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
Appellate Tracking No.: 2020-001371

Barry Clarke...Petitioner,

vs.

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

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

PETITIONER'S REPLY TO RESPONDENT'S RETURN FOR PETITION FOR CERTIORARI

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As authorized by Rule 242(g) of the *South Carolina Appellate Court Rules*, the Petitioner files this brief Reply to Respondent's Return.

REPLY 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 Respondent's well written Return deploys a shadow syllogism. In elementary sentential logic, the syllogistic construct known as "*Modus Tollens*" is stated thus:

If "p" then "q."	$(p \supset q)$
Not p.	$(-p)$
Therefore not q.	$(\because -q.)$

"*Modus Tollens*" is a Latin abbreviation for the thing is proved by disproving. However, despite adopting the form of a syllogism, Respondent's logic is derailed by a double negative in the middle term thus: "I cannot be bound by what I did not read." (As explained below, the Respondent's argument is that the Right would have been enforceable had he been a signatory.) The fallacy is exposed because Respondent fails to account for the Recording Statute, § 30-7-10, S. C. Code, ann., which charges Respondent with knowledge of the right of first refusal; in other words Respondent's second term, "Not p." (—p) is a double negative (I cannot be charged with what I did not read) and the whole syllogism falls apart because a double negative yields the positive: I am bound by what I read. In other words, a party cannot complain about an alleged ambiguity/deficiency in a document he never bothered to examine.

This logical fallacy comes into sharper focus on page 5 where Respondent asserts: "The rationale that Petitioner pieces together . . . **might make sense if Petitioner had signed the Lease**. But it did not." (emphasis added) Precisely, and this is where the recording statute does triple duty:

not only does it control the outcome of this case, but also it illuminates Respondent's invalid syllogism and the Court of Appeals' error because the undisputed application of the recording statute charges Respondent with knowledge of the Lease whether he read it or not. Respondent's Return concedes this. Thus, when Respondent professes to not comprehend why Respondent's sharp practice is relevant (Respondent's Return at page 4: "Petitioner never explains how those business practices factor into the application of the Recording Statute"), the fog clears when the Court evaluates how the Respondent's sharp practice created his inability to examine the title properly, and thus it becomes fundamentally relevant because he is asking this Court to shield him from the inequitable circumstances he created. As the Record on Appeal demonstrates, Respondent factored in Robin Robinson's precarious financial situation and exploited it: "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. Vol. 1, page 205 [tr. Page 38, lines 8-19] This evidence refutes Respondent's assertion on page 8 of its Return that the timing of the transaction was not Respondent's choice—he waited to the last possible moment to exploit the situation. Respondent manipulated the timeline in order to prey upon and exploit Robin Robinson and force her to surrender to his terms and asked a Court of Equity to provide the torque for his sharp practice. In order to do this, he must contend the recording statute has no application to this case while simultaneously agreeing he never examined the title. Or, as a fallacious logician, with apologies to George Berkeley, might construct it:

If a right of first refusal exists, but I never saw it.

Therefore, I cannot be bound by it.

On page 5, the Respondent inverts his own argument—hedging his bet—conceding that the Respondent **is** charged with knowledge of the Right of First Refusal, "but only if the Petitioner had properly and timely invoked it." The record in this case proves that the Petitioner immediately attempted to exercise his right of first refusal as soon as he learned that the property might be changing hands. The timeline is undisputed:

December 2, 2013	Destaso loans Robinson $850,000.0 (Robinson pays rent of $12,500.00 per month for 24 months and lump sum of $1,250,000.00, 40%, to reacquire property)
March 2014	The "two Terry's" visit Clarke and tell him "something is up with the Club" (R.O.A. Vol 2, page 312)
February 19, 2014	Robin Robinson sues Respondent to rescind the loan/sale. (R.O.A. Vol. 2, page 403)
March 2014	Clarke attempts to contact DeStaso to exercise right for $650,000.00 (R.O.A. Vol. 2, page 308, line 20–309, line 13)
April 10, 2014	Clarke sends offer of purchase (R.O.A. page Vol. 2, pages 420 and 422
January 9, 2015	Robin Robinson dismisses her suit to rescind contract R.O.A. Vol. 2, page 413
May 28, 2015	Clarke files suit for specific performance

Inasmuch as the parties stipulated that no one provided notice to Clarke of the impending "sale," the above timeline summary demonstrates that there is no issue of timeliness, and, as Respondent concedes, not only did he abandon any objection to timeliness at trial, but also the Court of Appeals reversed on one ground; to wit, it found the right of first refusal too vague to enforce, not because it was a restraint on alienation. On page 10 of its Return, Fine Housing argues Petitioner "waited . . . until April 13, 2015, more than a year after he learned of the transfer to Fine Housing on March 21, 2014, to formerly invoke the Right of First Refusal." The timeline and

undisputed record shows otherwise. Why this issue keeps coming up is a mystery because Respondent abandoned it at trial.

The Respondent's final example is a reliance on a hypothetical Lease containing a clause requiring conveyance on the third anniversary of the lease. (Respondent's Return at page 6) This example sheds no light on the issue before the Court because, as set forth above, the Seller controlled the terms of sale, and in order for a deed to be an effective transfer, it must conform to strict legal requirements requirements. South Carolina's caselaw is littered with the carcasses of lawyers who overlooked the technicalities required to make an effective transfer of real estate. Cases such as *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 159 S.E2d 46 (1968), which invalidated a deed because the granting clause conveyed a fee simple absolute while the *habendum* attempted to cut down on the fee by requiring a reversion under certain circumstances, is a perfect example of how deeds must adhere to precise technical execution to be effective. However, a right of first refusal does not require precise language like a deed. Rather, it is a contract by which parties agree to terms of notice, and the parties here stipulated that no one provided notice to Clarke. Whether Robinson failed to provide notice because she regarded the transaction a loan and not a sale, or whether she overlooked it because she took over management after her husband died, or whether she neglected to provide notice because she is a careless business operator is immaterial to Clarke's right to receive notice, and neither the Respondent nor the Court of Appeals explains how the obligation to provide notice disappeared. The only issue, overlooked by the Court of Appeals, is that the right of first refusal was properly recorded, and DeStaso proceeded at his own peril when he chose not to examine the title because he was involved in predatory lending.

Reply to Argument 2. The Right of First Refusal is enforceable.

The Respondent violates logical principles a second time: this time again succumbing to a double negative: "The Right is not invalid because it is ambiguous; it is invalid because it lacks essential terms." (Respondent's Return at page 7.) According to *Webster's Seventh New Collegiate Dictionary*, "ambiguous" means: "doubtful or uncertain especially from obscurity or indistinctness." Petitioner fails to explain how "lacking essential terms" is differs from "ambiguous." The essential terms are set forth with precision and clarity: "Lessor grants Lessee the right of first refusal should it wish to sell." (R.O.A. Vol. 2, page 355)

Before we turn to an analysis of whether this right of first refusal contains the necessary essential terms, some mention is required of Respondent's self-refuting argument. In argument 1, the Respondent asserts that the Right may have some applicability to him if he had been a signatory to the document, but in Argument 2, the Respondent asserts that in evaluating the validity of the Right of First Refusal, the Court is required to "determine the parties' intent." The record in this case presents full evidence of the parties' intent. Mr. Clarke testified at length that the intent of the Lease was to promote the business of both businesses by allowing shared parking and to make sure that John Robinson always had two prospective purchasers any time he wished to sell. Since Respondent argued forcefully in Argument 1 that the Right is not enforceable because he was not a signatory to the Lease, he cannot shift his position in Argument 2 to assert that his intent is in any way relevant.

In Argument 2, the parties do reach common ground. The Court of Appeals did reverse the trial court for the three grounds cited by the Respondent. The Court of Appeals found three insufficiencies:

(1) a description of the real property encumbered;

(2) the price at which the Right can be exercised; and

(3) the time for exercising the Right. (Respondent's Return at page 7)

The record refutes all three. First, as to the first, insufficient description, the Court of Appeals overlooked the indisputable fact that the recorded Lease has the exact legal description of the property subject to the option as recorded as part of the Lease, including, but not limited to, both a legal description and a plat showing metes and bounds. (R.O.A. Vol. 2, pages 366-368) There is no more precise description possible. Similarly, the Court of Appeals overlooked the application of its own holding in *Webb v. Reames,* where the Court found an option to purchase to be a restraint on alienation because it **fixed the price**! Here, by contrast, the option is carefully drawn to make sure that the price of sale is controlled solely by the Lessors, Robinsons. Under the holding of *Webb v. Reames*, if the Right of First Refusal fixed the price, then the Right would be invalid as a restraint on alienation. However, as the Record demonstrates, the Right of First Refusal is drafted to favor the property owner by maximizing the sales price, and it is not a serious criticism to assert that by allowing the owner to set her price, the Right of First Refusal is too indefinite or a restraint of alienation. Arguing that no fixed price is a missing essential element is a self-refuting argument. Under *Webb,* fixing the price would invalidate the Right. In the restraint on alienation case relied upon by the Court of Appeals, *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997), the Court struck the Right down because it **limited** the purchase price: "The right 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." By contrast, Robinson drew his to maximize the price, a procedure that favors him.

The third and final alleged insufficiency, time of performance, is likewise a hollow criticism. Just as with the price, the time of performance is controlled entirely by the seller, not the buyer. The Right of First Refusal preserves the Seller's control: "Lessor grants Lessee the right of first refusal **should it wish to sell**." (emphasis added) Thus, if the Robinsons came to Clarke and said: "I have an offer for Four Million Dollars payable in 30 days, then in order to exercise his Right he would have to meet that. This principle is clear in the case cited by the Respondent (and relied upon by the Court of Appeals) as authoritative, *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997): "A preemptive right merely requires the owner, when and if he deicides to sell, to offer the property first to the holder of the preemptive right so that he may buy at a price set out in the pre-emption agreement."

Thus the price, time of performance—subject to the exclusive control of the seller—and the precise legal description are all contained in the recorded Lease. The Respondent seeks to manufacture ambiguities/deficiencies to support his argument that the Right of First Refusal is unenforceable. For example, in another example of working both sides of a question, the Respondent, suggests that the transaction is "complicated" because the transaction involved "other real property not controlled by the Lease." (Respondent's Return at page 9) The Respondent attempts to throw shade on the circuit court's effort to do justice to the parties by adjusting the purchase price notwithstanding the fact that the Respondent, who was in complete control of the transaction, purchased it for $150,000.00. (The Respondent also "purchased" Robinson's waterfront property for $700,000.00. R.O.A. Vol 2, page 369 [deed]) In light of the recorded deeds, Respondent can hardly complain about the amount of money he paid for the property, especially since every recorded deed in South Carolina is required to be accompanied by a sworn "Affidavit of True Consideration." Thus, when Respondent writes at pages 9-10 that "Petitioner's claim that

there was an 'obvious' method for determination the price at which he could exercise the Right (R. p. 321) is not based on what the parties to the Lease negotiated and is contradicted by this wide rang of suggestions of the price at which Petitioner could exercise the Right," the Respondent overlooks the inescapable conclusion that the selling price is controlled exclusively by the Seller. The Respondent is correct—the price of acquisition is set by the Lease, and pursuant to the terms of the Lease, the price of acquisition is $150,000.00 because that is what the Respondent paid for the property. The trial judge exercising his equitable discretion increased the acquisition price to $350,000.00, a decision which the Petitioner cross appealed, an issue the Court of Appeals obviously never reached. Frankly, Fine Housing's appeal of this erroneous decision seemed shocking at the time, and in light of what has happened to retail businesses across the country, seems exponentially shocking today.

Finally, Respondent circles back to "intent," even though he previously argued that because his client was not a signatory to the document, "intent" cannot be applied to him. If this is Respondent's argument, then any discussion of intent is irrelevant. Obviously, such an argument is a throwaway argument because Respondent spends a lot of time arguing that the intent of the agreement is unclear. However, Petitioner provided detailed evidence about the parties' intent at R.O.A. Vol. 2, pages 303-304, never more clearly summarized than at page 303, lines 3-8, as part of Petitioner's explanation that a right of first refusal benefits both the Lessor and the Lessee:

Q. In your view, does the right of first refusal inhibit the ability to sell the property or does it promote the ability to sell the property?

A. It promotes it. Well, it doesn't inhibit it, but it gives the owner of the property a better shot at getting more money.

For purposes of evaluating whether this Court should grant certiorari or not, the Court of Appeals did not reverse on any finding surrounding intent, but rather on the ground that the right of first refusal did not contain "essential terms." However, the record demonstrates that all the "essential terms" are within the Lessor's sole power to control, and thus the Right of First Refusal provides all the essential terms to be valid, and the Court of Appeals erred in reversing the trial court.

Reply to Argument 3.
The Court of Appeals misapplied *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App.)

Once again, the parties reach common ground. Respondent argues correctly that property rights are akin to a bundle of rights. Where this metaphor comes from is the subject of debate, but for purposes of this Petition for Certiorari, the parties agree that one of the "sticks" making up the "bundle" of rights of property is the right to sell to whomever whenever at whatever price a property owner chooses. Thus from this common ground, we climb to the next common rung of analysis by agreeing with Respondent that the Court of Appeals in *Webb* struck down the right of first refusal, not only because it violated the Rule Against Perpetuities, but also because **"it provided a fixed price at which the right could be exercised."** (Respondent's Return at page 12, emphasis added) Thus Respondent makes Petitioner's argument for him. Here, the Right of First Refusal (1) does not violate the Rule Against Perpetuities, and (2) does not fix the price for the Seller. Instead the owner/Lessor is in complete control of (1) when the property will be sold, and (2) at what price. As both the record and common sense dictate: the right of first refusal in this case maximizes the return to the Owner. Here, as Respondent argues, the Petitioner attempted to exercise his right on April 10, 2014, for $650,000.00, a considerable (400+%) increase over the $150,000.00 paid by Fine Housing. The Respondent calls these indisputable facts "semantics" (Respondent's Return at page

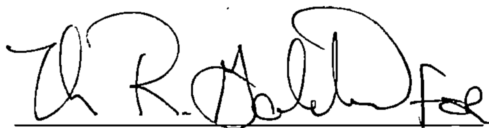
13), and it is impossible to conclude that these facts do anything other than enhance the Lessor's ability to sell the property. (Respondent also repeats the same alleged ambiguities or open ended terms discussed above in Reply Argument 2, and there is no need to repeat the reply to those assertions here.) It is both farfetched and unsupported by the record to construe the Right of First Refusal in this case as any kind of a restraint on alienation.

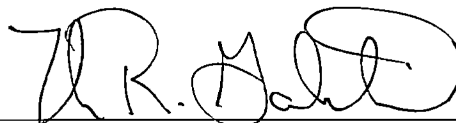
Conclusion

For the reasons set forth in Petitioner's Petition for Certiorari, the Petitioner respectfully submits that the Respondent's Return does not excuse the fact that the Court of Appeals overlooked these important legal considerations, including misapplying and improperly relying on 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 as alleged in Respondent's Cross Appeal.

Respectfully submitted,

November 20, 2020





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