THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J. C. Nicholson., Circuit Court Judge

2020-UP-238
Case No. 2015-CP-10-03038
Appellate Tracking No.: 2017-002285

Barry Clarke.....Petitioner,

vs.

Fine Housing, Inc. and RRJR, L.L.C. .....Respondent,

Of which Fine Housing, Inc. is the ..... Appellant/Respondent.

PETITION FOR CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that Petitioner filed a Petition for Rehearing on August 21, 2020, and the Court of Appeals issued a ruling denying rehearing on September 21, 2020.

PETITION FOR CERTIORARI

As authorized by Rule 242 of the *South Carolina Appellate Court Rules*, the Petitioner respectfully requests that the Supreme Court grant certiorari to review the Court of Appeals' August 12, 2020, Opinion because the Court of Appeals overlooked and misapprehended two important, settled principles of law, and its holding is in conflict with settled South Carolina law as set forth in *Webb v. Reames, 326* S. C. 444, 485 S.E.2d 384 (Ct. App. 1997). Moreover, there are no published Opinions on the issues raised in this case, and thus the issue raised in this case is one involving a novel question of law, and, as set forth above, the unpublished Court of Appeals' decision is in conflict with an earlier opinion of the same Court.

STATEMENT OF THE CASE

This interesting case originates in 1999, when the Petitioner, Barry Clarke, signed a lease with Group Investment Company, Inc. (John and Robin Robinson), the predecessor of the defaulting defendant, RRJR. Barry Clarke and John Robinson were longtime friends and competitors, each owning an adult club on Pittsburgh Avenue in Charleston County. Robinson's club was located at 2028 Pittsburgh Avenue; Clarke is across the street at 2015 Pittsburgh Avenue. For self-evident reasons, each competing club permitted customers of the other to use each other's parking lot, and Petitioner and Respondent entered into a written lease that provided in exchange for an annual rent of $1,000.00, Petitioner's customers could park in Robinson's parking lot, and Robinson granted to Clarke a right of first refusal as follows: "Lessor grants Lessee the right of first refusal should it wish to sell." (R.O.A. Vol. 2, page 355 [Lease]) After the Petitioner signed the lease, he recorded it in the Office of the Register of Mesne Conveyances on January 17, 1999 at Deed Book C 319 at Page 791. (R.O.A. Vol. 2, page 355 [Exhibit 1])

(For convenience, the Petitioner refers to the Pittsburgh property throughout the petition as the "subject property" and Robinson's residence as the "Sol Legare property.")

As summarized above, the lease granted to the Petitioner two things: (1) a right for Petitioner's customers to park at 2028 Pittsburgh Avenue, and (2) a right of first refusal to purchase the property "should the [Respondent] wish to sell." (The Respondent had a reciprocal parking agreement for its customers to park on Petitioner's lot located at 2015 Pittsburgh Avenue, but that agreement is not involved in this action.) The Petitioner signed the lease in his individual capacity, and Robin Robinson, the defaulting defendant, signed the lease on behalf of the landlord as "President" of Group Investment Company, Inc., a company comprised of the husband and wife team of John and Robin Robinson. On February 19, 2007, for the consideration of $5.00, Group Investment Company, Inc. deeded the subject property to RRJR, L.L.C., one of the two defendants in this case, which were the same individual owners, John and Robin, doing business under a new name. (RRJR stands for Robin Robinson and John Robinson.) R.O.A. Vol. 2 page 434 [Exhibit 33]

In 2008, John Robinson died, and Robin Robinson took over managing his businesses, including the bar at 2028 Pittsburgh Avenue. Under her management, John Robinson's several enterprises floundered, and her financial condition deteriorated to the point that by 2012, she faced the loss of both the business as well as her home located at 2347 Sol Legare Road, Charleston, S. C. 29412 by foreclosure sale scheduled for December 3, 2013. (R.O.A. Vol. 1, page 266 [tr. page 99]) On December 2, 2013, the day prior to the scheduled foreclosure sale, and as part of a single transaction, Ms. Robinson executed a deed to the Pittsburgh Avenue property to the Respondent, Fine Housing Inc., for the sum of $150,000.00, which is recorded in the Register of Mesne Conveyances at Book 0377 on Page 843 on December 9, 2013. At the

same time as part of the same transaction, Robin Robinson also executed a deed to Fine Housing for the Sol Legare property, her home, for $700,000.00, which is recorded at Book 0377 at Page 369 (R.O.A. Vol. 2, pages 269 and 369 [Exhibit 3])

Fine Housing stipulated that neither Fine Housing nor RRJR notified Barry Clarke, Petitioner, of the proposed sale. (R.O.A. Vol. 2, page 228 and Vol. 2, pages 270 and 492 [tr. Page 61, line 13, 103, line 18 and stipulation]) Clarke testified he first learned of the sale when two of Robinson's employees, the "two Terry's," came to his house in March, 2014 and told him "something is up with the club." (R.O.A. Vol. 2, pages 307 and 312 [tr. Page 140, line 6 and 145, line 7]) When the respondent learned of the putative sale of the subject property, he made a demand upon the Fine Housing to transfer the property to him upon reimbursement of its consideration, and when that failed, Fine Housing and Clarke entered into negotiations that culminated in a proposed purchase contract on April 10, 2014, in which Clarke offered to exercise his right of first refusal and purchase the subject property for $650,000.00. (R.O.A. page Vol. 2, page 420 [Exhibit 16]) Fine Housing refused this tender, and when further efforts at negotiation failed, Clarke filed suit on May 28, 2015, seeking specific performance to enforce his right of first refusal. (R.O.A. Vol. 1, page 32 [complaint]) Fine Housing Inc. timely answered. RRJR never answered, and the respondent filed an Affidavit of Default with the Court on August 3, 2015, (R.O.A. Vol. 1, page 60 [affidavit of default]).

Both parties moved for summary judgment, which the Court of Common Pleas denied by written Order dated August 29, 2016. (R.O.A. Vol. 1, page 28) Thereafter, the Clerk of Court called the case to trial on July 26, 2017. After the trial, the Court entered a written Order on September 28, 2017, finding that the defendants failed to notify appellant of RRJR's intent to sell, and required the plaintiff to tender the sum of $350,000.00 within 60 days to Fine Housing

to exercise his right of first refusal. Fine Housing filed a Motion for Reconsideration on October 13, 2017, which the trial court denied by written Order dated October 20, 2017. (R.O.A. Vol. 1, page 1) On October 31, 2017, Fine Housing filed a Notice of Appeal, and on November 10, 2017, Clarke filed a Notice of Cross Appeal as to the trial court's calculation of purchase price. (R.O.A. Vol. 2, pages 482 and 483)

ARGUMENTS

1. THE COURT OF APPEALS FAILED TO APPLY OR EVEN CONSIDER THE APPLICATION OF THE SOUTH CAROLINA RECORDING STATUTE TO THE FACTS OF THIS CASE.

The trial court correctly relied on the South Carolina Recording Statute, § 30-7-10, S. C. Code, ann., but in reversing the trial court, the Court of Appeals overlooked and failed to apply the requirements of the controlling recording statute. The recording statute, as correctly relied on by the trial court, means:

> Every purchaser or mortgagee is regarded as having notice of documents properly recorded. Any properly recorded interest is valid as to subsequent purchasers without notice. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 662 S.E.2d 452 (S.C. App. 2008), *In Re Davis*, 490 Bkrtcy Rpts. (221 D.S.C. 2013)

The Court of Appeals correctly noted on page 2 of its Opinion that ". . . Fine Housing had refused to allow Clarke to acquire the Property in conformity with a lease (Lease)." (Opinion No. 2020-UP-238 at page 2) Significantly, the Court of Appeals never mentioned, analyzed, or applied the controlling provisions of the recording statute, § 30-7-10, S. C. Code, ann. In fact, throughout its Opinion, the Court of Appeals consistently referred to the Lease in question as a "Lease" but not, as the record establishes, a "Recorded Lease." This is a critical omission and distinction because Fine Housing, cannot complain about a putative ambiguity in a document it failed to review. As this Court noted in a different context (products liability), a party cannot escape negligence by

"turning a blind-eye to the obvious." ("A manufacturer may not avoid negligence liability by turning a blind-eye to the obvious." *Five Star v. Ford Motor Company*, 408 S.C. 362, 759 S.E.2d 139 (2014) The analogy to a manufacturer's duty in a products case is an apt analogue because in contract law, we find the same duty imposed on every party to a contract: the duty to read. "The law does not impose a duty on [Clarke] to explain to [Fine Housing] what he could learn from simply reading the document. *Burwell v. South Carolina National Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986); *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)" *C. & S. National Bank v. Lanford*, 313 S.C. 540 (1994) (Guaranty enforceable even though signatory claimed Bank did not explain it.)

Not to put too fine a point on it, but the Purchaser is the author of its own dilemma by not examining the documents that the law requires it to examine. As the Court of Appeals noted, Fine Housing rushed the transaction, which prevented a meaningful examination of title, and by doing so, it cannot turn a blind eye to the facts as they are recorded and simultaneously complain that the recorded lease was not specific enough for it to act. The record demonstrates that the Respondent, Fine Housing, rushed the transaction in order to capitalize upon Robin Robinson's weak financial position. See the Settlement Statement in the Record on Appeal Vol. 2, page 261 [tr. Page 94, line 12 and 104, line 10] and Vol. 2, page 373 [Exhibit 4, Settlement Statement]. As the Settlement Statement demonstrates (and as Fine Housing admitted at R.O.A. Vol. 2, page 261 [tr. Page 94, line 12 and 104, line 10]), while the $850,000.00 loan cleared up all the tax liens and judgments, in fact, Fine Housing held back $35,000.00 out of the "purchase price" for itself as a security deposit for Robinson's performance of the parties' buy-back agreement. (Fine Housing also sold the Sol Legare property for $500,000.00.) DeStaso also paid himself $5,500.00 for acting as "broker," and he also paid $9,311.00 to cover his personal insurance premiums. See Record on

Appeal Vol. 2, page 269 and 273-274 [tr. page 102, line 19 – 105, lines 20-22, and page 106, line 4 – page 107, lines 5-8]. The record also demonstrates that Fine Housing allowed Robinson to recover the property in 24 months for the sum of $1,250,000.00, which is equivalent to a 40% rate of interest. (R.O.A. Vol. 2, page 443 [Exhibit 35]). The entire transaction is summarized in the settlement statement found at Vol. 2, page 373 of the Record on Appeal. [Exhibit 4], and likewise the record contains abundant evidence of Fine Housing's predatory intent such as the exchange between Vincent DeStaso and his broker, Mark Alfredo: "I think they'll be coming back around" because "I was told that they were unable to find anybody to invest given the problems that were there." (R.O.A. page Vol. 2, page 205 [tr. Page 38, lines 8-19])

The Court of Appeals gave no weight to this indisputable evidence of sharp practice and overreach even though well-established case law, also overlooked by the Court of Appeals, does not permit a party to complain about an alleged ambiguity in a document it never bothered to examine no more than a motorist can hope to avoid a speeding ticket by claiming she did not see the sign, and such negligence should never provide a shield for the predatory conduct exhibited by Fine Housing in this transaction. Opinion 2020-UP-238 rewards a sophisticated real estate developer for its own negligence and unethical conduct.

2. IF THE RIGHT OF FIRST REFUSAL IS AMBIGUOUS, THEN THE AMBIGUITY MUST BE CONSTRUED AGAINST THE DRAFTER.

As set forth above, Fine Housing chose to rush its transaction to purchase the property—a point acknowledged by the Court of Appeals—and it did not avail itself of an opportunity to examine title before going forward with the transaction. Even though there is nothing ambiguous or complicated about the right of first refusal in the recorded lease, if it were ambiguous, then such ambiguity is subject to clarification by parole testimony. Fine Housing offered nothing, nor could

it, that provides the Court with evidence to shed light on an alleged ambiguity. On the other hand, Clarke testified in depth about the negotiations leading up to the right of first refusal, the reason for it, and in particular how it was bargained for at arm's length and beneficial for both parties, facts ignored by the Court of Appeals. The right of first refusal says simply, as the Court of Appeals noted, that if the Seller decides to sell, it will give Lessee an opportunity to purchase the property at a matched or greater price. The requirements to exercise the right required nothing more than for either the seller or purchaser to notify Clarke of the proposed sale, and Fine Housing stipulated no one did this. Because the right of first refusal is not elaborately constructed does not render it invalid, especially where, as here, the time of performance and the purchase price is controlled exclusively by the Seller as the trial court found:

> It is well established in this state that time is not of the essence of a contract to convey land unless made so by its terms expressly or by implication from the nature of the subject matter, the object of the contract or the situation or conduct of the parties. When the contract does not include a provision that time is of the essence, the law implies that it is to be done within a reasonable time; and the failure to incorporate in the memorandum such a statement does not render it insufficient. *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948).
>
> *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989)

As set forth above, even if there were some ambiguity in the document, the ambiguity must be construed against Fine Housing and in favor of Clarke because Fine Housing stands in the position of the Lessor who controlled the terms of the Recorded Lease and for whom the law charges with knowledge of the recorded lease:

> We reject the suggestion of an ambiguity. In any event, were we to entertain the idea of an ambiguity, such ambiguity would have to be construed against the Bank which drafted the agreement. *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting the rule of contract interpretation that an ambiguous contract will be construed against the drafting party); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.").

Duncan v. Little, 384 S.C. 420, 682 S.E.2d 788 (2009)

Of course, if the contractual, right of first refusal, were ambiguous, then this issue becomes an issue of fact that must be resolved by the trier of fact, and, as the Court of Appeals noted in its Standard of Review: "this [c]ourt is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." (Opinion at page 3) Assuming *arguendo* there is an ambiguity, the resolution of any such alleged ambiguity is a question of fact:

See *S.C. Dep't of Nat. Res. v. Town of McClellanville* , 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). When a trust is susceptible of more than one reasonable interpretation, a motion for a directed verdict should be denied. See *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC* , 374 S.C. 483, 489, 649 S.E.2d 494, 497 (Ct. App. 2007) ("If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created . . . . ")

Harbin v. Williams, 429 S.C. 1, 837 S.E.2d 491 (Ct. App. 2019)

Here, the Court of Appeals never addressed whether the right of first refusal is or is not ambiguous. Instead, the Opinion under review asserted an unsupported conclusion that the "[Recorded] Lease did not specifically set forth whether the Right of Frist Refusal applied to the leased parking spaces or the entire property; the Lease did not specify how the price of the Property would be determined for the Right of First Refusal; and the Lease did not state a time for exercising the Right of First Refusal." (Opinion at page 6) The Court's conclusion is not supported by the record as the recorded lease contains the **exact legal description** of the entire parcel, specifically identifying what the Lease covers in precise metes and bounds. As for the Court of Appeals' list of putative missing elements, South Carolina law demonstrates that the failure to specify these terms does not create an ambiguity because the Court must read the document as a whole. It is clear the recorded lease means that if the Robinson's decided to sell, they would give Clarke an opportunity

to match or beat the offer. The Court of Appeals' unexplained conclusion that the right is defectively vague is neither accurate nor supported by the record because the Recorded Lease clearly provides for the use of ½ of the parking lot during the life of the lease and the opportunity to match a tendered purchase price "should it wish to sell." (Opinion at page 4 quoting Recorded Lease) The Recorded Lease contains the exact legal description of the entire parcel, and the Court of Appeals overlooked this important part of the whole. It is indisputable that the Lease defined the property that the Right applied because the Recorded Lease carefully appended to it the exact legal description of the entire property, and it is the sale of the property that triggers the right, not the sale of ½ of parking. Not only did the Court of Appeals overlook the legal description in the lease, but also it overlooked how the price is determined by any acceptable offer made to the Seller by a third party "should it wish to sell." Finally, the time for performing is a reasonable time implied by the contract unless it made time of the essence and set a deadline. *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989) These facts and this law are uncontested, and even if they were not, they certainly were within the purview of the trial court on which to make findings, sitting as the fact finder weighing the believability and credibility of the evidence. To do this, the trial must weigh the evidence and weigh the credibility of the witnesses, two bedrock principles of jurisprudence, which the Court of Appeals ignored. By abandoning its duty to enforce the terms of the contract as written requiring adherence to its terms, the Court of Appeals ignored the evidence, failed to examine the Recorded Lease as a whole, and disregarded well established precedent that governs the manner in which courts enforce contractual rights.

3. THE COURT OF APPEAL'S RELIANCE ON *WEBB V. REAMES* VIOLATES *STARE DECISUS* BECAUSE *WEBB V. REAMES* STRUCK DOWN A RIGHT OF FIRST REFUSAL BECAUSE IT VIOLATED THE RULE AGAINST PERPETUITIES.

In determining that the Clarke Right of First Refusal is not enforceable, the Court of Appeals deviated from controlling precedent. First, a right of first refusal is **not** a restraint on alienation. A right of first refusal does not inhibit or restrict a property owner in any manner, and as the trial court found, it enhances the value of property by guaranteeing that a seller will always be assured of two potential purchasers vying for the right to purchase. More importantly, the Court misplaces its authority on *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997) because *Webb* struck down a right of first refusal because it ran afoul of the Rule Against Perpetuities. Here the Recorded Lease is carefully drawn to avoid the Rule. The Recorded Lease runs from January 8, 1999 until the 6th anniversary after Clarke's death. (R.O.A. Vol. 2, page 355) Thus, it could not possibly violate the Rule Against Perpetuities as did the Lease in *Webb v. Reames*:

> The right [of first refusal] represented an attempt by the grantor Blease to reserve to himself, his heirs, and assigns a perpetual option to purchase the property described at the price of $64. Because the right or interest was one that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter, the interest violates the rule against perpetuities and is therefore void.

The Recorded Lease in this case specifically limits the right of first refusal to the lifetime of the lease and no more than 6 years after Clarke's death, so it is specifically drawn to avoid the Rule Against Perpetuities. Therefore, the right is enforceable, and unlike the Right of First Refusal struck down in *Webb*, the **purchase price is determined by any price being paid by any third party**. Thus, under the Court of Appeal's own reasoning: "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," the right of first refusal is valid. Here, the uncontested facts demonstrate that the Right of First Refusal fulfills all of these criteria. First, there is nothing in the record suggesting the right is illegitimate, and it is beyond

dispute that the existence of the right impairs any rights of the Seller. Second, the owner alone determines the purchase price, and she can sell at any price she chooses. In *Webb*, **the purchase price was fixed**, which is a restraint on alienation. Third, and most importantly, the procedure for exercising the right is simple and solely determined by the Seller. As the *Restatement (Third) of Property (Servitudes)* § 3.4 says: "A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy." The record here establishes that there is nothing illegal, unconstitutional, or a violation of public policy in this case. The test for "reasonableness" under the *Restatement's* formulation is as follows: "Reasonableness is determined by weighing the utility of the restraint against injurious consequences of enforcing the restraint." § 3.4 "Direct restraints" Here, the trial court found—and the Court of Appeals tacitly agreed—that the right of first refusal enhanced Seller's ability to sell by guaranteeing a minimum of two competing purchasers at any time Seller wished to sell. The Court of Appeals did not make a specific finding on this point, but it is uncontestable that there is not a *scintilla* of evidence in the record to the contrary. As stated above, Fine Housing asks this Court to indemnify it from its own lack of due diligence and promote its sharp practice, and that is never the function of the Court in construing contracts. The function of the Court is to enforce the agreement as written. "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 428 S.E.2d 705 (1993). The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. *Id.*" *Ellis v. Taylor*, 449 S.E.2d 487, 316 S.C. 245 (S.C. 1994) Fine Housing is a sophisticated real estate speculator, and it knew the risks of hurrying a transaction to take advantage of a weak Seller, and by providing cover to Fine Housing for its

sharp practice violates established legal precedent as well as violates public policy to reward a sophisticated developer for engaging in sharp practice. To do this, the Court of Appeals departed from established precedent and failed to adhere to the Courts' traditional function of formulating sound public policy.

Conclusion

For the above reasons, the Petitioner respectfully submits that the Court of Appeals overlooked these important legal considerations, including misapplying the holding of *Webb v. Reames* to the facts presented in this case. The Petitioner prays, therefore, that the Court grant certiorari in this case, permit oral argument and reverse the Court of Appeals' Opinion No. Opinion 2020-UP-238 to affirm the trial court's decision to enforce the right of first refusal and require the Respondent to convey the property to the Petitioner for the sum of Respondent's purchase price of $150,000.00

Respectfully submitted,

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