

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case Number 2019-001945

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

v.

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

REPLY TO RETURN TO
PETITION FOR A WRIT OF CERTIORARI

Brian McCoy
McCOY LAW FIRM, LLC
378 East Main Street
Rock Hill, SC 29730
(803) 366-2280
Attorneys for Appellants

Other Counsel of Record:

James W. Boyd
P.O. Box 36425
Rock Hill, SC 29732
(803) 328-2600

N. Beth Ramsey Faulkner
P.O. Box 1030
York, SC 29745
(803) 818-5700

Attorneys for Respondents

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S.C. SUPREME COURT

INTRODUCTION

The Court of Appeals in the Opinion below, and the Respondents in their Return, fail to acknowledge two significant facts that require a ruling in favor of Appellants and reversal of the Opinion below. First, the language of the FROR provision in issue (in the Deed) does not mention a “grantee” in any way. Instead, it states that “the grantors reserve unto themselves” a first right of refusal. No grantee is specified or even mentioned. Thus, the language used shows it expressly is not limited to a particular grantee. Yet, that is the basis for the Court of Appeals’ holding. Second, in the gift Quitclaim Deed from Henry to his son, the language expressly makes it “subject to . . . rights . . . now of record.” It cannot be disputed that the FROR was a right of record that was expressly assumed by the son in the Quitclaim Deed to him. In light of these facts, the legal conclusions in the Court of Appeals Opinion have no merit and should be reversed.

ARGUMENT

- I. **The Court of Appeals’ holding that the FROR was binding only on the Grantee Henry is plainly wrong because the FROR does not mention a grantee.**

The crux of the Opinion of the Court of Appeals is that “the right of first refusal was enforceable only against Henry McCombs.” [Appx. at p. 213]. The Respondents make the same contention in the Return. [See pp. 3-4]. But a reading of the plain language of the FROR demonstrates the illogic of the holding. The FROR provision reads 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.

Plainly, no grantee is mentioned or specified at all. Thus, the holding that the FROR is limited to a specific grantee, i.e. Henry, is illogical based on the language of *this* provision.

Certainly, a first right of refusal often states that it applies to the “Grantee,” but in this case no such language was used. Accordingly, the conclusions of the Opinion below make no sense. That is, it is perfectly logical that the FROR does not expressly include the words “heirs and assigns,” but the language in the Deed limiting the number of mobile homes¹ does use the words “heirs and assigns.” This is because the FROR does not use the word “grantee,” but the mobile home restriction does use the word “grantee.” [See Appx. at 084 (Deed) (“that neither the grantee nor any of his successors or assigns or heirs will place more than one mobile home . . .”).] Also, the citation in the Opinion below and in the Return to decisions from other jurisdictions holding that first rights of refusal are “presumed to be personal and are not ordinarily construed as transferrable or assignable” [Appx. at p.214 (Opinion); and Return at p.4] have no application because the language of *this* FROR is not personal to anyone. Again, a grantee is not mentioned in the provision.

As this Court has repeatedly stressed, the language used in the instrument is important, and indeed is controlling. “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). Moreover, 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

¹ The Court of Appeals misapplied the doctrine of statutory interpretation of *expressio unius est exclusio alterius*, which has no application in this case because the language in the mobile home restriction uses the term “grantee” but the FROR does not.

effectuate the intention of the parties, unless that intention contravenes some well settled rule of law or public policy”).

The Court of Appeals failed to follow this law, and should be reversed.

II. In any event, the son expressly accepted the Quitclaim Deed “subject to” the FROR.

An additional and separate reason to reverse the Court of Appeals is that in this case the Quitclaim Deed from Henry to his son was subject to the FROR. Therefore, whether or not the FROR was otherwise applicable to an assignee of Henry is not reached because the son expressly accepted the Quitclaim Deed with language that it was “subject to” rights appearing of record. The Quitclaim Deed includes a derivation statement that refers to the Deed to Henry, and specifically provides: “HOWEVER, subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record, if any.” [Appx p. 087; R. 085]. The FROR was a right appearing of record.

Thus, the intent of the son to assume the FROR is plainly stated in the Quitclaim Deed, and the decisions from other states cited by the Court of Appeals and the Respondents are not applicable. Under the circumstances of this case, the FROR applied to the son, and the Appellants should have been provided their rights under the FROR when the son sold the Property. The express assumption by the son is controlling. *See, Harbison Community Ass’n v. Mueller*, 319 S.C. 99, 459 S.E.2d 860, 862 (Ct. App. 1995) (although the deed did not reference a Declaration of Covenants, it did state that it was subject “to easements and restrictions of record,” which included the Declaration).

In their Return, Petitioners apparently cannot refute the fact that the son took the property “subject to” the FROR, so they again argue against the enforceability of the FROR [see Return at

pp. 1-2]. This contention was refuted in Appellants Final Brief [see Appx. at pp. 181-183], and was not even addressed by the Court of Appeals in its Opinion.

Accordingly, the “subject to” language in the Quitclaim Deed provides an additional reason to reverse the Court of Appeals.

III. The language of the habendum clause in the Deed to Henry and the rule of construction against interpretations leading to absurd results are additional reasons to reverse the Court of Appeals.

Appellants rely upon their previous arguments regarding the habendum clause of the Deed and the rule of construction against interpretations that could lead to absurd results. As yet another reason to reverse the Court of Appeals, the language of the Deed itself *does* make it binding on Henry’s heirs and assigns. The habendum clause of the Deed states that the “premises above mentioned” are conveyed to “Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever.” [Appx p. 085; R.083]. *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”).

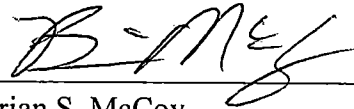
As set forth previously, the South Carolina rule of contract interpretation is based on whether the construction *could* lead to absurd results. If so, then such a construction is to be avoided. *Charleston & W. Carolina Ry v. Joyce*, 231 S.C. 493, 99 S.E. 2d 187 (1957) (“it is the policy of the Court to give a reasonable and equitable construction to a contract and avoid giving a construction that will bring about absurd results”). The Respondents contend that “no absurd results happened in this case” [Return at p. 4] because 16 years passed before Henry gifted the property to his son by Quitclaim Deed. Logically and practically, this fact is irrelevant. The rule of interpretation looks to whether the interpretation could lead to absurd results, and if so then such a construction should be avoided. *Id.*

CONCLUSION

For the reasons stated, the Opinion of the Court of Appeals fails to apply the plain language of both the Deed and the Quitclaim Deed, both of which make the FROR applicable and enforceable to the son's sale of the Property. The language of the FROR omitting a "grantee" makes the non-inclusion of "successors or assigns or heirs" language irrelevant, and the inclusion of such language in the separate provision limiting mobile homes also is irrelevant. The Court of Appeals simply misconstrued the language of the instruments, and failed to apply the doctrine of construction under South Carolina law to avoid absurd results. The Court of Appeals should be reversed, and the case remanded to the court of common pleas.

Respectfully submitted,

McCOY LAW FIRM, LLC



Brian S. McCoy

SC Bar No. 2155

378 East Main Street

Rock Hill, SC 29730

803-366-2280

Attorney for Appellants

December 31, 2019.

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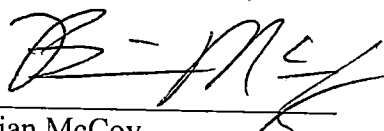
PROOF OF SERVICE

I certify that I have served a copy of the Reply to Return to Petition for a Writ of
Certiorari to the counsel of record for Respondents as indicated below on the date indicated by
First Class United States Mail, postage prepaid, addressed as follows:

James W. Boyd
P.O. Box 36425
Rock Hill, SC 29732
(803) 328-2600

N. Beth Ramsey Faulkner
P.O. Box 1030
York, SC 29745
(803) 818-5700

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