 1.3 (1983) in adopting the approach of waiting to see what does happen. This approach is known as the "wait-and-see method of perpetuity reform." Unif. Stat. R. Against Perpetuities, prefatory note at 2.

provision that would have been invalid because it wasn't certain to vest in the required time period if it actually vests or terminates within 90 years. S.C. § 27-6-20(A)(2). That is what occurred here.

The Deed containing the FROR was executed in 1996. (Kelly Aff. ¶ 5; Exhibit A). The FROR vested at the time that Defendant Allen S. McCombs received an offer to purchase the Property from Defendant Russell. Russell made Allen McCombs an offer to purchase that invoked the FROR in 2015, easily within the 90-year deadline. Accordingly, the provision is valid by the plain terms of § 27-6-20(A)(2).

2. Because the transfer in issue was nondonative,
no provision applies to invalidate the FROR.

The statute as adopted in South Carolina provides exceptions to the invalidating provision of § 27-6-20 above. Section 27-6-50 states that the rule does not apply to:

- (1) a nonvested property interest or a power of appointment arising out of a nondonative transfer . . .

Accordingly, the statutory restriction does not apply to this transaction because it was certainly a nondonative transfer from Plaintiffs to Henry McCombs.

The National Conference of Commissioners of Uniform State Laws defines a "donative transfer" as one that is gratuitous in nature by one party. *Unif. Stat. R. Against Perpetuities*, § 4 cmt. a. "Nondonative" constitutes a transaction given for consideration other than nominal consideration. *See, e.g., Scott v. Lee & Donna Metcalf Charitable Trust*, 358 P.3d 879, 884 (Mont. 2015). The rationale for the nondonative exclusion is that the Rule Against Perpetuities is inappropriate for transactions made at arms-length as such transactions should be made freely. *Whiting Oil & Gas Corp. v. Atlantic Richfield Co.*, 321 P.3d 500, 505 (Colo. App. 2010); *Shaver v. Clanton*, 31 Cal.Rptr.2d, 595, 598,

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26 Cal.App.4th 568, 574 (1994), 1 mt. Stat. R. Against Perpetuities, § 4 cmt. d.

The deed from Plaintiffs to Henry McCombs constitutes a nondonative transfer. Plaintiffs sold the Property to McCombs for fair market value. Plaintiffs would not have sold the Property to McCombs for this price without incorporation of the FROR. (Kelly v. M.C. 3). McCombs did not “donate” the FROR to Plaintiffs and the FROR was not gratuitous. Thus, the FROR falls under the nondonative exception provided in § 27-6-500 and therefore is valid.

C. In any event, because the FROR does not constitute a “property interest,” it would not have been subject to any prohibition.

Both the common law rule against perpetuities and the statutory provision apply only to a “property interest.” The FROR at issue here is not a property interest. The modern trend in the courts is to find that first rights of refusal do not constitute interests in property. See, e.g., *A. Rightfield Co. v. Whiting Oil & Gas Corp.*, 320 P.3d 1479, 1184 (Colo. 2014); *Old Port Cove Holdings v. Condo. Ass’n*, 986 So.2d 1279, 88 Cal. 2d 86, 44 Cal. App. 3d 1000, 124 Cal. App. 3d 85, 550 A.2d 650, 653 (1989); *Kaiser Dev. Co. v. City of Honolulu*, 649 F.Supp. 926, 937 (D. Haw. 1986). The Restatement Third of Property reversed the position of the Restatement First of Property by recognizing that first rights of refusal are not subject to the Rule Against Perpetuities. Restatement (Third) of Prop. Serv. §§ 2.3.3 cmt. b–2009.

Rights of first refusal are not subject to the Rule Against Perpetuities because they do not restrain alienation of property. *Old Port Cove Holdings*, 986 So.2d at 1288.

A right of first refusal is a right to elect to take specified property at the same price and on the same terms as a bona fide offer, as those contained in a good faith offer by a third person if the owner manifests a willingness to accept the offer. The right of first refusal ripens into an option once an owner manifests a willingness to accept a good faith offer.

Id. at 1285. The holder of a right of first refusal cannot compel the owner to sell the property. *Id.*; *Kaiser Dev. Co.*, 648 F.Supp. at 937; see *Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608, 610 (1980). Once an offer is made for the sale of property, the owner is free to either sell or reject the offer. *Old Port Cove Holdings*, 986 S.W.2d at 1285; *Smith*, 301 N.C. 58, 269 S.E.2d at 611 (quoting 6 American Law of Property § 26.64 at 506-07 (1952)). The first right of refusal essentially has no effect on the property owner's rights. For example, had Defendant Allen S. McCombs properly adhered to the FROR upon receiving an offer from Defendant Russell, he would have still been able to sell the property and he would have still received \$125,000 for the sale, or he could have decided not to sell at all.

In *Webb v. Reames*, the South Carolina Court of Appeals held that the right of first refusal was a contingent, nonvested interest. 326 S.C. 444-446, 485 S.E.2d 584 (S.C. App. 1997). However, the deed containing the first right of refusal was executed in 1955 and filed in 1956. *Webb*, 326 S.C. at 445. As a result, the deed was not subject to the Statutory Rule Against Perpetuities. It is expected that the South Carolina Supreme Court would follow the modern trend and hold that first rights of refusal are not interests in property.

II. THIS COURT HAS PERSONAL JURISDICTION OVER THE DEFENDANTS

The Defendant contends that the obligation of the FROR was limited to Henry McCombs. However, the transfer of the Property by Henry McCombs to his son Allen

The Contract between Plaintiff and Henry McCombs includes language making the FROR applicable to both parties, here and assigns. (Kelly Aff. Ex. 1 at ¶ 9, 11). It appears to be a scrivener's error that the language was not included in the deed. Appendix-056

McCombs was a straightforward assignment from father to son. This assignment had no effect on the FROR because no one would contend that Plaintiffs were entitled to match the "§5 and love and affection" that was the consideration for that transfer. (Kelly Aff. ¶ 7, Quitclaim Deed, p. 1). Allen S. McCombs was assigned Henry McCombs's obligations, including the FROR as set forth in the Quitclaim Deed:

HOWEVER, *subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record, if any, TO HAVE AND TO HOLD* all and singular the premises before mentioned unto the said GRANTEE, GRANTEE'S heirs and assigns forever

(Quitclaim Deed, p. 2, emphasis added). As assignee of Henry McCombs, Allen McCombs was expressly assigned the Property with the FROR (Quitclaim Deed, p. 2).

The fact that the deed does not expressly make the FROR binding on Henry McCombs' heirs and assigns has no legal effect here. The deed does not expressly prohibit assignment of the FROR. South Carolina has recognized that contracts are freely assignable unless expressly agreed otherwise. See, *Oxypro, Inc. v. Cubana Ltd. Partn.*, 340 S.C. 367, 381, 532 S.E.2d 269, 279 (2000); *Skelton v. Summit Builders of Greenville, Inc.*, 288 S.C. 453, 454, 343 S.E.2d 446, 447 (1986). Here, the rights and obligations of Henry McCombs were assigned to his son by the Quitclaim Deed. Accordingly, as assignee of the Property and FROR, and as the person who violated the provisions of the FROR, Allen McCombs is the proper defendant in this lawsuit.

III. PLAINTIFFS FILED THIS ACTION WELL WITHIN THE STATUTE OF LIMITATIONS AFTER DISCOVERY OF THE VIOLATION

Plaintiffs' claims were timely filed within the statute of limitations. The applicable statute of limitations period for this action is three-years, S.C. Code § 15-3-530(1). South

Because the language in the deed does not prohibit an assignment of the Property subject to the FROR it is enforceable against Henry McCombs' assign (see argument below).

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Carolina courts have found that tolling the statute of limitations period until the time of discovery is the equitable and rational view. *Mills v. Kinnon*, 254 S.E.2d 556, 558 (S.C. 1979); see *Costal St. Bank v. Hanover Homes of S.C.*, 408 S.C. 510, 759 S.E.2d 152 (S.C. App. 2014) (finding the discovery rule applies to breach of contract actions).

Henry McCombs assigned the Property by Quitclaim Deed to Defendant Allen McCombs in April of 2012. (Quitclaim Deed, p. 1). Plaintiffs were not aware of this assignment until early 2016. (Kelly Aff. ¶ 7). Thus, the statute of limitations did not start to run until early 2016. *Mills*, 254 S.E.2d at 558. The three-year statute of limitations has not yet expired.

Record notice is not sufficient to start the statute of limitations. See *Spence v. Spence*, 608 S.E.2d 106, 628 S.E.2d 869 (2006). Record notice is tied directly to an individual's duty to inquire. *Id.* at 877. Without an inquiry duty, record notice holds no merit. *Id.*

If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him, but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose. There must appear to be . . . such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter.

Id. citing *Black v. Childs*, 14 S.C. 312, 321-22 (1880). There were no facts disclosed to Plaintiffs of the April 2012 assignment that created a duty to inquire. (Kelly Aff. ¶ 7).

IV. THE FROR PROVISION IS NOT UNENFORCEABLE DUE TO VAGUENESS

Defendants argue that the FROR is unenforceable because the terms are vague. Defendants proceed to list the details in the FROR terms that, in actuality, were not an issue.

With respect to this FROR, Defendants' reasons for failing to adhere to the FROR were not that the terms of the FROR were vague or unclear. Rather, both Defendants were aware of the FROR and made a conscious decision not to comply. (Russell Interrogatory Response No. 2; A.McCombs Interrogatory Response No.8).

Defendant states that the FROR does not include the length of time given to Plaintiff to reject or accept the right of refusal. "Where a contract sets no date for performance . . . it must be performed within a reasonable time." *Drews Co. v. Ledwith-Hart Assoc., Inc.*, 296 S.Ct. 207, 209, 371 S.Ct.2d 532, 533 (1988) (citing *Gen. Sprinkler Co. v. York-Bath Developers, Inc.*, 271 F.Supp. 551, 557 (D.S.C., 1967); *Firebaugh, Inc. v. . .*, 398, 559 S.E. 2d at 616). The court may imply a reasonable time for Plaintiffs to either accept the FROR. Moreover, Plaintiffs were always ready to act promptly, so this certainly is not an issue in this case. (Kelly Aff. ¶ 19).

But this same principle that court would imply reasonable notice terms as well, even if contract or agreement that FROR is unenforceable due to lack of notice terms fails. It is undisputed that Henry McCombs understood no notice was to be provided to Plaintiff, and his son certainly could have provided Plaintiffs any reasonable notice of rejection from Russell. Plaintiff were not difficult to locate, and there is no evidence that McCombs could not reasonably have informed Plaintiff of this offer. (Kelly Aff. ¶ 20).

Defendant also states that the determination of how either price or a title is to be determined is not a matter of law. As the court in *Chastain v. . .* has a standard definition as to how to determine the price of the property.

a right to elect to take specified property at the same price and on the same terms and conditions as those contained in a good faith offer by a third

person if the owner manifests a willingness to accept the offer. The right of first refusal ripens into an option once an owner manifests a willingness to accept a good faith offer.

Old Port Cove Holdings, 986 So.2d at 1285. “The nature of the [right of first refusal] makes it unnecessary for the terms of a future offer to be known in advance.” *Firchbaugh*, 263 Va. at 398, 559 S.E.2d at 615. The intent of Plaintiffs and Henry McCombs was to require Plaintiffs to match the price and terms of an offer made by a third-party in order to exercise their FROR. (Kelly Aff. ¶ 3(a)). Thus, lack of a specific price determination provision is not fatal to the validity of the FROR. *Firchbaugh*, 263 Va. at 398, 559 S.E.2d at 615. In fact, this is a common aspect of a first right of refusal. *Id.*

Lastly, Defendants state that the FROR fails to indicate whether the right was only good for the first transfer or for every transfer. The intention of the parties at the time Plaintiffs acquired the FROR was for the right to be extinguished after the first transfer, whether Plaintiffs exercised the right or not. (Kelly Aff. ¶ 6). Again, this is a typical feature of a first right of refusal. Any other interpretation would be unreasonable and contrary to law.

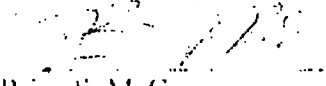
The cardinal rule of contract interpretation in South Carolina is to determine the intent of the parties. *Maybank v. BB&T Corp.*, app. case no. 2014-002638, at 25 (S.C., 2016). *Schulmeyer v. State Farm Fire and Cas.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Here, the evidence shows that the parties bargained for a standard first right of refusal provision.

CONCLUSION

For the reasons set forth above, the Defendants’ motions should be denied.

Respectfully submitted,

McCOY LAW FIRM, LLC

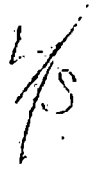

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that a true and correct copy of the foregoing
Plaintiff's Brief in Opposition to Defendant's Motions to Dismiss and for Summary
Judgment was sent to counsel for defendants by email on the 10th day of September,
2016 addressed to:

Beth Ramsey Laufkner
Laufkner Law Firm
605 E. Liberty St
P.O. Box 1039
York, SC 29745

William M. Brice, III
Brice Law Firm, LLC
P.O. Drawer 300
York, SC 29745


Brian S. McCoy

McCOY LAW FIRM, LLC

By
Brian McCoy

Appendix-061

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF YORK) 2016-CP-46-879

Edward R. Kelly, et. al.)
)
Plaintiff,)
)
v.) MOTION BRIEF
)
Benjamin J. Russell, et. al.)
)
)
Defendants.)
_____)

FACTS

Plaintiffs sold and conveyed 36 acres of land to Henry L. McCombs in 1996, deed attached, that contained the following two provisions:

1. "The above described property is also subject to the restriction that neither the grantee nor any of his successors or assigns or heirs will place more than one mobile home on the above described property for a period of 45 years, that being from August 29, 1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved"
2. "the grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same"

The first provision is not in dispute. The second provision is the issue in this action.

There was consideration given for the first provision (mobile homes) in that the Grantors restricted their other property against to mobile homes for the same period.

There was no additional consideration given for the purported right of refusal provision.

Henry McCombs conveyed this property for "love and affection" to his son, Allen McCombs by deed recorded April 11, 2012.

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Allen McCombs conveyed the property to Benjamin James Russell for \$125,000.00 by deed recorded November 20, 2015.

Plaintiffs brought the within action for enforcement of provision 2 above by action filed March 21, 2016.

LEGAL ARGUMENTS:

SUMMARY JUDGMENT FOR VIOLATION OF THE RULE AGAINST PERPETUITIES, COMMON LAW AND AS SET FORTH IN SECTION 27-6-20, CODE OF LAWS FOR SOUTH CAROLINA, AS AMENDED

DISMISSAL UNDER RULE 12(B)(2) FOR LACK OF JURISDICTION OVER BENJAMIN J. RUSSELL AND 12(B)(6) FOR FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AS TO RUSSELL

DISMISSAL FOR LACK OF ENFORCEABILITY DUE TO THE INDEFINITE AND VAGUE WORDING OF THE COVENANT

DISMISSAL DUE TO STATUTE OF LIMITATIONS:

Rule against Perpetuities:

The uniform statutory rule against perpetuities is set forth in Section 27-6-20, which states:

- (A) A nonvested property interest is invalid unless:
- (1) When the interest is created, it is certain to vest or terminate within twenty one years after the death of an individual then alive; or
 - (2) The interest either vests or terminates within ninety years after its creation

Provision 2 above fails to meet either test above and does violates the statutory requirements above and therefore is void from inception and unenforceable.

The case of Webb v. Reames, 485 S.E. 2d 384, 326 S.C. 444, (1997) is on point and factually similar to the within situation and is also a case decided post Section 27-6-20, et. seq.

In Webb v. Reames a deed set for the following right of first refusal: "The condition, running with the land... conveyed, is that the Grantee in case he or his heirs should sell

the ...property, the Grantor, his heirs and assigns shall be give the first refusal to buy same. A further condition is that, in case the land is to be resold, the Grantor, his heirs and assigns, may purchase the same at and for the same consideration [paid by the Grantee]. If building improvements have been made on the property, then and in that event, the Grantee or his heirs may select one appraiser, the Grantor, his heirs or assigns may select a second appraiser and the two so selected shall name a third appraiser and the three appraisers shall place a value...."

The court in Webb concluded that this was an invalid provision in that it violated the Rule against perpetuities. "This preemptive right is a contingent, non-vested interest in that the Grantee or the grantee's heirs might never choose to sell the property. It is an interest no conditioned on an event certain to occur" "Because the right or interest was one that might not vest within a life in being at the time of the creation of the interest or until 21 years thereafter, the interest violates the Rule Against Perpetuities and is therefore void.

Webb went on to make it clear that the condition was "determined to be void, as opposed to merely voidable", which is consistent with the case law on such matters. If a provision violated the rule, originally set forth in common law and now codified in the Uniform Statutory Rule Against Perpetuities, then it is void and unenforceable from inception

Webb involved a matter where the provision allowed for a repurchase as the original sale price rather than at fair market value, but the determination was not made on that issue in this case.

Other jurisdiction have made a distinction and at times an exception in their application of the Rule Against perpetuities if the option to repurchase is for the then current fair market value of the property, but that is not the law in South Carolina and South Carolina is not bound by such determinations from other states and Webb v. Reames therefore controls and is one point to our specific facts.

Webb references the statutory version of the Code, but did not apply the sayings clause nor consider that any exclusion applied.

Webb further cites the York County case of Love v. Love 38 S.E. 2d 231, (1946) which states: "it is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the Rule Against Perpetuities: if it can possibly happen beyond those limits and interest conditioned on it is too remote" "If an interest is not good at its creation no subsequent accident or occurrence can make it so; the validity of the limitation is accordingly to be determined under the circumstances then existing, and the certainty that it will vest within the permitted period, if at all, must be discernable at that date"

There is a discussion of the Rule Against Perpetuities in Queens Grant II v. Greenwood Development 628 S.E. 2d 902 (2006) but the case did not rule on the applicability of the Rule as set forth in Section 20-6-20, but did set forth the following: "Nonvested property interests tend to restrain the free alienability of property and interfere with its beneficial use" The Court in Queens Grant II did cite Webb v. Reames as the controlling law on the matter.

The Court in Queens Grant II did note that the other party, Greenwood Development Corporation, had cited cases from other state jurisdictions that limited application of the rule in certain circumstances in those other states, but did not cite any in South Carolina case law that limited the application of the rule, and while discussing the rule to some extent, then declined to rule on the application of the Rule in that particular factual matter.

Plaintiff alleges in its complaint the following (Paragraph 14) that either a first right of refusal is not a property interest although case law has repeatedly established them to clearly be non-vested property interest, and further alleges that Webb v. Reaves is either not controlling or should be overturned and further alleges that this is an exception to the Statutory Rule in that "arise from a non-donative transfer", but to hold any of those would basically mean that no first right of refusal arising from a normal and customary sale and conveyance or property could ever create a violation of the Rule Against Perpetuities and that is an unreasonable position.

It appears clear that the legislative intention was to limit matters such as this to 90 years and the open ended wording of the provision herein could potentially last forever if not barred be either the common law rule against perpetuities or the statutory codification of same and any other interpretation would be unreasonable.

12(b) (2) and (6):

The exact wording of the purported right of first refusal states:

"The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same"

The first provision as to mobile homes went to great lengths to make clear it was binding on more than just the Grantor by stating "neither the grantee nor any of his successors or assigns or heirs shall place more than one mobile home..."

The provision in question is lacking in that -or any- wording to make it binding upon any person other than the original grantee, Henry L. McCombs. It does not contain the heirs and assigns language. It does not reference his successors in title. It does not have even the basic "runs with the land" style language.

While the deed did create fee simple title in Henry L. McCombs and did create an effective restriction on multiple mobile homes, the specific lack of wording in that refusal provision make it insufficient to be able to be enforced as to any person other than Henry L. McCombs.

This deed was drafted by Plaintiff's attorney and they are bound by their choice of words. They cannot claim mistake in that the immediately preceding paragraph contains all of the sufficient wording to bind that covenant beyond the original grantee.

This covenant, should it survive a Rule Against Perpetuities examination, was only effective as to the original Grantee, Henry L. McCombs either during his period of ownership, or at greatest, for the lifetime of Henry L. McCombs.

Henry L. McCombs conveyed the property out of his name in 2012.

Henry L. McCombs died in June of 2015.

Benjamin James Russell acquired the property in November of 2016 from Allen McCombs, and he is a remote assignee of Henry L. McCombs and therefore this provision does not contain sufficient language to extend enforceability to him and this should be dismissed as to Benjamin J. Russell. If it fails as to Benjamin J. Russell, then by natural conclusion, same should be dismissed as to the real property in question.

Plaintiffs, in their complaint and in their supporting affidavit, do allege some contract between the parties that allegedly did contain heirs and assigns language, but that executory contract, under all relevant South Carolina law, would be ineffective in that it was merged into the deed and the necessary wording is not contained in the deed.

According to the Plaintiff's own affidavit, there was much discussion and delay and consideration, as well as several changes in the basics of the transfer, all quite typical of a negotiation on a real property purchase and sale.

Per the Plaintiff's affidavit and the pleadings, the contract in question was executed in August of 1995, some seven (7) months prior to the preparation and execution of the deed.

The case of Shoney's Inc. v. Cooke, 353 S.E. 2d 300, 291 S.C. 307 (Ct. App 1986) sets forth a good description of the merger rule in South Carolina:

"The doctrine of merger is founded upon the privilege, which parties possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions contained in the deed." "Where there is no mistake or fraud a deed executed subsequent to the making of an executory contract for the sale of

land is generally regarded as conclusive evidence of a previous modification of the executory contract. A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract"

DISMISSAL FOR VIOLATION OF STATUTE OF LIMITATIONS

Should the Court determine above that the wording of the provision only apply to Henry L. McCombs and be insufficient to bind his successors, heirs or assigns, then this claim should fail due to passage of the statute of limitation time period.

Henry L. McCombs conveyed this property to Allen S. McCombs by deed recorded April 11, 2012, and such record notice of the transfer occurred well more than three (3) years prior to the filing of this action.

The words chosen by Plaintiffs in their right of refusal do not specify type, kind or method of notice.

The affidavit of Allen S. McCombs in this matter indicates that he and his father both gave verbal notice to the Plaintiffs, or at least to one of them, in early 2012, of the intention to transfer the property from Henry L. McCombs to Allen S. McCombs and such verbal notice also occurred more than three years prior to the filing of this action. Nothing in the refusal provision states that verbal notice is ineffective and it is in fact silent as to any requirement of notice and so Plaintiffs had both verbal notice and record notice more than three years prior to the filing.

DISMISSAL FOR UNENFORCEABILITY DUE TO LACK OF DEFINITENESS AND DUE TO VAGUENESS

The law generally dislikes and strictly construes all matters that tend to interfere with the free use, enjoyment or transfer of real property, most generally applied to restrictions on use, but the general concepts should be applicable to any limitation on real property.

The rule of strict construction does not prevent enforcement: "The Court shall enforce such covenants unless they are indefinite or contravene public policy" Vickery v. Powell 225 S.E. 2d 856, 267 S.C. 225 (1976)

The general rule is well stated in the case of Sea Pine Plantation v. Wells, 363 S.E. 2d 891, 292 S.C. 266 (1987) and restated recently in Spur at Williams Brice v. Lalla.

781 S.E. 2d 115, 415 S.C. 72 (2015) Both were matters involving use restrictions, but each set forth the construction rule as follows: "Restriction on use are generally disfavored. The historical disfavor of restrictions by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land. The law governing the enforceability of covenants restricting use is well established in South Carolina. A restriction on use of the property must be created by express terms or by plain or unmistakable implication and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property".

The same standard should apply to restrictions on the alienability of real property and same should be clear, plain, express or at minimum, not be indefinite.

The provision the Plaintiffs seek to enforce fails all of these.

The covenant the Plaintiffs are attempting to enforce as a right of refusal is not definite as to any term, including but not limited to: order of priority of enforcement among the heirs of the Grantors, price, method for determination of price, time frame in which to accept or deny, time frame in which to complete any purchase, whether or not this was designed for one refusal or repeatedly applies to any sales for all time, how notice is to be give, in what form notice is to be proven, in what form acceptance or rejection is to be noticed- all typical terms of a well worded first right of refusal.

The wording of the purported right of refusal, separate from any perpetuities issue, and separate from the issue of enforceability beyond the original Grantee, is lacking in every manner a sufficient method by which any party could know with any degree of certainty how compliance was to be made, met or even required or how to determine if any waiver had ever occurred, due to the lack of clear or definite terms, and because of such vagueness and lack of specific express terms it should fail as an unreasonable restriction on the ability to alienate or transfer title to real property. The Plaintiff were very specific in the mobile home provision, but failed to do the same in the refusal provision.

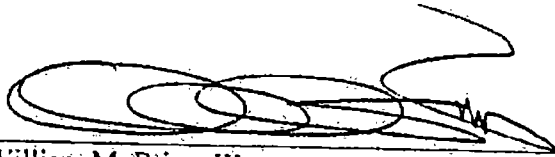
CONCLUSIONS:

1. That the provision in question is, under South Carolina law, void from inception as an impermissible violation of the Rule Against Perpetuities as is set forth in the South Carolina Uniform Statutory Rule Against Perpetuities and under Webb v. Reaves and that Defendants are entitled to Summary Judgment and Dismissal with prejudice
2. That either in addition to, or in the alternative to, the above Rule Against Perpetuities issue, that the actual wording of the provision in question is insufficient to extend any right of enforcement to any party beyond the original Grantee, Henry L. McCombs and that this action should be dismissed with

prejudice under 12(b)(2) for lack of jurisdiction over Benjamin J. Russell and 12(b)(6) as to lack facts sufficient to constitute a cause of action as to Benjamin J. Russell and as to the real property that is in controversy herein, and further that the merger doctrine in South Carolina prevents the use of the executory contract of the parties from modifying the final and express wording of the deed.

3. That either in addition to, or in the alternative to each above matter, for a dismissal with prejudice as to Benjamin J. Russell for failure to bring this action within three (3) years of the record date of the transfer of this property from the name of Henry L. McCombs and also within three (3) years of being given verbal notice of the intention to make such conveyance from Henry L. McCombs to Allen S. McCombs.
4. That either in addition to, or in the alternative to each above matter, that this action be dismissed with prejudice in that the provision in question is not definite enough in its terms to be enforceable and as such is an impermissible impediment to the free alienation of the real property title.

Respectfully submitted:



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September 6, 2016

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-46-870

EDWARD R. KELLY and DEIRDRE O.
KELLY,

Plaintiffs,

vs.

ALLEN S. MCCOMBS and BENJAMIN
JAMES RUSSELL,

Defendants

AFFIDAVIT OF EDWARD R. KELLY

[Handwritten signature]

2016-7-11:13:45

TO: DEFENDANTS AND THEIR COUNSEL:

I, Edward R. Kelly, being first duly sworn, depose and say as follows:

1. I am over the age of eighteen and under no legal disability. This Affidavit is made upon my personal knowledge of the facts stated herein.

2. I am a Plaintiff in this lawsuit, and was primarily involved in the transactions with Mr. McComb underlying this case.

3. In 1995, my wife and I purchased certain property in York County from Henry L. McCombs, and entered into a Contract of Purchase and Sale ("Contract") relating to the property. We knew that Mr. McCombs did not read or write well, so we had extensive discussions and we encouraged him to consult an attorney. In fact, he was in possession of the Contract for more than six months before the sale concluded. The Contract provided that we would sell back to Henry McCombs the 37-acre tract that is the Property in issue. Henry McCombs and I had extensively discussed that if my wife and I would agree to sell the Property back to Mr. McCombs while extending him a loan and taking a mortgage instead of being paid cash as we had originally agreed, Mr.

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McCombs and his heirs would have to agree to allow us and our heirs a first right of refusal to match any offer that Mr. McCombs or his heirs would receive on the Property.

This was important to us because:

- a) It was a quid pro quo agreement. My wife and I financed the original purchase of the property by Henry McCombs from the estate of Dora Mitchell. To do so, we acquired a personal loan. Mr. McCombs was our friend. Mr. McCombs initiated that original transaction because he was offered the property but was unable to afford it. He did not want all of the land, and invited us to join him in the deal so that he could acquire a portion of the property. We would be allowed to purchase the rest of the property in return for providing the capital required to complete the original transaction. The initial agreement was for Mr. McCombs to pay us in cash for the portion of the land that he retained. When we went to contract Mr. McCombs did not have the money to pay for his portion of the property. He asked us to hold a mortgage on the property in lieu of a cash payment. We had no doubt that Mr. McCombs would repay us. But, the change in the terms of the deal required us to refinance our home to pay off the personal loan. We felt that this concession on our part merited something of value in return. The ability to reacquire the property had both financial and sentimental value to us. Thus, we agreed to hold the mortgage in return for the ability to buy the property back. My wife and I were keenly aware that we would not have had the opportunity to purchase any of the land if we were not for Mr. McCombs. We wanted to be as fair as

possible. We viewed the first right of refusal as a fair method to reacquire the property. Mr. McCombs would be able to sell his property at the time and the price he wanted, and we would have an opportunity to match it. We all certainly understood the terms of the first right of refusal.

b) Financial value: Pursuant to a verbal agreement with Mr. McCombs the property was divided at our expense with all of the improvements (barns, well, pond, and majority of the road frontage) on his portion of the property. The re-incorporation of these features to our adjoining parcel makes it more valuable than the sum of the individual lots taken separately.

c) Sentimental value: The land previously belonged to Louis Mitchell who was our friend and mentor when we first moved to the area. We spent many hours in fellowship on the property as "Mr. Louis" taught us about rural life. We love the home site and had hoped to retire there one day.

4. Accordingly, Paragraph 11 of the Contract provides.

The purchaser (my wife and I) will have the first right of refusal if the seller (McCombs) ever decides to sell the 37 acres or any portion (sic) thereof. The first right of refusal shall be binding upon the heirs of the seller and the right of first refusal shall inure to (sic) the heirs of the purchasers.

A true and correct copy of the Contract is attached hereto as Exhibit A.

5. In 1996, we completed the transaction with Henry McCombs of the purchase of the Property and he received a deed for the Property. The deed back to Henry McCombs for the Property was recorded March 22, 1996. The Deed expressly includes a first right of refusal, as follows.

The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion or partial of the same.

A copy of the deed is attached to movant's motion.

6. Subsequently, on at least two occasions prior to 2001, Henry L. McCombs informed me, pursuant to the first right of refusal, that he had received an offer to purchase the Property and asked if we would match the price of the offer. The first occasion was in approximately 1999, and the second occasion was in 2000. I have attached as Exhibit B a true and correct copy of a letter from my attorney to Mr. McCombs dated February 14, 2001. On both occasions, I requested a copy of the offer or contract, and expressed our interest to exercise the right and re-purchase the Property. However, on both occasions Mr. McCombs failed to provide the offer or contract, and no sale occurred. We understood that my wife and I had a reasonable time after presentation of an offer to respond, and a reasonable time to close if we exercised the right. We also understood that it was a one-time right and if we did not exercise the right after being presented a legitimate offer, then the right would have been extinguished and we would have provided a release to be filed on the public record.

I was not aware that Henry McCombs transferred the property to his son, Allen S. McCombs in April of 2012. I was not informed of this transfer, and neither my wife nor I were aware of the transfer until after the death of Henry McCombs in June 2015. I first became aware of this transfer in early 2016. However, I would not have considered a transfer to his son "for love and affection" to invoke the first right of refusal.

8. I have never met Allen S. McCombs in person, and I have never had any occasion with him in person, by telephone, or otherwise. I never told anyone at any time

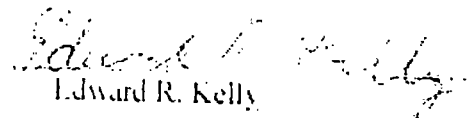
that I was not interested in exercising the first right of refusal. In fact, every time I discussed the issue I indicated my desire to exercise the right, depending of course on the offer price that we would have to match.

9. I was not aware of the sale of the property by Allen S. McCombs to Benjamin James Russell for \$125,000.00, which occurred November 20, 2015, until after the sale. We were not given a first right of refusal, as required. My wife and I were not aware of the transaction until early 2016. I have never met Allen S. McCombs in person.

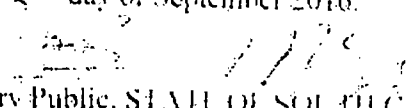
10. We certainly would have exercised the right of first refusal, and we would have promptly purchased the Property at the sale price. We were, and we remain, ready, able, and willing to exercise the first right of refusal contained in the 1996 Deed.

11. My wife and I request the Court to enforce the first right of refusal, and allow us to purchase the Property for the price that it was sold to Mr. Russell in violation of the deed provision. I know that both of the Defendants were aware of the First Right of Refusal, but proceeded with the sale without giving us the right to match the offer. My wife and I cannot understand why they did that, or how that is fair and equitable to us.

This the 2nd day of September, 2016.


Edward R. Kelly

SWORN TO AND SUBSCRIBED before me
this 2nd day of September 2016.


Notary Public, STATE OF SOUTH CAROLINA

My Commission Expires: _____

Appendix-074

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

CONTRACT OF PURCHASE AND SALE

THIS AGREEMENT made, entered into and concluded this 27th day of August, 1995 by and between Henry McCombs, Old Pinckney Road, York, South Carolina, Party of the First Part, hereinafter designated as "Seller", and Edward R. Kelly and Deirdre Kelly, whose address is 6070 Lockhart Road, Sharon, South Carolina, Party of the Second Part, hereinafter designated as "Purchaser".

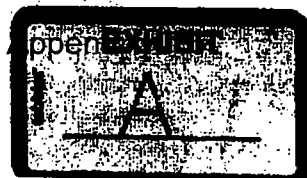
WHEREAS, it is stipulated and agreed that the value of the below-described property is \$7,777.03 as to the property which the Seller is going to purchase from the Purchaser and the value of the property which the Purchaser is to purchase from the Seller is \$210.19; and

WHEREAS, Edward R. and Deirdre O. Kelly agree to convey to Henry McCombs, for and in consideration of \$7,777.03 for 37 acres below described; and

WHEREAS, Henry McCombs agrees to convey to Edward R. and Deirdre O. Kelly a one acre tract of land below described; and

WITNESSETH:

That Seller, in consideration of the mutual covenants, promises and condition herein contained, and in further consideration of the transfer of 37 acres by Purchaser hereinafter mentioned, has sold and does hereby



agree to convey unto Purchaser, their heirs and assigns forever, and Purchaser, in consideration of the premises, has purchased for the purchase price above mentioned, the one acre tract of land shown as Henry McCombs property by Plat and Plat Book 110, page 109, and further described as Tax Parcel 133-11 together with all rights, privilege, be easements and appurtenances to the said premises incident to or belonging to and all rents, issues and profits thereof.

2. That the Purchaser, for themselves, their heirs, executors, administrators and assigns, do hereby agree to and with Seller, his heirs and assigns, and executors, to convey to the Seller the 37 acres of land on the northeastern part of property previously conveyed to Purchasers by Seller for and in consideration of the amount of \$7,777.03; The Seller will execute a note and mortgage agreeing to pay in full and without interest, the \$7,777.03 indebtedness or whatever portion remains unpaid at closing.

3. That upon the payment in full of the indebtedness, the Purchaser will cancel the mortgage and note.

4. Purchaser will pay taxes on all property for 1995 and after 1995 taxes, each party will be responsible for taxes on the property which is in his or her own name.

5. That Purchaser will pay for revenue stamps with regard to the transfer of the 15 acres and the one acre.

6. That it is mutually agreed by and between the parties hereto that if Seller should default in the

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obligation hereunder, Purchaser may institute a proceeding as may be appropriate for the foreclosure of the mortgage and/or the specific performance of the agreement, and in such event Seller agrees to pay all costs and expenses of such proceeding, including a reasonable sum as attorney's fees.

4. The parties stipulate and agree that time is of the essence as to this contract and agreement.

5. This contract and agreement of purchase and sale is made and executed in duplicate, each of which shall be deemed an original for each and every purpose.

6. The benefits and obligations of this Agreement shall inure to and be binding on the heirs, executors, administrators and assigns of both Seller and Purchaser.

7. The closing and the transfers set forth herein will occur on or before September 30, 1995.

8. The purchaser will have the first right of refusal if the seller ever decides to sell the 37 acres or any portion thereof. The first right of refusal shall be binding upon the heirs of the seller and the right of first refusal shall inure to the heirs of the purchasers.

IN WITNESS WHEREOF, the parties hereto have hereunto
set their hands and seals at York, South Carolina, the day
and year first above written.

Signed, sealed and
Delivered in the
presence of:

John A. [Signature]
[Signature]

Henry [Signature] (Seal)
Seller

John A. [Signature]
[Signature]

Edmund R. Kelly (Seal)
Purchaser

John A. [Signature]
[Signature]

Edmund R. Kelly (Seal)
Purchaser

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

Personally appeared before me [Signature]
and made oath that (s)he saw the within named [Signature]
[Signature] sign, seal, and as free act
and deed, deliver the within written Contract of Purchase
and Sale; and that [Signature] with [Signature]
witnessed the execution thereof.

Sworn to and subscribed
before me this 27 day
of March, 1995.

[Signature]
Notary Public, South Carolina
My Commission Expires [Signature]

ROBERTS & D'AGOSTINO
ATTORNEYS AT LAW
300 WEST LIBERTY STREET
MYERS, SOUTH CAROLINA 29745

TELEPHONE (803) 684-4807
FACSIMILE (803) 684-9966
TELETYPE (803) 684-4527

POST OFFICE BOX 408
(803) 684-4807
(803) 684-9966
FAX (803) 684-4527

February 14, 2000

Mr. McCombs
1000 Lockhart Road
Myers, SC 29752

Mr. McCombs:

Advised that you have again told Mr. Kelly that you have an offer on the property conveyed to you by deed in March, 1996. I request that you provide a copy of the offer. I have previously requested that you close on the sale of the land in March, 1999. At that time you were selling the property for \$1000.00 per acre. I request that you provide me with a copy of the price on the offer. My client, Ed Kelly, has previously set forth his

offer. If you have an attorney, please let me know who it is or have him or her get in touch with me. I will provide a copy of the deed with the first right of return as well as the contract which has been made in this regard.

Thanking you and with kind regards, I am,

Sincerely,

Daniel D. D'Agostino

Ed and Debra Kelly
1000 Lockhart Road
Myers, SC 29752

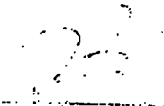
CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing and attached AFFIDAVIT was served upon the attorney for Defendants by email and by depositing it in the U.S. mail, postage paid, addressed to:

William M. Brice, III, Esq.
Brice Law Firm
PO Box 300
York, SC 29745

Beth Ramsey Faulkner, Esq.
Faulkner Law Firm
PO Box 1030
York, SC 29745

This the 8th day of September 2016.



Brian McCoy


2016-09-07 13:10:45

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
2016-CP-46-870

Edward R. Kelly, et. al.,)
Plaintiff,)
Vs.)
Benjamin J. Russell, et. al.,)
Defendants.)

AFFIDAVIT IN SUPPORT OF
MOTION

Personally appeared before me Benjamin J. Russell, who first being duly sworn,
deposes and says as follows:

1. I am a citizen and resident of York County, South Carolina. I am
over the age of eighteen and am competent and authorized to make this statement.
The matters and things set forth in this affidavit are based on my personal
knowledge and experience, as well as my observations, and to the best of my
knowledge are true. Any matter stated "on information and belief" is genuinely
believed by me to be true.

2. I am informed and believed that the wording in the deed that is two
deeds prior to mine in the chain of title of deeds, does not contain sufficient
language to constitute an enforceable right of first refusal in that it has no
termination period as is required by South Carolina law and violates the Rule
Against Perpetuities.

Appendix-081

3. I am informed and believe that this provision further is not enforceable against me because it does not contain any language or wording of any type that makes it binding on any person other than Henry McCombs. Henry McCombs conveyed the property to Allen McCombs and Allen McCombs conveyed the property to me.

4. I am aware that the paragraph immediately above this one in the deed in question, which paragraph addresses mobile homes on the property, has both the "heirs and assigns" wording and a specific termination point in time and that that restriction on mobile homes is effective against me and I do not dispute that restriction, but the sentence purported to be a right of first refusal contains no such language, not even in general terms.

5. I am informed and believe that the wording in question, created by the Plaintiff's own attorney, did limit the Plaintiffs, who are also the original grantors, to a personal right against only the original grantee, Henry L. McCombs, and Mr. McCombs no longer owns the property and also is now deceased.

6. I am informed and believe that if the Plaintiffs had any rights, those rights should have been asserted at the time Henry L. McCombs first conveyed the property and that deed of conveyance has been on public record for more than three years prior to the filing of this action and any such claim is too late under the statute of limitations.

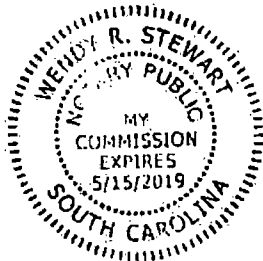
7. I am informed and believe that the wording of the provision in question is too vague to be enforceable in that it has no terms to describe as to how any repurchase would be calculated, noticed, valued or accomplished, nor as

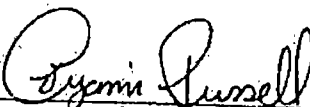
to whether the purported right of first refusal is valid only as to one first conveyance or as to every conveyance for all time.

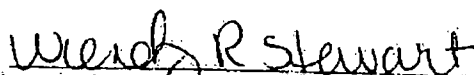
8. I am informed and believe that all of these matters were indicated and made known to the Plaintiffs in writing prior to their filing of this lawsuit and believe that I have been unnecessarily required to respond to this action.

9. I am also informed and believe that Mr. Henry McCombs was barely able to read or to write and that he was unrepresented at the time of all conveyances and contracts between himself and the Plaintiffs and that all documents were prepared and presented by the Plaintiff's attorney.

RESPECTFULLY SUBMITTED:




Benjamin J. Russell


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: May 15 2019

Prepared by Melvin R. Roberts & Associates

FILED-RECORDED
STATE OF SOUTH CAROLINA
COUNTY OF YORK

TITLE TO REAL ESTATE
GENERAL WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, That we, Edward R. Kelly and Deirdre O. Kelly, in the State and County aforesaid, for and in consideration of Seven Thousand Five Hundred Sixty and No/100 (\$7,560.00) Dollars, to us in hand paid at and before the sealing of these presents by Henry L. McCombs, Route 1, SC Highway 49 (Lockhart Rd.), Sharon, SC 29742, receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell and release unto the said Henry L. McCombs, his heirs and assigns forever the following described property:

DESCRIPTION: All that certain piece, parcel or lot of land and being situated along SC Highway No. 49 in the Bullocks Creek Township, York County, South Carolina and more fully shown on a plat entitled boundary survey for Henry L. McCombs recorded on March 22, 1996 in Plat Book 227 at page 3 in the Office of the Clerk of Court for York County, South Carolina, and containing 36.00 acres more or less and having such courses and distances, metes and bounds, as will appear by reference to the above Plat; said Plat being incorporated herein by reference.

Derivation: This being a portion of the same property conveyed by Henry L. McCombs to Edward R. Kelly and Deirdre O. Kelly by deed dated August 29, 1995 and recorded in Record Book 472 at page 124 in the office of the Clerk of Court for York County, South Carolina.

COUNTY
CONVEYANCE
TAX
11.20
PAID

The above described property is conveyed subject to all easements, rights of way or restrictions appearing of record, in the chain of title, shown on the above-referenced survey, or visible on an actual physical examination of the subject premises. The above described property is also subject to the restriction that neither the grantee nor any of his successors or assigns or heirs will place more than one mobile home on the above described property for a period of 45 years, that being from August 29, 1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved.

The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion or partial of the same.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances whatsoever, to the said premises belonging, or in any wise incident or appertaining.

11 125

1481 125

TO HAVE AND TO HOLD, all and singular the said premises above-mentioned, unto the said Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever.

And we, do hereby bind our heirs, executors, administrators, successors, and assigns to warrant and forever defend all and singular the premises unto the said, Henry L. McCombs, his heirs, executors, administrators, successors, and assigns, against myself and my heirs, executors, administrators, successors, and assigns, and all other persons whomsoever lawfully claiming, or to claim the same, or any part thereof.

Witness My Hand and Seal this 18 day of March, 1996.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

D. O. O'Neil
Cherie R. Teat

Edward R. Kelly (Seal)

D. O. O'Neil
Cherie R. Teat

Daniel J. Kelly (Seal)

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

PROBATE

Personally appeared before me Cherie R. Teat
and made oath that (s)he saw the within named grantors sign,
seal and as his act and deed, deliver the within written
Deed, and that (s)he with Daniel D. O'Neil
witnessed the execution thereof.

Cherie R. Teat

Sworn to before me this
18 day of March, 1996.

Daniel O. O'Neil
Notary Public for South Carolina
My Commission Expires: Sept. 15, 2002

After Recording Mail To:
LegalZoom - 502799084
9041 South Pecos Road, Suite 3900
Henderson, NV 89074

Reviewed By:
Lloyd T. Kelso, Esquire
128 E. Garrison Boulevard, Suite A
Gastonia, NC 28054

201200167328
Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON, CLERK OF COURTS
04-11-2012 At 09:05 am.
DEED DC INT 10.00
State Tax .00
County Tax .00
OR Vol 12552 Page 91 - 94

RECORDED

YORK COUNTY

TAX ASSESSOR'S OFFICE

DATE 4-11-12
TAX MAP NO. 133-12
INITIALS CAK/TS

SPACE ABOVE THIS LINE FOR RECORDER'S USE

QUITCLAIM DEED

TITLE OF DOCUMENT

STATE OF SOUTH CAROLINA,

KNOW ALL MEN BY THESE PRESENTS, THAT:

Henry L. McCombs, a married man, (Hereinafter whether singular or plural the "GRANTOR")

WHOSE mailing address is 5911 Lockhart Road, Sharon, South Carolina 29742,

FOR AND IN CONSIDERATION of the sum of FIVE AND NO/100 DOLLARS (\$5.00) and LOVE AND AFFECTION, to the GRANTOR paid by

Allen S. McCombs, a single man, (Hereinafter whether singular or plural the "GRANTEE"),

WHOSE mailing address is 347 Trexler Lane, Rock Hill, South Carolina 29732,

GRANTOR has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release all right, title and interest unto the said GRANTEE the following described property:

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

Site County & State: York County, South Carolina

Tax Map Number/Parcel Number: 1330000012

Derivation Statement

This being the identical property conveyed to the GRANTOR herein by **General Warranty Deed** from **Edward R. Kelly and Deirdre O. Kelly** dated **March 18, 1996**, recorded **March 22, 1996** and filed in Record Book: 1481 Page: 125

Appendix-086

8K12552 P00091

TOGETHER WITH all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining. HOWEVER, subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record, if any. TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE, GRANTEE'S heirs and assigns forever.

WITNESS the hand and seal of the GRANTOR this 23 day of March, 2012.

Henry L. McCombs
Henry L. McCombs

Signed, Sealed and Delivered in the Presence of:

Witness #1: Yvonne Miskelly

Printed Name: YVONNE Miskelly

Witness #2: Charlene Pharr

Printed Name: CHARLENE PHARR

STATE OF SC

COUNTY OF York

ss

The foregoing instrument was acknowledged before me this 23 day, March, 2012, by Henry L. McCombs.

NOTARY STAMP/SEAL

Marie C. Sanders
Notary Public

Marie C. Sanders
Printed Notary Name
My Commission Expires: 2-24-2020

Appendix-087

BK12552 PG0092

EXHIBIT "A"
LEGAL DESCRIPTION

ALL INTEREST IN THE FOLLOWING DESCRIBED REAL ESTATE SITUATED IN THE COUNTY OF YORK, STATE OF SOUTH CAROLINA, TO WIT:

ALL THAT CERTAIN PIECE, PARCEL OR LOT OF LAND BEING SITUATED ALONG SC HIGHWAY NO. 49 IN THE BULLOCKS CREEK TOWNSHIP, YORK COUNTY, SOUTH CAROLINA AND MORE FULLY SHOWN ON A PLAT ENTITLED BOUNDARY SURVEY FOR HENRY L. MCCOMBS RECORDED ON MARCH 22, 1996, IN PLAT BOOK A-87 AT PAGE 3 IN THE OFFICE OF THE CLERK OF COURT FOR YORK COUNTY, SOUTH CAROLINA, AND CONTAINING 36.00 ACRES MORE OR LESS AND HAVING SUCH COURSES AND DISTANCES, METES AND BOUNDS, AS WILL APPEAR BY REFERENCE TO THE ABOVE PLAT, SAID PLAT BEING INCORPORATED HEREIN BY REFERENCE.

Appendix-088

8K12552 P00093

STATE OF SOUTH CAROLINA
COUNTY OF YORK

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at (36 AC) Highway 49, Lockhart Road, bearing York County Tax Map Number 1330000012, was transferred by Henry L. McCombs, a married man to Allen S. McCombs, a single man on: MARCH 23, 2012

3. Check one of the following: The deed is

- (a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
- (b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
- (c) ☒ exempt from the deed recording fee because (See Information section of affidavit); #3 Transfer between parent and child for love and affection
(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes ☐ or No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):

- (a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____
- (b) ☐ The fee is computed on the fair market value of the realty which is _____
- (c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____

5. Check Yes ☐ or No ☐ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____

6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here: _____
- (b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here.)
- (c) Subtract line 6(b) from Line 6(a) and place result here: _____

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: _____

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as:

Henry L. McCombs

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

SWORN to before me this 23
day of March year of 2012

Henry L. McCombs
Grantor

Sandra L. Thomas
Notary Public for South Carolina
My Commission Expires: 2/17/2021

Henry L. McCombs
Print or type the above name here

Appendix-089

8K12552 P80094

325.00
137.50

Brice Law Firm, LLC
P. O. Drawer 300
York, SC 29745



RECORDED
YORK COUNTY
TAX ASSESSOR'S OFFICE
DATE 11/20/15
TAX MAP NO. 133-12
INITIALS EB/JA

201500321812
Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON, CLERK OF COURTS
11-20-2015 At 12:01 PM.
DEED 10.00
State Tax 325.00
County Tax 137.50
OR Vol 15286 Page 201 - 202

STATE OF SOUTH CAROLINA)
COUNTY OF YORK) TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS that Allen S. McCombs hereinafter referred to as "Grantor", in the State and County aforesaid, for and in Consideration of One Hundred Twenty Five Thousand and 00/100 (\$125,000.00) Dollars paid by Benjamin James Russell

3784 Wilson Chapel Rd
Sharon SC 29742 hereinafter the "Grantee", has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the Grantee, his heirs and assigns forever, the following described real property, to wit:

All that certain piece, parcel or lot of land being situated along SC Highway No. 49 in the Bullocks Creek Township, York County, South Carolina, and more fully shown on a plat entitled Boundary Survey for Henry L. McCombs recorded on March 22, 1996 in Plat Book A-87 at page 3 in the Office of the Clerk of Court for York County, South Carolina, and containing 36.00 acres more or less and having such courses and distances, metes and bounds, as will appear by reference to the above plat, said plat being incorporated herein by reference.

DERIVATION: This being the identical real property conveyed to Allen S. McCombs by deed recorded April 11, 2012 in Book 12552, page 91, RMC office for York County, SC.

The within property is conveyed subject to all existing easements and restrictions appearing in the chain of title, which said easements and restrictions are not intended to be reimposed hereby.

TOGETHER with, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

Instrument
201500321812 OR Vol 15286 Page 201

Appendix-090

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, his heirs and Assigns forever.

And the Grantor does hereby bind his heirs, Executors, Personal Representatives, and Administrators to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's Heirs and Assigns, against the Grantor and the Grantor's heirs and assigns and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS the Hand and Seal of The Grantor(s) this the 19 day of November, 2015.

Signed, Scaled, and Delivered
in the presence of:

Chaim Kinkel
Witness A

Allen S. McCombs (Seal)
Allen S. McCombs

Brittany Mow
Witness B

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

ACKNOWLEDGMENT

I, the undersigned, Notary Public for the State of South Carolina do hereby certify that Allen S. McCombs, personally appeared before me this day and acknowledge the due execution of this foregoing instrument.

Witness my hand and seal this 19 day of November, 2015.

Brittany Mow (Seal)
Notary Public for South Carolina
My Commission Expires: 10-09-24

Appendix-091

Instrument
201500321812 OR
Vol Page
15286 202

EDWARD R. KELLY, ET AL. -VS- ALLEN S. MCCOMBS, ET AL.
Transcript of Proceedings on 09/07/2016

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF YORK) IN THE COURT OF COMMON PLEAS

COPY

3
4 EDWARD R. KELLY AND)
5 DEIRDRE O. KELLY,)
6 PLAINTIFFS,)

-VS-

CA NO. 2016-CP-46-870

7 ALLEN S. MCCOMBS, ET AL,)
8 DEFENDANTS.)
9

10
11
12
13
14 TRANSCRIPT OF PROCEEDINGS

15 YORK, SOUTH CAROLINA

16 SEPTEMBER 7, 2016
17
18
19
20

21 REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM
22 DALLAS REPORTING, A HUSEBY COMPANY
23
24
25

1 Appearances:

Representing the Plaintiffs -

2

Brian S. McCoy, Esquire
McCoy Law Firm

3

378 E. Main Street

4

Rock Hill, South Carolina 29730

5

803-366-2280

bmc coy@mccoylawfirm.com

6

Representing the Defendant,
Russell -

7

Mac Brice, Esquire

8

The Brice Law Firm

9

9 N. Roosevelt Street

York, South Carolina 29745

10

803-684-4464

mac@thebricefirm.com

11

Representing the Defendant,
McCombs -

12

Beth Ramsey Faulkner, Esquire

13

Faulkner Law Firm

14

616 E. Liberty Street

York, South Carolina 29745

15

803-818-5700

beth@faulknerlawfirm.com

16

17

18

19

20

21

22

23

24

25

1 PROCEEDINGS

2 BEFORE: THE HONORABLE S. JACKSON KIMBALL

3 11:00 A.M.

4 * * * * *

5 The Court - This is Case Number 2016-CP-46-870,
6 Edward R. Kelly and others against Allen S. McCombs
7 and others. Present and representing the plaintiffs
8 is Mr. Brian McCoy. Present and representing the
9 defendants is Mr. Mac Brice.

10 This is the defendants' Motion to Dismiss and
11 for Summary Judgment. The first question I have is,
12 are there any factual issues to be determined by
13 anybody?

14 Mr. Brice - If the court determines that this
15 right of refusal is, in fact, some type of valid
16 right of refusal, it's silent as to notice and type
17 of notice, waiver and different ---

18 The Court - The vagueness argument?

19 Mr. Brice - Not just the vagueness. There's
20 some information in the affidavits that indicate
21 that perhaps Mr. Henry McCombs did have a conversation
22 with Mr. or Mrs. Kelly. That's disputed, but that's
23 the factual dispute, in which he gave them notice
24 that he intended to transfer the property. They
25 gave him an indication that they were no longer

1 interested in acquiring the property, but that would
2 have to come from testimony, I think, from Mr.
3 Allen McCombs. That would be a factual dispute as to
4 if there was any notice given and if that notice was
5 sufficient, if the covenant is even valid to start
6 with.

7 The Court - I know I read the affidavits. Hold
8 on a minute.

9 Mr. Brice - That would be Mr. Allen McCombs. He
10 indicates his father and him spoke. Mr. Kelly's
11 affidavit indicates they did not speak. That would be
12 the only factual issue I could think of.

13 The Court - If we're simply talking about an
14 interpretation of the deed, what difference would that
15 make, construction of the deed.

16 Mr. Brice - I guess we've got to that point that
17 it would be a question of did they have notice and
18 did they waive their right of repurchase to Henry
19 McCombs?

20 The Court - If, for example, I was to rule that
21 the deed in question was simply too vague, your
22 argument, as to the manner and timing and price
23 determination of the right of first refusal, why would
24 I need to look at any affidavits?

25 Mr. Brice - You would not need to. Factually,

1 only if we had gotten to the point where -- I
2 agree, if you make that ruling ---

3 The Court - If I deny all your motions, you
4 think we've got to have a hearing is what you're
5 saying?

6 Mr. Brice - I think that's the only factual
7 issue left if you deny all my motions. The court
8 may decide that one is not worth going forward with.

9 Mr. McCoy - I think I would agree with that,
10 Your Honor. I don't think the affidavit that Mac is
11 referring to is in evidence.

12 The Court - It was submitted to me for
13 consideration in connection with the motions. Here
14 it is.

15 Mr. McCoy - Is that from Allen McCombs?

16 The Court - No, this is Russell.

17 Mr. McCoy - I don't think that one creates a
18 fact issue. I'm not going to deny that I received a
19 -- I think it was a pre-filing affidavit from Allen
20 McCombs. Some interpretation of that could indicate
21 that he did give verbal notice to my clients and
22 that's, of course, vehemently disputed by my clients'
23 affidavits. That would be a fact issue.

24 The Court - We're not going to talk about that
25 anymore. Have a seat.

1 Mr. Brice - I want to refer to the affidavit
2 that Ms. Faulkner filed along with her brief for
3 Allen McCombs.

4 The Court - That may be what I'm talking about.
5 What I want to happen is, I want Ms. Faulkner to sit
6 right there since she's a lawyer in this case.

7 Ms. Faulkner - Your Honor, for clarification, I
8 did not file an affidavit on behalf of my client
9 because from my understanding if there are any factual
10 issues, which that would be a factual issue, that's
11 not before the court today.

12 The Court - I'm not going to worry about that
13 anymore. The other thing I want to do, from reviewing
14 all this, and I'm going to do it in sort of a summary
15 way. One of the grounds for dismissal submitted by
16 the defendants is lack of personal jurisdiction.

17 From reviewing the file, I can't see any reason
18 why the court would lack personal jurisdiction over
19 residents of South Carolina, who have been served.
20 Do you have any response to that?

21 Mr. Brice - I don't disagree.

22 The Court - Aren't all these people residents
23 of ---

24 Mr. Brice - They are.

25 Ms. Faulkner - I certainly agree, Your Honor.

1 The Court - I'm going to deny that. That will
2 save us some time. Do you have something else about
3 that?

4 Ms. Faulkner - No, Your Honor. I was just going
5 to go further and state that I think the argument as
6 to jurisdiction to my client is that the court does
7 have jurisdiction over him. I guess the arguments
8 are as to the motion. The language of the first
9 right of refusal is not applicable to my client
10 because it -- My argument is that it just applies to
11 Henry McCombs.

12 The Court - That's not a jurisdiction question.
13 I have jurisdiction over any resident of South Carolina
14 who gets served.

15 Ms. Faulkner - I understand, Your Honor.

16 The Court - With that, let's proceed. Mr. Brice,
17 your motion.

18 Mr. Brice - Your Honor, we basically have four
19 points, which would be the right of first refusal
20 under the rule against perpetuities as codified in
21 South Carolina, the vagueness question, statute of
22 limitations question, whether the wording of the
23 provision actually affects anybody beyond Henry
24 McCombs. Would you like for us to go through them
25 one at a time or ---

1 The Court - Absolutely.

2 Mr. Brice - We'll start with the first one.

3 The Court - Did you pack a lunch?

4 Mr. Brice - I'll try to be brief.

5 The Court - Go ahead.

6 Mr. Brice - I know the court has the cases and
7 its own research so I won't try to belabor too much
8 of it.

9 The first one we will start with is the rule
10 against perpetuities. It's clear that the uniform
11 statutory rule codified by the State of South Carolina
12 supercedes the common law rule against perpetuity. Our
13 problem is that we don't really have any South Carolina
14 case law that address the statutory rule.

15 We have a lot of South Carolina case law that
16 addresses the common law rule and sets forth a lot of
17 the State of South Carolina's perceptions on alienation
18 of title and things like that.

19 The case that we've cited, and the case that
20 appears to be the most cited would be Webb v. Reames.
21 Webb v. Reames does a good job of citing the State
22 of South Carolina's disfavor with anything that
23 alienates title. The State of South Carolina
24 strictly construes anything that would violate a
25 rule against perpetuities as being only from

1 inception, as opposed to merely voidable later.
2 There's no case law shows how that particular
3 standard may interplay with the statutory rule against
4 perpetuities. I think that's part of our problem.
5 Webb has been cited as recent as 2015.

6 The Court - Webb talks about that at the end
7 of it, doesn't it?

8 Mr. Brice - I talks about, I think, that --
9 Webb dealt with a matter that was created prior to
10 the statutory rule.

11 The Court - They throw in this business about
12 the statute of limitations.

13 Mr. Brice - They do, and say that the statute of
14 limitations didn't really apply in this particular
15 case.

16 The Court - And the reason it didn't apply is
17 because the thing was void from the beginning.

18 Mr. Brice - Void from the beginning, yes, sir.
19 Part of our argument, as far as this particular
20 paragraph, is that the wording of this provision in
21 the deed is, grantors reserve unto themselves, their
22 heirs and assigns, a first right of refusal as to
23 the sale of the above described property or any
24 parcel or portion of same.

25 That clearly, under any common law standard,

1 is violation of the rule against perpetuity. It
2 doesn't vest forever. Absent any vagueness, it could
3 go forever if it's not sold. I would believe it's
4 a clear violation of the rule against perpetuity.

5 The Court - It would seem to me to violate
6 sub-paragraph 1 of 27620. That statute talks about
7 a determination in the alternative. It says, or the
8 interest either vests or terminates within 90 years
9 after it's creation.

10 Mr. Brice - I don't believe we have any case
11 law saying that South Carolina has adopted a wait and
12 see. In Mr. McCoy's ---

13 The Court - Let's just look at the language of
14 the statute.

15 Mr. Brice - The language of the statute, my
16 thought would be that that's the guidance on the
17 legislative intent because life and being plus 21 years
18 is an uncertain time, that 90 years is a certain time.
19 If you have something that is absolutely going to vest
20 or not vest within 90 years, then it's not going to
21 violate the rule against perpetuity.

22 The Court - Let's narrow that down a little more.
23 The interest either vests -- strike out either. One
24 way of reading it to be specific would be, the
25 interest vests within 90 years after it's creation.

1 Mr. Brice - Okay. But nothing in the provision,
2 nothing in the words of the right of refusal say that
3 it will vest or terminate within 90 years. Not that
4 it actually does, but nothing in the words says that
5 it will terminate or vest.

6 The Court - Do you agree that this interest,
7 whatever it is, the right of first refusal, vests
8 when the time comes to exercise it?

9 Mr. Brice - Yes, sir.

10 The Court - Then couldn't you say the interest
11 vests -- this interest vested with 90 years after its
12 creation?

13 Mr. Brice - My interpretation of it is the
14 wording doesn't create a situation where it could
15 possibly vest. The wait and see provision ---

16 The Court - I agree with that.

17 Mr. Brice - Completely counters the South Carolina
18 case law. It's from inception. It's not later
19 voidable. So to interpret that, if we wait and see
20 up to 90 years, there is no South Carolina law that
21 says that there is no statutory interpretation that
22 says wait. There's a lot of South Carolina law that
23 says, if it wasn't valid, if it violated the rule
24 the day it was created, it's void and nothing changes
25 that. I think the statutory language would've said it,

1 said, this must void -- this must either terminate or
2 vest within 90 years, had been written in that
3 sentence then, yes, it would meet the statutory
4 provision.

5 I think that that -- I think the argument that
6 we have a wait and see provision created by that, is
7 completely counter to the case law that says it is
8 void from inception.

9 The Court - I think the term, wait and see, came
10 from the comments to the uniform act, if I remember
11 right.

12 Mr. Brice - I believe so. Those are just the
13 comments. I don't know that they have actually been
14 applied, adopted, accepted or considered to be the
15 law in South Carolina. Webb seems to be quite counter
16 to it. Webb actually refers back to another case,
17 Love v. Love, which is also a York County case which
18 says the same thing. There is a line of longstanding
19 cases, including one we have from 2004, which Ms.
20 Faulkner provided to me this morning that also refers
21 to Webb, which clearly says South Carolina. South
22 Carolina has a long line of cases strongly expressing
23 disfavor for ---

24 The Court - Are you talking about the Page case?

25 Mr. Brice - Sir?

1 The Court - You're talking about the Page case?

2 Mr. Brice - Yes, sir. Do you have a copy of the
3 Page case?

4 The Court - I do.

5 Mr. Brice - I just think that to interpret that 90
6 years is a wait and see provision based on comments,
7 runs very counter to the case law in South Carolina,
8 that it is void from inception.

9 The Court - That is a catchy phrase, wait and
10 see. I don't think it accurately describes Sub-
11 Paragraph 2. It's catchy, it sounds good, we'll wait
12 and see if it vests. I don't think that's an
13 accurate description either. Wait and see is not
14 what it is. What it is, is either the interest vests
15 within 90 years after its creation, and if we agree
16 that it vests, means the opportunity or obligation
17 to exercise it is the vesting event, then this one
18 vested within 90 years.

19 Mr. Brice - But that would be -- If it was void
20 from inception, it wouldn't matter.

21 The Court - That's a circular argument. It's
22 not void by reason -- It's not void by reason of --
23 Would not be void by reason of the rule against
24 perpetuities and the statutory expression of that, if
25 it doesn't violate the statute. So it's not void if

1 it doesn't violate the statute. If it violates the
2 statute, it is void.

3 Mr. Brice - Based on that interpretation of ---

4 The Court - That's right. I recognize -- They
5 tell you, you may practice law your whole life and
6 never have a case involving the rule against
7 perpetuity. I've had two. This is my second.

8 The first one was as a legal research assistant
9 in law school, forty-something years ago. I still
10 don't know the answer. My point is, I'm just asking
11 questions that came up as I read through this stuff.
12 I'm trying to see if I can reason through it.

13 Mr. Brice - I guess our argument would be the
14 interest either vests or terminates within 90 years
15 after its creation. I would think that there would
16 be some requirement that the creating language would
17 limit it to 90 years. The case law says that if it
18 violates the rule against perpetuity, life and being
19 plus 21 years, that it is void from inception.

20 The Court - So would you say then that you would
21 have to include -- to take the safe harbor, to get
22 into the safe harbor of Sub-Section 2 -- You're saying
23 that the deed or other document would have to say,
24 this interest must vest within 90 years?

25 Mr. Brice - I think it would have to say ---

1 Under the old rule against perpetuity, it would say
2 restrictions. I believe in the Page case it says,
3 first right of refusal for the life times of A, B and
4 C or 21 years after the death of the last of them.
5 That's hard to determine. The statutory rule allows
6 you to say, this right of refusal is good for so and
7 so's life time plus 21 years or 90 years from the
8 date of creation, whichever is greater. It gives you
9 a way to put a finite date on something in the title.

10 The Court - What you're saying, that must be in
11 the deed.

12 Mr. Brice - It must be in the deed. It must be
13 in the granting language, that it would be limited to
14 90 years or some specific lives in being plus 21 years.
15 The statute gave you an opportunity to have some more
16 definite limitation on how long this affected the
17 alienability of title, which is what I think they were
18 trying to do, stop the ability to transfer title in
19 perpetuity.

20 The Court - I did not print out for myself a
21 copy of the plaintiffs' deed. Can one of you give
22 me a copy? I relied on the language that's in the
23 briefs.

24 Mr. Brice - I have a copy of the first page,
25 which is the only one that's pertinent to the language.

1 The Court - Anything else from a statute of
2 limitation's point from either of you?

3 Mr. Brice - Whether it was a donative or a
4 non-donative transfer. I'm not sure I understand
5 exactly what distinction we're trying to make with
6 that. In that particular deed, there was consideration
7 for the land, the \$7,000.00 paid. If you read that
8 very first provision about mobile homes, there's
9 consideration given for that. In the last paragraph,
10 it says that they're restricted for 40 years as well as
11 restricting the property from which the above was
12 carved.

13 So there's a mutual restriction for grantor
14 and the grantee's property. There is no discernible
15 separate consideration for that purported right of
16 first refusal.

17 The Court - Why does it have to be separate?

18 Mr. Brice - I don't know that it does. I'm
19 just saying it was not a donative transfer. I don't
20 think if it ---

21 The Court - I'm sorry. I see what you're ---

22 Mr. Brice - I don't think you can say it was
23 donative because clearly they established consideration
24 for everything in the deed except that purported right
25 of first refusal. I don't know that that's an

1 exception to applying the statute to it or the case law
2 to it. I don't know, again, if there's any South
3 Carolina language anywhere that addresses it.

4 The Court - Ms. Faulkner.

5 Ms. Faulkner - I agree with Mr. Brice. Your
6 Honor, in the grantee clause, it just says, for the
7 \$7,000.00 plus that the grantor was giving to the
8 grantee that particular parcel of property. Then it
9 goes on to talk about the mobile home restriction and
10 then it has the first right of refusal.

11 There is no specification of any considerations
12 given for that first right of refusal. Furthermore,
13 in Mr. McCoy's affidavit, there is a factual
14 disagreement - I was going to inform the court of
15 earlier - as to the consideration ---

16 The Court - Which consideration?

17 Ms. Faulkner - Consideration for the first right
18 of refusal.

19 The Court - In the deed?

20 Ms. Faulkner - Our position, there is no
21 consideration for the first right of refusal.
22 Furthermore, if we get into a factual determination
23 as to what happened before that deed was put into
24 place, then there -- In my opinion, no affidavit
25 submitted to the court addressed -- I don't believe

1 addressed what actually happened from the very
2 beginning, at the time that Henry McCombs acquired
3 the property from the estate of Dora -- I can't
4 remember her last name. He acquired that property,
5 and then the Kellys acquired the property. There
6 was some exchange. The Kellys actually bought it from
7 Mr. McCombs, I think, I might have this incorrect.
8 Anyway, then after that, the Kellys conveyed the
9 property back to the McCombs, to Henry McCombs, and
10 there was a loan that was in place. It gets into a
11 factual argument, Your Honor.

12 The Court - What does that factual argument have
13 to do with?

14 Ms. Faulkner - The point of my argument is that I
15 think, actually, Henry McCombs came out on the short
16 end of the stick, so to speak. Of course, Mr. McCoy's
17 argument is the exact opposite. If there's any actual
18 consideration, I think Mr. Henry McCombs came out the
19 loser in the transaction, as opposed to the Kellys,
20 Your Honor. That is actually a factual argument, and I
21 can tell you're looking at me ---

22 The Court - I remember now reading through this
23 business of -- Something said, in effect, that they
24 gave the property back to Mr. McCombs.

25 Ms. Faulkner - Maybe Mr. Brice can address this

1 more fully because he actually ---

2 The Court - Didn't I read that.

3 Mr. Brice - Having looked at the title, Mr.

4 Henry McCombs purchased 135 acres from Dora Mitchell
5 for \$118,000.00. He put \$90,000.00 down apparently of
6 his own money and borrowed \$28,000.00 from the Kellys,
7 put a mortgage against 135 acres. Approximately a year
8 later he deeded ---

9 The Court - Borrowed the \$28,000.00 difference
10 from the plaintiffs?

11 Mr. Brice - From the plaintiffs. Approximately
12 one year later, Mr. McCombs conveyed the entire
13 135 to the Kellys in extinguishment of his \$28,000.00
14 debt. There is no mention of 90. Shortly after
15 that ---

16 The Court - Hold on a second. There's a deed
17 saying that. Do I have that?

18 Mr. Brice - A plat and copies and stuff that
19 I pulled. If you can give me a minute, I imagine
20 I can find it.

21 The Court - Was it attached to your memo?

22 Mr. Brice - I didn't go that far back in the
23 chain of title. I have the deed from Dora Mitchell
24 for 118, and the deed from Henry, another piece of
25 property. There's a deed from Henry to them that

1 says, in satisfaction of the balance of \$28,500.00,
2 followed about three days later by the deed from them
3 back to Henry of 36 acres of the 135 he had deeded
4 them.

5 The Court - Seven thousand five hundred sixty.

6 Mr. Brice - He, effectively, had deeded back
7 135.

8 The Court - Let me see that. All I want is a
9 deed satisfying the mortgage. They conveyed back to
10 him 36 of the 135 acres.

11 Mr. Brice - Yes, sir.

12 The Court - I had trouble wrapping my head
13 around that. He conveyed ---

14 Mr. Brice - 135, I think it was.

15 The Court - It doesn't say how much. Just
16 assume that to be so. 135 acres to them in
17 satisfaction of a \$28,500.00 ---

18 Mr. Brice - Yes, sir. He originally paid
19 118 for it. This all happened within a year.

20 The Court - Cancellation of mortgage, principal
21 balance of \$28,500.00, paren, love and affection,
22 closed paren, to us. What's that about?

23 Mr. Brice - I do not know. I do agree with
24 Ms. Faulkner that I think Mr. McCombs came out very
25 much on the short end of the consideration. That

1 was a factual issue.

2 The Court - It is what it is. It looks like
3 they roughly conveyed back to him the 36 acres for
4 roughly the per acre price that he conveyed to them,
5 the 135 acres, in satisfaction of the mortgage.

6 Mr. Brice - Yes, Your Honor.

7 The Court - Ms. Faulkner is shaking her head
8 yes. Have you calculated it?

9 Mr. Brice - My assumption would be ---

10 Ms. Faulkner - I didn't calculate it per dollar,
11 but I think that's ---

12 The Court - It looks to be about right.

13 Mr. Brice - My assumption would be they deeded
14 back to him an amount of acres that was equivalent
15 to the money he put down to start with, that he
16 lost, \$90,000.00.

17 The Court - Anything else, Ms. Faulkner?

18 Ms. Faulkner - No, Your Honor, not in regards
19 to the.

20 The Court - Mr. McCoy, what about the rule against
21 perpetuity?

22 Mr. McCoy - Yes, Your Honor. I think one thing
23 that we all need to get our brain around is that the
24 statute drastically changed, the common law rule of
25 perpetuities that we all taught in law school.

1 It is a drastic change. The whole long line of
2 cases, they're gone because the statute -- Let me
3 point out two important provisions, judge. This is
4 within the statutory rule against perpetuities, Sub-
5 Section 80 says, this chapter supercedes the common law
6 against perpetuities.

7 The Court - Right.

8 Mr. McCoy - Two sections up, in Section 60, it
9 says, this chapter applies to a non-vested property
10 interest or power of appointment that is created on or
11 after July 1, 1987.

12 So Webb and all those other cases, don't apply the
13 statute. In Webb, that restriction was created in
14 the 1950s. So, of court, the Webb court applied the
15 common law.

16 The Court - Well, it was conveyance prior to
17 1987, which is when the act was adopted.

18 Mr. McCoy - Webb was well before the statute, so
19 it was decided on common law.

20 The Court - I had that here somewhere. Here it
21 is. Webb's deed was in '55 or '56.

22 Mr. McCoy - That's right.

23 The Court - Sub-Section B of 60 says, if a
24 non-vested interest was created before July 1, '87,
25 then a proceeding after that date applies to the rule

1 before that date.

2 Mr. McCoy - That's Sub-Section 2. A says, this
3 chapter applies to the non-vested interest created
4 after July 1, 1987.

5 The Court - Yes.

6 Mr. McCoy - Right. So Webb was common law, it
7 was before 1987. Our deed in 1996 is under the
8 statute because it's after 1987. So Webb has no
9 application. The other cases applying to common law
10 have no application to this case. The common law
11 has been superceded by the statute.

12 The Court - Do you agree that Sub-Section 1 of
13 20-A essentially restates, in substance, the common
14 law.

15 Mr. McCoy - Yes.

16 The Court - As I read the material, you're only
17 talking about Sub-Section 2 anyway, right?

18 Mr. McCoy - Yes. Sub-Section 2 completely saves
19 this transaction, if you want to look at it that way.
20 Also, there is no mystery what the legislature
21 intended, judge. This is a uniform act. It's got
22 comments. It's got other states that have applied it.
23 Our legislature said in Section 70 that it shall be
24 applied and construed to effectuate it's general
25 purpose, to make uniform the law with respect to the

1 subject of this chapter and among other states enacting
2 it.

3 It's no mystery what they intended. They
4 intended to change the old common law rule against
5 perpetuities that we all learned. It does it in two
6 important ways in this case. The first one is,
7 Sub-Section 2. Instead of the old common law,
8 voidable from the beginning, it's not anymore. We
9 look -- We wait and see. Does it vest within 90
10 years? If it does, then the statute says it's valid,
11 and it did here.

12 The Court - But if it doesn't, it's void?

13 Mr. McCoy - Right. If you wait the 90 years and
14 it hasn't vested, it's void. Exactly. That is the big
15 change from A-1, which is the common law. 2 says,
16 or it can be saved in the 90 years, and that happened
17 here.

18 The Court - Do you agree -- I asked them this
19 question. Just to be sure the record is clear, you
20 agree that the vesting of this non-vested property --
21 First of all, you agree it's a non-vested property
22 interest?

23 Mr. McCoy - No. I would make that argument if
24 I had to, but I don't I don't think. In Sub-Section
25 C of my brief, Your Honor, Sub-Section 1-C, is

1 essentially the argument that -- For some reason, if
2 we were still under the common law, which we're not,
3 it still isn't a property interest because it has
4 no ---

5 The Court - But all the cases call it a property
6 interest, a non-vested property interest, even this
7 unpublished opinion in 2006.

8 Mr. McCoy - I would, I think, reluctantly,
9 even though I could distinguish it otherwise, that
10 Webb says that, and I ---

11 The Court - Well, so does this Page case.

12 Mr. McCoy - Is it Supreme Court?

13 The Court - No.

14 Mr. McCoy - I would argue that I think our
15 Supreme Court would go with the modern trend in
16 finding that these rights of first refusal, where
17 it simply matched the price, really have no effect
18 on the holder of the property's decision to sell
19 or not ---

20 The Court - Say that again.

21 Mr. McCoy - What these cases hold, and I agree
22 with, is the right of first refusal or first right
23 of refusal has no impact on the owner, subject to
24 that right, on his decision to alienate the property.
25 He can decide never to sell it. He can sell it

1 whenever he wants, for whatever price he wants.

2 The Court - You're saying it's not a restraint
3 on alienation?

4 Mr. McCoy - Right.

5 The Court - I understand.

6 Mr. McCoy - I think similar logic on a lot these
7 cases have held that it's just not a property
8 interest. The rule against perpetuities doesn't
9 apply. But, Your Honor, we don't get there. That's
10 the common law. We'd be having this discussion if
11 the statute wasn't passed, but it was. It's clear
12 on two points. One is, if you just look at A, two it's
13 vested in the 90 years. It's saved. It's not an
14 issue.

15 The Court - When did it vest, whatever it is?

16 Mr. McCoy - When Allen McCombs sold the property
17 to Mr. Russell, without giving the option to my
18 client.

19 The Court - You're talking about the statute
20 of limitations now.

21 Mr. McCoy - No.

22 The Court - Well, I know you're not, but that's
23 what they say. If you had an otherwise validly
24 stated right of first refusal in the deed, does not
25 the statute of limitations begin to run with each

1 vesting of that right? That is, it vests, there's an
2 offer. That offer doesn't come to fruition; time
3 goes by, there is another offer. It vests again
4 based on the terms of the proposed sale. Do you
5 think that's accurate?

6 Mr. McCoy - Well, in context of this case, I
7 do not think it vested when Henry McCombs gave the
8 property to his son. There was nothing my client
9 could have matched. They weren't going to say, well,
10 here's five dollars, we'll match it, no. That was
11 just a pure assignment.

12 The Court - What I'm saying is -- it was a quit
13 claim deed.

14 Mr. McCoy - The deed expressly says it's subject
15 to all the rights and obligations.

16 The Court - That's right.

17 Mr. McCoy - That did not trigger the right of
18 first refusal.

19 The Court - It seems to me that it's triggered
20 each time the opportunity comes up to exercise the
21 right of first refusal. In other words, it could
22 come up again and again and again, so long as it
23 meets the rule against perpetuity. Go ahead.
24 That's not your position anyway.

25 Mr. McCoy - I would like to get to that point.

1 Before we -- I think it's easily resolved by A-2 and
2 particularly when you look at really what our
3 legislature necessarily intended in doing this. It
4 just totally changed the common law, and said, we'll
5 allow it to be saved if it happens in the 90 years.
6 We don't actually don't even get there, judge,
7 because Section 60 excludes -- I'm sorry, Section 50
8 does not apply to non-donative transfers. This was
9 a sale of property at arms length. It's a non-
10 donative transfer by any use of that term. I mean,
11 we cite some cases and authorities that explain what
12 donative and non-donative mean. It's pretty obvious.

13 The Court - I didn't print out Section 50 either.
14 Do you have an extra copy of that? I've 60 and 20,
15 but I didn't print out 50. I looked at it.

16 Mr. McCoy - This is it. It's a part of the
17 uniform law that has plenty of authority that can
18 only explain what our legislature intended. It will
19 apply the statute to property transferred by will,
20 by gift, when the recipient doesn't have any say in
21 what restrictions are on the property, then that's
22 when we're going to apply this rule against
23 perpetuities. When it's an arms length transaction
24 like this one, it doesn't apply at all. We actually
25 don't even get to 20-1-A and B because 60 just

1 excludes this transaction from the rule against
2 perpetuities altogether.

3 The Court - So you would say then that so long
4 as a deed provided consideration for the right of
5 first refusal you could never violate the statute
6 of the rule against perpetuities?

7 Mr. McCoy - Right.

8 The Court - Because the statute says you paid
9 for that non-complying provision.

10 Mr. McCoy - And it's another change to the
11 common law that's kind of hard for me to wrap my
12 head around as well. Yes, that's exactly what it
13 says, the authority and re-statement position is the
14 same, judge ---

15 The Court - So in any deed where there was
16 consideration ---

17 Mr. McCoy - Arms length.

18 The Court - Arms length?

19 Mr. McCoy - Yes.

20 The Court - An arms length transaction, not
21 between relatives and that kind of thing.

22 Mr. McCoy - Yes, sir.

23 The Court - In any deed, where there was
24 consideration, an arms length transaction, you would
25 never apply the rule against perpetuity.

1 Mr. McCoy - Right.

2 The Court - That's your position.

3 Mr. McCoy - Yes, sir. That's reading the
4 statute. Yes, that's my position. By the way,
5 separately I think, in the affidavit of Edward
6 Kelly, paragraphs A, B and C talk about the
7 consideration for this first right of refusal. In
8 an arms length transaction like this, why in the
9 world wouldn't there be consideration? In what world
10 do you get something for free. Of course, the
11 presumption is there was consideration for it. Mr.
12 Kelly tells in the affidavit why it was important.

13 So, frankly, the rule against perpetuities
14 argument here is easy. I never thought I'd say
15 that. The statute -- The passage of the statute
16 just makes it easy. It's clear in its language,
17 and I understand what Mr. Brice is saying about the
18 old common law because it is different. It's not a
19 mystery what the legislature intended because it's
20 a uniform law with plenty of authority. We know
21 what they meant. This is what they meant. This is
22 the case they meant for it not to apply to.

23 The Court - Okay. Any response? What about
24 the fact -- You've said there was no consideration,
25 Mr. Brice, looking at the two deeds, it looks like

1 both parties kind of thought what all the property
2 was worth. Why is that -- The deed on its face, has
3 consideration. Are you saying it has to be
4 separately stated consideration for the right of
5 first refusal?

6 Mr. Brice - I'm not sure that the legislature
7 intended to exempt any arms length deed from the
8 rule against perpetuities.

9 The Court - It's hard to believe.

10 Mr. Brice - I think that when you're talking
11 about consideration, Mr. McCombs gave some
12 consideration to Mr. Kelly to buy the property. Mr.
13 Kelly didn't give any consideration to Mr. McCombs,
14 first right of refusal. So yes there is consideration
15 on the deed, from McCombs and Kelly. McCombs isn't
16 paying Kelly for the right to give him a right of
17 refusal. I don't think that -- consideration is
18 running the wrong direction the way he's arguing.
19 Consideration ran from McCombs to Kelly to buy the
20 land.

21 The Court - I saw that. I meant to think that
22 through, and I didn't. How would a deed ever be
23 otherwise? In other words, the grantee is always
24 going to be the one who is taking the property
25 subject to the right of first refusal, and the grantor

1 is always going to be paid something.

2 Mr. Brice - Which is why I don't think the
3 legislature intended it non-donative to talk about
4 arms length deeds, estates, in that particular
5 provision, if I've got it.

6 The Court - A non-vested property interest, which
7 I believe the cases seem to say this is. Then
8 separately talks about a power of appointment which
9 bring into mind estates and wills.

10 Mr. Brice - It does on about separation, divorce,
11 spouses election, respective martial relationships,
12 contracts about wills. I don't know that they were
13 talking about allowing every single deed that was an
14 arms length transaction to have a provision that
15 violated the rule and the statute on perpetuities.

16 The Court - What?

17 Mr. Brice - That's not very clear what they
18 mean by it's invalid, it's a non-donative transfer.
19 I don't know of any interpretation of case law or
20 any interpretation anywhere. I have a hard time
21 believing the legislature meant, as the court stated
22 earlier, every deed, as long as there was consideration
23 for the land transfer, is exempt from the rule against
24 perpetuities or the state statute about perpetuities.
25 That undermines the purpose of having a statute

1 against perpetuities.

2 The Court - Read that section, a non-vested
3 property interest, dot, dot, dot, arising out of a
4 non-donative transfer except. The statute 27-6-20 does
5 not apply to a non-vested property interest, dot, dot,
6 dot, arising out of a non-donative transfer except.
7 So it applies to a non-vested property interest
8 arising out of a non-donative transfer.

9 Mr. Brice - I've struggled over that language
10 and what it may or may not mean either. I just
11 cannot believe the legislative intent would be to
12 create this statute that superceded the common law
13 rule against perpetuities because it wanted to
14 avoid perpetuities, it wanted to limit the creation
15 that could be a perpetuity and then exempt every arms
16 length deed ever executed, from the rule.

17 The Court - Is the rule against perpetuities the
18 only law that sort of protects this notion of
19 restraints on alienation?

20 Mr. Brice - I believe the Page case sets forth
21 a lot of the elements that the State of South Carolina
22 does not, like a fee simple deed that is created as
23 a fee simple deed, which Mr. McCombs deed is, to be
24 limited by any language later in the deed. If that
25 language later in the deed is going to attempt to

1 limit the fee, it needs to be real specific and
2 meet some real stringent details, which this one does
3 not. I believe Page is exactly on point on that.
4 It talks about a lot of cases that says we really
5 don't want anything to limit the fee simple interest
6 by language that comes after the granting of the
7 fee simple interest. The granting of the fee simple
8 is the first paragraph of Mr. McCombs deed. I think
9 there is separate case law.

10 The Court - Ms. Faulkner, do you have anything
11 to add to that?

12 Ms. Faulkner - Your Honor, I would just add, I
13 don't know that I really think that we even need to
14 get to the rule against perpetuities. I think the
15 language of the first right of refusal is clear, that
16 it extinguishes with Henry McCombs. That's what I
17 was referring to earlier when I first addressed the
18 court.

19 Your Honor, it has no heirs and assigns language.
20 It does say that the grantors reserve for themselves,
21 heirs and assigns, this first right of refusal. It
22 does not specify that it's restraining Mr. Henry
23 McCombs' heirs and assigns from selling the property
24 without first offering the Kellys the first right
25 of refusal.

1 Your Honor, I think Mr. Henry McCombs died in
2 June 2015. He conveyed this property back in 2012 to
3 my client, Allen McCombs. At the very latest, it
4 extinguished when Henry McCombs died. Your Honor, it
5 was not until over six months later, at least six
6 months later that the Kellys came forward and said
7 that, we have learned and now that my client, Allen
8 McCombs, has transferred the property, and we think
9 that was wrong. We should have been offered that first
10 right of refusal. Even if they weren't put on notice
11 with the quit claim deed back in 2012 when Henry
12 McCombs deeded the property to my client, they
13 certainly should have been put on notice or put on
14 notice that Henry McCombs died. That point is
15 extinguished.

16 The Court - As opposed to the deed itself, in
17 order to convey a fee simple title, has to have this
18 heirs and assigns language, why does the right of
19 first refusal have to have any heirs and assigns
20 language, as a matter of law?

21 Ms. Faulkner - I don't think it has to, but I
22 don't think it extends to anybody that has the
23 property after the original grantor.

24 The Court - Why not? Because it's -- Your answer
25 is because you say it's a personal right.

1 Ms. Faulkner - I do, Your Honor. I think that
2 is correct. It is a personal right. Mr. Henry
3 McCombs is dead. If he were still living, I think
4 we might ---

5 The Court - What makes it a personal right, the
6 absence of heirs and assigns language?

7 Ms. Faulkner - Yes.

8 The Court - Well, if you're not required to have
9 the heirs and assigns language in the first place,
10 how does that play in?

11 Ms. Faulkner - I think you are required to have
12 that with a first right of refusal.

13 The Court - Why?

14 Ms. Faulkner - I don't have a case to cite to
15 you. From my memory of law school, I do think that's
16 required, Your Honor.

17 The Court - My memory of law school had to be
18 longer than yours. I know that.

19 Ms. Faulkner - Why would my client be obligated,
20 Mr. Allen McCombs, be obligated for a first right of
21 refusal when it specifies on the deed that for
22 consideration -- the deed to my client that Mr. Henry
23 McCombs is conveying it to my client, property?

24 The Court - Because it's just like a restrictive
25 covenant. A restrictive covenant doesn't have to say

1 heirs and assigns. It just says this land -- There is
2 a question of whether they run with the land, a
3 restrictive covenant runs with the land. I don't know
4 of any similar thing that would apply to a right of
5 first refusal.

6 Ms. Faulkner - That's my argument. It's not
7 like a restrictive covenant. I think it's separate,
8 Your Honor. I think the case law is clear and even
9 going to the Page case, Your Honor, the courts are
10 reluctant to restrain alienation of property interests.
11 I think that's exactly what you're doing. You're
12 certainly restraining. If the court were to hold
13 that this would apply to Mr. Henry McCombs and now
14 Allen McCombs, who is an assignee of Mr. Henry McCombs,
15 Your Honor, that is not fair. I don't think that's
16 in line with the case law.

17 The Court - Why should somebody be able to
18 receive a deed with this non-vested interest in it
19 and then the next day to void the non-vested interest,
20 convey it to somebody else and defeat the whole
21 thing?

22 Ms. Faulkner - I understand, and that is an
23 argument, Your Honor. I certainly understand that.
24 That is a way to get around it if the court buys my
25 argument. But, Your Honor, my client had the property

1 from 2012 until after the three years had expired from
2 that point, is one argument. He had it for three
3 years. During that period of time, the Kellys should
4 have been on notice that that deed was recorded, Your
5 Honor. They had three years to go and look at it
6 at the register of deeds office to find that deed.
7 After that time ---

8 The Court - You don't contend that they could have
9 then bought the property back for five dollars, which
10 is what the deed said, five dollars, love and
11 affection.

12 Ms. Faulkner - I certainly do not, Your Honor.
13 But, then, Henry McCombs even died after that. He
14 died in June of 2015.

15 The Court - Let's deal with the vagueness part.

16 Mr. Brice - Can I address two of the parts on
17 what Ms. Faulkner just argued, Your Honor?

18 The Court - I don't want you to double team
19 Mr. McCoy. No, I think I've got it all. I have a
20 thought process.

21 Mr. Brice - The language is as it is. It's
22 purported to be a right for the Kellys, their
23 heirs and assigns in perpetuity, this property or
24 any part or parcel of it without any limitations.
25 Under general contract, you can apply reasonable

1 terms to it. There is absolutely nothing in this
2 provision that says how long they have to comply,
3 how they have to give notice and whether they waive
4 it. Notice has to be given whether there is somebody's
5 interest in buying it. How do you determine a
6 difference in value. How you value any structures
7 completed upon it. There is absolutely no detail
8 of any sort.

9 As the Page case states very clearly and right
10 on point, very clear a right of first refusal depends
11 on the legitimacy of the purpose, which we do not
12 know, the price at which they purchase and the
13 procedures for executing the right.

14 The right of refusal language in Page was far
15 more detailed than what is in this deed, but that
16 court, and Mr. McCoy says he tried to assume what our
17 Supreme Court or Court of Appeals would do, this is
18 what they would do. They said, we are therefore
19 constrained and conclude that the lack of specificity
20 in the language of the right of first refusal creates
21 an unreasonable restraint on the alienability of the
22 property. This is also the case that talks about any
23 language further limiting the fee.

24 They say that there are a long line of cases
25 that disfavor the subsequent clauses in deeds that

1 purport to cut down a fee simple estate in the granting
2 clause. They go on to say the second issue we have
3 is that any restraint on alienation in the form a
4 first right of refusal that is not specific in all
5 the required elements, legitimacy of purpose, price and
6 detailed procedures, runs counter to the commonly
7 acknowledged concept in this state that one of the
8 attributes of fee simple ownership is the ability to
9 freely convey it with few restrictions. Therefore,
10 it is violative of the public policy of the state and
11 has not force effect.

12 The Court - That's what it says.

13 Mr. Brice - That's far more language and
14 specificity in Page than there is in the McCombs
15 restriction. I just think you don't have -- You'd
16 be in front of a court every time trying to determine
17 the terms upon which you would enforce it with, the
18 timeliness of it, the price, who pays what. All of
19 those things should be in a valid, enforceable right
20 of first refusal. They're just simply lacking, and it
21 should fail for enforceability ---

22 The Court - Let me say this. I think, as I
23 understand, the way we're suppose to do it. Page
24 has no precedential value. I don't think there's
25 anything wrong with referring to the logic in Page.

1 I don't think we're bound by Page at all.

2 Mr. Brice - I agree completely on that. Mr.
3 McCoy is the one who said we don't know what our
4 Supreme Court would do, we don't know what our
5 Appellate Courts would do. I think we do have some
6 indication what our Appellate Courts would do.

7 The Court - We just have their logic.

8 Mr. McCoy - Two things, Your Honor, I'd like to
9 get on the record. I'm not prepared to discuss
10 Page because it's unpublished. I didn't even think
11 I could, unless you asked. Because it's unpublished,
12 we're not allowed to cite it. In any event, I think
13 there's a reason it's unpublished. I'm not prepared
14 for that.

15 Number 2, I didn't say -- When I said what the
16 legislature would do, I think that was with respect
17 to whether a right of first refusal is an interest
18 in property. I said I think there is a very good
19 argument that our Supreme Court would not hold that
20 it was. My argument in that regard didn't touch on
21 this issue so I don't think I opened the door for
22 an unpublished opinion.

23 Mr. Brice - Page does quote published opinions.

24 The Court - I understand all that. My view of
25 unpublished opinions is that sometimes it's helpful

1 to me to organize my thought process. It has nothing
2 to do with applying the holding of an unpublished
3 opinion to the facts of the case. That's the way I
4 view it.

5 Mr. McCoy - Can in respond to that, Your Honor?
6 Are you ready?

7 The Court - I'm ready.

8 Mr. McCoy - I think when you're looking at those
9 arguments, which I think Mr. Brice as characterized
10 as the vagueness arguments, you look at this case.
11 In this case, what is the term we don't know. The
12 answer is, there's not a one.

13 The Court - I agree with you that there's no
14 way to specify a right of refusal that may be at any
15 price. Price I'm not worried about.

16 Mr. McCoy - Right, because price says you've
17 got to match it. In fact, the common interpretation
18 of or a standard interpretation of a first right of
19 refusal is you get to match it on the same terms as
20 an arms length offer. So the offer would include the
21 price and when you have to close and all of those
22 things. That's what they would have match. I
23 think Mr. Brice mentioned ---

24 The Court - If you have a contract of sale, it
25 wouldn't be enforceable.

1 Mr. McCoy - Pardon me?

2 The Court - If this were a contract of sale,
3 it would not be enforceable because it doesn't
4 contain -- Laying aside the price part, it doesn't
5 contain the price, but laying aside that, it doesn't
6 have anything to do with time for performance or
7 anything else.

8 Mr. McCoy - Time for performance, in cases when
9 it's not included, the court can impose a reasonable
10 time restriction. Not a problem here. In my client's
11 affidavit, he says, we're always ready to do it
12 promptly.

13 The Court - I'm not sure I agree with that.
14 Again, to analogize it to a contract of sale, I think
15 of contract of sale does have to have in it a time for
16 performance.

17 Mr. McCoy - In a contract of sale -- In a
18 contract, in the absence of the time for performance,
19 the court would impose a reasonable time. I think that
20 would be the proper approach.

21 The Court - Is that for interpretation by the
22 court or is that a matter that requires a trial, a
23 factual decision.

24 Mr. McCoy - The factual information may help,
25 from Mr. Kelly. In fact, he has some testimony in his

1 affidavit that's undisputed about what everyone
2 understood this meant. Even aside from that, if you
3 just look at it neutrally, Mr. Brice came up with
4 some theoretical problems that could happen, but none
5 of them are a real problem in this real case where
6 the right is already vested. All they had to do was
7 give reasonable notice. They gave no notice. That's
8 undisputed in my client's affidavit or consider
9 theirs, maybe that is disputed.

10 We're not saying any type of -- We're saying
11 reasonable. There was none. A time period to respond,
12 reasonable time. Like I said, we were always ready to
13 go quickly. Time for closing, that would be included
14 in the offer.

15 The Court - How do we know that?

16 Mr. McCoy - How do we know what?

17 The Court - That you were always ready to go
18 quickly.

19 Mr. McCoy - Well, if they weren't, then if they
20 weren't ready in a reasonable time, they would have
21 breached their right, and it would be gone. So the
22 reasonable time is not a difficult thing to apply in
23 this provision. All of them he came up with
24 theoretically. In reality, in this case, we're not an
25 issue.

1 The Court - I don't think it's theoretical. I
2 think the issues he raised are the issues that
3 govern an interpretation of the provision. You
4 don't govern the interpretation of a provision based
5 on the facts of this case.

6 Mr. McCoy - I also don't think you ignore the
7 purpose of the provision by not giving any notice at
8 all. By not including those details, my clients
9 wouldn't have had arguments they might have otherwise
10 had. In other words, we don't have -- We would have
11 had an argument if the notice given was reasonable, for
12 example, verbal or if the time -- if they gave the
13 notice and our clients didn't respond in some period
14 of time then they risk -- By not having it clear, they
15 risk that not being a reasonable time. If it imposed
16 a reasonable time, we never even got there because
17 they didn't comply with the basic term of the
18 agreement, and I specifically mean Allen McCombs, if
19 it's enforceable.

20 I think the contract interpretation law in
21 South Carolina is that -- Provisions like this, which
22 clearly were paid for, some consideration is given.
23 It's not just a gift. So we have something that was
24 paid for and bargained for. We don't just reduce it
25 to nothing by allowing him to convey it to his son

1 the next day. That would make it meaningless. I
2 think adding these theoretical problems that weren't
3 actually a problem here because they didn't comply
4 with it is not complying with the basic -- is not
5 giving meaning to that provision in these parties
6 arms length deed.

7 The Court - Anything else? I've already dealt
8 with the personal jurisdiction. I deny that.

9 Mr. McCoy - I don't know if I had a chance for
10 statute of limitations. I'm not sure if ---

11 The Court - You did not. Go ahead and get it on
12 the record about the statute of limitations.

13 Mr. Brice - Yes, sir, the statute of limitations
14 would only apply in the event of the deed that was
15 executed in 2012, some four years before the filing
16 between Henry McCombs and Allen McCombs. That would,
17 of course, be contingent on whether the court feels
18 that this language limited it to a personal right to
19 Henry McCombs.

20 If it did, at such point, we would say the
21 statute of limitations was well past those three years.
22 They clearly were neighbors and knew each other. They
23 were aware -- had dealt with each other for a number of
24 years, and so it would be reasonable to know that they
25 would know. If you have a first right of refusal, and

1 I don't have the case law in front of me, I believe you
2 have an obligation to watch the property, be sure that
3 you're aware of what's going on with it. You have an
4 obligation to not sit upon your laurels and wait for
5 something to happen, to watch and protect.

6 I believe as far as statute of limitations, that
7 would be contingent upon the fact that the deed was
8 executed in 2012.

9 The Court - Mr. McCoy.

10 Mr. McCoy - Thank you, Your Honor. The deed in
11 2012 is the one, I think, everyone has conceded was not
12 a vesting of this right. That's one thing. That
13 transaction, a gift to the son, did not trigger this
14 provision.

15 Second of all, my client, unequivocally in his
16 affidavit, says he didn't know about it until early
17 2016. That's undisputed evidence.

18 The only argument they could have was that he
19 was on perpetual record notice to check the public
20 records. Even that's not a fair burden on him because
21 the right of refusal includes in its common knowledge
22 that you get a right to refuse it by someone bringing
23 it to you. The provision itself indicated that he
24 didn't have to check.

25 Frankly, according to the cases we've cited,

1 there's just no ongoing duty to check the public
2 records. The duty was for them to present an arms
3 length offer to my client. That's what they failed to
4 do.

5 The Court - My view of the statute of limitations
6 is that with any right of first refusal, the way they
7 work is that when it is triggered -- that the rights of
8 the person claiming the right of first refusal are
9 triggered with any -- with each and every, I guess
10 I should say, presented transaction.

11 In other words, the first conveyance was a gift.
12 I agree, it didn't trigger then. Even if it had and
13 the deal fell through so that the right to exercise
14 the right wasn't -- didn't actually ripen, if you
15 will, I think it started all over again with the
16 second transaction.

17 I think with each transaction, the holder of the
18 right of first refusal gets to say whether they want
19 to buy it at that price or not, which means -- If they
20 didn't get notice, if they weren't granted the right
21 to refuse or offered the right to refuse with each
22 separate transaction I think -- I'm going to say it
23 another way.

24 Anytime they're not offered the right and
25 something happens that offends that right, the statute

1 starts all over again. I think the statute had to
2 start with the offer to sell or to buy and sell for
3 \$125,000.00, whenever that was. It was 2015 or 2016.

4 Mr. McCoy - Late '15. We filed a few months
5 after that. So whether it started then or when we
6 discovered it a couple of months later, it doesn't
7 matter in this case. We're well within -- there's
8 not a limitations issue unless Your Honor would find
9 they had some ongoing duty to check the public
10 record on a daily basis.

11 The Court - In my view, the plaintiff's statute
12 did not start to run until this transaction presented
13 itself.

14 Mr. McCoy - This was the vesting transaction,
15 Your Honor.

16 The Court - Anything else?

17 Mr. Brice - Nothing, Your Honor. Thank you.

18 The Court - One question I had that I didn't --
19 or perhaps I didn't read it closely enough. This
20 business of personal right. I don't quite understand
21 that. Is that covered completely in briefs? The
22 personal right that extinguished with the death of
23 the elder McCombs, Henry McCombs?

24 Mr. Brice - Yes, sir. That's in our brief. We
25 feel like ---

1 The Court - We don't need to talk about it.

2 I just want to be sure it's covered. You've talked
3 about it.

4 Mr. Brice - I do think it has sufficient language
5 to extend it past Henry McCombs, considering it did
6 specifically make the paragraph above it, the
7 restriction finding on the grantees, heirs and
8 assigns. There's also, I believe, in Mr. McCoy's
9 argument, a copy of a contract that did talk about
10 heirs and assigns language in the contract. It
11 does not appear in the deed. The deed controls so
12 that clearly shows a change.

13 The Court - Is all that in your brief?

14 Mr. Brice - Yes, sir.

15 Ms. Faulkner - I would like to add that Mr. McCoy,
16 in his brief, even concedes that he believes it may be
17 was a scrivener's error. I don't think it's fair to
18 allow him to rely on a scrivener's error when my
19 client was not even a party to that contract. Neither
20 of the defendants in this case is a party to that
21 contract, had no idea that contract was ever recorded
22 of public record, would have no reason to know that
23 that contract even existed in writing, Your Honor.

24 Mr. McCoy did submit in his brief that contract,
25 and it does, in fact -- It does specify that that

1 language is included in the contract. Of course,
2 it didn't make it to -- As Mr. Brice pointed out, it
3 was in the provision about the mobile home restriction
4 in the deed. It was not in the provision for the first
5 right of refusal.

6 The Court - Do you have the second page of the
7 \$7,500.00 deed? You handed me the first one. Maybe
8 you don't have the second one. Is the whole thing
9 in here? You said it's not.

10 Mr. Brice - I believe that does include
11 everything except the Page case that has our case
12 law.

13 The Court - Does it have the full deed?

14 Mr. Brice - I don't know if it has the full
15 deed or if it just has the first page. I should have
16 a copy.

17 Mr. McCoy - Which full deed, Your Honor?

18 The Court - The full deed from Kelly to Henry
19 McCombs.

20 Mr. McCoy - Yes, sir, it's attached to Mr.
21 Brice's motion.

22 The Court - Let me find it. Hold on.

23 Mr. Brice - Here's a complete copy of the deed,
24 Your Honor, from my real estate file.

25 The Court - Why wouldn't the heirs and assigns

1 language in the to have and to hold clause apply to
2 everything that's in the deed?

3 Mr. Brice - Because I think that language is
4 in creating the fee simple. If you're going to create
5 a limitation on the fee that's going to go beyond the
6 grantee, I think you need to specifically say in the
7 limiting language ---

8 The Court - Do you have a case that says that?

9 Mr. Brice - No, sir.

10 The Court - Ms. Faulkner, do you have a case
11 that says that?

12 Ms. Faulkner - I do not but, again, I would point
13 the court to the Page case which says that after the
14 grantee clause the first right of refusal, the way
15 I interpret that case, and the opinion of the court,
16 is to mean that after the grantee clause, then if
17 you add any restrictions, that goes on to restrict
18 the fee simple which is ---

19 The Court - Forgive me. I've never been much of
20 of a property lawyer. Which is the granting clause
21 in this deed?

22 Ms. Faulkner - The grantee clause is the first
23 part of the deed where it says -- In this deed, I would
24 submit that the grantee clause ---

25 The Court - Granting, isn't it?

1 Ms. Faulkner - The grantee clause.

2 The Court - Grantee clause.

3 Ms. Faulkner - Is where it says, know all, at
4 the beginning, that first paragraph, continuing
5 through the deed description, unless Mr. Brice wants
6 to correct me.

7 The Court - Mr. Brice, what about that?

8 Mr. Brice - From remembrance, I think that you
9 could limit the fee with wording in the later clause
10 that the court was referring to. I believe that one
11 reason they got away from that heirs and assigns
12 language so it wouldn't inadvertently limit the fee
13 simple interest. I think both in the to Henry McCombs'
14 heirs and assigns and then the later language it says,
15 the grantees, heirs and assigns, is all in terms of
16 creating the fee.

17 The Court - Well, it's certainly what is required
18 to create the fee. Without that, you don't have
19 a fee.

20 Mr. Brice - I think the true fee is where it
21 says -- The very first paragraph, grant to sell unto
22 Henry McCombs, his heirs and assigns forever the
23 following property. That created a fee interest in
24 the property. Then Page and the line of cases that
25 Page actually cites.

1 The Court - What is the technical name for the
2 to have and to hold clause?

3 Mr. Brice - Habendum?

4 The Court - Mr. McCoy, do you think that's right?
5 Habendum?

6 Mr. McCoy - I've heard that term. I'm not sure,
7 Your Honor.

8 The Court - I'm going to read this business about
9 the personal right?

10 Mr. McCoy - Can I make two points on that, Your
11 Honor?

12 The Court - I think you already did.

13 Mr. McCoy - Maybe I did. I wanted to point out
14 why I included the contract. The contract did show ---

15 The Court - I think the contract was subsumed,
16 not the deed.

17 Mr. McCoy - I understand. It might be a
18 scrivener's error, but I don't need it. I don't think
19 it's necessary.

20 The Court - I understand.

21 Mr. McCoy - One thing I just want to say. I think
22 the thing that decides, that's the question on the
23 personal right, is the quit claim deed. A quit claim
24 assumed -- It was a gift to him, and then he assumed
25 all the rights and obligations and burdens of his ---

1 The Court - I clearly have a question about the
2 argument that it was only a personal right. I'm not
3 sure that is true. I just want to read about that.
4 I need to read that more closely. If I need something
5 more, I'll let you know. Anything else?

6 Mr. Brice - Nothing further, Your Honor.

7 Ms. Faulkner - Nothing further.

8 Mr. McCoy - Nothing.

9 The Court - Thank you very much.

10 Whereupon - Hearing was concluded 12:12 p.m.

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

Edward R. Kelly and Deirdre O. Kelly,

Plaintiffs,

vs.

Allen S. McCombs and Benjamin James
Russell,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

DEFENDANT ALLEN S. MCCOMBS'
RESPONSES TO PLAINTIFF'S FIRST
SET OF INTERROGATORIES,
REQUESTS FOR PRODUCTION AND
REQUESTS FOR ADMISSION

Case No. 2016-CP-46-870

INTERROGATORIES

1. Give the names and addresses of persons known to you or to your counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE:

Edward R. Kelly and Deirdre O. Kelly, c/o Brian S. McCoy, 378 E. Main Street, Rock Hill, South Carolina.

Allen S. McCombs, c/o Beth Ramsey Faulkner, P.O. Box 1030, York, South Carolina.

Benjamin James Russell, c/o William M. Brice, P.O. Drawer 300, York, South Carolina.

Marc Lubiato, address unknown at this time.

Kelly and Kelly v. McCombs and Russell
2016-CP-46-870

Defendant Allen S. McCombs' Responses to Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admission to Defendant Allen S. McCombs
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To the Defendant's knowledge, no written or recorded statements have been taken. The Defendant reserves the right to supplement this request as new information becomes available.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of you or your counsel that relate to the claim or defense in this case.

RESPONSE: Plats and deeds. The Defendant reserves the right to supplement this request as new information becomes available.

3. Set forth the names and addresses of all insurance companies and coverages.

RESPONSE: There are none as to Defendant McCombs.

4. List the names and addresses of any expert whom you propose to use as a witness at the trial of the case.

RESPONSE: None at this time. The Defendant reserves the right to supplement this request as new information becomes available.

5. For each person known to you or your counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Plaintiff of the important facts known to our observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE: The Defendant McCombs will testify to the allegations in the Complaint and his Answer and Counterclaim. Furthermore, he will testify that Henry McCombs could not read or write. Marc Lubiato will testify that he was Henry McComb's neighbor and knew that he couldn't read or write.

Kelly and Kelly v. McCombs and Russell
2016-CP-46-870

Defendant Allen S. McCombs' Responses to Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admission to Defendant Allen S. McCombs
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6. Identify any and all persons assisting with preparation of the answers to these interrogatories; have each such person identify the answers, or portions of answers, for which he is responsible.

RESPONSE: The Defendant McCombs assisted with the preparation of the answers to these interrogatories.

7. State whether you contend that the Plaintiffs were informed of the transfer of the property to you by Quitclaim Deed (the transfer alleged in paragraph 8 of the Complaint). If you contend that the Plaintiffs were informed of the transfer, set forth a detailed statement of all facts concerning such alleged notification to Plaintiffs, including without limitation, the parties to the communication, the date, the location, and the contents of the alleged communication.

RESPONSE: The Defendant McCombs contends that he was present during a conversation between Mr. Henry McCombs and Mr. Kelly at Mr. Henry McComb's home in the summer of 2012. During this conversation, Mr. Henry McCombs indicated to Mr. Kelly that he was going to deed thirty-six acres to one of his children unless Mr. Kelly was interested. Mr. Kelly indicated he was not interested in the thirty-six acres, only the one hundred acres he already owned. Furthermore, the deed was recorded on April 11, 2012 in the public record and thus, Plaintiffs were on constructive notice of the transfer.

8. State whether you contend that the Plaintiffs were informed of the transfer of the property by you to Benjamin James Russell (the transfer alleged in paragraph 10 of the

Kelly and Kelly v. McCombs and Russell
2016-CP-46-870

Defendant Allen S. McCombs' Responses to Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admission to Defendant Allen S. McCombs
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Complaint). If you contend that the Plaintiffs were informed of the transfer, set forth a detailed statement of all facts concerning such alleged notification to Plaintiffs, including without limitation, the parties to the communication, the date, the location, and the contents of the alleged communication.

RESPONSE: The Defendant McCombs contends that he did not inform the Plaintiffs of the transfer of the property to Benjamin James Russell and that he had no obligation to do so.

9. Set forth whether you or anyone on your behalf informed Benjamin James Russell of a provision in the deed to Henry L. McCombs relating to a right of first refusal. If you contend that the Russell was informed of the transfer, set forth a detailed statement of all facts concerning such alleged notification to Russell, including without limitation, the parties to the communication, the date, the location, and the contents of the alleged communication.

RESPONSE: Benjamin James Russell was given a copy of the deed containing language about mobile homes and the statement regarding the Kelly interest at the time they conveyed the property in possibly repurchasing it. The copy was provided by the closing attorney. Mr. Russell discussed it with Mr. McCombs prior to completing the transaction.

10. For each Request for Admission that you did not admit without qualification, set forth in detail each and every reason and fact support the denial.

RESPONSE: The Defendant McCombs refers to his Answer and Counterclaim and Motion to Dismiss Under Rules 12(b)(2) and 12(b)(6), SCRCP and Also for Statute of Limitation and for Unenforceability Due to Vagueness, and also refers to his Answers to other interrogatories herein.

REQUEST FOR PRODUCTION

1. Produce true and accurate copies of any and all documents that relate in any way to the transfer of the property to you from Henry L. McCombs, including without limitation any files and documents from the closing thereof.

RESPONSE: See attached deed. The Defendant is not in possession of any further files or documents. The Defendant reserves the right to supplement this request as new information becomes available.

2. Produce true and accurate copies of any and all documents that relate in any way to the transfer of the property to Benjamin James Russell from you, including without limitation any files and documents from the closing thereof.

RESPONSE: See attached deed. The Defendant is not in possession of any further files or documents. Furthermore, loan related terms and other closing documents are inherently private matters and neither applicable to the matter nor subject to discovery in this matter and the scope of this question is too broad and is objected to for same. The Defendant reserves the right to supplement this request as new information becomes available.

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2016-CP-46-870

Defendant Allen S. McCombs' Responses to Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admission to Defendant Allen S. McCombs
Page 5 of 8

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3. Produce true and accurate copies of any and all documents used to answer or referenced in your responses to Interrogatories or responses to request for admission.

RESPONSE: See attached plats and deeds provided herein. Otherwise, the Defendant is not in possession of such documents. The Defendant reserves the right to supplement this request as new information becomes available.

4. Produce true and accurate copies of any and all correspondence, including without limitation electronic mail, to or from or relating to the Plaintiffs or relating to the transfers of the property.

RESPONSE: Other than the documents provided herein, the Defendant is not in possession of such documents. The Defendant reserves the right to supplement this request as new information becomes available.

5. Produce true and accurate copies of any and all files, whether paper or electronic, that relate to or reference the Plaintiffs or the transfers of the property.

RESPONSE: Other than the documents provided herein, the Defendant is not in possession of such documents. The Defendant reserves the right to supplement this request as new information becomes available.

6. Produce a true and accurate copy of all documents you may introduce at a hearing or trial in this case, whether as part of your case or for purposes of impeachment or cross-examination.

RESPONSE: See attached deeds and plats. The Defendant reserves the right to supplement this request as new information becomes available.

Kelly and Kelly v. McCombs and Russell

2016-CP-46-870

Defendant Allen S. McCombs' Responses to Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admission to Defendant Allen S. McCombs Appendix-152
Page 6 of 8

7. Produce copies of all statements of any individual or witness relating to the allegations in the Complaint, the Answer and Counterclaims, or other pleadings in this case.

RESPONSE: None at this time. The Defendant reserves the right to supplement this request as new information becomes available.

8. Produce all documents shown to or referred to or created by any expert that you may call to testify in this case.

RESPONSE: None at this time. The Defendant reserves the right to supplement this request as new information becomes available.

9. Produce all documents relating to Defendant's affirmative defenses.

RESPONSE: See attached. The Defendant reserves the right to supplement this request as new information becomes available.

10. Produce a curriculum vitae or resume for each individual you may call as an expert witness in this case.

RESPONSE: None at this time. The Defendant reserves the right to supplement this request as new information becomes available.

REQUESTS FOR ADMISSION

1. Admit that you are not aware that anyone informed the Plaintiffs of the transfer of the property to you by Henry L. McCombs.

RESPONSE: Denied.

2. Admit that you did not inform the Plaintiffs of the transfer of the property to Benjamin James Russell by you.

Kelly and Kelly v. McCombs and Russell
2016-CP-46-870

Defendant Allen S. McCombs' Responses to Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admission to Defendant Allen S. McCombs
Page 7 of 8

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RESPONSE: Admitted.

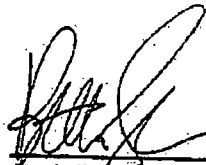
3. Admit that you or someone on your behalf informed Benjamin James Russell of the right of first refusal in the deed to Henry L. McCombs.

RESPONSE: Admitted.

4. Admit that you have never met either of the Plaintiffs in person or by telephone.

RESPONSE: Denied.

York, South Carolina
September 1, 2016



Beth Ramsey Faulkner
Attorney for Defendant Allen S. McCombs
Faulkner Law Firm, LLC
P.O. Box 1030
616 East Liberty Street
York, South Carolina 29745
(803) 818-5700

Kelly and Kelly v. McCombs and Russell
2016-CP-46-870

Defendant Allen S. McCombs' Responses to Plaintiff's First Set of Interrogatories, Requests
for Production and Requests for Admission to Defendant Allen S. McCombs
Page 8 of 8

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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

COURT OF COMMON PLEAS
CASE NO 2016-CP-46-870

Edward R. Kelly, et. al,)
Plaintiff,)

-vs-)

Allen S. McCombs, et. al.,)
Defendant.)

**DEFENDANT'S (RUSSELL) RESPONSES TO
INTERROGATORIES, PRODUCTIONS AND
AND ADMISSIONS**

TO: BRIAN S. MCCOY, ESQUIRE AND ATTORNEY FOR PLAINTIFF.

INTERROGATORY 1:

Give the names and addresses of persons known to you or to your counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

**Response: Benjamin J. Russell and Allen S. McCombs
No Statements**

INTERROGATORY 2:

Set forth a list of photographs, plats, sketches, or other prepared documents in possession of you or your counsel that relate to the claim or defense in this case.

There are none at this time

INTERROGATORY 3:

Set forth the names and addresses of all insurance companies and coverages.

There are none as to this Defendant (Russell)

INTERROGATORY 4:

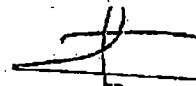
List the names and addresses of any expert whom you propose to use as a witness at the trial of the case.

No experts anticipated at this time

INTERROGATORY 5:

For each person known to you or your counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

Benjamin J. Russell will testify that he knew of Allen McCombs and discussed the purchase with him and was aware the deed contained language referring to a right of refusal but did not believe it enforceable.

A handwritten signature, possibly reading "B. Russell", is written in dark ink over a set of horizontal lines.

INTERROGATORY 6:

Identify any and all persons assisting with preparation of these answers:

Benjamin James Russell

INTERROGATORY 7:

Set Forth each and every reason that the Plaintiffs were made aware of the transfer

The Defendant is not aware of the Plaintiffs being informed of the transfer, nor was he aware of any obligation on his part to do so. He discussed it with Defendant McCombs who indicated that it had been discussed with Kelly prior to the Russell transaction.

INTERROGATORY 8:

Set forth any notice prior to closing of the deed provision:

Benjamin James Russell was given a copy of the deed containing language about mobile homes and the statement regarding the Kelly interest at the time they conveyed the property in possibly repurchasing it. The copy was provided by the closing attorney. Mr. Russell discussed it with Mr. McCombs prior to completing the transaction.

INTERROGATORY 9:

For each Request for Admission that you did not admit without qualification, set forth in detail each and every reason and fact support the denial:

There have been no Requests for Admission prior to Item 9 of the section styled "Interrogatories" and so no further answer is possible to this Item.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION 1:

Attached hereto are copies of the deeds. Loan related terms contained in the file are inherently private matters for the lender and neither applicable to the matter nor subject to discovery in this manner and the scope of this question is too broad and is objected to for same.

REQUEST FOR PRODUCTION 2:

No such documents exist as apply to this request other than the granting deeds in question involving Kelly to McCombs and the deed from McCombs to Russell and same are already of public record and a part of this action.

REQUEST FOR PRODUCTION 3:

There is no written correspondence specifically relating to the transfer itself.

REQUEST FOR PRODUCTION 4:

There are no files related to the transfer itself and the only document relating to the actual transfer would be the deed that is already part of this action.

REQUEST FOR PRODUCTION 5:

The only known document to produce at this time for introduction at would be the deed from Kelly to McCombs and Plaintiff already possesses same.

REQUEST FOR PRODUCTION 6:

No statements have been taken related to this action.

REQUEST FOR PRODUCTION 7:

There are no experts at this time in this case

REQUEST FOR PRODUCTION 8:

There are no separate trial documents as to the affirmative defenses and same are based upon the application of common law and statutory law to the facts of this action.

REQUEST FOR PRODUCTION 9:

There are no experts expected to testify at this time in this matter

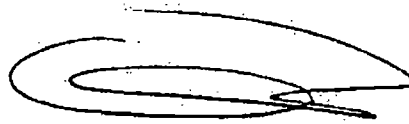
ADMISSIONS:

Admit that You did not inform the Plaintiffs of the transfer of the Property to You by Allen S. McCombs.

1. Defendant admits that he did not personally discuss this transfer with the Plaintiffs but denies that he had a contractual obligation to do so based on the reasons set forth in his answers.

Admit that You or someone on your behalf was informed of the Right of Refusal in the deed to Henry L. McCombs before closing on your property.

2. Defendant admits he was aware of the language in that deed, but denies that it created a right of first refusal in the Plaintiffs for the reasons set forth in his answer.



William M. Brice, III
Brice Law Firm, LLC
P.O. Box 300
9 North Roosevelt Street
York, S.C. 29745

Prepared by Melvin J. Roberts & Associates

1911 South L St
Sharon, S.C. 29753

STATE OF SOUTH CAROLINA

COUNTY OF YORK

TITLE TO REAL ESTATE
GENERAL WARRANTY DEED.

200
1120

KNOW ALL MEN BY THESE PRESENTS, That we, Edward R. Kelly and Deirdre O. Kelly, in the State and County of York, for and in consideration of Seven Thousand Five Hundred Sixty and No/100 (\$7,560.00) Dollars, to us in hand paid at and before the sealing of these presents by Henry L. McCombs, Route 1, SC Highway 49 (Lockhart Rd.), Sharon, SC 29742, receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell and release unto the said Henry L. McCombs, his heirs and assigns forever the following described property:

RECORDED
1995
133-142

DESCRIPTION: All that certain piece, parcel or lot of land and being situated along SC Highway No. 49 in the Bullock Creek Township, York County, South Carolina and more fully shown on a plat entitled boundary survey for Henry L. McCombs recorded on March 22, 1994 in Plat Book 417 at page 3 in the Office of the Clerk of Court for York County, South Carolina, and containing 16.00 acres more or less and having such courses and distances, notes and bounds, as will appear by reference to the above Plat, said Plat being incorporated herein by reference.

Derivation: This being a portion of the same property conveyed by Henry L. McCombs to Edward R. Kelly and Deirdre O. Kelly by deed dated August 29, 1995 and recorded in Record Book 1472 at page 22 in the Office of the Clerk of Court for York County, South Carolina.

COUNTY
CONVEYANCE
TAX
11-20
PAID

The above described property is conveyed subject to all easements, rights of way or restrictions appearing of record, in the chain of title, shown on the above-referenced survey, or visible on an actual physical examination of the subject premises. The above described property is also subject to the restriction that neither the grantee nor any of his successors or assigns or heirs will place more than one mobile home on the above described property for a period of 45 years, that being from August 29, 1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved.

The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion or partial of the same.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances whatsoever, to the said premises belonging, or in any wise incident or appertaining.

125

1481 125

TO HAVE AND TO HOLD, all and singular the said premises above-mentioned, unto the said Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever.

And we, do hereby bind our heirs, executors, administrators, successors, and assigns to warrant and forever defend all and singular the premises unto the said, Henry L. McCombs, his heirs, executors, administrators, successors, and assigns, against myself and my heirs, executors, administrators, successors, and assigns, and all other persons whomsoever lawfully claiming, or to claim the same, or any part thereof.

Witness My Hand and Seal this 15 day of March, 1996.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

D. O. Oates Charles R. Teat Edward R. Kelly (Seal)

D. O. Oates Charles R. Teat David A. Kelly (Seal)

STATE OF SOUTH CAROLINA)
COUNTY OF YORK

PROBATE

Personally appeared before me Charles R. Teat
and made oath that (s)he saw the within named grantors sign,
seal and as his act and deed, deliver the within written
deed, and that (s)he with David A. Kelly
witnessed the execution thereof.

Charles R. Teat

Sworn to before me this
15 day of March, 1996.

Daniel O. Oates
Notary Public for South Carolina
My Commission Expires: September 15, 2002

After Recording Mail To:
LegalZoom - 502799084
9041 South Pecos Road, Suite 3900
Henderson, NV 89074

Reviewed By:
Lloyd T. Kelso, Esquire
128 E. Garrison Boulevard, Suite A
Gastonia, NC 28054

201200167328
Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON, CLERK OF COURTS
04-11-2012 At 09:05 am.
DEED QC INT 10.00
State Tax .00
County Tax .00
OR Vol 12552 Page 91 - 94

RECORDED
YORK COUNTY
TAX ASSESSOR'S OFFICE

DATE 4-11-12
TAX MAP NO. 133-12
INITIALS CAK/TB

SPACE ABOVE THIS LINE FOR RECORDER'S USE

QUITCLAIM DEED
TITLE OF DOCUMENT

STATE OF SOUTH CAROLINA,

KNOW ALL MEN BY THESE PRESENTS, THAT:

Henry L. McCombs, a married man, (Hereinafter whether singular or plural the "GRANTOR")

WHOSE mailing address is 5911 Lockhart Road, Sharon, South Carolina 29742,

FOR AND IN CONSIDERATION of the sum of FIVE AND NO/100 DOLLARS (\$5.00) and LOVE AND AFFECTION, to the GRANTOR paid by

Allen S. McCombs, a single man, (Hereinafter whether singular or plural the "GRANTEE"),

WHOSE mailing address is 347 Trexler Lane, Rock Hill, South Carolina 29732,

GRANTOR has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release all right, title and interest unto the said GRANTEE the following described property:

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

Site County & State: York County, South Carolina

Tax Map Number/Parcel Number: 1330000012

Derivation Statement

This being the identical property conveyed to the GRANTOR herein by General Warranty Deed from Edward R. Kelly and Deirdre O. Kelly dated March 18, 1996, recorded March 22, 1996 and filed in Record Book: 1481 Page: 125

BK 12552 PG 0091

TOGETHER WITH all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining, HOWEVER, subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record, if any. TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE, GRANTEE'S heirs and assigns forever.

WITNESS the hand and seal of the GRANTOR this 23 day of March, 2012.

Henry L. McCombs
Henry L. McCombs

Signed, Sealed and Delivered in the Presence of:

Witness #1: Yvonne Miskelly

Printed Name: YVONNE MISKELLY

Witness #2: Charlene Pharr

Printed Name: CHARLENE PHARR

STATE OF SC

COUNTY OF YORK

ss

The foregoing instrument was acknowledged before me this 23 day of March, 2012, by Henry L. McCombs.

NOTARY STAMP/SEAL

Marie C. Sanders
Notary Public

Marie C. Sanders
Printed Notary Name
My Commission Expires: 2-24-2020

BK12552 PG0092

EXHIBIT "A"
LEGAL DESCRIPTION

ALL INTEREST IN THE FOLLOWING DESCRIBED REAL ESTATE SITUATED IN THE COUNTY OF YORK, STATE OF SOUTH CAROLINA, TO WIT:

ALL THAT CERTAIN PIECE, PARCEL OR LOT OF LAND BEING SITUATED ALONG SC HIGHWAY NO. 49 IN THE BULLOCKS CREEK TOWNSHIP, YORK COUNTY, SOUTH CAROLINA AND MORE FULLY SHOWN ON A PLAT ENTITLED BOUNDARY SURVEY FOR HENRY L. MCCOMBS RECORDED ON MARCH 22, 1996, IN PLAT BOOK A-87 AT PAGE 3 IN THE OFFICE OF THE CLERK OF COURT FOR YORK COUNTY, SOUTH CAROLINA, AND CONTAINING 36.00 ACRES MORE OR LESS AND HAVING SUCH COURSES AND DISTANCES, METES AND BOUNDS, AS WILL APPEAR BY REFERENCE TO THE ABOVE PLAT, SAID PLAT BEING INCORPORATED HEREIN BY REFERENCE.

BK 12552 PG 093

STATE OF SOUTH CAROLINA
COUNTY OF YORK

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at (36 AC) Highway 49, Lockhart Road, bearing York County Tax Map Number 1330000013, was transferred by Henry L. McCombs, a married man to Allen B. McCombs, a single man on MARCH 23, 2012

3. Check one of the following: The deed is

- (a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
- (b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
- (c) ☒ exempt from the deed recording fee because (See Information section of affidavit):
#3 Transfer between parent and child for love and affection
(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes ☐ or No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):

- (a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____
- (b) ☐ The fee is computed on the fair market value of the realty which is _____
- (c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____

5. Check Yes ☐ or No ☐ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____

6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here: _____
- (b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here.)
- (c) Subtract line 6(b) from Line 6(a) and place result here: _____

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: _____

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as:

Henry L. McCombs

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

SWORN to before me this 23
day of March, year of 2012

Henry L. McCombs
Grantor

Andrea L. Thomas
Notary Public for South Carolina
My Commission Expires: 2/17/2021

Henry L. McCombs
Print or type the above name here

8K12552 PBU094

325.00
137.50

Brice Law Firm, LLC
P. O. Drawer 300
York, SC 29745

(39)

RECORDED
YORK COUNTY
TAX ASSESSOR'S OFFICE
DATE 11/20/15
TAX MAP NO. 133-12
INITIALS EH/DA

201500321812
Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON, CLERK OF COURTS
11-20-2015 At 12:01 PM.
DEED 10.00
State Tax 325.00
County Tax 137.50
OR Vol 15286 Page 201 - 202

STATE OF SOUTH CAROLINA)
COUNTY OF YORK) TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS that Allen S. McCombs hereinafter referred to as "Grantor", in the State and County aforesaid, for and in Consideration of One Hundred Twenty Five Thousand and 00/100 (\$125,000.00) Dollars paid by Benjamin James Russell

3784 Wilson Chapel V2
Sharon SC 29742 hereinafter the "Grantee", has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the Grantee, his heirs and assigns forever, the following described real property, to wit:

All that certain piece, parcel or lot of land being situated along SC Highway No. 49 in the Bullocks Creek Township, York County, South Carolina, and more fully shown on a plat entitled Boundary Survey for Henry L. McCombs recorded on March 22, 1996 in Plat Book A-87 at page 3 in the Office of the Clerk of Court for York County, South Carolina, and containing 36.00 acres more or less and having such courses and distances, metes and bounds, as will appear by reference to the above plat, said plat being incorporated herein by reference.

DERIVATION: This being the identical real property conveyed to Allen S. McCombs by deed recorded April 11, 2012 in Book 12552, page 91, RMC office for York County, SC.

The within property is conveyed subject to all existing easements and restrictions appearing in the chain of title, which said easements and restrictions are not intended to be reimposed hereby.

TOGETHER with, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

Instrument
201500321812 OR
Vol. Page
15286 201

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, his heirs and Assigns forever.

And the Grantor does hereby bind his heirs, Executors, Personal Representatives, and Administrators to warrant and forever defend all and singular the said premises unto the said Grantee and the Grantee's Heirs and Assigns, against the Grantor and the Grantor's heirs and assigns and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS the Hand and Seal of The Grantor(s) this the 19 day of November, 2015.

Signed, Sealed, and Delivered
in the presence of:

Chasim K. Kish
Witness A

Allen S. McCombs (Seal)
Allen S. McCombs

Brittany Mow
Witness B

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

ACKNOWLEDGMENT

I, the undersigned, Notary Public for the State of South Carolina do hereby certify that Allen S. McCombs, personally appeared before me this day and acknowledge the due execution of this foregoing instrument.

Witness my hand and seal this 19 day of November, 2015.

Brittany Mow (Seal)
Notary Public for South Carolina
My Commission Expires: 10-09-24

Instrument
201500321812 OR
Vol Page
15286 202

Brice Law Firm, LLC

William M. Brice, III

Attorney & Counselor at Law

P. O. Drawer 300

York, South Carolina, 29745

9 N. Roosevelt Street

(Phone) 803-684-4462

(Fax) 803-684-3507

July 11, 2016

Brian S. McCoy
378 E. Main Street
Rock Hill, SC 29730

Beth Ramsey Faulkner
PO Box 1030
York, SC 29745

Re: Case No. 2016-CP-46-870

Dear Brian and Beth:

Enclosed is Defendant Benjamin Russell's Responses to Interrogatories,
Productions and Admissions, along with a Certificate of Service.

With kind regards, I remain,

Very truly yours,



William M. Brice, III

Appendix-168

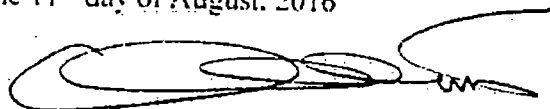
CERTIFICATE OF SERVICE:

The undersigned does hereby certify that a copy of the foregoing and attached Responses to Interrogatories and Request for Production of Documents was served on the attorneys of record as follows, by mailing with US Mail, first class, postage prepaid as follows:

Brain S. McCoy
378 E. Main Street
Rock Hill, S.C. 29730

Beth Ramsey Faulkner
P.O. Box 1030
York, S.C. 29475

This the 11th day of August, 2016

A handwritten signature in black ink, appearing to read 'William M. Brice, III', written over a horizontal line.

William M. Brice, III
Attorney for Benjamin James Russell

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM YORK COUNTY
Court of Common Pleas**

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-002176

Edward R. Kelly and Deirdre O. Kelly..... Appellants

v.

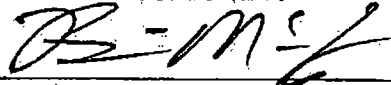
Allen S. McCombs and Benjamin James Russell..... Respondents

CERTIFICATE OF COUNSEL FOR APPELLANTS

The undersigned counsel for Appellants hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties, and not any other material.

March 22, 2017

McCOY LAW FIRM, LLC



Brian S. McCoy, Esq. (SC Bar #2155)
Danielle Scimeca, Esq. (SC Bar # 102822)
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-002176

Edward R. Kelly and Deirdre O. Kelly Appellants

v.

Allen S. McCombs and Benjamin James Russell Respondents

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. SOUTH CAROLINA COURTS IMPLY REASONABLE NOTICE AND TIMING TERMS WHEN NOT SPECIFIED IN AN AGREEMENT. BY NOT SPECIFYING NOTICE AND TIMING PROCEDURES IN A FIRST RIGHT OF REFUSAL, THE PARTIES AGREED TO BE BOUND BY REASONABLE NOTICE AND REASONABLE TIMING PROVISIONS. DID THE LOWER COURT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL INVALID FOR NOT EXPRESSLY STATING THE NOTICE AND TIMING PROCEDURES?
- II. UNDER SOUTH CAROLINA LAW, COURTS SHOULD AVOID INTERPRETATIONS THAT LEAD TO ABSURD RESULTS, AND A CONTRACTURAL OBLIGATION CAN BE ASSIGNED UNLESS EXPRESSLY PROHIBITED. THE FIRST RIGHT OF REFUSAL DOES NOT PROHIBIT ASSIGNMENT, AND ALLEN McCOMBS EXPRESSLY ASSUMED IT IN A QUITCLAIM DEED. DID THE LOWER COURT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL ENFORCEABLE ONLY AGAINST HENRY McCOMBS AND INVALID BECAUSE IT WAS ASSIGNED?
- III. BEFORE HIS DEATH, HENRY McCOMBS CONVEYED HIS INTEREST IN PROPERTY WITH A FIRST RIGHT OF REFUSAL TO HIS SON. DID THE LOWER COURT ERR BY HOLDING THAT A FIRST RIGHT OF REFUSAL EXPIRED ON HENRY'S DEATH BECAUSE THE PROVISION ITSELF DID NOT INCLUDE THE TERM "HEIRS"?

INTRODUCTION

Appellants bargained for and paid consideration for a first right of refusal in a deed. Inexplicably, although Respondent Allen McCombs had actual knowledge of the first right of refusal, and would have received the exact same sale price and terms if he notified Appellants of an offer on the property, he sold the property without notifying Appellants. The buyer, Respondent Benjamin Russell, also had actual knowledge of the first right of refusal, but he elected to proceed with his purchase with knowledge that the Appellants were not given their right. Appellants promptly filed this lawsuit when they became aware of the violation, but instead of giving effect to the clear intent of the parties to the deed in issue, the lower court stretched logic and law to hold that the first right of refusal was (i) unenforceable, and (ii) enforceable only against the grantee of the deed in issue. The holdings are clearly incorrect, and Appellants are entitled to specific performance.

STATEMENT OF THE CASE

Appellants filed their Complaint on March 21, 2016 asserting claims for specific performance and rescission, equitable relief/constructive trust and breach of contract relating to a first right of refusal in a deed. Respondents timely answered and asserted defenses. Respondent Russell filed a Motion to Dismiss or for Summary Judgment on August 17, 2016, and Respondent McCombs filed a Motion to Dismiss or for Summary Judgment on August 26, 2016. A hearing on the motions was held on September 7, 2016. No testimony was taken at the hearing. On September 28, 2016, the Special Circuit Court Judge signed an Order for Summary Judgment (the "Order") granting summary judgment to the Respondents. The Order was filed on September 30, 2016. The Notice of Appeal was served on October 21, 2016. Counsel for Appellants timely ordered the transcript, which was received on November 14, 2016.

UNDISPUTED FACTS

All of the facts are undisputed. Only two affidavits were filed relating to the motions for summary judgment: (1) by Appellant Edward R. Kelly (R.pp.068-072), and (2) by Respondent Benjamin J. Russell. However, the affidavit of Russell merely states his legal contentions and does not include any factual allegations that dispute the sworn testimony of Kelly. (R.pp.079-081).

This case involves a 37-acre tract of real estate ("Property") located in York County, South Carolina. R.pp.068 ¶3) Henry L. McCombs ("Henry") wanted to purchase part of a 100+ acre-tract of property next to his property, but the seller would not divide it and Henry could not afford the purchase price. (R.p.069 ¶3(a)). Appellants financed the

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purchase of the entire tract, and in a series of transactions, sold a portion back to Henry, including the tract in issue in this case. (R.p.069 ¶3(a)). The parties entered into a Contract of Purchase and Sale ("Contract") relating to the sale of the 37-acre tract to Henry. (R.p.068 ¶3; R.pp.073-076). The Contract included a first right of refusal in favor of the Appellants. (R.pp.073-076). The parties extensively discussed the provision and agreed that it would allow the Appellants to match any offer that Henry or his heirs would receive on the Property. (R.pp.068-069 ¶3). The right was very important to the Appellants and was an important factor in their determination to go forward with the transaction, and in the consideration they were willing to accept for the transaction. (R.pp.069-070 ¶3(a-c)).

Based on all of the consideration, including the right, Appellants conveyed the property to Henry by deed, which was recorded on March 22, 1996 (the "Deed") (R.pp.070-071 ¶5). The description of the property conveyed includes a legal description of the property by reference to a plat book, a restriction on mobile homes on the property (not involved in this case), and the following reservation:

The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property of any portion or partial of the same.

(the "FROR")¹ (R.p.082). The habendum clause then provides: "TO HAVE AND TO HOLD, all and singular the said premises above-mentioned, unto Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever." (R.p.083).

¹ Although the FROR provision does not include a termination date for the right, the provision does not violate the rule against perpetuities because of S.C. Code §27-6-20(A)(2) and §27-6-50. The issue was argued below, and the lower court's ruling on that issue was not appealed (and is correct). Appendix-178

After the deed was executed and recorded, on at least two occasions, Henry informed the Appellants, pursuant to the FROR, that he had received (or might receive) an offer to purchase the Property and asked if they would be interested to match the price and terms of the offer. (R.p.071 ¶6). Appellants requested a copy of the offer on both occasions and expressed their interest to exercise their right to purchase the Property subject to their review of the offer. (R.p.071 ¶6; R.pp.077-078). Henry did not provide either offer, and no sale of the Property occurred pursuant to those purported offers. (R.p.071 ¶6).

On April 11, 2012, Henry conveyed his interest in the Property by Quitclaim Deed to his son, Respondent Allen S. McCombs, for “\$5 and love and affection.” (R.pp.084-085). The Quitclaim Deed includes a derivation statement that refers to the Deed to Henry, and specifically includes: “HOWEVER, subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record, if any.”

The Appellants were not informed of the transfer and were not aware that it occurred until early 2016. R.p.071 ¶7). Henry died in June 2015. (R.p.071 ¶7).

On November 20, 2015, Respondent Allen S. McCombs conveyed the Property to Respondent Benjamin James Russell for \$125,000. (R.pp.088-089). The Appellants were not provided notice pursuant to the FROR, and were not aware of the transaction until early 2016. (R.p.072 ¶9). No evidence was submitted by Respondents that notifying Appellants was a problem. Appellants would have exercised the FROR and would have promptly purchased the Property at the sale price. (R.p.072 ¶10). Both Allen S. McCombs and Russell had actual knowledge and record knowledge of the FROR, but

failed to comply with the requirements thereof, and proceeded with such knowledge.

✓ (R.pp.147-148 No.8; R.p.154 No.5, p.155 No.8).

Promptly after learning of the sale to Russell in violation of the FROR, the Appellants filed this lawsuit to enforce their rights. (R.pp.006-011).

STANDARD OF REVIEW

"When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders Firstsource-Southeast Grp.*, 413 S.C. 630, 776 S.E.2d 434, 437 (Ct.App.2015). When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRPC. Specific performance and rescission are equitable remedies. In equity actions, an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 335 S.C. 118, 515 S.E.2d 544(Ct.App.1999).

ARGUMENT

- I. **SOUTH CAROLINA COURTS IMPLY REASONABLE NOTICE AND TIMING TERMS WHEN NOT SPECIFIED IN AN AGREEMENT. BY NOT SPECIFYING NOTICE AND TIMING PROCEDURES IN A FIRST RIGHT OF REFUSAL, THE PARTIES AGREED TO BE BOUND BY REASONABLE NOTICE AND REASONABLE TIMING PROVISIONS. THE LOWER COURT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL INVALID FOR NOT EXPRESSLY STATING THE NOTICE AND TIMING PROCEDURES.**

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The lower court acknowledged that a first right of refusal “is enforceable so long as both the price term, and the time within which the right may be exercised are reasonable.” (R.p.003) (citing 61 Am.Jur.2d *Perpetuities and Restraints on Alienation* § 110 (2002)). It held that the price term of the FROR here was reasonable because by “reasonable inference” the price to be paid “would be the same as the sale price contained in the offer from a potential third party purchaser.” (R.pp.003-004). However, the lower court held that the FROR was unenforceable because “the procedures for exercising the [FROR] are not specifically stated in the grant itself.” (R.p.004).

The Order lists the following as purported deficiencies: “[The FROR] contains [(1)] no specification for giving notice of a third party’s offer to purchase; [(2)] no specification of time after notice within which the FROR must be exercised by Plaintiffs, [and (3)] no specification of the time within which Plaintiffs must pay the consideration for repurchase.” *Id.* However, these purported deficiencies are easily cured by implying reasonable time and notice terms, which the courts routinely do to effectuate the intent of the parties. “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Maybank v. BB&T Corp.*, app. case no. 2014-002638, at 25 (S.C. 2016); *Schulmeyer v. State Farm Fire and Cas.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (same).

A. South Carolina Courts Routinely Imply Reasonable Terms

South Carolina courts have consistently enforced the intent of the parties to a contract by implying reasonable time and notice terms.² *See Cloniger v. Cloniger*, 261

² In fact, the lower court here acknowledged this law of implying reasonable or standard terms by holding that the implied price term was reasonable, based on the nature of a FROR and the implied terms therein. Appendix-181

S.C. 603, 193 S.E.2d 647, 651 (1973) (a reasonable time for performance is implied when the time for performance is not stated in an agreement to repurchase property.); *Martin v. Boon*, 116 S.C. 97, 107 S.E. 320, 323 (1921) (“payment will be presumed to be due within a reasonable time or on demand” when not specified); *Carolina Cable Network v. Alert Cable*, 316 S.C. 98, 447 S.E.2d 199 (1994) (implying “reasonable notice” may be given to terminate when the contract lacks a duration term); *South Carolina Elec. & Gas Co. v. Hartough*, 375 S.C. 541, 654 S.E.2d 87, 90 (Ct.App.2007)(“if the parties to an option agreement fail to specify a time for performance, a reasonable time will be implied”).

In *Carroll v. Page*, 264 S.C. 345, 215 S.E.2d 203, 205 (1975), the plaintiff brought an action against the defendant for specific performance of a first right of refusal to purchase real estate in a lease. *Id.* at 204. The lease agreement containing the first right of refusal stated “It is agreed that should the Lessor elect or should the Lessor decide to sell the whole property at any specific figure, he does hereby agree to give the Lessee the right to the buy the property at the figure so determined...” *Id.* at 350, 215 S.E. 2d at 205. Several years later the defendant landlord notified the plaintiff tenant that he decided to sell the property and gave the plaintiff an opportunity to match the terms. *Id.* The plaintiff requested a “few days to think it over.” *Id.* Instead, the plaintiff attempted to purchase the property and enforce the right over a year after notification. *Id.* No time limit for acceptance of the offer was fixed in the right of refusal. *Id.* Significantly, the Court did not hold the provision unenforceable, and in fact enforced the implied reasonable time

See, e.g., Old Port Cove Holdings v. Condo. Ass’n, 986 So.2d 1279, 1285 (Fla. 2008)(first right of refusal defined as “a right to elect to take specific property at the same price and on the same terms and conditions as those contained in a good faith offer”).

provision by denying specific performance. *Id.* The lower court's ruling is contrary to this precedent.³

B. Reasonable Time and Notice Terms are Easily Implied to the FROR

Thus, each of the three purported deficiencies is easily satisfied by implying reasonable terms. Of course, the Appellants and Henry McCombs *could* have specified details for these procedures in the Deed. But by not specifically stating the procedures, Appellants agreed (1) to allow Henry McCombs or his assignees to provide notice by any reasonable means, (2) to exercise the FROR within a reasonable time after notice, and (3) to pay the consideration within a reasonable time after exercise of the FROR, or to match the timing in the offer (if one is stated). The undisputed facts demonstrate that none of these purported deficiencies was an actual issue in this case because Appellants were easy to locate, and would have promptly accepted and closed on the FROR if they had been given notice. (R.p.072 ¶11).

II. UNDER SOUTH CAROLINA LAW, COURTS SHOULD AVOID INTERPRETATIONS THAT LEAD TO ABSURD RESULTS, AND A CONTRACTUAL OBLIGATION CAN BE ASSIGNED UNLESS PROHIBITED. THE FIRST RIGHT OF REFUSAL DOES NOT PROHIBIT ASSIGNMENT, AND ALLEN McCOMBS EXPRESSLY ASSUMED IT IN A QUITCLAIM DEED. THE LOWER COURT ERRED BY HOLDING THE FIRST RIGHT OF REFUSAL ENFORCEABLE ONLY AGAINST HENRY McCOMBS AND INVALID BECAUSE IT WAS ASSIGNED.

Apparently as an alternative holding, the Court held: "I conclude that the FROR was enforceable only between Henry and Plaintiffs, and expired either upon Henry's conveyance to Allen, or Henry's death." [Order p.5]. The basis for the holding is the irrelevant fact that the Deed also includes a restriction above the FROR that states

³ Based on the definitive case law set forth in this section, if the Restatement (Third) of Property, Servitude § 3.4 (R.p.003) requires detailed procedures to be stated and does not allow reasonable terms to be implied, then it contradicts with well-established South Carolina law and is not the law of South Carolina. Appendix-183

“neither the grantee nor any of his successors or assigns or heirs” will place more than one mobile home on the property for 45 years. (R.p.082). Because the FROR paragraph does not repeat the “successors or assigns or heirs” language in the provision itself, the lower court held that it therefore was binding only against Henry. (R.p.005). Plainly, this is wrong.

A. The Gift to Allen was an Assignment that Did Not Invoke the FROR

The transfer of the Property from Henry McCombs to his son Allen McCombs was a straightforward assignment by Quitclaim Deed. South Carolina has recognized that contracts are freely assignable unless expressly agreed otherwise.⁴ *See Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 381, 532 S.E.2d 269, 279 (2000); *Skelton v. Summit Builders of Greenville, Inc.*, 288 S.C. 453, 454, 343 S.E.2d 446, 447(1986); Restatement (Second) Contracts §328 (1981). Here, in the Quitclaim Deed, Allen expressly agreed to the assignment of the FROR. The Quitclaim Deed states the property conveyed is:

subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record, if any. TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE, GRANTEE’S heirs and assigns forever.

(R.p.085, emphasis added). The FROR was a restriction or covenant that was assigned to Allen by the Quitclaim Deed. The fact that the FROR provision itself does not expressly state “assigns” is not pertinent. The FROR does not prohibit assignment of the obligation, and it was expressly assigned.

B. The Lower Court’s Ruling Leads to Absurd Results

⁴ There are exceptions not applicable here, such as a personal services contract for an opera singer. Appendix-184

Moreover, an interpretation that the gift by Henry to his son invalidated the FROR leads to absurd results. First, the transfer from Henry to his son Allen was for “\$5 love and affection.” Under the lower court’s reasoning, the Appellants should have been given the opportunity to match this consideration. Instead, the Quitclaim Deed from Henry to his son Allen simply did not qualify as a “sale” under the FROR. Courts have consistently found that a transfer of property that amounts to a gift does not trigger a first right of refusal. *Mericle v. Wolf and Sacred Heart Hospital*, 386 Pa.Super. 82, 562 A.2d 364 (1989); *Bennette v. Dove*, 166 W.Va. 772, 277 S.E.2d 617 (1981); *Isaacson v. First Security Bank of Utah*, 95 Idaho 452, 511 P.2d 269 (1973). Second, under the lower court’s reasoning, despite the fact that the Appellants negotiated and gave consideration for the FROR, Henry could have *immediately* circumvented the right simply by transferring the Property to his son. South Carolina courts will not engage in an interpretation leading to absurd results. *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187 (1957) (“It is the policy of the Court to give a reasonable and equitable construction to a contract and avoid giving a construction that will bring about absurd results”)⁵.

III. BEFORE HIS DEATH, HENRY McCOMBS CONVEYED HIS INTEREST IN PROPERTY WITH A FIRST RIGHT OF REFUSAL TO HIS SON. THE LOWER COURT ERRED BY HOLDING THAT A FIRST RIGHT OF REFUSAL EXPIRED ON HENRY’S DEATH BECAUSE THE PROVISION ITSELF DID NOT INCLUDE THE TERM “HEIRS”.

Finally, the lower court held that “even if it is assumed that the donative transfer to Allen would not operate to extinguish the FROR . . . Henry’s death would.” (R.p.004).

A. Henry Conveyed All of His Interest Before He Died

⁵ Also, the entire premise of the lower court’s ruling is incorrect because the Deed includes heirs and assigns language. See Argument section III.B. below.

The Order does not explain how Henry's death could possibly be relevant when he did not own an interest in the property at the time of his death. The presence or absence of the word "heirs" is irrelevant. *See Son v. Shealy*, 112 S.C. 312, 318, 99 S.E. 825 (1919) ("no one is an heir of the living"). Henry conveyed the property and assigned the FROR prior to his death. Thus, at the time of his death, Henry did not own the property, and his death is not pertinent to the analysis.

B. The Deed to Henry Includes Heirs and Assigns Language

In any event, the very premise of the lower court's holding is faulty. The plain language of the Deed it makes it binding upon the heirs and assigns of both parties. A review of the entire Deed reveals that the provision is expressly binding on Henry's heirs and assigns. *See First Carolinas Joint Stock Land Bank v. Deschamps*, 171 S.C. 466, 172 S.E. 2d 622, 624 (1934) ("the court will look to the entire deed to obtain the intention as to the meaning of the words used"); S.C. Code §27-5-130 (every deed "passes to the grantee the entire interest of the grantor in the property described in the deed, unless provided to the contrary in the deed").

In the Deed, the description of the property conveyed sets forth a plat book reference, describes the restriction on mobile homes, and describes the reservation of the FROR to Appellants. After the description, in the habendum clause, the Deed states that the "premises above-mentioned" are conveyed to "Henry L. McCombs, his *heirs*, executors, administrators, *successors, and assigns forever.*" (R.p.083, emphasis added).

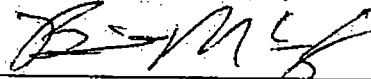
Thus, even though it is not necessary on these facts, the Deed actually contains the language making the FROR binding on heirs and assigns. It was not necessary for the

heirs and assigns language to be repeated in the FROR provision, and the fact that it was superfluously repeated in the mobile homes provision is irrelevant.

CONCLUSION

The lower court's holdings are incorrect for the reasons set forth above, and should be reversed. South Carolina Supreme Court precedent implies reasonable time and notice requirements into first right of refusal provisions such as the one in issue here. *Carroll v Page*, 215 S.E.2d at 205. The Property and the FROR were assigned to Allen McCombs, and he failed to give the required notice to the Appellants to exercise or decline their right to match it. Henry McCombs' death is irrelevant because he owned no interest in the Property at death. This Court should reverse and remand to the circuit court with instructions to order rescission and specific performance.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-002176

Edward R. Kelly and Deirdre O. Kelly..... Appellants

v.

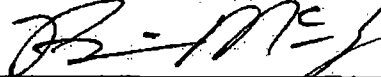
Allen S. McCombs and Benjamin James Russell..... Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCAR.

March 22, 2017

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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS**

S. JACKSON KIMBALL, SPECIAL COURT JUDGE

CASE NO. 2016-002176

**Edward R. Kelly and Deirdre O. Kelly,
Appellants**

v.

**Allen S. McCombs and Benjamin James Russell,
Respondents**

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STATEMENT OF ISSUES ON APPEAL

- I. THE LOWER COURT DID NOT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL INVALID FOR NOT EXPRESSLY STATING THE NOTICE AND TIMING PROVISIONS. THE RIGHT OF REFUSAL WAS TOO VAGUE AND INDEFINITE AND THUS IS VIOLATIVE OF PUBLIC POLICY.
- II. THE LOWER COURT DID NOT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL WAS ENFORCEABLE ONLY AGAINST HENRY MCCOMBS AND THUS INVALID BECAUSE IT WAS ASSIGNED.
- III. THE LOWER COURT CORRECTLY HELD THAT A FIRST RIGHT OF REFUSAL EXPIRED ON HENRY McCOMB'S DEATH.

STATEMENT OF THE CASE

Appellants filed their Complaint on March 21, 2016 asserting claims for specific performance and rescission, equitable relief/constructive trust and breach of contract relating to a first right of refusal in a deed. Respondents timely answered and asserted defenses. Respondent Russell filed a Motion to Dismiss or for Summary Judgment on August 17, 2016, and Respondent McCombs filed a Motion to Dismiss or for Summary Judgment on August 26, 2016. A hearing on the motions was held on September 7, 2016. No testimony was taken at the hearing. On September 28, 2016, the Special Circuit Court Judge signed an Order for Summary Judgment (the "Order") granting summary judgment to the Respondents. The Order was filed on September 30, 2016. The Notice of Appeal was served on October 21, 2016. Counsel for Appellants ordered the transcript.

This case involves a 37-acre tract of real estate ("Property") located in York County, South Carolina. (R. pp 82-83). The Appellants allege there was some Contract of Purchase and Sale ("Contract") between Henry McCombs and Appellants regarding the 37-acre tract or real estate. (R. p. 68 ¶3, lines 1-3). However, this Contract is irrelevant to this action, as any agreement between Appellants and Henry McCombs was merged into and is evidenced by the publicly recorded deed, in which Appellants conveyed the Property to Henry McCombs by deed recorded on March 22, 1996 (the "Deed"). (R. pp. 82-83). The description of the property conveyed includes (1) a legal description of the property by reference to a plat book; (2) a restriction on mobile homes on the property:

The above described property is also subject to the restriction that neither the *grantee nor any of his successors or assigns or heirs* will place more than one mobile home on the above described property for a period of 45 years, that being from August 29,

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1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved. (R. p. 82 ¶4).

and; (3) the following first right of refusal:

The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion or partial of the same. (R. p. 82, ¶5),

(R. pp. 82-83).

On April 11, 2012, Henry McCombs conveyed his interest in the Property by Quitclaim Deed to his son, Respondent Allen S. McCombs, for "\$5 and love and affection." (R. p. 84). The Appellants were on constructive notice of the transfer by virtue of the recordation of the Quitclaim Deed on April 11, 2012 in the public record in the Office of the Clerk of Court in York County, South Carolina. (R. p. 84).

Henry McCombs died in June 2015. (R. p. 71, ¶7, lines 3-4).

On November 20, 2015, Respondent Allen S. McCombs conveyed the Property to Respondent Benjamin James Russell for \$125,000. (R. pp. 88-89). The Appellants were not provided notice of the transfer prior to the transfer.

ARGUMENTS

I. THE LOWER COURT DID NOT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL INVALID FOR NOT EXPRESSLY STATING THE NOTICE AND TIMING PROVISIONS. THE FIRST RIGHT OF REFUSAL WAS TOO VAGUE AND INDEFINITE AND THUS IS VIOLATIVE OF PUBLIC POLICY.

A first right of refusal is a pre-emptive right, and it is a contingent nonvested interest because the grantee or the grantee's heir has the right to decide to sell the property, and thus, may never decide to do so. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2 384, 385 (Ct. App. 1997). A first right of refusal is an interest predicated on an event which is not certain to occur. *Id.* As a pre-emptive right, a first right of refusal is subject to the rule against restraint of alienation of interest in land. 61 Am.Jur.2d *Perpetuities and Restraints on Alienation* § 110 (2002). Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right. Restatement (Third) of Prop.: Servitude § 3.4 cmt. (f) (2000). In this instant case, the procedures for exercising the right are omitted. The first right of refusal in the instant case "contains no specification for giving notice of a third party's offer to purchase, no specification of time after notice within which the [first right of refusal] must be exercised by [Appellants], no specification of the time within which [Appellants] must pay the consideration for repurchase, or any other terms by which the reasonableness of the servitude imposed by the [first right of refusal] may be assessed. Nor are any such procedures otherwise specified in the deed to Henry [McCombs]." (R. p. 4, lines 5-10). The first right of refusal contains no specification of how price or value are to be determined, and it contains no specification as to how long either party, if notice is given, has to reject or accept the right of refusal or any determination of the timing of the closing.

A first right of refusal should be strictly construed in South Carolina. South Carolina has long disfavored subsequent clauses in deeds that purport to cut down a fee simple estate contained in the granting clause. See *Sanford v. Sanford*, 106 S.C. 304, 306, 91 S.E. 294, 295 (1917); *Douglas v. Medical Investors, Inc.* 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971); *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 498, 159 S.E.2d 46, 47 (1968); *Batesburg—Leesville School Dist. No. 3 v. Tarrant*, 293 S.C. 442, 444, 361 S.E.2d 343, 345 (Ct. App. 1987).

One of the commonly acknowledged attributes of fee simple ownership in South Carolina is the ability to freely convey it without any restrictions. Any restraint on alienation, including a first right of refusal, not specific in all elements including legitimacy of purpose, price and detailed procedures for exercising the right, runs counter to this commonly acknowledged attribute. Without detailed procedures for exercising the right, the first right of refusal in the instant case is an unreasonable restraint on the alienability of the property and it therefore violates the public policy of South Carolina, and is thus unenforceable. *McCravey v. Otts*, 90 S.C. 447, 452, 74 S.E. 142, 143 (1912); *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct.App. 1984).

II. THE LOWER COURT DID NOT ERR BY HOLDING THE FIRST RIGHT OF REFUSAL WAS ENFORCEABLE ONLY AGAINST HENRY MCCOMBS AND THUS INVALID BECAUSE IT WAS ASSIGNED.

“The [first right of refusal] as contained in the deed to Henry [McCombs] states: ‘the grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same.’ On its face, the [first right of refusal] contains no language making it binding on the heirs or assigns of Henry [McCombs]. This is in

contrast to a previous provision of the deed placing a restriction on the property pertaining to mobile homes. That provision states:

The above described property is also subject to the restriction that neither the *grantee nor any of his successors or assigns or heirs* will place more than one mobile home on the above described property for a period of 45 years, that being from August 29, 1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved.
(Emphasis added.)

This restriction is clearly made binding on the successors in title to Henry [McCombs] for a definite period. No such intent is expressed, or can be reasonably inferred, from the language of the [first right of refusal]. Thus, upon Henry [McCombs'] conveyance of the property, or upon his death, the [first right of refusal] would expire, and have no effect going forward.

After Henry [McCombs] conveyed the subject property to Allen in 2012, some sixteen years after he received title, the [first right of refusal] was no longer binding. Even if it is assumed that the donative transfer to Allen [McCombs] would not operate to extinguish the [first right of refusal]...Henry [McCombs'] death would. His heirs would not be bound by its provisions, as the language of the [first right of refusal] simply did not contain any such provision or language.” (R. p. 4, lines 13-33).

As for the reasons stated above, a first right of refusal is a restraint on alienability of interest in land, and restrictions on alienability should be strictly construed. While it is true that in the habendum clause, the Deed states that the “premises above-mentioned” are conveyed to Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever,” this language addresses the fee simple interest of Henry McCombs but should not be interpreted to

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extend to any restraint on the fee simple interest set forth in the deed, such as the first right of refusal. (R. p. 82, ¶5). Strictly construed, the first right of refusal ended with Henry McCombs, and his assignment of the land extinguished the first right of refusal. Therefore, upon the assignment of the interest in land by Henry McCombs, the first right of refusal extinguished.

Thus, the first right of refusal was only enforceable between Henry McCombs and the Appellants.

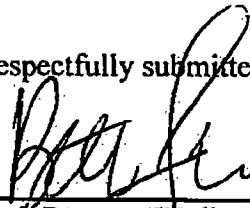
III. THE LOWER COURT CORRECTLY HELD THAT A FIRST RIGHT OF REFUSAL EXPIRED ON HENRY McCOMB'S DEATH.

As for the reasons stated above, a first right of refusal is a restraint on alienability of interest in land, and restrictions on alienability should be strictly construed. Again, while it is true that in the habendum clause, the Deed states that the "premises above-mentioned" are conveyed to Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever," this language addresses the fee simple interest of Henry McCombs but should not be interpreted to extend to any restraint on the fee simple interest set forth in the deed, such as the first right of refusal. Strictly construed, the first right of refusal ended upon the death of Henry McCombs, and is not enforceable against respondents.

CONCLUSION

"The right of first refusal in this case constitutes an unreasonable limitation upon the power of alienation, and it is therefore violative of the applicable case law and public policy of this state, and is unenforceable. *See McCravey v. Otts*, 90 S.C. 447, 452, 74 S.E. 142, 143 (1912); *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct.App. 1984). Further, the right of first refusal was binding only as between [Appellants] and Henry McCombs, as it contained no language making it binding on Henry [McCombs'] heirs and assigns." (R. p. 5, lines 4-9). South Carolina Supreme Court precedent does not imply reasonable time and notice requirements into first rights of refusal but rather, strictly construes them. Based on the reasons set forth above, the lower court's holdings should be affirmed.

Respectfully submitted,



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March 23, 2017

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS**

S. JACKSON KIMBALL, SPECIAL COURT JUDGE

CASE NO. 2016-002176

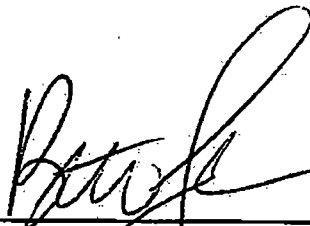
**Edward R. Kelly and Deirdre O. Kelly,
Appellants**

v.

**Allen S. McCombs and Benjamin James Russell,
Respondents**

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondents complies with Rule 211(b), SCACR.



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**THE STATE OF SOUTH CAROLINA
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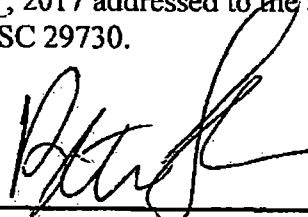
**Edward R. Kelly and Deirdre O. Kelly,
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**Allen S. McCombs and Benjamin James Russell,
Respondents**

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents by depositing a copy of it in the United States Mail, postage prepaid on March 23, 2017 addressed to the attorney of record, Brian S. McCoy, 378 East Main Street, Rock Hill, SC 29730.



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
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v.

Allen S. McCombs and Benjamin James Russell.....Respondents

FINAL REPLY OF APPELLANTS

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INTRODUCTION

There is no dispute that a first right of refusal is enforceable in South Carolina unless it imposes an unreasonable restraint on alienability of the property in issue. In this case, Respondents have completely failed to demonstrate that the FROR in issue here is unreasonable. In fact, the property owner here was always completely free to decide if, when, and at what price he might want to sell his property. The *de minimus* burden under these circumstances has universally been held to be enforceable. Respondents do not even challenge the clear South Carolina case law, including *Carroll v. Page*, 264 S.C. 345, 215 S.E.2d 203 (1975), that allows a court to impose a reasonable term under these circumstances.

Once it is determined that the FROR here is enforceable, it is clear that it applied to the sale of the property by Henry McCombs' son, Respondent Allen McCombs, to Respondent Russell. Appellants demonstrated that the FROR was assigned by Henry McCombs to his son, who expressly accepted the assignment in the Quitclaim Deed. Respondents did not address this critical fact. Nor did Respondents address the absurd and unfair results if the gift from father to son would invalidate the bargained-for FROR.

Finally, the Respondents did not even attempt to explain how the death of Henry McCombs could affect the FROR. Henry had no interest in the property at the time of his death.

Importantly, Respondents fail to address these points in their brief. Instead, Respondents simply restate the disproven statements of the lower court, and cite to inapplicable law.

ARGUMENT

I. RESPONDENTS FAILED TO DEMONSTRATE AN UNREASONABLE RESTRAINT ON ALIENATION

The lower court held, and all parties hereto agree, that a first right of refusal “is enforceable so long as both the price term, and the time within which the right may be exercised are reasonable.” (R.p.003) (citing 61 Am.Jur.2d *Perpetuities and Restraints on Alienation* § 110 (2002)). Certainly, some first rights of refusal can constitute an unreasonable restraint on alienation, if, for example, the price term is fixed and over time becomes below market value. This would inhibit the owner from selling the property. But Courts examine each case individually to determine whether alienability is unreasonably restrained. Whether a restraint is reasonable “depends upon its long-term effect on the improvement and marketability of property. Once that effect is determined, common sense should dictate whether it is reasonable or unreasonable.” *Inglehart v. Phillips*, 383 So. 2d 610, 614 (Fla. 1980).

The FROR in this case does not contain any feature that would constitute an unreasonable restraint on alienation. The price term, as held by the lower court and not appealed by Respondents, provides for a matching of a bona fide offer.¹ (R.pp.003-004). The time to accept or reject the right to match the offer, and the time to close if accepted, are implied reasonable time periods under the circumstances. *See, Carroll v. Page*, 264 S.C. 345, 215 S.E. 2d 203 (1975); Appellants’ Initial Br. pp. 7-9. Respondents did not contest this well-settled South Carolina law.

¹ A right of first refusal is defined as a “potential buyer’s contractual right to meet the terms of a third party’s offer.” *Black’s Law Dictionary* at 1439 (9th ed. 2009).

An examination of the FROR in this case, with the implied reasonable terms under South Carolina law, reveals at most only *de minimus* restraint on alienation. “Restraint on Alienation” is defined as “[a] provision in an instrument of conveyance which prohibits the grantee from selling or transferring the property which is the subject of the conveyance.” *Black’s Law Dictionary* at 1181-81 (5th ed. 1979). Here, McCombs was always totally free to convey or not convey, and was free to get any price he could if he decided to sell. Appellants were required to exercise or decline the right within a reasonable time, and to close within a reasonable time if accepted. Therefore, any restraint by this FROR was negligible – simply to notify the Appellants. Upon such notification, the transaction would proceed exactly the same as if there were no FROR, except that the name on the deed would be different if the Appellants elected to exercise the right.

Under these circumstances, the FROR is simply not an unreasonable restraint on alienation. *See, e.g., Bortolotti v. Hayden*, 866 N.E.2d 882 (Mass. 2007) (because Hayden only had the right to match the terms of a bona fide offer on the property and had no additional power, the right of first refusal contained in the deed did not prohibit the free alienation of the property); *Shiver v. Benton*, 304 S.E.2d 903 (Ga. 1983) (a right of first refusal is not an unlawful restraint on alienation when it is conditioned on meeting the terms of the offer of a third party); J.A. Bryant, Jr., Annotation, *Pre-Emptive Rights to Realty as Violation of Rule Against Perpetuities of Rule Concerning Restraints on Alienation*, 40 A.L.R. 3d 920 (1971) (a standard right-of-first-refusal provision, which merely gives the holder of the right the power to match a bona fide offer, does not prohibit the free alienation of property).

Respondents contend that the FROR should be strictly construed because it purports to cut down a fee simple estate. [Respondents' Br. at p. 8]. First, under any level of scrutiny, the FROR here, with *de minimus* effect on alienability, would not be considered an unreasonable restraint. Moreover, this contention is a non-starter because the premise is false. In the Deed, the granting clause conveyed "to Henry L. McCombs, his heirs and assigns forever *the following described property . . .*" (R.p.082 emphasis added). The legal description that follows includes the FROR language, as all parties agree.² Thus, the property conveyed, by definition, included the reservation of the FROR, and the interest conveyed expressly included the FROR. Finally, under S.C. Code §27-5-130, every deed "passes to the grantee the entire interest of the grantor in the property described in the deed, unless provided to the contrary in the deed." Here, the Deed in issue clearly provides that the FROR is reserved to the grantors (Appellants).

II. THE GIFT FROM FATHER TO SON DID NOT AFFECT THE FROR

Respondents do not address or contest the common-sense conclusion in Appellants' Brief that the gift from Henry L. McCombs to his son Allen McCombs did not invoke or affect the FROR³. It would be an absurd result if (1) the bargained-for FROR could be immediately negated by giving the property to his son, or (2) interpreting the "\$5 love and affection" consideration from father to son to invoke the FROR and allow the Appellants to match the \$5 consideration. *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187 (1957) ("It is the policy of the Court to give a

² See, Respondent's Br. at 5-6 ("The description of the property conveyed includes . . . the following first right of refusal"); Appellants' Br. at p. 4 ("The description of the property conveyed includes . . . the following reservation").

reasonable and equitable construction to a contract and avoid giving a construction that will bring about absurd results”).

In addition, in the Quitclaim Deed, the son Allen expressly accepted the property “subject to any Restrictions . . . Rights now of record . . .” Accordingly, the FROR was effective and binding when Respondent Allen sold the property to Respondent Russell. Respondents’ again failed to address this decisive fact.

III. HENRY McCOMBS OWNED NO INTEREST IN THE PROPERTY AT THE TIME OF HIS DEATH

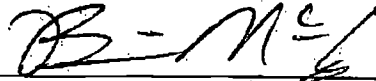
Again, the Respondents failed to address Appellants’ decisive argument that Henry’s death was irrelevant because he had conveyed his interest in the property before his death. Therefore, Henry’s death cannot be relevant to whether or not the FROR provision uses the word “heirs.” In any event, the Deed in issue actually uses the “heirs and assigns” language, so the entire premise is false. The Deed provides that the “premises above-mentioned,” which includes the FROR provision, are conveyed to “Henry L. McCombs, his heirs . . . successors and assigns forever.” (R.p.083).

CONCLUSION

The Respondents failed to address each of the Appellants’ arguments demonstrating the errors of the lower court’s Order. For the reasons set forth in Appellants’ Initial Brief, the ruling of the lower court should be reversed.

³ Respondents restate the fact that the restriction in the Deed relating to mobile homes includes language making it binding on McCombs’ heirs and assigns. This fact is not relevant to the issues in the case. Appendix-209

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In the Court of Appeals**

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S. Jackson Kimball, Special Circuit Court Judge

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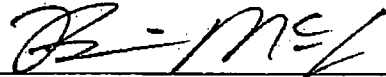
Allen S. McCombs and Benjamin James Russell.....Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCAR.

March 22, 2017

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Edward R. Kelly and Deirdre O. Kelly, Appellants,

v.

Allen S. McCombs and Benjamin James Russell,
Respondents.

Appellate Case No. 2016-002176

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Unpublished Opinion No. 2019-UP-308
Heard March 14, 2019 – Filed August 28, 2019

AFFIRMED

Brian Scott McCoy and Danielle Rose Scimeca, both of
McCoy Law Firm, LLC, of Rock Hill, for Appellants.

N. Beth Ramsey Faulkner, of Faulkner Law Firm, LLC,
of York, and James W. Boyd, of James W. Boyd Law
Firm LLC, of Rock Hill, both for Respondents.

PER CURIAM: Edward R. Kelly and Deirdre O. Kelly (collectively, the Kellys)
appeal the trial court's order refusing to enforce a right of first refusal. We affirm.

We disagree with the Kellys' argument the trial court erred in holding the right of first refusal was enforceable only against Henry McCombs (Henry).¹ The deed from the Kellys to Henry did not extend the right of first refusal to Henry's successors, heirs, or assigns. See *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 561, 570, 635 S.E.2d 660, 665 (Ct. App. 2006) ("One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." (quoting *S. Ry. Co. v. Smoak*, 243 S.C. 331, 336, 133 S.E.2d 806, 808 (1963))); *id.* at 571, 635 S.E.2d at 665 ("Moreover, in ascertaining such intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law." (citing *Wayburn v. Smith*, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977))); *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997) (stating a right of first refusal is a preemptive right); 61 Am. Jur. 2d *Perpetuities, Etc.* § 92 (2012) ("Any restriction or prohibition against transfer acts as a restraint on alienation and should be strictly construed against the party urging the restriction.").

As the trial court noted, the right of first refusal provision lacked the language found in a restriction on the property pertaining to mobile homes that made the restriction binding on Henry and "his successors or assigns or heirs." See *Evins v. Richland Cty. Historic Pres. Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) ("[T]he maxim 'Expressio unius est exclusio alterius' is defined as: 'When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.'" (alteration by court) (quoting *Little v. Town of Conway*, 171 S.C. 27, 31, 171 S.E. 447, 448 (1933))); *Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, Inc.*, 320 S.C. 113, 119, 463 S.E.2d 600, 604 (1995) (stating the rule "expressio unius est exclusio alterius" means the "enumeration of particular things excludes [the] idea of something else not mentioned" (citing *Pa. Nat'l Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 554, 320 S.E.2d 458, 463 (Ct. App. 1984))). Thus, while the parties knew how to make a restriction binding on Henry and his successors, assigns, and heirs, they chose not to employ this language in the right of first refusal provision.

¹ The Kellys acknowledge the right of first refusal did not apply to Henry's transfer of the Property to Henry's son Allen McCombs (Allen) as this transaction was a gift. See *McLeod v. Sandy Island Corp.*, 265 S.C. 1, 11, 216 S.E.2d 746, 750 (1975) (holding a right of first refusal only applied when the property was sold and did not apply to a donative transfer).

Furthermore, "absent evidence of intent, preemptions are generally construed to be nontransferable." *Ryan v. Lawyers Title Ins. Corp.*, 959 N.E.2d 870, 876 (Ind. Ct. App. 2011) (footnote omitted) (citing *Shower v. Fischer*, 737 P.2d 291, 295 (Wash. Ct. App. 1987)); see *Park Station Ltd. P'ship, LLLP v. Bosse*, 835 A.2d 646, 655 (Md. 2003) ("[R]ights of first refusal are presumed to be personal and are not ordinarily construed as transferable or assignable unless the particular clause granting the right refers to successors or assigns or the instrument otherwise clearly shows that the right was intended to be transferable or assignable."); *Waterstradt v. Snyder*, 194 N.W.2d 389, 390 (Mich. Ct. App. 1971) (holding a right of first refusal to repurchase property was not binding on a personal representative, because "[i]f the grantors had meant to bind her personal representative, her successors in title, or assigns (assuming they could), they should have said so" (footnote omitted)); *Kershner v. Hurlburt*, 277 S.W.2d 619, 623 (Mo. 1955) (holding because the contract did not include a specific provision that it would be binding upon the heirs and assigns of the parties or any indication in the contract that the parties intended its terms would be binding beyond the lives of the parties, a right of first refusal was personal to the parties to the contract); *Old Nat'l Bank of Wash. v. Arneson*, 776 P.2d 145, 148 (Wash. Ct. App. 1989) ("Absent evidence of intent, preemptive rights are generally construed to be nontransferable.").

We find the Kellys' assertion the deed contained the requisite language in the granting clause to make the right of first refusal run with the land is not preserved for our review. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding an issue is not preserved when the trial court does not explicitly rule on a question and the appellant fails to make a Rule 59(e), SCRPC, motion to alter or amend the judgment on that ground).

We find no merit to the Kellys' argument the trial court's ruling leads to an absurd result because Henry could have immediately circumvented the right of first refusal by transferring the Property to his son. Sixteen years passed between the deed to Henry and the quitclaim deed to Allen. Thus, we do not need to decide whether equity would have offered relief under the situation posited by the Kellys.

We hold that without a specific provision in the deed that the right of first refusal was binding upon Henry's heirs and assigns, the obligation of the right was personal to Henry. The Kellys knew or should have known when reserving the right of first refusal, they were reserving a contingent, nonvested interest and

Henry might never choose to sell the property. *See Webb*, 326 S.C. at 446, 485 S.E.2d at 385 ("This pre[em]ptive right is a contingent, nonvested interest in that the grantee . . . might never choose to sell the property."). We find the transfers of the property did not violate the Kellys' preemptive right as this right never ripened because Henry never sold the Property.

As the above issues are dispositive, we need not address the Kellys' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

AFFIRMED.

HUFF, THOMAS, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-002176

RECEIVED
SEP 12 2019
SC Court of Appeals

Edward R. Kelly and Deirdre O. Kelly..... Appellants

v.

Allen S. McCombs and Benjamin James Russell..... Respondents

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellants Edward R. Kelly and Deirdre O. Kelly ("Kellys" or "Appellants") hereby petition for rehearing of this Court's August 28, 2019 Unpublished Opinion No. 2019-UP-308 ("the Opinion") in the above-captioned appeal. The Court should grant rehearing, consider any remaining issues not addressed in the Opinion, and issue a revised opinion reversing the decision of the lower court and remanding the case to the court of common pleas, as set forth herein.

Introduction

The case involves a 1996 deed of Property from the Kellys to Henry McCombs ("Henry") in which the Kellys bargained for a first right of refusal ("FROR"), which was reflected in the price of the Property. (The 1996 deed at Record pp. 082-083 is referred to herein as the "Deed"). In the Opinion, this Court affirmed the lower court's refusal to enforce the FROR solely on the basis that it was enforceable only against the grantee Henry. Appendix-216
One basis for

the conclusion is that the specific FROR provision itself did not contain the language "successors, heirs or assigns" following the grant of the FROR to the Kellys, whereas a separate provision in the Deed contains a restriction on mobile homes did include "successors or assigns or heirs." [Opinion at p. 2]. Another basis in the Opinion to affirm is based on decisions from other states that limit the transferability of rights of refusal [Opinion at p. 3]. However, in this case, both the language of the Deed to Henry and language of the Quitclaim Deed gift of the Property from Henry to his son indicate no intention to limit the FROR to Henry, and the Quitclaim Deed expressly includes an assumption the FROR by the son. Under the circumstances of this case, the FROR applied to the son, and the Kellys were entitled to exercise it when he sold the Property.

Law/Analysis

I. The Intent of the Parties Was to Create a Valid FROR in favor of Kellys.

There can be no doubt that in the Deed from Kellys to Henry the parties intended for the Kellys to retain a first right of refusal relating to a future sale of the Property. Under South Carolina law, "[w]hen interpreting a deed, the primary rule of constructing the deed is to ascertain and effectuate the parties' intentions, unless that intention contravenes some well-settled rule of law or public policy." *Williams v. Tamsberg*, 425 S.C. 249, 259, 821 S.E.2d 494, 500 (Ct. App. 2018). *See also, Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965) ("in construing a deed it is elementary that the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well-settled rule of law or public policy").

The entirety of the FROR provision in the Deed reads:

The grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion or parcel of the same.

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[Deed, R. p. 082]. The language of the FROR avoids any reference to the “grantee” or to Henry, thereby reflecting the intent that it be binding on anyone acquiring the Property other than by “sale” mentioned in the provision. “Effect must be given to all the words and clauses in an instrument if that be possible in reason, so that each is made operative and effective to some purpose.” *Wilson v. Poston*, 111 S.E. 873, 875 (S.C. 1922). Thus, the conclusion of the lower court that the obligation was personal to Henry fails to follow the rules set forth by our Supreme Court. The law of South Carolina should be followed and the intent of the parties, as determined by the language used in the Deed, should be enforced.

II. Henry’s son expressly assumed the FROR in the Quitclaim Deed.

The Opinion acknowledges that Henry’s transfer of the Property to his son by way of Quitclaim Deed [R. pp. 084-086 (herein the “Quitclaim Deed”)] was a gift that did not invoke the FROR. [Opinion at p. 2 fn 1]. The Kellys agree, as stated in the Opinion. [Id.] Thus, the Kellys did not have the right to match the \$5 consideration set forth in the Quitclaim Deed to exercise the FROR and repurchase the Property at that price. The FROR simply did not apply to the gift.

It follows that the FROR remained in effect. In fact, the conveyance of the property from Henry to his son by Quitclaim Deed transferred the FROR by expressly stating that the property conveyed is “subject to any *Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements* now of record . . .” [R. p. 085 (emphasis added)]. Because in this case the FROR was expressly included in the Quitclaim Deed from Henry to his son, this appeal does not require the Court to decide whether a conveyance in the absence of such language would have conveyed the FROR. Here, through the Quitclaim Deed, Henry assigned the FROR and it was expressly assumed by his son. Therefore, the FROR being enforced by the Kellys is the one ~~Appendix 218~~

assumed in the Quitclaim Deed, and it applies to the son's sale of the property. After the date of the Quitclaim Deed from Henry to his son, Henry was no longer relevant to the FROR.

III. Presence or absence of "successors, heirs or assigns" language is not relevant.

For the same reasons, the absence of "successors, heirs or assigns" language in the FROR provision itself is not relevant. South Carolina law does not prevent the FROR from being assigned and expressly assumed by another. Here, it was not only assigned by Henry, but expressly assumed by the son. Thus, the issue of the necessity of the "successors, heir or assigns" language in the absence of an express assignment and acceptance is not reached in this appeal.

The fact that a separate restriction on the Property to permit no more than one mobile home includes "successors, heirs or assigns" language has no relevance whatsoever. The language of that *use* restriction includes the language because it also specifies the "grantee" (Henry) by stating that "neither grantee nor his successors or assigns or heirs . . ." [Deed, R. p. 083]. In contrast, the language of the FROR does not refer to a grantee at all, as set forth above. Instead, it intentionally is not specific to the grantee, thereby making it apply to subsequent owners who did not obtain title by a sale. Because the grantee (Henry) is not mentioned in the FROR provision, there is no place for "successor" language and it is not necessary. This demonstrates the illogic of the holding that the FROR was personal to Henry.

Further, the language of the Deed *does* make it binding on Henry's heirs and assigns. A review of the entire Deed demonstrates that the premise of the holding below is faulty. In the habendum clause of the Deed it states that the "premises above mentioned" are conveyed to "Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever." [*Id.*]¹

¹ The Opinion finds that this contention was not preserved for review. [Opinion at p. 31] Appendix-219
However, the issue was raised at the trial court [see Transcript, R. pp. 140-143], and the lower

See, *First Carolinas Joint Stock Land Bank v. Deschamps*, 171 S.C. 466, 172 S.E. 2d 622, 624 (1934) ("the court will look to the entire deed to obtain the intention as to the meaning of the words used"). Accordingly, the premise of the lower court's decision is faulty because the entire deed, including the FROR provision, is expressly binding on Henry's heirs, successors and assigns:

IV. The construction of the language should avoid absurd results.

The Opinion finds "no merit" to the argument that the ruling below could lead to absurd results because Henry could have circumvented the bargained-for FROR by transferring the Property to his son immediately after receiving the Deed. [Opinion at p. 3]. However, the absurd result in the hypothetical obviously *could* have occurred under the interpretation adopted by the court. The fact that in this case it did not happen because sixteen years actually passed between the Deed to Henry and the Quitclaim Deed to his son does not change the policy of the rule of interpretation. The South Carolina rule of contract interpretation is based on whether the construction could lead to absurd results. If so, then such a construction is to be avoided. *Charleston & W. Carolina Ry v. Joyce*, 231 S.C. 493, 99 S.E. 2d 187 (1957) ("it is the policy of the Court to give a reasonable and equitable construction to a contract and avoid giving a construction that will bring about absurd results"). See also, *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 446, 82 S.E.2d 720, 722 (1971). Following that rule of construction under South Carolina law, an interpretation that could lead to absurd results, as here, should be avoided. Instead it was adopted.

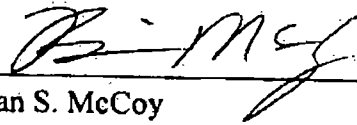
court's holding that the Deed on its face contains no language making it binding on the heirs or assigns of Henry constitutes a ruling on the issue by the trial court. [Order, R. p. 4] Appendix-220

Conclusion

Rehearing is required in this matter. For the reasons stated, the Opinion fails to follow existing South Carolina law in its interpretation of the language of the Deed. The Opinion should be revised to hold that the decision of the lower court should not be affirmed on the basis that the FROR was personal to Henry, and this Court should consider any remaining issues not addressed in the Opinion. After consideration of any remaining issues, the decision of the lower court should be reversed, and the case remanded to the court of common pleas.

Respectfully submitted,

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September 12, 2019

The South Carolina Court of Appeals

Edward R. Kelly and Deirdre O. Kelly, Appellants,

v.

Allen S. McCombs and Benjamin James Russell,
Respondents.

Appellate Case No. 2016-002176

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Laff

J.

Paula W. Thomas

J.

[Signature]

J.

Columbia, South Carolina

cc:

Brian Scott McCoy, Esquire
N. Beth Ramsey Faulkner, Esquire
Danielle Rose Scimeca, Esquire
James W. Boyd, Esquire

FILED

October 24, 2019

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