THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Barry Clarke..... Respondent/Appellant,

vs.

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

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

FINAL REPLY BRIEF OF RESPONDENT/APPELLANT

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STANDARD OF REVIEW

"Because this case requires us to answer a question of law—whether equitable estoppel may be used to prevent the enforcement of an unambiguous contract—we apply a different standard of review than in the typical fact-based challenge to summary judgment." *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017). In general, the appellant cites the correct standard of review citing *Wachovia Bank Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014), but cites the standard as if it were in a vacuum. In an appeal from a non-jury trial in equity, this Court can review the record and find its own facts, but this does not mean the appellate court ignores the findings of the trial court who had the opportunity to observe the witnesses and judge their credibility and believability: On appeal from an action in equity, this Court may find facts in accordance with its view of the preponderance of the evidence. *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, we need not disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses. *Tiger, Inc. v. Risher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989) *Walker v. Brooks*, 414 S.C. 343, 778 S.E.2d 477 (2015) The admission or exclusion of evidence is within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal absent an abuse of discretion. [citations omitted] An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. [citations omitted] *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005)

REPLY ARGUMENTS

I. The appellant/respondent asserts a mutually exclusive view of the right of first refusal that is the subject of this litigation.

On page 2, the appellant/respondent writes: "This case is not about contract interpretation; it is about the creation of a valid interest in real estate." Written—and recorded—documents are the legal instruments crafted for "the creation of a valid interest in real estate." Parties create valid interests in real estate through contracts, deeds, mortgages, various liens, *etc.* Parties can even create an inchoate, but temporary, valid interest in real estate by filing a *lis pendens*. The appellant/respondent's legal position on Clarke's "valid interest in real estate" is bi-polar. On the one hand, appellant/respondent concedes "it had constructive, record notice of the Lease," (Brief at page 2), but simultaneously asserts "Clarke's contract analysis of the right of first refusal . . . is only a valid analysis of any dispute he may have with Group Investment." (Brief at page 2.) First, Clarke sued Group Investment, by suing its successor, RRJR, and RRJR defaulted. As the successor of Group Investment, RRJR is the real party in interest. See Rule 17, *South Carolina Rules of Civil Procedure,* and Fine Housing cannot assert otherwise. Second, and this is the bi-polar part, since Fine Housing concedes the right of first refusal is properly recorded, and concedes that it had constructive notice, it cannot escape the effect of the South Carolina recording statute, § 30-7-10. This is the entire case in a paragraph.

Instead of addressing these unchallenged facts, the appellant/respondent argues that the right of first refusal is "ambiguous." Fine Housing cites *Poynter v. Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010) and *Stonhard Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005), yet *Poynter* involves the trial court adding a geographical limitation in a non-compete agreement that was not there:

Neither this Court, nor the Court of Appeals, has directly addressed the authority of a court to decrease the geographical limitations in an overly broad non-compete agreement. However, this Court has held that it would violate public policy to allow a court to insert a geographical limitation where none existed. See *Stonard, Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005). *Stonhard* held that such a reformation would be void, as it would add a term to the contract that the parties neither negotiated nor agreed to. *Id.* The Court of Appeals has held that it would be impermissible to extend the non-compete period contained in the agreement as a remedy for its breach, since such an extension "would essentially rewrite the parties' contract, a service the courts of South Carolina do not perform." *MailSource, LLC,* 356 S.C. at 369, 588 S.E.2d at 639 (Ct.App.2003).

. . .

These cases stand for the proposition that, in South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms. We hold, therefore, that the trial judge erred in rewriting the territorial restriction in the parties' contract.

Thus, these cases do not support appellant's assertion that the Court had to "re-write" the Lease to enforce it. Rather, the cases cited by Fine Housing further support Clarke's legal position and drive home the point that the trial court erred in requiring the respondent/appellant to pay more than Fine Housing's purchase price. The decision to require Clarke to pay more is the type of "judicial re-writing" forbidden by *Poynter.* Since the right of first refusal is recorded, and since the right of first refusal is clear (Fine Housing asserts a false equivalency between succinct and ambiguous), the South Carolina Recording Statute compels the result. Even, *arguendo*, if the right of first refusal were ambiguous, the ambiguity does not render it unenforceable. It means only the Court takes testimony to ascertain the parties' intentions. "Construction of an ambiguous contract is a question of fact to be decided by the trier of fact." *Id.* (citing *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997)). *Wallace v. Day*, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010)

Instead of *Poynter*, the Court of Appeals' case, *Regions Bank v. Wingard Properties, Inc.*,

394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011), presents an analysis in a case closer to the facts presented here. There, this Court applied the Recording Statute and principles of equity to affirm the trial court's decision to grant the defendant a priority mortgage over Regions Bank because the trial court found that Regions Bank knew of the mortgage because it required Wingard to sell the property (Lot 38) as a condition of receiving its lending commitment. "Utilizing the above equitable principles for guidance, the trial court noted Regions Bank made its loan to Wingard in reliance on the purchase contract and down payment made by Covington." The only difference between Regions Bank and Fine Housing is that Regions Bank had actual knowledge, in fact a condition precedent, and Fine Housing had constructive knowledge. The implementation of Fine Housing's analysis works a forfeiture of Clarke's rights under the record lease. Not to put too fine a point on it, but Clarke did everything right, and Fine Housing did everything wrong. This record presents an unmistakable record of Fine Housing's overreaching and sharp practice. Or, as this Court said in *Regions*: "Courts should also balance other equitable concerns when deciding whether a party is entitled to an equitable lien." *Regions* at page 354. Clarke, of course, does not have an equitable lien; he has a recorded right of first refusal, and Fine Housing seeks to avoid its impact because it overlooked it. There is no equity in appellant's legal position. § 30-7-10 compels the outcome as the trial court found. There is nothing ambiguous about the right of first refusal, and Fine Housing set the purchase price as $150,000.00 for the property. The trial court erred in not applying appellant's calculation of value.

II. The excluded evidence is admissible and relevant.

As Kris Kristofferson might have written, relentless is just another word for zealous. Fine Housing asserts: "The details of the transaction between Fine Housing and RRJR have absolutely no bearing on the validity of Clarke's interest in the Property or Clarke's attempt to enforce his

interest in the Property." (Brief at page 3) This assertion is incorrect for two reasons.

First, Clarke filed suit for specific performance, an equitable claim based on the recorded right of first refusal. Fine Housing's conduct throughout the transaction shines a powerful light on the equitable factors in the case. Fine Housing's sharp practice led to its dilemma, and if there is one overarching principle of equity, it is that the courts do not reward litigants for inequitable actions. In short, Fine Housing seeks to profit from its own wrongdoing. This record bursts at the seams with evidence of Fine Housing's sharp practice and shifting legal positions, and the excluded evidence, Exhibits 5, 6, 7 and 8, demonstrated it. If the right of first refusal is invalid, then there is no need to sue the closing attorney for missing it. (Exhibit 30) However, Fine Housing lacks confidence in its legal position, and its inconsistent acts are admissible to show "evidence of character." See Rule 608(c): "Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Evidence otherwise adduced includes evidence of Fine Housing's alternative theories of recovery because they are mutually exclusive.

The logical weakness of Fine Housing's argument may be probed by means of a simple thought experiment: if Fine Housing had conducted a proper title exam and discovered Clarke's right of first refusal, it would not have consummated the transaction. No lawyer would close that transaction without first obtaining a release:

Q Okay. Now, if you had had the luxury of the proper amount of time, would you have reviewed the lease since you now know there is a least recorded?

A Yes.

Q And if you had become aware of the right of first refusal, would you have closed the transaction or would you have taken additional steps?

A I would have immediately called Mr. Destaso and discussed it with him on whether to

move forward or cancel the closing.

Q Okay. And you did not do that in this case?

A No.

Q Because you didn't have time?

A Correct.

Q Okay. Because at 10:00 the following day, the Sol Legare property is gone?

A Correct.

R.O.A. Vol. 2, pages 277 – 278 [tr. Page 110, line 21—111, line 12]

This compelling logical—and obvious—reasoning belies the appellant's argument of misdirection. Because Fine Housing concedes that it had constructive knowledge of right of first refusal by operation of the recording statute, even though it did not have actual knowledge of it because its closing attorney did not have an opportunity to conduct a proper examination of title prior to closing, it must fashion an alternative theory to excuse its neglect, the defense of confession and avoidance. Having missed the recorded lease, Fine Housing is forced to explain why missing it is not important, and the only alternative theory possible is that the right of first refusal is unenforceable. The point is that Fine Housing's legal theory is an invention of necessity, which is contradicted by its back-up theory filed in the Dorchester County Court of Common Pleas. This evidence, Exhibit 30[1], demonstrates that Fine Housing lacks conviction in its own argument. It is, therefore, relevant and material, and the trial court erred in excluding it as "other evidence adduced" to show Fine Housing's sharp practice and acts undertaken by Fine Housing that conflict

[1] Whether the trial court erred in excluding Exhibit 30 or not, this Court can take judicial knowledge of a lawsuit filed in Dorchester County, *Fine Housing, Inc. v. Sloan*, 2016-CP-18-00340

with its legal position.

Second, Fine Housing structured the transaction just as it wanted it. It was in total control. In essence, Robin Robinson walked away with almost nothing other than the right to redeem her property by paying rent for 24 months and then repaying approximately 40% in interest. Fine Housing controlled every aspect of the closing to the point of holding back $35,000.00 for itself for reasons that are not clear. See R.O.A. Vol. 1, pages 207 – 208 [tr. Page 40, lines 17 - 41, line 4]:

Q. Well, let's talk about the closing. You told her you would pay 850 to acquire title to the property, correct?

A Correct.

Q But you didn't wire 850, did you?

A No.

Q You wired $815?

A Correct.

Q Okay. You kept $35,000 back, isn't that correct?

A Yes.

Q You paid 3500 to Tamara Lane; is that correct?

A Correct.

Q That's you. You're Tamara Lane?

A It's myself and I have a partner.

Fine Housing made a conscious, calculated business decision to allocate $150,000.00 of the "purchase" to the Pittsburgh property and $700,000.00 to its acquisition of Robin Robinson's home on Sol Legare Road. Fine Housing was in control of its allocation, even to the point of paying itself or its personal creditors over $58,811.00 out of what was supposed to go to the

"seller." [2] Under these facts, Fine Housing cannot now be heard that the acquisition for the Property was more than $150,000.00, and its figure fixes the price. The structure of the transaction sheds light on appellant's motives, and the evidence the trial court excluded is the evidence of Fine Housing's overreaching.

Fine Housing then breaks its argument down into two points: a: the trial court's exclusions of evidence is not error and b: that Clarke demonstrates no prejudice.

A. The trial court's exclusion of relevant evidence is error.

As to the first, it is always legal error to exclude probative and relevant evidence. See Rule 402: "All relevant evidence is admissible. . ." *South Carolina Rules of Evidence.*

B. The trial court's exclusion of relevant evidence is prejudicial.

As to prejudice, Fine Housing is correct that the respondent/appellant cannot identify prejudice at trial because the trial court determined that Clarke's right of first refusal is enforceable. However, Fine Housing cannot have it two ways. On the one hand, it asserts—correctly—that this Court may make its own findings of fact, and on the other hand wants to suppress relevant, material evidence to prevent this Court from having the opportunity to review the entire record. Because the standard of review is not necessarily deferential, the respondent/appellant is entitled to provide a fully developed record on which this Court can make correct findings of fact. Every trial lawyer keeps an eye on the record at trial in order to carry her burden of proof while simultaneously creating a full record for purposes of judicial review. For this reason, trial judges universally allow lawyers to mark exhibits for identification or provide proffers of proof for the record. Thus, it is not a meaningful argument to assert respondent/appellant can identify no prejudice at trial when the exclusion of some piece of evidence might carry the day on appeal. The trial court excluded

[2] $35,000.00 + $3,500.00 (Joseph Scamato) + $5,500.00 (AAA inspections) + 5,500.00 (Tamara Lane) + $9,311.00 (Cherie Dumez Agency) = $58,811.00, R.O.A. Vol. 2, pages 373 - __, Exhibits 4, 5, 6, 7, and 8.

the evidence not because it found it irrelevant but because it found it cumulative. See R.O.A. Vol. 2, pages 294 – 295 [tr. Page 127, line 24—Page 128]:

THE COURT: What's relevant about it?

MR. GOLDSTEIN: Oh, well, he testified -- Mr. Sloan testified about them. I thought they were already in evidence and he testified about them in response as to how much he received and how much he disbursed out. But Your Honor is correct that they are shown on the closing statement.

THE COURT: I mean they ought to show on the closing statement.

MR. GOLDSTEIN: They are.

THE COURT: My thoughts are it's cumulative. Motion denied. I don't know why you want them in. The HUD statement shows them. Testimony says what they are for.

. . .

THE COURT: The HUD statement lists them. The testimony from everybody that's testified has stated what they were and what they're for.

. . .

THE COURT: I sustain the objection.

MR. GOLDSTEIN: I understand.

THE COURT: On the grounds that it's cumulative.

MR. GOLDSTEIN: I understand. Thank you, Your Honor.

Thus, the record demonstrates that the trial court's reason for exclusion was cumulative, not relevance as set forth in appellant's brief. Cumulative evidence is inadmissible only where it causes "undue delay, waste of time, or **needless** presentation of cumulative evidence." Rule 403, *South Carolina Rules of Evidence*. (emphasis added) Here, the record reveals that the trial court was not confused or mislead by the evidence, which is the test under the rule and *State v. Lyles*, 379 S.C. 328, 665 S.E.2d 2011 (Ct. App. 2008), but rather convinced by the ability to see and hear

the testimony and gauge the honesty of the transaction by observing the witnesses. This is not a case like *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006) in which the trial court properly excluded the admission of the actual motor vehicle in an *Unfair Trade Practices Act* case. The excluded evidence is undeniably relevant and creates no hardship by its admission. Anytime a party is deprived of an opportunity to present a full picture of the transaction under review, the party suffers prejudice because the reviewing court does not have the same opportunity to see and hear the witnesses and judge the manner in which they testify. Since Fine Housing argues this Court can examine the record and make its own findings, the exclusion of relevant, probative evidence is error. See *Winters v. Fiddie*, 394 S.C. 629, 716 S.E.2d 316 (Ct. App. 2011) (no error in admitting consent order even if it were cumulative). Just as the consent order in *Winters* was between defendant and a third party, the trial court still found it admissible to show knowledge of a defect. "While a third party may have instituted the LLR complaint against Daniels, the provision relating to the disclosure of the mold reports clearly pertained to Buyers." Here, the appellant's sharp practice toward RRJR shows the appellant's motives surrounding his acquisition of the property, and in a case brought in equity, his unclean hands are important.

CONCLUSION

Therefore, as set forth in respondent's brief the lower court correctly determined that the respondent holds an enforceable right of first refusal. Even though this is a case brought in equity for equitable remedy of specific performance, this Court is being asked to enforce an unambiguous contract as written and recorded, and, as appellant points out, since he was not a party to the contract, the only available remedy is in equity. Because the appellant chose to purchase real estate without examining the title, he cannot be heard to complain that the purchase price is set by the terms of the written and recorded document and the appellant's decision as to what he would pay for the building.

The appellant never explains why § 30-7-10 does not apply to him or why the application of this statute controls the outcome. Under the appellant's theory of the case, the orderly transfer of real estate in South Carolina would end overnight. To provide a reliable system of transferring property, the law must feed every citizen from the same spoon. The appellant produced no evidence of waiver or estoppel, and a right of first refusal in a lease is not a restraint on alienation. Nothing in the lease or the right of first refusal prohibited RRJR from selling the property to anyone it chose for any amount it was willing to take. Because it was willing to sell the property for $150,000.00, and because the terms of the contract are clear, the law requires that the court enforce the terms of the contract must be fulfilled in a reasonable time in a reasonable manner. The acquisition price was established by the seller using his independent judgment what he was willing to pay for the property, and for that reason the trial court is obligated to make the property available to the respondent for $150,001.00. For all the reasons set forth in the respondent's brief and as dictated by the overwhelming weight of the evidence, the Order of the trial court should be affirmed but modified only as to the amount respondent must pay to acquire the property, which should be $150,001.00.

Respectfully submitted,

May 15, 2018

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CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules*.

May 15, 2018

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