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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson., Circuit Court Judge

Court of Appeals Opinion No.: 20-UP-238
Case No. 2015-CP-10-03038
Appellate Tracking No.: 2020-001371

Barry Clarke……Petitioner,

vs.

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

of which Fine Housing, Inc. is the …….. Respondent.

APPENDIX
Volume 2

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Re: Barry Clarke v. Fine Housing, Inc.
Appellate Case No. 2017-002285

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V Claire Allen

CLERK

cc: The Honorable J. C. Nicholson, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Barry Clarke, Respondent/Appellant,

v.

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

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

Appellate Case No. 2017-002285

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2020-UP-238
Submitted May 1, 2020 – Filed August 12, 2020

REVERSED

W. Cliff Moore, III, and Kirby D. Shealy, III, both of Adams and Reese, LLP, of Columbia, for Appellant/Respondent.

Ashley G. Andrews, of Lafonde Law Group, P.A., of Charleston, and Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, P.A., of North Charleston, for Respondent/Appellant.

PER CURIAM: Fine Housing, Inc., appeals from the trial court's order finding a right of first refusal (Right of First Refusal) to be enforceable against it and requiring it to deliver title to a property (Property) to Barry Clarke upon his payment of $350,000. Fine Housing argues the trial court erred in (1) finding Clarke had an enforceable Right of First Refusal, (2) not finding Clarke waived the right to enforce the Right of First Refusal, (3) not finding Clarke is barred by the doctrine of laches; (4) not finding Clarke is equitably estopped from asserting the Right of First Refusal, and (5) calculating the price at which to exercise the Right of First Refusal. Clarke cross appeals, arguing the trial court erred in (1) setting the acquisition price of the Property at $350,000 when Fine Housing paid $150,000 for the Property, and (2) not allowing him to introduce cancelled checks related to Fine Housing's payments to itself and others. We reverse.

FACTS

Clarke filed an action to enforce the Right of First Refusal to purchase Property located in Charleston, South Carolina. Clarke asserted that, as successor to Group Investment Company, Inc. and RRJR, LLC, Fine Housing had refused to allow Clarke to acquire the Property in conformity with a lease (Lease). Clarke's complaint asked only for specific performance of a provision in the Lease for the Property and relief from the owner of the Property, Fine Housing, and Fine Housing's grantor, RRJR.[1] Fine Housing answered, asserting, among other defenses, that Clarke (1) waived the ability to enforce the Right of First Refusal; (2) was estopped from exercising the Right of First Refusal; and (3) was barred by the doctrine of laches from enforcing the Right of First Refusal.[2] Both parties moved for summary judgment, and the court denied both motions.

After a non-jury trial, the trial court held the Right of First Refusal was enforceable and ordered Fine Housing to deliver title of the Property to Clarke upon his payment of $350,000. Fine Housing filed a motion to alter or amend, which was denied by the trial court. Fine Housing appeals, and Clarke cross-appeals.

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[1] Group Investment deeded the Property to RRJR for $5. John and Robin Robinson were shareholders of Group Investment and members of RRJR. John Robinson died in 2008, and in December 2013, Robin Robinson transferred the Property, along with her home, to Fine Housing. RRJR defaulted and is not a party to this appeal.

[2] At trial, Fine Housing abandoned the other defenses.

STANDARD OF REVIEW

An action for specific performance of a real estate contract is in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Wachovia Bank, Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). "However, 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." *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291.

LAW/ANALYSIS

A. Fine Housing's Appeal

Fine Housing argues the trial court erred in enforcing the Right of First Refusal. We agree.

A right of first refusal is a pre-emptive right. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997). A right of first refusal "is a contingent, nonvested interest in that the grantee . . . might never choose to sell the property." *Id.* It is an interest predicated on an event that is not certain to occur. *Id.* Pre-emptive rights are subject to the rule against restraint of alienation of interest in land. 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 110 (2002).

Under some circumstances, a right of first refusal may not be an unreasonable restriction on alienation. *Id.* A right of first refusal is not a restraint on alienation as long as both the price the designated person must pay and the time allowed for the exercise of the right of first refusal are reasonable. *Id.* When assessing the reasonableness of a restraint on alienation in the form of a right of first refusal, consideration should be given to several factors, including: "(1) the purpose or purposes for which the restraint is imposed; (2) the duration of the restraint; and (3) the method of determining the price to be paid." *See* 61 Am. Jur. 2d *Perpetuities, Etc.* § 109 (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 (Servitudes) § 3.4 cmt. f (2000).

The Lease, dated January 8, 1999, provided Clarke the use of one-half of the parking spaces on the Property. The description of the Property attached to the Lease references a plat recorded in the Office of the Register of Deeds for Charleston County; however, Clarke does not claim he leased the other one-half of the parking spaces or the buildings located on the Property. The Lease for the Property provides in article V, section 5.2, "Right of First Refusal: [Group Investment] grants [Clarke] the right of first refusal should it wish to sell."

The trial court first found Clarke had an enforceable Right of First Refusal of which Fine Housing had record notice. The court wrote, "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." The court noted Fine Housing did not contest the applicability of the recording statute or dispute that the parties' lease, containing the contested right of first refusal, was on file in the Office of the Register of Deeds for Charleston County and constituted notice to Fine Housing of its existence. The court also noted Fine Housing's closing attorney, William Sloan, was candid about missing the recorded Lease due to the time constraints on the quick transaction.

The trial court then addressed Fine Housing's argument that the Right of First Refusal was invalid for vagueness. The court noted a right of first refusal is the opposite of a restraint on alienation because nothing in the Lease prevents the owner from selling and it guarantees the seller will always have at least two bidders for his property in the event he wishes to sell. As to the time for performance, the court stated every contract in South Carolina contains within it implied terms of good faith and reasonableness. Further, as for the price, the trial court was "persuaded not only by the [L]ease itself, but also by the testimony of [Clarke] that the price is controlled by the property owner and set by the owner's acceptance of any price from any purchaser whose offer is acceptable to the owner, after which the plaintiff, as the holder of the right, can either match the price or waive the right to exercise it." Therefore, the trial court held the Right of First Refusal was definite, and the intention of the parties was clear and unmistakable. *See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC.*, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007) ("Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.") (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)).

Fine Housing argues the trial court erred in finding the Right of First Refusal to be enforceable because it does not (1) specify the property encumbered by the right, (2) describe the method for determining the price at which the right can be exercised, or (3) provide procedures for exercising the right. Therefore, Fine Housing argues the Right of First Refusal in the Lease lacks the specificity required to be an enforceable interest in real estate. While it is recorded, it asserts the Lease does not contain the necessary details for notice and understanding by a third party of the operation of the Right of First Refusal and the nature and extent of Clarke's interest. Thus, the Right of First Refusal is unenforceable because it constituted an unreasonable restraint on alienation that violates the public policy of the State of South Carolina.

As to the specificity of property encumbered, the language in the Lease does not specifically state whether the Right of First Refusal encumbers the entire tract or just the leased parking spaces. Fine Housing argues the Lease solely provides for Clarke's lease of parking spaces on the Property. Clarke asserts he has a Right of First Refusal on the entire tract, including improvements on the Property.

As to the method for determining the price, Fine Housing asserts the Right of First Refusal pursued by Clarke is not only uncertain on the issue of price, it is completely devoid of any language addressing price. Clarke claimed he was entitled to exercise the Right of First Refusal by paying Fine Housing one dollar more than Fine Housing paid RRJR for the Property. No evidence was offered at trial as to what Group Investment intended for determining the price, and Clarke's attempts to testify about his understanding of what John Robinson intended were denied by the trial court under the Dead Man's Statute. *See* S.C. Code Ann. § 19-11-20 (2014).

As to the procedures for exercising the Right of First Refusal, Fine Housing argues the Lease has no provision that identifies when or how Clarke should be notified of events that would trigger the Right of First Refusal and, once triggered, the time period during which Clarke must respond and how he must respond. Clarke argues the Right of First Refusal was not triggered by the transfer to RRJR; whereas, Fine Housing asserts the Lease does not state whether the Right of First Refusal is or is not triggered by a transfer of the Property from one entity to another entity if the entities share common ownership. Fine Housing asserts Clarke waited until April 13, 2015, more than a year after he learned of the transfer to Fine Housing on March 21, 2014, to formally invoke the Right of First Refusal.

Based on our review of the evidence, we find the Lease did not specifically set forth whether the Right of First 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. Further, John Robinson was unavailable to testify as to his intent of the Right of First Refusal, and Robin Robinson defaulted and was not a party to the action. We, therefore, find the lack of specificity in the language of the Right of First Refusal creates an unreasonable restraint on alienation. Thus, the trial court erred in determining the Right of First Refusal was enforceable.

Fine Housing also argues the trial court erred in (1) not finding Clarke waived the right to enforce the Right of First Refusal; (2) not finding Clarke's attempt to exercise the Right of First Refusal is barred by the doctrine of laches; (3) not finding Clarke is equitably estopped from asserting the Right of First Refusal; and (4) calculating the price at which to exercise the Right of First Refusal. We need not address these issues because our determination that Clarke's Right of First Refusal was not enforceable is dispositive of the appeal. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive); *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (holding the appellate court need not address remaining issues when the resolution of a prior issue is dispositive).

B. Clarke's Appeal

Clarke argues the trial court erred in (1) setting the acquisition price of the property at $350,000 when Fine Housing paid $150,000 for the property; and (2) not allowing him to introduce cancelled checks related to Fine Housing's payments to itself and others.

We need not address these issues because our determination that Clarke's Right of First Refusal was not enforceable is dispositive of the appeal. *See Hagood*, 362 S.C. at 199, 607 S.E.2d at 711 (declining to address an issue when the resolution of a prior issue is dispositive); *Whiteside*, 311 S.C. at 340-41, 428 S.E.2d at 889 (holding the appellate court need not address remaining issues when the resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, the decision of the trial court is

REVERSED.

HUFF, THOMAS, and MCDONALD, JJ., concur.[3]

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

Barry Clarke, Respondent/Appellant,

v.

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

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

Appellate Case No. 2017-002285

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. Huff
_____ J.

_____ J.

Stephenie P. McDonald
_____ J.

Columbia, South Carolina

cc:
W. Cliff Moore, III, Esquire
Kirby Darr Shealy, III, Esquire
Thomas R. Goldstein, Esquire

FILED
September 21, 2020

Ashley G. Andrews, Esquire
The Honorable J. C. Nicholson, Jr.

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In The Court of Appeals

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PETITION FOR REHEARING

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OTHER AUTHORITIES:

As authorized by Rule 221 of the *South Carolina Appellate Court Rules*, the Respondent/Petitioner respectfully requests that the Court grant oral argument on this case and amend its August 12, 2020, Opinion because the Court overlooks and misapprehends two important, settled principles of law and misapplies the holding of *Webb v. Reames*.

1. THE COURT OVERLOOKS THE APPLICATION OF THE SOUTH CAROLINA RECORDING STATUTE

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 overlooks the application 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)

In the Opinion under review, the Court notes on page 2 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) Throughout the Opinion, the Court refers to the Lease as a "Lease" and not, as the record establishes, a "Recorded Lease." This is a critical omission and distinction because the Appellant, Fine Housing, cannot complain about a putative ambiguity in a document it failed to review. Not to put too fine a point on it, the Purchaser is the author of its own dilemma by not examining the documents that the law requires it to examine. As the Court notes, Fine Housing rushed the transaction, which prevented any meaningful examination of the chain of title, and by doing so, it cannot turn a blind eye to the record and then complain that the recorded lease was not specific enough

for it to act. Well established case law does not permit a party to complain about an alleged ambiguity in a document it never bothered to examine. Opinion 2020-UP-238 rewards a sophisticated real estate developer for its own negligence.

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 and did not avail itself of an opportunity to examine the record. There is nothing ambiguous or complicated about the right of first refusal in the recorded lease. It says simply, as the Court notes, that if the Seller decides to sell, it will give Lessee an opportunity to purchase the property at the same price. Just because the right is not constructed in elaborate terms 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)

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:

> 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 contract, 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 notes 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 never reaches whether the right of first refusal is or is not ambiguous. The Opinion under review only spells out 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) However, the 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 from the overarching meaning of the Recorded Lease, that the Court's conclusion is not accurate because the Recorded Lease clearly provides for 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 this Court overlooked this important part of the whole. Of course, the Lease spelled out that the Right applied to the entire property because it

is the sale of the property that triggers the right. 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 are irrefutable, and even if they were not, they certainly were within the purview of the trial court to make, sitting as the fact finder, to determine by weighing the evidence and weighing the credibility of the witnesses. By vacating the right, this Court misconstrues the evidence, fails to examine the Recorded Lease as a whole, and disregards established precedent controlling the enforcement of contractual rights.

3. THE COURT'S RELIANCE ON *WEBB V. REAMES* IS INAPPLICABLE BECAUSE *WEBB V. REAMES* STRUCK DOWN A RIGHT OF FIRST REFUSAL FOR VIOLATING THE RULE AGAINST PERPETUITIES

In determining that the Clarke Right of First Refusal is not enforceable, the Court misapplies the law. 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 there will always be 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). Here the Lease ran from January 8, 1999 until the 6th anniversary after Clarke's death. (R.O.A. Vol. 2, page 355) Thus, it could not possibly run afoul of 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, which is specifically drawn so as to avoid the Rule Against Perpetuities (6th anniversary of Clarke's death). Therefore, the right is enforceable, and the **purchase price is determined by any price being paid by any third party**. Thus, under the Court'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 record demonstrates Respondent meets all these. There is nothing in the record suggesting the right is illegitimate. The purchase price is determined entirely by the landowner who can sell at any price he chooses. Finally, 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 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 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, and 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 that is not the function of the Court. 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 it now seeks to enlist the Court of Appeals in pulling off a sharp practice. The Court should not do so.

Conclusion

For the above reasons, the Respondent/Petitioner respectfully submits the Court of Appeals overlooked these important legal considerations and misapplied the holding of *Webb v. Reames* to the facts presented in this case. The Respondent/Petitioner prays, therefore, that the Court reconsider its decision, set the case for oral argument, and amend Opinion 2020-UP-238 to affirm the trial court's decision to enforce the right of first refusal and allow Respondent/Petitioner an opportunity to be heard on his cross appeal setting the purchase price as the purchase price of $150,000.00.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Appellant/Respondent, Fine Housing, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on August 21, 2020, addressed to its attorney of record, W. Cliff Moore, III, Adams & Reese, L.L.P. at P. O. Box 2285, Columbia, S. C. 29202.

August 21, 2018

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PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

CASES:

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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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THE STATE OF SOUTH CAROLINA
In The 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. ..... Defendants,

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the Petitioner's petition for writ of certiorari upon respondent by serving a copy upon respondent's counsel of record, W. Cliff Moore, III, Adams & Reese, L.L.P. at P. O. Box 2285, Columbia, S. C. 29202, by mailing a copy of each properly addressed with sufficient postage affixed thereto this 15th day of October 2020.

October 15, 2020

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

2020-UP-238
Case No. 2015-CP-10-03038
Appellate Case 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.

RETURN TO PETITION FOR CERTIORARI

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Cases

Statutes

Other Authorities

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case offers facts that are not material to the questions presented by this appeal. As such, Respondent provides this Counterstatement.

On December 2, 2013, Respondent purchased real property identified as 2028 Pittsburg Avenue in Charleston, South Carolina, (the "Property") from RRJR, LLC. (R. pp. 369-372). Respondent engaged William H. Sloan, Jr., an attorney licensed to practice law in South Carolina, to close the transaction for it. (R. pp. 264-265).

At the time of Respondent's purchase, Petitioner claimed that he had an interest in the Property in the form of a Right of First Refusal (the "Right"). (R. pp. 32-36). The Right is a term in a Lease dated January 8, 1999, between Petitioner and Group Investment Company, Inc. (the "Lease"). (R. pp. 355-367). Group Investment Company, Inc. owned the Property at the time the Lease was executed. Petitioner filed the Lease in the Office of the Register of Mesne Conveyance on January 27, 1999. (R. pp. 300, 367).

Mr. Sloan reviewed the title work provided to him by RRJR, LLC's counsel, which did not mention the Lease, prior to the closing. (R. pp. 265, 270). On the date of the closing, Mr. Sloan reviewed a title report that he ordered, which mentioned the Lease, but he failed to take note of the Lease when he reviewed the title report. (R. pp. 275-277, 285). Mr. Sloan did not discover and review the Lease until March 21, 2014 and he immediately advised the Respondent of the Lease. (R. pp. 285-287, 289).

The Lease is for one/half (1/2) of the parking spaces located on the Property. However, Petitioner claims that the Right encumbered all of the Property, including parking spaces that were not leased, improvements, and the unimproved portion of the property not dedicated to parking. (R. p. 316). The Lease requires an annual payment, and Petitioner made those payments to the

Respondent after Respondent purchased the Property from RRJR, LLC. (R. p. 330). The language in the Lease that Petitioner claims to be the Right simply, and in its entirety, states "Section 5.2: Right of First Refusal: Lessor grants Lessee the right of first refusal should it wish to sell." (R. p. 357).

The Petitioner and Respondent stipulated that no one advised Petitioner of the sale of the property from RRJR, LLC to Respondent. (R. p. 10). Petitioner claims that Respondent refused his attempts to enforce the Right. (R. pp. 32-36). On May 28, 2015, Petitioner filed his Summons and Complaint against Respondent and RRJR, LLC, seeking specific performance of the Right. (R. pp. 32-36). RRJR, LLC did not appear in the action and is in default. (R. pp. 60-61). Respondent answered the Complaint with a general denial and raised the affirmative defenses of waiver, laches, estoppel, prior breach, statute of limitations and contract terms too uncertain and indefinite to enforce. (R. pp. 62-66).

On September 28, 2017 the trial court entered its Order of Judgment that, in part, enforced the Right and set out the steps Petitioner needed to take to exercise it. (R. pp. 2-27). The trial court denied Respondent's Motion to Reconsider on October 20, 2017. (R. p. 1). Respondent appealed the Order of Judgment to the Court of Appeals and Petitioner filed a cross appeal concerning the trial court's calculation of the price at which Petitioner could exercise the Right. On August 12, 2020, the Court of Appeals reversed the trial court. In its reversal the Court of Appeals resolved all issues on appeal by determining that the language of the Right creates an unreasonable restraint on alienation and is therefore unenforceable. The Court of Appeals denied Petitioner's Petition for Rehearing on September 1, 2020. On October 15, 2020, Petitioner served his Petition for Certiorari requesting review of the Court of Appeals' decision.

ARGUMENTS

Petitioner offers three reasons for the Supreme Court to issue a Writ of Certiorari to review the decision of the Court of Appeals. None of the offered reasons meets the criteria set out in Rule 242, SCACR or presents an otherwise valid reason for this Court to grant the requested Writ.

1. South Carolina's Recording Statute does not address the underlying validity of real estate transactions; it only determines the priority of validly created and recorded real estate interests as to subsequent purchasers and creditors.

Petitioner complains that the Court of Appeals overlooked South Carolina's Recording Statute (S.C. Code Ann. §30- 7-10 (2007)) (the "Recording Statute") and failed to acknowledge that the Lease was recorded. In Petitioner's view, this oversight and that failure led the Court of Appeals away from the conclusion that Respondent had a duty to review the Lease, and, because it did not review the Lease prior to the purchase of the Property, Respondent cannot complain about the validity of the Right in the Lease. In taking this position, Petitioner misstates the Court of Appeals' decision and misreads the Recording Statute.

Contrary to Petitioner's argument, the Court of Appeals actually addressed the Recording Statute and acknowledged that the Lease was recorded. Its decision specifically recited: Respondent did not contest the Recording Statute's applicability, did not dispute that the Lease contained the contested language, acknowledged that the Lease was recorded in the Office of the Register of Deeds for Charleston County, and agreed that the Lease provided notice of the language argued to be the Right.

Petitioner seeks to have the Court punish Respondent for failing to review the Lease prior to purchasing the property and because Respondent engaged in "sharp" and "overreaching"

business practices. Petitioner never explains how those business practices factor into the application of the Recording Statute.

Petitioner also fails to explain how the legal authority he cites supports his Recording Statute argument, or why that argument should change the result here. The first of the two cases Respondent presents is *Five Star v. Ford Motor Company*, 408 S.C. 362, 759 S.E.2d 139 (2014). *Five Star* was a negligent design products liability case. The portion of the decision to which Respondent directs attention concerns the sufficiency of evidence offered to prove an automobile manufacturer's failure to exercise due care in design. This Court imputed basic scientific knowledge to the manufacturer and stated "[a] manufacturer may not avoid negligence liability by turning a blind-eye to the obvious". *Id.*, 408 S.C. at 371, 759 S.E.2d at 144.

The bridge Petitioner offers from *Five Star* to the Recording Statue is the second case – *C&S National Bank v. Landford*, 313 S.C. 540, 443 S.E.2d 549 (1994). In *Landford* this Court recognized a guarantor's duty to read a guaranty before signing it. *Landford* relies upon two earlier decisions *Burwell v. South Carolina National Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986) and *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988). *Burwell* and *PPG Industries* also involved guarantee agreements and, like *Landford*, recognize the duty to read a contract before signing it. None of these cases address the Recording Statute.

Petitioner's argument appears to be that Respondent had a duty to read the Lease before it purchased the Property from RRJR, LLC and, had it read the lease, it would have read the putative language. Respondent agrees, but this uncontroverted point of law does not have any bearing upon the Court of Appeals' decision.

The matter for consideration involves the alleged Right contained in a Lease recorded January 17, 1999. Respondent was not a party to the Lease, but Petitioner seeks to enforce it against the Respondent almost 15 years after it was executed because it was recorded. The rationale that Petitioner pieces together citing *Five Star*, *Landford*, *Burwell* and *PPG Industries* might make sense if Petitioner had signed the Lease. But it did not.

Furthermore, Petitioner's argument makes no sense because Respondent acknowledged the Lease and that it had record notice of the Lease. This acknowledgement concedes to Petitioner whatever rights the Lease contains. Accordingly, if the Right is enforceable, Respondent accepts that it would be subject to the Right, but only if Petitioner had properly and timely invoked it.[1]

However, Respondent's challenge to the Right is that it was not validly created and, as such, notice under the Recording Statute is of no consequence. The Recording Statute specifically references many real estate transactions, including deeds of conveyance of lands, deeds creating a trust in regard to property, mortgages, marriage settlements, leases, statutory liens on buildings and lands, and contracts for purchase and sale of real property. The Recording Statute does not direct or control the creation of those interests in real estate; it just provides for constructive notice once they are filed. By way of illustration, in South Carolina certain formalities are required to create an enforceable deed conveying real property. Those requirements are set out in S.C. Code Ann. § 27-7-10, *et seq.* (2007), not in the Recording Statute. The details for a valid marriage settlement are not found in the Recording Statute, either. They are codified at S.C. Code Ann § 20-5-50 (2014).

[1] Respondent argued that because of his conduct after he discovered the sale of the Property by RRJR, LLC to Respondent, Petitioner's attempt to enforce the Right of First Refusal was barred by the doctrines of waiver, laches, and estoppel. The Court of Appeals did not address these arguments because its determination that the Right of First Refusal was not enforceable was dispositive.

The Court of Appeals determined that the Right was unenforceable because it lacked specificity and, consequentially, was an unreasonable restraint on alienation. Therefore, while the Respondent acknowledged notice of the Lease contacting the purported Right, the notice was of an unenforceable right. To illustrate this point, suppose that the Petitioner recorded a lease that contained the language "On the third anniversary of this lease I deed the Property to Tenant." Under the Recording Statute, everyone would have notice of the language in the lease. However, because the lease did not meet the statutory requirements of a deed conveying real property, it could not be enforceable as a deed.

Application of the Recording Statute does not provide a path to the relief Petitioner requests. The identified closing events, however characterized, do not impact the claimed Right. The Court of Appeals' decision addressed the language of the Lease and determined that its execution and recording 15 years before the sale by RRJR, LLC to Respondent was insufficient to create an enforceable right of first refusal. Nothing in Petitioner's first argument provides a reason to review the decision of the Court of Appeals under the guidance provided in Rule 242, SCACR, or otherwise.

2. The Right lacks essential terms.

Next, Petitioner suggests that the Court of Appeals should have construed the language in the Lease against Respondent to impose Petitioner's time-of-trial interpretation of the Right. Petitioner misses the fact that the Court of Appeals did not determine that the language was ambiguous. Further, even if it had made that determination, Petitioner's jumbled facts do not support his reasoning, and he completely fails to point to any testimony that would support the suggested construction of the Right's terms.

The Court of Appeals did not determine that the Right was ambiguous. Rather, it concluded that the Right lacked the specific terms that are required to make the Right enforceable. For the Petitioner's argument to gain any foothold, there must first be a threshold determination that there was an ambiguity. That determination is a question of law, and only after that question of law has been decided should the court attempt to determine the parties' intent, which is a question of fact. *Hawkins v. Greenwood Development Corp.,* 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citing 17A Am. Jur. 2d *Contracts* § 338, at 345 (1991)). Petitioner vaults over the first step of the analysis and moves directly to argue the intended terms of the Right. But the Right is not invalid because it is ambiguous; it is invalid because it lacks essential terms.

The terms of the Right contained in the Lease would be ambiguous if it were susceptible of more than one interpretation. *Id.* Petitioner does not argue for a specific interpretation of the one sentence Right; it demands the creation of new key terms. The Court of Appeals determined that the Right lacked three essential terms – (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. The Lease does not provide for direction on any of those three (3) points. Petitioner's request is not for an interpretation of the Right; it is an improper request that the Supreme Court re-write the Lease. Courts may not add or modify terms in a contract to make it enforceable or comport with public policy. *See Poynter v. Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010); *Stonhard, Inc. v. Carolina Flooring Spec., Inc,* 366 S.C. 156, 621 S.E.2d 352 (2005).

In its effort to convince the Supreme Court to add those additional terms to the Lease, Petitioner presupposes several facts that are not consistent with the record. Ultimately, they should have no bearing on Petitioner's argument, but they should be corrected to make the record clear and avoid a decision based on a misstated record. First, Petitioner states that Respondent "chose

to rush its transaction to purchase the property." Petition for Certiorari, p. 9. In fact, the timing on the transaction was not Respondent's choice. In addition to the purchase of the Property, the transaction involved the purchase of the residence of Robin Robinson, a member of RRJR, LLC. (R. p. 373). The transaction closed on December 2, 2013 because the residence was scheduled to be sold at a foreclosure sale on December 3, 2013 (R. pp. 266, 267).

Next, Respondent suggests that Respondent "did not avail itself of an opportunity to examine title before going forward with the transaction." Petition for Certiorari, p. 9. The record clearly reflects that this statement is false. Respondent's closing attorney, Mr. Sloan, made the decision to rely on the title examination provided by the attorney for RRJR, LLC, and to close the transaction for Respondent based on his review of that title examination. (R. pp. 265, 270). Mr. Sloan also ordered an additional title examination that was delivered to him on the day of the closing of the sale from RRJR, LLC to Respondent. (R. pp. 275, 276.). The title examination performed by RRJR's counsel did not report the Lease. (R. p. 270). The title examination delivered to Mr. Sloan on the date of the closing of the sale reported the Lease, but Mr. Sloan, distracted by newly reported federal tax liens, did not see the Lease in the title report. (R. pp. 277, 285). As the Court of Appeals noted, Mr. Sloan "was candid about missing the recorded Lease." Opinion 2020-UP-238, p. 4.

Finally, Petitioner states that the Group Investment Company, Inc., the original lessor under the Lease, "controlled the terms of the Recorded Lease" and the case law offered suggests that any ambiguities in the Lease should be construed against Group Investment Company, Inc., because it drafted the Lease. In fact, Petitioner testified that his attorney, representing the interests of Petitioner and Group Investment Company, Inc. drafted the Lease. (R. pp. 300, 314-315).

There is nothing in Petitioner's argument that directs the Supreme Court to evidence of either Petitioner's intent or the intent of Group Investment Company, Inc. as to: (1) the property encumbered by the Right, (2) the price at which Petitioner could exercise the Right, or (3) the mechanics for the exercise of the Right. On direct examination at the trial before the Lower Court, Petitioner testified as to why he wanted the Right but offered nothing from which the Court could determine intent as to these key components of an enforceable Right. (R. pp. 302-305). On cross-examination, Petitioner offered his belief that the Right should be prospectively enforced given the lack of the essential terms, but absent from his testimony was any evidence that could assist in the construction of the Right as intended by the parties at the time of its creation. (R. pp. 318-327). In fact, if the record suggests anything, it is that the parties never considered any of these necessary terms and that the Lower Court rewrote the Right to add them.

Petitioner attempts to fill the void created by these missing terms demonstrate that the parties to the Lease did not consider anything specific about the extent of the Right and how it would be exercised. As to the price at which Petitioner could exercise the Right, Petitioner initially claimed that he was entitled to exercise the Right by paying Fine Housing one dollar more than Fine Housing paid RRJR for the Property. (R. p. 480). At trial Petitioner suggested that the Right gave him a stake in a "bidding war" that would be launched when the owner of the Property received a purchase offer. (R. pp. 320, 321). The Lower Court determined that Petitioner attempted to exercise his Right when he offered to purchase the Property from Fine Housing on April 10, 2014 for Six Hundred Fifty Thousand Dollars ($650,000.00). (R. p. 25). Finally, in a complicated analysis that involved consideration of the sale price of other real property not controlled by the Lease, the Lower Court found that the price at which Petitioner was entitled to exercise the Right was Three Hundred Fifty Thousand Dollars ($350,000.00). (R. p. 26). Petitioner's claim that there

was an "obvious" method for determine 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 range of suggestions of the price at which Petitioner could exercise the Right. The Lower Court's ultimate decision was to rewrite the Lease to determine a price at which Petitioner could exercise the Right. This illustrates the fact that Petitioner is not seeking an interpretation of the Right according to its parties' intent, but the addition of new terms to the Right.

In his Petition for Certiorari, Petitioner concedes that there is no language in the Lease that addresses the timing of the exercise of the Right and retreats to the position that prior court decisions indicate that he has a reasonable time to perform. Petition for Certiorari, p. 10. At trial, Petitioner suggested that he had a "few weeks or a month or something like that" to exercise the Right after notice. (R. p. 325). Regardless, Petitioner testified clearly at trial that instead of exercising his Right of First Refusal to purchase the Property for One Hundred Fifty Thousand Dollars ($150,000.00), he offered to purchase the Property for Six Hundred Fifty Thousand Dollars ($650,000.00). When RRRJR refused to sell the Property to him, Petitioner waited until April 13, 2015, more than a year after he learned of the transfer to Fine Housing on March 21, 2014, to formally invoke the Right of First Refusal. There is no evidence as to what the parties intended at the time of the Lease as to how to exercise the Right. Without explanation or evidence of the parties' intent, the Lower Court rewrote the terms of the Right by determining that "[t]he right of first refusal contains an implied condition of timeliness, and sixty (60) days is a reasonable time for performance." (R. p. 26).

Finally, as to the description of the property encumbered by the Right, the only evidence offered was the Lease and Petitioner's understanding of what was obvious to him at the time of trial. (R. p. 316). Petitioner conceded that the Right does not specifically identify the real property

it encumbers (R. pp. 317, 318), and he offers nothing as to the parties' intent at the time the Lease was executed as to what that property would be. The Lease is for one-half (1/2) of the parking spaces on the Property, which is defined by reference to a survey attached to the Lease. The Lease gave the tenant no right to possess the other one-half of the parking spaces, the improvements located on the Property, or the unimproved portions of the Property. Extending the Right to the entire Property is not only unsupported by evidence of the intention of the parties to the Lease, it requires an improper addition of language to the Lease.

The Right is not ambiguous. It merely lacks essential terms that make it unenforceable. The relief Petitioner requests does not merely require interpretation of an ambiguous provision, it requires the Court to rewrite the Lease without any evidence of the intention of the parties to the Lease. The Court of Appeals appropriately reversed the Lower Court's effort to rewrite the Lease, and Petitioner has not identified a special or important reason for its decision to be reviewed.

3. The Court of Appeals appropriately relied on *Webb v. Reames*.

Petitioner's final request for review goes to the heart of the of the Court of Appeals' decision, but misses its mark. Suggesting that the Court of Appeals improperly relied on *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997), Petitioner engages a game of semantics in an effort to persuade this Court that the Right is not a restraint on alienation. The challenges to the application of *Webb* are not valid, and there is no legitimate reason offered to change the Court of Appeals' decision.

The volume and variety of possible interests in real property is often compared to a bundle of sticks. *See, e.g., Sea Cabins on the Ocean IV Homeowners Assn., Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 431, 548 S.E.2d 595, 602 (2001). In the comparison, the full bundle is the complete fee simple title to the property that can be separated into distinct interests represented by

the individual sticks in the bundle. Here the bundle is the fee simple title to the Property and the "stick" being examined is the Right. In its effort to name the "stick" that is the Right, the Court of Appeals relied on *Webb* to label the interest as a "pre-emptive right." *Id.,* 326 S.C. at 446, 485 S.E, 2d at 385.

Webb concerned a deed reserving a right of first refusal to the grantor. In its analysis of the right, the South Carolina Supreme Court determined

> [t]his pre-emptive right is a contingent, nonvested interest in that the grantee or the grantee's heirs might never choose to sell the property. It is an interest not conditioned on an event certain to occur. *See* R. Cunningham, W. Stoebuck, & D. Whitman, The Law of Property §3.18, at 132 (2d ed. 1993) ("A pre-emptive right merely requires the owner, when and if he decides to sell, to offer the property first to the holder of the pre-emptive right so that he may ... buy at a price set out in the pre-emption agreement").

Id. The Court of Appeals' reliance on *Webb* was limited to that single characterization of a contingent, nonvested right of first refusal as a "pre-emptive" interest. Petitioner recites portions of the decision on which the Court of Appeals did not rely in his effort to challenge *Webb*'s applicability. Specifically, it points out that *Webb* involved a right of first refusal deemed unenforceable because it violated the Rule Against Perpetuities and because it provided a fixed price at which the right could be exercised. These factual distinctions have no bearing on the Court of Appeals' characterization of the Right as pre-emptive and are therefore immaterial.

Once identified, the Court of Appeals defined the nature, character and requirements of an enforceable right of first refusal and explained that pre-emptive rights are subject to the rule against unreasonable restraints on alienation. 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 110 (2002). Under common law, restraints on alienation of property were disfavored. *Crosswell Enters., Inc. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157 (Ct. App. 1992). Unreasonable restraints on

alienation violate public policy and are not enforceable. *McCravey v. Otts*, 90 S.C. 447, 74 S.E. 142 (1912); *Wise v. Poston*, 281 S.C. 574, 316 S.E.2d 412 (Ct. App. 1984).

Again, citing 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 110 (2002) the Court of Appeals determined that in some situations a right of first refusal may not be an unreasonable restraint on alienation and suggests that the Right might have been enforceable if it had (1) clearly identified the real property it encumbered, (2) described a method for determining the price at which the Right could be exercised, and (3) provided for the timing of the exercise of the Right. Because it lacked these terms, the Court of Appeals appropriately decided that the Right is an unenforceable restraint on alienation.

Without citing authority, Petitioner argues that the Right does not inhibit or restrict the property owner in any manner and, as such, is not a restraint on alienation. In fact, he suggests that the Right enhances the ability of the owner of the Property to sell it. This is a game of semantics. A validly created right of first refusal that encumbers a parcel of real property is a barrier to free alienability of that parcel – the owner of the parcel cannot sell the parcel without addressing the encumbrance. If the Right were enforceable, RRJR, LLC, could not have transferred the Property to Respondent without addressing Petitioner's encumbrance. RRJR, LLC, would not have enjoyed the right of free alienability of the Property because it would have been restrained by the Right.

The Court of Appeals' limited reliance on *Webb* was appropriate. Petitioner's third argument does not state an argument of the character required for this Court to grant the requested Writ of Certiorari.

CONCLUSION

To succeed in his quest for a Writ of Certiorari, Petitioner must point to "special and important reasons." Rule 242(b), SCACR. Petitioner has not identified any of the reasons listed in Rule 242(b), SCACR, nor has he articulated a reason of similar character. The Petition for a Writ of Certiorari should be denied.

November 11, 2020

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THE STATE OF SOUTH CAROLINA
In The 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.	$(\sim p)$
Therefore not q.	$(\therefore \sim q.)$

"*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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THE STATE OF SOUTH CAROLINA
In The 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. ..... Defendants,

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the Petitioner's Reply to Respondent's Return to Petition for Writ of Certiorari upon respondent by serving a copy upon respondent's counsel of record, W. Cliff Moore, III, Adams & Reese, L.L.P. at P. O. Box 2285, Columbia, S. C. 29202, by mailing a copy of each properly addressed with sufficient postage affixed thereto this 20th day of November 2020.

November 20, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-03038

Barry Clarke, Respondent/Appellant,

v.

Fine Housing, Inc. and RRJR, LLC, Defendants,

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

APPELLANT'S FINAL BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF THE CASE

On May 28, 2015 Respondent Barry Clarke ("Clarke") initiated this action to enforce a claimed right of first refusal ("Right of First Refusal") to purchase a parcel of real estate located at 2028 Pittsburg Avenue in Charleston County, South Carolina (the "Property"). Clarke's Complaint asked only for the specific performance of a contract provision contained in a recorded lease of real estate and asked for that relief against the current owner of record of the Property, Appellant Fine Housing, Inc. ("Fine Housing"), and Fine Housing's grantor, RRJR, LLC ("RRJR").

RRJR did not appear in the matter and was held in default. In its Answer, Fine Housing challenged the enforceability of the Right of First Refusal and alleged that Clarke waived the ability to enforce the Right of First Refusal; was estopped from exercising the Right of First Refusal; and was barred by the doctrine of laches from enforcing the Right of First Refusal.

The action was tried on July 26, 2017 as a non-jury matter. The trial judge entered the Order of Judgment on September 28, 2017 finding the Right of First Refusal to be enforceable and

requiring Fine Housing to deliver title to the Property to Clarke upon the payment of Three Hundred Fifty Thousand Dollars ($350,000.00). Fine Housing received written notice of the entry of the Order of Judgment on October 6, 2017. Fine Housing filed a Motion to Reconsider on October 13, 2107 that was denied by Order of the trial court dated October 20, 2017. On October 31, 2017 Fine Housing served a Notice of Appeal on Clarke. On November 10, 2017 Clarke served his Notice of Cross Appeal on Fine Housing.

ARGUMENT

FACTS

On January 8, 1999 Group Investment Company, Inc. ("Group Investment") and Clarke entered into a Lease and Agreement ("Lease") (R. pp. 355-367). Clarke negotiated the Lease with John Robinson (R. p. 297, lines 19-20). Robin Robinson signed the Lease on behalf of Group Investment (R. p. 364). Clarke and Fine Housing stipulated that Robin Robinson and John Robinson were shareholders of Group Investment, but not the sole shareholders (R. p. 350, lines 7-25).

The Lease was recorded in the Office of the Register of Deeds for Charleston County, South Carolina on January 27, 1999 in Book C319 at page 791.

The Lease provided for Clarke's use of one half (1/2) of the parking spaces ("Leased Parking Spaces") on the Property. (R. p. 357, Article VII). The description of the Property attached to the Lease references a plat recorded in the Office of the Register of Deeds for Charleston County in Book CE at page 116. (R. p. 368). Clarke does not claim that he leased the other one half (1/2) of the parking spaces or the buildings that are located on the Property. (R. p. 312, line 21 to R. p. 314, line 21). The Leased Parking Spaces are described by reference to a plat of the entire Property.

Article V, Section 5.2 of the Lease provides: "[Group Investment] grants [Clarke] the right of

first refusal should it wish to sell." (R. p. 357). Clarke contends that this language creates a valid Right of First Refusal not only to the Leased Parking Spaces, but also to the entire Property. (R. p. 316, line 1 to p. 317, line 7). Group Investment transferred the Property to RRJR by Deed dated February 19, 2007 and recorded on April 25, 2007 in the Office of the Register of Deeds for Charleston County in Book H623 at page 181. (R. pp. 434-441). Clarke knew of the transfer to RRJR (R. p. 327, line 23 to p. 328, line 24) but did not attempt to exercise the Right of First Refusal. Clarke did not believe that transferring the Property from Group Investment to RRJR triggered the Right of First Refusal because John Robinson and Robin Robinson were both shareholders of Group Investment and were both members of RRJR (R. p. 328, lines 3-24). Clarke and Fine Housing stipulated that John Robinson and Robin Robinson were members of RRJR, but not the sole members (R. p. 350, lines 7-25).

By Deed dated December 2, 2013 and recorded December 9, 2013 in the Office of the Register of Deeds for Charleston County in Book 0377 at page 843, RRJR transferred the Property to Fine Housing. (R. pp. 369-372). No one advised Clarke that RRJR intended to transfer the Property to Fine Housing (R. p. 402; R. p. 305, lines 20-24 and p. 311, lines 18 to p. 312, line 20). The consideration stated in the Deed from RRJR to Fine Housing was One Hundred Fifty Thousand Dollars ($150,000.00). The attorney who represented Fine Housing in the closing of the sale of the Property from RRJR to Fine Housing, William H. Sloan, Jr., was not aware of the Lease containing the Right of First Refusal at the time of the closing (R. p. 270, lines 12-20 and p. 285, line 10 to p. 286, line 1).

Clarke discovered that RRJR had conveyed the Property to Fine Housing on or immediately prior to March 21, 2014. On March 21, 2014 Clarke spoke with Mr. Sloan and advised him of the

Lease. In turn, Mr. Sloan advised Fine Housing's representative, Vincent DeStaso, of the Lease and that the lease contained a provision for a Right of First Refusal. This was Mr. Sloan's first actual knowledge of the Right of First Refusal and Fine Housing's first actual knowledge of the Right of First Refusal. (R. p. 307, line 3 to p. 308, line 23 and p. 286, line 2 to 287, line 16; R. p. 401). During Mr. Sloan's conversation with Clarke on March 21, 2014, Mr. Clarke did not raise the Right of First Refusal (R. p. 286, lines 2-23; R. p. 401).

Following Mr. Sloan's conversation with Clarke on March 21, 2014, Mr. Sloan engaged in email communication with Thomas R. Goldstein, counsel for Clarke. During those communications, Mr. Goldstein advised Mr. Sloan that Clarke was unsure of what he wanted to do concerning the Right of First Refusal (R. p. 286, lines 25 to p. 287, line 8).

On April 7, 2014, Mr. Goldstein, on behalf of Clarke, sent Fine Housing a check for One Thousand Dollars ($1,000.00), representing the payment due under the Lease for the year 2014 (R. p. 422). In the letter transmitting the 2014 lease payment to Fine Housing, Mr. Goldstein explained why the payment was late. He indicated that Clarke earlier sent a separate check to RRJR because "[a]t the time we sent the lease payment to the former owner, we were not aware that you held title." (R. p. 422). The letter sending the lease payment to Fine Housing did not mention the Right of First Refusal and contained the unqualified acknowledgement that Fine Housing was the owner of the Property.

At trial, Clarke testified that, instead of enforcing his Right of First Refusal, he offered to purchase the Property from Fine Housing for Six Hundred Fifty Thousand Dollars ($650,000.00) (R. p. 308, line 18 to p. 308, line 13; p. 310, line 14 to p. 311, line 3; and p. 331, lines 5-10). Clarke desired to secure title to the Property as quickly as possible so that he could start generating profits

from its operation (R. p. 333, lines 7-18). That was his goal in offering an amount greater than required under his claimed Right of First Refusal (*Id.*). Clarke directed his attorney to prepare a proposed contract and send it to Fine Housing on April 10, 2014 (R. p. 420; R. pp. 464-470; R. p. 309, line 14 to p. 310, line 13).

Clarke revised the proposed contract to include, among other things, an option to lease the Property. Clarke's attorney sent the revised proposed contract to Fine Housing on April 21, 2014 (R. p. 421; R. pp. 471-479; R. p. 309, line 14 to p. 310, line 13). Neither of the proposed contracts mentioned the Right of First Refusal.

Mr. DeStaso and Clarke's attorneys exchanged electronic mail concerning the proposed contracts through at least July 8, 2014 (R. p. 460, R. pp. 461-462, R. p. 463), but Fine Housing and Clarke did not execute a contract.

On December 11, 2014, Mr. Goldstein, on behalf of Clarke, sent Fine Housing the payment due under the Lease for the year 2015 (R. pp. 423-424). The letter sent with the check did not mention the Right of First Refusal.

Following its purchase of the Property, Fine Housing invested time and money improving the Property and resolving issues that clouded title to the Property. Clarke acknowledges this (R. p. 323, lines 8-18). With the assistance of legal counsel, Fine Housing resolved tax liens against the Property, resolved building code violations, made concessions to tenants to accommodate eviction, made rent concessions to tenants to encourage needed improvements to the Property, and paid funds to resolve litigation that encumbered the Property (R. p. 235, line 24 to p. 239, line 3). Mr. DeStaso testified that, exclusive of attorney fees, Fine Housing had invested over Two Hundred Thirty-Two Thousand Dollars ($232,000.00) in the Property post purchase (R. p. 235, line 24 to p. 239, line 3).

On April 13, 2015, Mr. Goldstein, on behalf of Clarke, sent a letter to Fine Housing's counsel, Charles S. Altman (R. p. 480). In that letter Mr. Goldstein first raised the Right of First Refusal to Fine Housing and advised that Clarke was exercising his right. Mr. Goldstein demanded a deed from Fine Housing to Clarke on payment of One Hundred Fifty Thousand One Dollars ($150,001.00), an amount that was One Dollar ($1.00) more than Fine Housing paid RRJR as consideration for the purchase of the Property. (R. p. 480).

Clarke filed his Summons, Complaint and Lis Pendens on May 28, 2015 seeking specific performance of the right of first refusal term in the Lease. Clarke included RRJR as a Defendant. RRJR did not appear and is in default. Fine Housing answered Clarke's Complaint with a general denial and raised the affirmative defenses of waiver, laches, estoppel, prior breach by Clarke, statute of limitations and contract terms too uncertain and too indefinite to enforce.

The trial occurred on July 26, 2017 and the trial court entered its Order of Judgment on September 28, 2017. In its Order of Judgment, the Court determined that the Right of First Refusal was enforceable and that Clarke was not barred from enforcing it by his conduct. In reaching its decision, the trial court unnecessarily addressed issues not properly before it and not germane to the controversy among the parties. Specifically, the trial court included in the Order of Judgment

- discussions and findings concerning the nature and use of the Property,
- the history of the business relationship between John Robinson and Clarke,
- the death of John Robinson,
- the financial troubles of Robin Robinson, RRJR's negotiations with Fine Housing that led to the transfer of title to the Property,
- Robin Robinson's negotiations with Fine Housing that led to the transfer of her

residence (the "Sol Legare Road Property") to Fine Housing,

- the conduct of the closing of the sale of the Property and the Sol Legare Road Property to Fine Housing,
- the quality of the services rendered by William Sloan to Fine Housing, and
- and a separate transaction concerning the sale of other real property by Robin Robinson individually to Fine Housing.

None of those matters are relevant to the existence or enforceability of a Right of First Refusal, and the trial court's reasoning relies on facts that are not in the record.

In the Order of Judgment, the trial court found that Clarke could exercise the Right of First Refusal by paying Fine Housing Three Hundred Fifty Thousand Dollars ($350,000.00). The Court arrived at this number by considering the combined underlying sales price of the Property by RRJR to Fine Housing and the Sol Legare Road Property by Robin Robinson to Fine Housing and subtracting from that combined sales price the gross proceeds of Fine Housing's resale of the Sol Legare Road Property.

This is a simple matter that has been complicated and clouded by the trial courts reliance on facts that are of no consequence to Clarke's request for relief and Fine Housing's defenses. Fine Housing admitted that there is a Lease containing language that attempts to create a Right of First Refusal. Fine Housing also stipulated that no one gave Clarke notice of the transfer from RRJR to Fine Housing, a transfer that would trigger the Right of First Refusal that Clarke claims. Fine Housing did not provide notice to Clarke because it did not have actual knowledge of the Lease. The only issues raised by the pleadings are (1) the enforceability of language that Clarke contends is a Right of First Refusal and (2) the consequence of Clarke's conduct once he learned of the transfer

of the real property that triggers the right he champions.

Yet, the trial court offered discussions and made determinations as to:

- a business relationship that existed between Clarke and one of the principals of Group Investment,
- the decisions by RRJR to transfer property to Fine Housing,
- the decision by Robin Robinson to transfer her residence (property to which Clarke made no claim) to Fine Housing,
- the relationship between Fine Housing and its lawyer, and
- the quality of the legal services delivered by Fine Housing's attorney.

The last two topics are especially problematic in that there is litigation pending between Fine Housing and its lawyer concerning the legal services on which the Court commented, a fact noted by the Court in its Order of Judgment (Order of Judgment, p. 8). The admission of irrelevant evidence can confuse the issue before the court and can form the sole base's alone on which an appellate court can reverse. *Holmon v. City of Orangeburg*, 118 S.C. 361, 110 S.E. 674 (1922); *Timmons v. S.C. Tricenntennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970).

STANDARD OF REVIEW

An action for specific performance of a real estate contract is in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 (1999). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Wachovia Bank, Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

I. The right of first refusal is not an enforceable interest in real estate.

The gravamen of Clarke's complaint is that he was deprived of an alleged Right of First Refusal. He claims that he had the right to competitively bid against Fine Housing for the purchase of the Property from RRJR which was denied. Clarke also claims that Fine Housing had record notice of his Right of First Refusal and that, accordingly, Fine Housing took its interest in the Property subject to his ability to exercise the Right of First Refusal.

The trial court agreed with Clarke and found that Clarke had an enforceable Right of First Refusal of which Fine Housing had record notice (R. pp. 24-25). To reach this decision, the trial court misstated Fine Housing's arguments concerning the enforceability of the claimed Right of First Refusal; relied on reasoning not supported by the cited precedent; and failed to make findings necessary to determine the legitimacy of the claimed Right of First Refusal.

A. The Trial Court misstated Fine Housing's argument.

In its Order of Judgment the trial court misstated the position advanced by Fine Housing. It suggested that Fine Housing's primary argument relied on the February 24, 2004 unpublished opinion of this Court, *Page v. Page*, No. 2004-UP-110, and incorrectly concluded that Fine Housing espoused the idea that "the right of first refusal is not enforceable because it constitutes a 'restraint on alienation' and the Court must, therefore, apply it narrowly." (R. p. 12). After it stated that the *Page* decision has no precedential value and should have no bearing on the matter, the trial court proceeded to analyze the matter under *Page*.[1]

Page addressed the validity of a restrictive clause in a deed that purported to create a right of

[1] Rule 268(d)(2), SCACR provides that unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved. Fine Housing only raises *Page* because it was addressed by the trial court as part of its decision.

first refusal. The clause in the deed followed the granting clause that did not contain the restriction. In reaching its decision, the *Page* Court made two determinations. First, citing *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 159 S.E.2d 46 (1968), the Court held that language found in a deed after the granting clause cannot cut down or reduce the fee simple title for which provision is made in the granting clause. Second, the Court determined that the clause purporting to create a right of first refusal was not specific as to the procedures for exercising the right and was therefore an unreasonable limitation of the power of alienation of real property which violated public policy and was not enforceable. In its review of *Page*, the trial court conflated these two separate analyses into one, made unsupported conclusions as to why the decision is unpublished, and misstated the holding of *Stylecraft*.

The trial court baldly concluded that the *Page* decision is unpublished "because it is relying entirely on the published [*Stylecraft*]" (R. p. 14) and further explained that *Stylecraft* "held that any efforts to impose restrictions in a deed that are contained in granting clauses of deeds are ineffective to prevent the conveyance of an unrestricted fee simple transfer" (*Id.*). In fact, *Stylecraft* does not address restrictions in a granting clause. *Stylecraft* stands for the proposition that "where the granting clause of a deed purports to convey title in fee simple absolute, the fee simple estate may not be cut down by subsequent words in the same instrument." *Stylecraft*, 250 S.C. at 498, 159 S.E.2d at 47.

After the incorrect statement of the holding in *Stylecraft*, the trial court squeezed the *Page* restraint on alienation analysis together with its reading of *Stylecraft* to yield the rule "...when a granting clause in a deed attempts to impose a reversion of title in a deed, it is, under *Stylecraft*, ineffectual to cut down the grant of a fee simple estate for the very reason [Fine Housing] advocates:

it represents a restraint on alienation." (R. p. 14). Having announced this contorted rule, the trial court determined that Fine Housing's reliance on *Page* was misplaced because this matter does not involve a restriction in the granting clause of a deed. (R. p. 14).

Fine Housing did not offer *Page* to the trial court as controlling authority. Rather, it presented *Page* as a "roadmap" or summary of South Carolina law as to the enforceability of restraints on the alienation of real property. Fine Housing did not rely on *Page*; it relied on the decisions and authorities outlined in *Page*. (R. p. 339, line 11 to p. 341, line 11). Further, Fine Housing did not argue the *Stylecraft* analysis found in *Page*. Instead, it argued the second analysis found in *Page* – the enforceability of the right of first refusal as a restraint on alienation. The decisions and authorities summarized in *Page* and separately argued to, and considered by, the trial court (R. p. 13) detail why a right of first refusal that is not specific is an unreasonable restraint on alienation which violates public policy and is not enforceable.

A right of first refusal in real estate is a preemptive right. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 383, 385 (Ct. App. 1997). Such a preemptive right is a restraints on alienation. *Id.*; Restatement (Third) of Property: Servitude § 3.4, cmt. (f) (2000). Under common law, restraints on alienation of property were disfavored. *Crosswell Enters. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157 (Ct. App. 1992). Unreasonable restraints on alienation violate public policy and are not enforceable. *McCravey v. Otts*, 90 S.C. 447, 74 S.E. 142 (1912); *Wise v. Poston*, 281 S.C. 574, 316 S.E.2d 412 (Ct. App. 1984).

When assessing the reasonableness of a restraint on alienation in the form of a right of first refusal, consideration should be given to several factors, including: (1) the method of determining the price at which the right is exercised, (2) procedures for exercising the right, and (3) the legitimacy of

the purpose for the right. 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* §§ 88, 90, 109 and 108 (2002); Restatement (Third) of Property: Servitude § 3.4, cmt. (f) (2000).

Here, the Right of First Refusal is a single line – "Lessor grants the Lessee the right of first refusal should it wish to sell." (R. p. 357). There is no specificity as to the property encumbered by the right, there is no described method for determining the price at which the right can be exercised, and there are no procedures for exercising the right.

1. There is confusion as to the property encumbered by the Right of First Refusal.

The Right of First Refusal is contained in a Lease that provides for Clarke's lease of parking spaces on the Property from Group Investment. (R. pp. 355-357; R. p. 312, line 21 to p. 313, line 13). Clarke acknowledged that he did not have leasehold rights in all of the parking spaces on the Property and the Lease did not entitle him to any rights in the buildings that exist on the Property. (R. p. 313, lines 14-23). However, Clarke claims that he has a Right of First Refusal on the entire tract, including improvements, that comprises the Property. (R. p. 316, lines 4-19).

In his deposition, Clarke acknowledged that the language purportedly creating the Right of First Refusal does not specifically state that the right applies to the entire parcel (R. p. 316, line 20 to p. 317, line 11). Clarke explained at trial that it is necessary to consult the survey attached as an exhibit to the Lease to see that the right extends to the entire tract. (R. p. 317, line 12 to p. 318, line 7). The language in the Lease does not specifically state that the Right of First Refusal encumbers the entire tract or just the leased parking spaces. It is not clear and it is not specific. The only thing that is clear is that Clarke testified that he intended the right to extend to the entire parcel. (*Id).*

2. The Lease did not provide a method to determine the price at which the Right of First Refusal may be exercised.

Before filing this action, Clarke claimed that he was entitled to exercise the Right of First Refusal by paying Fine Housing one dollar more than Fine Housing paid RRJR for the Property. (R. p. 480). At trial Clarke testified that the Right of First Refusal gave him a stake in a "bidding war" that would be launched when the owner of the Property received a purchase offer. The "war" could have yielded a sales price higher than the One Hundred Fifty Thousand Dollars ($150,000.00) that Fine Housing paid. (R. p. 320, line 19 to p. 321, line 14). The trial court determined that Clarke attempted to exercise his Right of First Refusal when he offered to purchase the Property from Fine Housing on April 10, 2014 for Six Hundred Fifty Thousand Dollars ($650,000.00). (R. p. 25). Ultimately, the trial court found that the price at which Clarke is entitled to exercise the Right of First Refusal is Three Hundred Fifty Thousand Dollars ($350,000.00). It arrived at that amount by considering all of Fine Housing's transactions with RRJR and Robin Robinson, not just the transaction involving the Property in which Clarke has an interest.

The only evidence offered by Clarke to support the position that the Right of First Refusal could be exercised upon payment of One Hundred Fifty Thousand and One Dollars ($151,001.00) is his subjective understanding of how rights of first refusal operate. There was no evidence offered as to what Group Investment intended. Clarke's attempts to offer his understanding of what Mr. Robinson may have intended were refused by the trial court under the Dead Man's Statute, S.C. Code Ann. § 19-11-20 (Rev. ed 2014) (R. p. 292, lines 10-23).

The wide range of suggestions and determinations of the price at which Clarke can exercise the Right of Refusal - $150,000.00, $350,000.00, $650,000.00, an undetermined amount resulting

from a bidding war – illustrates the need for the Right of First Refusal to have specific language. There is not an "obvious" method for determining price as suggested by Clarke (R. p. 321, lines 16-21), and the language creating the right must be certain and not left to enunciation by one of the parties to the agreement that created the right. The Right of First Refusal pursued by Clarke is not only uncertain on the issue of price, it is completely devoid of any language addressing price.

3. The Right of First Refusal lacks any identified procedure for exercising the right.

On February 19, 2007, Group Investment conveyed the Property to RRJR. This was a conveyance from a corporation to a separate limited liability company. In his Complaint, Clarke alleged that the transfer from Group Investment was a "change in name only," wrongly asserting that John Robinson and Robin Robinson were the only shareholders of Group Investment and the only members of RRJR. (R. p. 33). Clarke therefore believed that the Right of First Refusal was not triggered by the transfer to RRJR. (R. p. 327, line 23 to p. 328, line 24).

The Right of First Refusal has no provision stating it is not triggered by a transfer of the Property from one entity to another entity if the entities share common ownership. That was Clarke's subjective expectation of how the Right of First Refusal operated.

Similarly, the Right of First Refusal is devoid of any provision that identifies when or how Clarke should be notified of events that would trigger the right and, once triggered, the time period during which Clarke must respond and how he must respond. Mr. Clarke testified clearly at trial that instead of exercising his Right of First Refusal to purchase the Property for One Hundred Fifty Thousand Dollars ($150,000.00), he offered to purchase the Property for Six Hundred Fifty Thousand Dollars ($650,000.00). He did this understanding that he was offering to pay more than he

was obligated to pay, but he hoped that he would secure quick possession of the property and avoid litigation. When that did not work, he waited until April 13, 2015, more than a year after he learned of the transfer to Fine Housing on March 21, 2014, to formally invoke the Right of First Refusal.

Without explanation or authority, the trial court found that "[t]he right of first refusal contains an implied condition of timeliness, and sixty (60) days is a reasonable time for performance." (R. p. 26).

To be an enforceable interest in real estate, it is necessary that the performance criteria of the Right of First Refusal be set out in enough detail so that a third party wishing to purchase the encumbered property can understand all interests in the property. Here, a potential purchaser of the Property would not know if the right allowed Clarke sixty (60) days, as determined by the trial court, the one (1) year Clarke argued, or a different time period to delay a potential purchase while he considered his Right of First Refusal. The document creating the right does not contain those details.

On these facts, and the cited published opinions and authorities, Fine Housing argued that the Right of First Refusal lacked any certainty as to the encumbered Property, the exercise price, and the procedure for exercising the right. As such, the Right of First Refusal constituted an unreasonable restraint on alienation that violates the public policy of the State of South Carolina and is therefore unenforceable. Without certainty as to the terms of the Right of First Refusal, any seller of the Property would not know the terms on which it could offer the Property for sale, and a potential purchaser of the Property would be dissuaded from purchasing it because of a lack of understanding of competing interests. A proper understanding of the authorities and argument advanced by Fine Housing at trial makes it clear that the Right of First Refusal advanced by Clarke is not an interest in real estate that can be enforced.

B. The Trial Court relied on reasoning not supported by the precedent it cited.

Having misstated Fine Housing's position on the enforceability of the Right of First Refusal and discounted it on that misstatement, the trial court concluded that this case turns on the intention of the parties to the Lease. It found that the Right of First Refusal language in the Lease was not ambiguous and therefore enforceable. (R. pp. 15-19). To reach this conclusion, the trial court relied heavily on two cases – *Minter v. GOCT, Inc.*, 322 S.S. 525, 473 S.E.2d 67 (1996) and *Ecclesiastes Production Ministries v. Outparcel Associates, LLC,* 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007). Its reliance is misplaced.

The trial court observed that in *Minter* "[t]he trial court [had] granted a directed verdict for the defendant on the breach of contract claim, and the Court of Appeals reversed." (R. p. 16). Actually, *Minter* addressed two issues: (1) the trial court's grant of a directed verdict for the defendant on the issue of damages and (2) the trial court's grant of a directed verdict for the defendant on a cause of action for breach of contract accompanied by a fraudulent act. The Court of Appeals reversed the grant of a directed verdict on the issue of damages, finding that the Minters had provided sufficient evidence to support a finding of damages. The Court of Appeals affirmed the trial court's decision to grant a directed verdict on the breach of contract accompanied by a fraudulent act claim, finding that there was no evidence of a fraudulent act. *Minter* did not involve the reversal of a directed verdict for the defendant on a breach of contract claim, as suggested by the trial court.

While a right of first refusal appears in *Minter's* fact pattern, the enforceability of that right was not an issue on appeal. The trial court drew a parallel between Clarke's testimony and the Minters' testimony to support its findings concerning the intent of parties to a contract. However,

the *Minter* Court mentioned Mr. Minter's intentions concerning the negotiation of the right of first refusal as part of its damages analysis, not in the course of analyzing the enforceability of that right. Accordingly, the parallel drawn between the testimony in *Minter* and in this case is erroneous.

Further, *Minter* did not involve an interest in real estate. The right of first refusal concerned the right to participate in the development of future oil change facilities in Richland and Lexington Counties and was not identified by reference to any parcel of real estate.

The trial court also misreads *Ecclesiastes* as a case "construing a similar right of first refusal contract between two parties." (R. p. 16). Although a right of first refusal on a parcel of real property was contained in the contract that underlies the dispute in *Ecclesiastes*, the language from *Ecclesiastes* cited by the trial court was not addressed to the right of first refusal. In *Ecclesiastes*, a tenant leased property from a landlord and the lease contained a right of first refusal. The landlord entered a bond for title with a third party and the third party, in turn, sued the tenant for rents. The tenant counterclaimed against the third party for tortious interference with contract and included a third party claim against the landlord for breach of the right of first refusal. The tenant settled with the third party. Under the settlement terms the tenant was required to pursue the landlord and, in some instances, would share any recovery from the landlord with the third party. At trial, the landlord claimed that the mutual release and settlement between the tenant and the third party resulted in the release of the landlord from any liability to the tenant. The decision in *Ecclesiastes* concerned the construction of that release, not the right of first refusal contained in the lease.

In *Minter* and *Ecclesiastes*, the litigation involved contracts and the contracting parties were parties to the action. The parties in each action were in contractual privity with each other. One party to a contract sought to enforce its rights against the other party to the contract. Here, Clarke

seeks to bind Fine Housing to the terms of the Right of First Refusal because it is a recorded interest in real estate of which Fine Housing had record notice, not because it was a party to the contract. While the intention of the parties may be relevant to an action to enforce a contract between parties in privity with each other, such intention is not relevant when the terms of a contract are imposed upon an entity because of a recorded interest in real property.

C. The Trial Court failed to make findings necessary to determine the enforceability of the claimed Right of First Refusal.

If *Ecclesiastes* stands for the position that the claimed Right of First Refusal is to be analyzed based on the intentions of Clarke and Group Investment, a position challenged by Fine Housing, the trial court failed to make any determination as to the intention of those parties, and the record contains no testimony as to what Group Investment may have intended concerning the Right of First Refusal. Clarke testified to his intentions and understandings, but the Court precluded him from testifying as to Mr. Robinson's intentions by the Court. (R. p. 302, lines 8-23). Clarke testified that he negotiated with Mr. Robinson, and Fine Housing stipulated that Mr. Robinson was a shareholder of Group Investment. However, Ms. Robinson executed the lease on behalf of Group Investment and there is no testimony as to her intentions or the intentions of Group Investment. Therefore, any determination as to the intention of the parties in crafting the Right of First Refusal would be a lopsided analysis, only considering the intentions of one of the parties – Clarke. Since the record lacks testimony as to the intention of both parties, the trial court's reliance on *Ecclesiastes* is not appropriate.

Fine Housing's positions at trial and on appeal are the same. The offered Right of First Refusal lacks the specificity required to be an enforceable interest in real estate. While it is recorded,

the instrument does not contain the details necessary for notice and understanding by a third party of the operation of the Right of First Refusal and the nature and extent of Clarke's interest. As written, the Right of First Refusal is an unreasonable restraint on alienation of real property that violates the public policy of the State of South Carolina. It is unenforceable.

II. Clarke waived the right to enforce the Right Of First Refusal.

The trial court determined that the evidence did not support Fine Housing's affirmative defense of waiver. Fine Housing first asserted the waiver defense based on Clarke's failure to exercise the claimed Right of First Refusal when Group Investment transferred the Property to RRJR. The trial court concluded that the waiver defense was not supported by the facts surrounding the transfer of the Property from Group Investment to RRJR because it was a name change only and because John Robinson and Robin Robinson were the only shareholders of Group Investment and the only members of RRJR.

Fine Housing also argued that Clarke's conduct following the transfer of the Property from RRJR to Fine Housing amounted to a waiver. The trial court disagreed, finding the defense of waiver inapplicable because: (1) RRJR's lawsuit against Fine Housing to unwind the transfer of the Property, which was filed two months after Fine Housing acquired title, clouded Fine Housing's title until it was cleared on January 9, 2015; and (2) Clarke diligently pursued the purchase of the Property once he discovered the deed from RRJR to Fine Housing.

The trial court's findings are contradicted by the record established at trial and the Order of Judgment itself.

"Waiver is the voluntary and intentional abandonment or relinquishment of a known right." *Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App.

2015). Waiver can be implied from conduct. *Id.* "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id* at 91, 781 S.E.2d at 125, *citing Janaski v. Fairway Oaks Villas Horizontal Prop. Regime,* 307 S.C. 339, 344, 451 S.E.2d 384, 387-388 (1992). A careful review of trial transcript demonstrates that Clarke voluntarily and intentionally abandoned any rights that he may have had under the claimed Right of First Refusal.

First, as to the conveyance from Group Investment to RRJR, the record includes a copy of the deed from Group Investment to RRJR. This is clearly a conveyance from a corporation to an LLC. Group Investment did not change its name to RRJR. While Clarke and Fine Housing stipulated that Robin Robinson and John Robinson were shareholders of Group Investment and members of RRJR. They also stipulated that there may have been other shareholders of Group Investment and other members of RRJR. The record is also clear that Clarke knew of the transfer but chose not to exercise the Right of First Refusal because of his subjective understanding as to the events that triggered the Right of First Refusal. The Right of First Refusal fails to state that it is not triggered by the transfer of the Property from one entity to another if the entities share partial common ownership. If that was the parties' intent, it should have been stated in the terms of the Right of First Refusal. Clarke's conscious decision not to exercise his rights when the property transferred from Group Investment to RRJR was a waiver of his right to make any claim under the Right of First Refusal.

Likewise, the voluntary, intentional, and informed decisions that Clarke made when he learned of the transfer from RRJR to Fine Housing constitute waiver. The Order of Judgment is confusing. On one hand, the trial court seems to excuse exercise of the claimed right until some

point in January 2015, but on the other, it specifically finds that Clarke attempted to exercise the Right of First Refusal on April 10, 2014, when his counsel presented a contract to Fine Housing for the purchase of the Property at the price of Six Hundred Fifty Thousand Dollars ($650,000.00) that lacked any mention of the Right of First Refusal. However, a close examination of the testimony offered at trial demonstrates that when Clarke discovered the transfer of the Property from RRJR to Fine Housing, he made the deliberate decision not to exercise his claimed Right of First Refusal and only after more than a year did he abandon his other efforts and retreat to the claimed right in an attempt to secure title to the Property.

The record indicates that when Clarke discovered the transfer from RRJR to Fine Housing, he spoke with Fine Housing's counsel, Mr. Sloan, on March 21, 2014. Mr. Sloan testified that during that conversation Clarke did not state that he wished to exercise the Right of First Refusal. To the contrary, Mr. Sloan recalled a conversation with Mr. Goldstein, counsel for Clarke, in which Mr. Goldstein stated that Clarke was "unsure what he wanted to do." (R. p. 286, line 25 to p. 287, line 8). Mr. Sloan then secured a copy of the Lease and first advised Fine Housing of the Lease and that it contained the Right of First Refusal.

Mr. Sloan's testimony regarding Clarke's stated intentions on learning of the transfer from RRJR to Fine Housing aligned with Mr. DeStaso's recollection. At trial, Mr. DeStaso testified that during his first conversation with Clarke, in March 2010, Clarke did not mention the Right of First Refusal nor did he state a desire to purchase the Property. (R. p. 241, lines 2-25).

On April 7, 2014, Mr. Goldstein, as counsel for Clarke, forwarded a check payable to Fine Housing from Clarke for the rent due under the Lease for the year 2014 with a letter addressed to Mr. DeStaso. In that letter Mr. Goldstein stated: "Thank you for taking the time to talk to us about the

lease on the property you acquired from RRJR. At the time we sent the lease payment to the former owner, we were not aware that you held title." (R. p. 422). This was an acknowledgement on April 7, 2014 by Clarke that Fine Housing owned the Property and that Clark knew of that ownership. The letter from Mr. Goldstein to Mr. DeStaso did not mention the Right of First Refusal.

Following the initial communication on March 21, 2014, Clarke and Mr. Destaso had other communications that resulted in Clarke's presentation of a proposed contract to Fine Housing on April 10, 2014. It is that proposed contract that the trial court determined to be Clarke's attempt to exercise the Right of First Refusal. However, that determination does not comport with the testimony and evidence offered at trial.

Clarke's own testimony was that he initially chose not to exercise the Right of First Refusal. (R. p. 308, line 18 to p. 311, line 3 and p. 330, line 23 to p. 331, line 10). He made the conscious decision to offer Fine Housing Five Hundred Thousand Dollars ($500,000.00) more than he was obligated to offer in hopes of getting quick possession of the Property and avoid potential litigation with Fine Housing. The proposed contract presented on April 10, 2014 demonstrates that Clarke was not exercising his Right of First Refusal on that date. Clarke's attorney, Ashley Andrews, presented the contract to Fine Housing by electronic mail. Neither the electronic mail communications, nor the contract, reference the claimed Right of First Refusal. The proposed contract did not offer to take the Property in the condition that Fine Housing received it from RRJR. Rather, the contract was conditioned on Fine Housing's ability to cure title problems in a two-year period that began on the execution of the contract; Clarke's ability to obtain financing; zoning and permits satisfactory to Clarke; and an inspection period that lasted one hundred twenty (120) days after Fine Housing cured any title problems. The contract allowed Clarke to terminate it for any

reason or for no reason. (R. pp. 464-470). The terms, Clarke offered make it clear that he was not exercising the claimed Right of First Refusal. He was negotiating a contract to purchase the Property on wholly separate terms and for an amount of money that was more than four (4) times the price he identified as the price at which he could exercise the Right of First Refusal.

Then, on April 21, 2014, Ms. Andrews, on behalf of Clarke, sent Fine Housing a revised offer in the form of a contract. This revised contract added additional terms to the original offer. The Six Hundred Fifty Thousand Dollars ($650,000.00) price remained the same, but other terms were added, including Clarke's ability to lease the Property prior to purchase for up to two (2) years. The revised contract and the electronic communications presenting the revised offer did not invoke or mention the claimed Right of First Refusal. Again, the revised contract and its terms are clear evidence of Clarke's conscious decision not to exercise the Right of First Refusal.

Ms. Andrews, on behalf of Clarke, and Mr. DeStaso, on behalf of Fine Housing, continued negotiations for the sale of the Property through at least July 8, 2014, with Fine Housing demanding that Clarke pay as high as One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00). None of those negotiations mentioned Clarke's Right of First Refusal.

On December 11, 2014, Mr. Goldstein, as attorney for Clarke, forwarded Fine Housing a payment of One Thousand Dollars ($1,000.00) as "the lease payment for the parking lot for 2015." (R. pp. 423-424). In his cover letter, Mr. Goldstein specifically referred to the Lease by date and by the book and page number of the recording, but he did not invoke or mention the Right of First Refusal.

On December 22, 2014, Mr. Goldstein sent Mr. DeStaso another letter clarifying that the payment sent on December 11, 2014 was for the 2015 lease payment. Again he referred to the Lease

by reference to its recording information. Again he failed to invoke or mention the Right of First Refusal.

It was not until April 13, 2015, one (1) year and twenty-four (24) days after Clarke learned of the transfer from RRJR to Fine Housing, and after Clarke's attempts to purchase the Property failed, that Clarke first raised the Right of First Refusal. In a letter dated April 13, 2015, Mr. Goldstein, as counsel for Clarke, raised the Right of First Refusal and claimed to exercise that right by the tender of one dollar more than Fine Housing paid RRJR for the Property. (R. p. 480).

By the time Clarke attempted to exercise his claimed Right of First Refusal, Fine Housing had made significant investment in the Property knowing that Clarke had elected not to exercise the Right of First Refusal. Fine Housing wrestled with tenant issues; worked to clear liens on the Property not resolved at closing; paid money to resolve claims that arose after the transfer to Fine Housing attributable to RRJR's conduct; invested in improvement to the Property; and paid an attorney to assist with all of these things. (R. p. 229, line 6 to p. 232, line 6) All of these efforts enhanced the value of the property beyond the Two Hundred Thirty-Two Thousand Dollars ($232,000.00) identified by Mr. DeStaso as Fine Housing's investment in the Property.

This review of the record makes it clear that, twice, Clarke made deliberate, voluntary and intentional decisions not to exercise his claimed Right of First Refusal. The doctrine of waiver binds Clarke to these decisions and precludes him from exercising the claimed Right of First Refusal.

III. The Doctrine Of Laches precludes Clarke's enforcement of the Right Of First Refusal.

The trial court determined that there is nothing in the record to support Fine Housing's claim that Clarke's attempt to exercise the Right of First Refusal is barred by the doctrine of laches. Instead, the trial court cited a series of facts and suggested that Clarke made his first written attempt

to exercise the Right of First Refusal on April 10, 2014, when Ms. Andrews presented Clarke's offer to purchase for Six Hundred Fifty Thousand Dollars ($650,000.00).

In addressing the defense of laches, the trial court made the following findings of fact. The sale from RRJR to Fine Housing occurred without notice to Clarke. Clarke discovered the sale from rumors spread by friends. Clarke instructed his attorney, Ms. Andrews, to investigate the matter. Ms. Andrews' investigation led to a phone call with Mr. DeStaso. Clarke offered Mr. DeStaso money to exercise his right in the club and DeStaso promised to call Clarke back. A month passed without DeStaso calling Clarke. Clarke made a second call to DeStaso and DeStaso told Clarke that he forgot. Clarke made a determination that he could not rely on DeStaso so he turned the matter over to his attorneys. Clarke made his first written expression of his attempt to exercise the Right of First Refusal on April 10, 2014. On April 17, 2014 Clarke renewed his effort to exercise the Right of First Refusal and stated that he was ready, willing and able to purchase the Property. (R. pp. 22-23). This chronology does not line up with the testimony or the evidence presented at trial.

The trial court determined that Clarke discovered the sale of the Property from RRJR to Fine Housing on or about March 21, 2014. (R. p. 24). Following that discovery, Clarke recalls two telephone conferences with Mr. DeStaso – one in which he and Ms. Andrews gave Mr. Destaso a price of Six Hundred Fifty Thousand Dollars ($650,000.00), and the second was a return call because Mr. DeStaso forgot to call him. (R. p. 309, line 18 to p. 309, line 13). Clarke did not recall any further conversation with Mr. DeStaso and surrendered the matter to his attorneys. *Id.* On April 10, 2014, twenty (20) days after the March 21, 2014 discovery of the transaction (not a month), Ms. Andrews forwarded a proposed contract for Six Hundred Fifty Thousand Dollars ($650,000.00) to Mr. DeStaso. There is nothing in the record showing anything occurring on April 17, 2014 as

identified by the trial court. On April 21, 2014, one month after the discovery of the RRJR to Fine Housing transaction by Mr. Clarke, Ms. Andrews submitted a revised contract to Mr. DeStaso by electronic mail with a cover message that Clarke was ready, willing, and able to close the transaction.

As outlined in the argument concerning the defense of laches, the contract submitted by Ms. Andrews on April 10, 2014 does not mention the Right of First Refusal and its terms suggest that it was not an exercise of that right. Clarke did not advise Fine Housing of his intent to exercise the Right of First Refusal until April 13, 2015. It is the delay from March 21, 2014 until April 13, 2015 and the events that transpired during that time that afford Fine Housing the defense of laches.

"The equitable doctrine of laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *Robinson v. Estate of Harris*, 389 S.C. 360, 372, 698 S.E.2d 801, 807 (2010), *quoting Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Robinson*, 296 S.C. at 372, 689 S.E.2d at 807, *citing Chambers of S.C., Inc. v. County Council of Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party alleging laches must show (1) delay, (2) the delay was unreasonable under the circumstances, and (3) resulting prejudice. *Robinson*, 296 S.C. at 372, 689 S.E.2d at 807, *citing Hallums*, 296 S.C. at 199, 371 S.E.2d at 528.

The delay from March 21, 2014 until April 13, 2015 was unreasonable given the circumstances. Clarke himself testified to the need to act swiftly to preserve the value of the Property. Instead of swift action and exercise of his Right of First Refusal, Clarke acknowledged

Fine Housing's title by repeatedly making rent payments and negotiating for a long period of time for the purchase of the Property. It was only when he did not get what he wanted and decided the time was ripe that he decided to exercise what he believed to be his Right of First Refusal. In the interim, satisfied that Clarke had abandoned any claim to the Property, Fine Housing invested time and money to enhance its value. The Two Hundred Thirty-Two Thousand Dollars ($232,000.00) investment in the Property after the purchase from RRJR does not account for the all the time Fine Housing dedicated to the management of the Property after Clarke learned of the transfer or the attorney fees incurred by Fine Housing during that same time period. These facts fit squarely in support of the defense of laches, and Clarke should be penalized for his delay by not allowing him to exercise his claimed Right of First Refusal.

IV. Clarke is equitably estopped from asserting the Right Of First Refusal.

The trial court bunches its consideration of the equitable estoppel defense with the waiver defense. While the factors at play in analyzing of the defense of waiver are similar to those in an equitable estoppel analysis, equitable estoppel is a separate defense that affords this Court another opportunity to consider the propriety of the trial court's decision. "The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007), *citing Kelley v. Kelley*, 368 S.C. 602, 608, 629 S.E.2d 388, 392 (Ct. App. 2006). "The elements of equitable estoppel as related to the party being estopped are (1) conduct which amounts to a false representation or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party

asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance on the conduct of the party estopped; and (3) prejudicial change of position in reliance on the conduct of the party being estopped." *Strickland*, 375 S.C. at 84-85, 650 S.E.2d at 470, *citing Boyd v. Bell South Tel. & Tel. Co., Inc.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

Clarke's conduct in making the Lease payment for 2014, submitting an offer to purchase the property for Six Hundred Fifty Thousand Dollars ($650,000.00), submitting an amended offer, negotiating for the purchase of the Property for a four (4) month period, and paying the 2015 Lease payment were all inconsistent with the intent to exercise his claimed Right of First Refusal. Clarke's testimony as to why he offered to purchase the Property for Five Hundred Thousand Dollars ($500,000.00) more than what he believed he was obligated to pay under the Right of First Refusal demonstrates that he understood his option to proceed under the Right of First Refusal and made a calculated decision not to proceed under that right.

Fine Housing relied on Clarke's choice. It discovered the existence of the Lease and the Right of First Refusal at the same time that Clarke discovered the sale from RRJR to Fine Housing. While Fine Housing was informed of the existence of the Right of First Refusal, it did not know that Clarke would exercise the right. Fine Housing did not wait long for Clarke's decision. From the offer Clarke made on April 10, 2014, it was clear that he did not want the Property in its existing condition; rather, he wanted the Property in the changed condition set out in the proposed contracts. Fine Housing relied on this election and had no means of knowing that Clarke intended to reserve the Right of First Refusal as a contingency plan. That intention was never expressed.

The record also demonstrates that Fine Housing changed its position in reliance on Clarke's

decision not to exercise the Right of First Refusal. Certainly Fine Housing would not have invested the time, incurred the expense of attorney fees, and invested Two Hundred Thirty-Two Thousand Dollars ($232,000.00) in the Property if it knew it would be required to transfer the Property to Clarke on the payment of One Hundred Fifty Thousand One Dollars ($150,001.00).

Here the doctrine of equitable estoppel requires a finding that Clarke's conduct, and Fine Housing's reliance on that conduct, precludes Clarke from enforcing the Right of First Refusal.

V. The Trial Court's calculation of the price at which to exercise the Right of First Refusal is not supported by the record.

The trial court determined that Clarke could exercise the Right of First Refusal by paying Fine Housing Three Hundred Fifty Thousand Dollars ($350,000.00). To reach that number the trial court started with the combined price that Fine Housing paid RRJR for the Property ($150,000.00) and that Fine Housing paid Robin Robinson for the Sol Legare Property ($700,000.00). From that $850,000.00 figure, the trial court subtracted the amount for which Fine Housing was able to resell the Sol Legare Property ($500,000.00) to calculate the $350,000.00 exercise price. Clarke claims no interest or right in the Sol Legare Property. The Court offered no explanation why it factored the purchase and resale of the Sol Legare Property into its equation. It likewise failed to explain why it found that Clarke exercised his Right of First Refusal by offering to pay Six Hundred Fifty Thousand Dollars ($650,000.00) for the Property in April 2014, but must only pay Three Hundred Fifty Thousand Dollars ($350,000.00) to exercise that right as of September 2017.

The trial court's decision as to the price for which Clarke can exercise the Right of First Refusal rewrites the agreement between Clarke and Group Investment. Courts may not add or modify terms in a contract to make it enforceable or comport with public policy. *See Poynter v.*

Century Builders of Piedmont, 387 S.C. 583, 694 S.E.2d 15 (2010); *Stonhard, Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005). Doing so "would essentially re-write the parties' contract, a service the courts of South Carolina do not perform." *MailSource, LLC v. M. A. Bailey & Assocs.*, 356 S.C. 363, 369, 588 S.E.2d 635, 639 (Ct. App. 2003).

This preclusion from judicial re-writing of contracts is an additional justification for the requirement that, in the creation of a right of first refusal, the method of determining price must be certain and the process for notification and exercise must be certain.

The trial court's arbitrary determination of the price at which Clarke can exercise the Right of First Refusal should be set aside.

CONCLUSION

Clarke initiated this action to enforce the Right of First Refusal as to the Property purportedly given to him by Group Investment in the Lease. He sought to enforce the Right of First Refusal against owners in the Property's chain of title that took from Group Investment. Clarke believed that he can do this because the Lease that contains the Right of First Refusal was recorded. However, the Right of First Refusal language in the Lease lacks the detail required to be an enforceable interest in real estate. Because of the lack of detail in the language creating the Right of First Refusal as to the encumbered property, price for exercising the right, and procedures for exercising the right, the Right of First Refusal is an improper and unreasonable restraint on alienation that violates the public policy of the State of South Carolina. It therefore has no effect.

Even if the Court could determine that the Right of First Refusal is enforceable, Clarke's actions upon learning of transactions that triggered the right demand the conclusion that Clarke waived his right to enforce the Right of First Refusal and that any such enforcement would violate

the doctrines of laches and equitable estoppel. In his own words, Clarke explained that he took the calculated risk that Fine Housing would accept what he believed to be an offer that was half a million dollars more than Clarke believed he was required to pay. He was wrong. His actions cost him the ability to claim the Right of First Refusal.

The record established at trial should lead this Court to find, in accordance with its own view of the preponderance of the evidence that (1) the Right of First Refusal is an improper and unreasonable restraint on alienation that violates the public policy of the State of South Carolina and has no effect; (2) even if the Right of First Refusal were enforceable, Clarke waived the right to enforce it, and (3) Clarke is precluded by the doctrines of laches and equitable estoppel from enforcing the Right of First Refusal.

Respectfully submitted,

May 7, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-03038

Barry Clarke, Respondent/Appellant,

v.

Fine Housing, Inc. and RRJR, LLC, Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief of Appellant/Respondent complies with Rule 211(b), SCACR.

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Barry Clarke.....Respondent/Appellant,

vs.

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

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

RESPONDENT'S FINAL BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF CASE

This interesting case originates in 1999, when the respondent, Barry Clarke, signed a lease with Group Investment Company, Inc., the predecessor of the defaulting defendant, RRJR. After signing the lease, the parties recorded it on January 17, 1999, in the Charleston County Register of Mesne Conveyance at Deed Book C 319 at Page 791. (R.O.A. Vol. 2, page 355 [Exhibit 1]) The property subject to the lease is located at 2028 Pittsburgh Avenue in North Charleston, S.C. For convenience, the respondent refers to this property throughout the brief as the "subject property." The respondent signed the lease in his individual capacity, and Robin Robinson 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. (R.O.A. Vol. 2, page 350 [tr. Page 183]) 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. (RRJR stands for Robin Robinson and John Robinson.) R.O.A. Vol. 2, page 438 [Exhibit 33] In 2008, John Robinson died, and Robin Robinson took over managing his affairs. Her financial condition deteriorated to the point that she faced the loss of 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 224 and Vol. 2, page 254 [tr. Page 57 lines 5-11, page 87, line 2]. The respondent refers to this property throughout as the "Sol Legare property." 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 subject property to the appellant, Fine Housing Inc., for the sum of $150,000.00, which is recorded at Book

0377 at Page 843 on December 9, 2013. At the same time Robin Robinson executed a deed to Fine Housing for the Sol Legare property for $700,000.00, which is recorded at Book 0377 at R.O.A. Vol. 2, Page 369 (Exhibit 3)

Fine Housing stipulated that neither Fine Housing nor RRJR notified Barry Clarke of the transaction. (R.O.A. Vol. 1, pages 228 and Vol. 2, 270, and 402 [tr. Page 61, line 13, 103, line 18 and stipulation, Exhibit 13] Clarke testified he first learned of the putative 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, page 307 and page 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 appellant to sell the property to him, and when that failed, his lawyer sent a proposed purchase contract on April 10, 2014, offering to purchase the subject property for $650,000.00. (R.O.A. Vol. 2, pages 420 and 422 [Exhibits 16 and 22]) Appellant refused, and after further efforts at negotiation failed, respondent filed suit on May 28, 2015, seeking specific performance to enforce his right of first refusal. (R.O.A. page 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 the appellant to exercise his right of first refusal. The appellant 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 2) On October 31, 2017, the appellant filed a Notice of Appeal, and on November 10, 2017, the respondent filed a Notice of Cross Appeal as to the trial court's calculation of purchase price. (R.O.A. Vol. 2, pages 481 and 482)

STATEMENT OF FACTS

There are no material facts in dispute. The appellant concedes that the respondent holds a recorded lease on the subject property and that the recorded lease contains a right of first refusal as follows:

ARTICLE V

Section 5.1: Option to renew: There are no options to renew.

Section 5.2: Right of first refusal: Lessor grant Lessee the right of first refusal should it wish to sell.

R.O.A. Vol. 2, page 355 [Exhibit 1, Lease]

The parties stipulated that neither RRJR nor Fine Housing provided notice to the respondent of the intent to sell. (R.O.A. Vol. 2, page 402 [Exhibit 13]

The other facts developed at trial demonstrated that after her husband died in 2008, Robin Robinson assumed the duties of running his various businesses. As may be seen by the numerous pay-offs listed on the settlement statement between Robin Robinson and the appellant in this case (R.O.A. Vol. 2, page 373 [settlement statement,

Exhibit 4], her finances were dire, and she could not turn to conventional lending sources. Facing the loss of her home to foreclosure sale, RRJR scheduled the transaction between appellant and Robin Robinson one day before the Charleston County Master-in-Equity was selling her home at a foreclosure sale. Because she was facing the imminent loss of her home, she turned to appellant to make her a loan to save her home and her business.

As the record shows, the agreement between appellant and Robin Robinson was a non-traditional loan, a hybrid bond-for-title. In exchange for paying off the loan to her home, several tax liens and judgments, Robin Robinson conveyed title to her home and the subject property to respondent but reserved the right to lease both back at the agreed upon monthly rental of $12,750.00 per month for 24 months and then reacquire both parcels by paying a fixed sum. (R.O.A. Vol. 2, pages 380 and 394 [tr. Pages 46-47, Exhibits 10 and 11]) On page 6 of his brief, respondent asserts that he spent time and money "improving the Property and resolving issues that clouded title to the property." To the extent such statement implies appellant spent additional money, it is not correct. As the Settlement Statement demonstrates (and as the defendant admitted at R.O.A. Vol. 2, page 261 [tr. Page 94, line 12 and 104, line 10]), the $850,000.00 loan cleared up all the tax liens and judgments, and in fact, the appellant held back $35,000.00 out of the "purchase price" for himself as a security deposit for Robinson's performance of the parties' buy-back agreement. He also paid himself $5,500.00 for acting as "broker," and he also paid $9,311.00 to cover his insurance premiums. See Record on Appeal Vol. 2, pages 269 and 273 - 274 [tr. page 102, line 19 – 105, lines 20-22, and pages 106, line 4

– page 107, lines 5-8]. The record demonstrates that the appellant and Robinson agreed in writing that after 24 months, the appellant would re-convey the property to Robinson 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]

There is no dispute that the appellant and Robinson rushed the transaction as they were up against an inflexible December 3rd deadline to save Robinson's home. Appellant's first visit to South Carolina was on November 26th, two days before Thanksgiving, and seven days before the foreclosure sale. (R.O.A. Vol. 2, page 264 [tr. Page 97, line 23] The record demonstrates Fine Housing hired a lawyer, William H. Sloan, Jr., to handle what he originally thought was a "refinance" on November 26, 2013. (R.O.A. Vol. 2, page 283 [tr. page 116, lines 11-19]) In 2013, Thanksgiving was on November 28th and the appellant gave Sloan a closing deadline of December 2, 2013. Thus, there is no factual dispute that appellant's closing attorney did not have sufficient time to conduct a proper title exam and relied on title information supplied by Robinson's personal lawyer. (R.O.A. Vol. 2, pages 264 and 283 [tr. Pages 97 and 116]) There is no dispute that from the time Robinson and Vincent DeStaso, the principal of Fine Housing, Inc., began negotiating in late November, 2013, up through the closing on December 2nd, neither Robinson nor appellant notified respondent of a contemplated "sale." Likewise, there is no dispute in the record that Respondent first heard about the "sale" three months later when two employees of the tenant informed respondent "that something is up with the club." (R.O.A. Vol. 2, page 307 [tr. page 140]) Respondent's closing attorney testified

he did not have time to check the title and that he missed the lease to respondent. (R.O.A. Vol. 2, page 270 [tr. page 103, line 15]) Respondent's brief at page 4 states that Sloan learned of the lease after Clarke spoke to him: "On March 21, 2014, Clarke spoke with Mr. Sloan and advised him of the Lease." This is an incomplete statement of fact. The record shows that Sloan conduced a proper search **during** the closing by asking a lawyer, Charles M. Feeley, to examine the title. Mr. Feeley discovered the recorded lease that contained the right of first refusal and transmitted the lease to the closing attorney on December 2nd while the closing attorney was meeting with Mrs. Robison. However, no one noticed the right of first refusal contained in the lease until Mr. Clarke called on March 21, 2014. R.O.A. Vol. 2, page 270 [tr. Page 103, line 18]. See also Record on Appeal Vol. 2 at page 401 [Exhibit 12] It is true that Mr. Sloan did not detect the right of first refusal contained in the lease until after Mr. Clarke called on March 21, 2014 (R.O.A. Vol. 2, page 270 and 286 [tr. Page 103, line 18, page 119, line 19], and 401 Exhibit 12]), but he had the lease in his hand while Robin Robinson was in his office during the closing on December 2, 2013. In fact, he took exception to it in his title policy. R.O.A. Vol. 2 pages 289 and 291 [tr. Page 122, line 25, 124, line 12].

The record shows that respondent first heard of the putative sale about three months after the closing in March 2014, following a visit from "the two Terry's." (R.O.A. Vol. 2, page 312 [tr. page 145, lines 7-8]) Once he learned that the possibility existed that the defaulting defendant, RRJR, might have transferred the property to appellant without notice to him, he attempted to resolve the matter by contacting the appellant directly in March 2014, and tried to purchase appellant's interest in the Pittsburgh property

for an agreed upon sum. (R.O.A. Vol. 2, page 310 [tr. page 143, line 16] and page 422 [Exhibit 22]) When appellant ignored him—he said he "forgot" Clarke offered him $650,000.00 (R.O.A. Vol. 2 page 309 [tr. Page 142, line 6])—respondent contacted counsel and attempted again to resolve the matter without litigation. When that failed, he filed a summons and complaint on May 28, 2015, 17 months after the putative sale, four months after the court dismissed Robinson's suit against Fine Housing, alleging that Robinson failed to notify him of his right of first refusal and asking the Court to order the property conveyed to him after he tendered the acquisition price. Appellant argues on page 7 of his brief that ". . . Goldstein first raised the Right of First Refusal to Fine Housing and advised that Clarke was exercising his right." This is misleading because the record shows that Clarke attempted to resolve the matter with the appellant directly in March 2014, but appellant ignored him, forcing respondent to consult with counsel. R.O.A. Vol. 2, pages 308 - 309 [tr. page 141, line 24-142, line 13]

The most important statement of fact in appellant's brief is found on page 9 where appellant writes: "Fine Housing also stipulated that no one gave Clarke notice of the transfer from RRJR to Fine Housing, a transfer that would trigger the right of first refusal Clarke claims. **Fine Housing did not provide notice to Clarke because it did not have actual knowledge of the Lease.**" (emphasis added) This is, of course, an inaccurate statement of fact because, as discussed above and below, appellant had the lease prior to disbursing, and the recorded lease gave constructive notice to the world of the respondent's right of first refusal. Thus, the only reason appellant did not have "actual knowledge" of the right of first refusal is because he failed to look at the lease in his hands.

STANDARD OF REVIEW

"Because this case requires us to answer a question of law—whether equitable estopppel 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)

REPLY ARGUMENT I

I. The Right of First Refusal is Enforceable.

A. The trial court addressed all of appellant's arguments and found them unsupported by the preponderance of the evidence.

The appellant complains that the lower court improperly analyzed appellant's reliance on *Page v. Page*, No. 2004-UP-110. This record demonstrates that appellant relied upon and cited *Page* is its primary authority. Appellant made *Page* a foundation of

his argument at both summary judgment and at trial. In its May 5, 2016, motion for summary judgment (R.O.A. Vol. 1, page 70), the appellant asserted to trial court:

> A right of first refusal on real property is a pre-emptive right and pre-emptive rights are subject to rules against restraints on alienation. *Page v. Page*, No. 2004-UP- 110 (Ct. App. 2004 Unpublished Opinion), citing *Webb v. Reames*, 326 SC 444, 446, 485 S.E.2d 306, 308 (1982) and *61 Am. Jr. 2d* Perpetuities and Restraints on alienation § 110 (2002). "A right of first refusal . . . is not a restraint on alienation, as long as both the price that the designated person must pay, and the time allowed for the exercise of the right of first refusal are reasonable." *Page* at 2, citing *61 Am.Jr.2d* Perpetuities and Restraints on Alienation § 110 (2002). Conversely, "Any restraint on alienation in the form of a right of first refusal that is not specific in all required elements—Legitimacy of purpose, price and detailed procedures" is an "unreasonable limitation upon the power of alienation." *Page* at page 2.
>
> . . .
>
> In *Page*, the Court found that (1) there was testimony of a legitimate purpose—assuring that property remained in the family—and (2) the language creating the right identified the price to be paid by the person exercising the right. However, the *Page* Court found that the document that created the he right did not describe the procedure for exercising the right. Because of that single omission, the Court found that the offered right of first refusal was an unenforceable restrain on alienation."
>
> Appellant's Motion for Summary Judgment at page 2, R.O.A. Vol. 1, page 68

That is six references to *Page* in two paragraphs! Appellant's supporting memorandum for summary judgement devoted two pages to an analysis of *Page v. Page* under its own heading called: "**b. The *Page* Decision**." In its motion for involuntary nonsuit (R.O.A. Vol. 2, page 340 [tr. Page 172]), the appellant made *Page* the foundation of his argument: ". . . if you put all of those pieces together, you get the unpublished decision of *Page v. Page*, which we think provides a roadmap. The record demonstrates that the appellant relied frequently and heavily on *Page* at summary judgment and at trial, and it is a material change of position to argue for the first time on appeal that the lower court mistakenly analyzed *Page* because the record demonstrates appellant made *Page* his sword and shield. Appellant parses its effort by explaining on page 12 that he was

not offering *Page* as "controlling authority" but rather as a "roadmap or summary of South Carolina law as to the enforceability of restraints on the alienation of real property." (Appellant's brief at pages 12-13) After telling this Court that appellant did not rely on *Page* below, appellant argues on page 13 that *Page* controls because the appellant "argued the second analysis found in *Page*—the enforceability of the right of first refusal as a restraint on alienation." (Appellant's brief at page 13)

Aside from being bi-polar on *Page*, the appellant attempts to construct a straw man argument. Relying on *Page*, the appellant asserts without authority that a right of first refusal **is** a "restraint on alienation." According to appellant: right of first refusal = restraint on alienation. Neither the trial court's analysis nor any case law supports this false equivalency. A right of first refusal is the opposite of a restraint on alienation. Consider the two terms side by side:

Right of first refusal is a right to have first opportunity to purchase real estate when such becomes available or right to meet any other offer.	**Restraint on alienation**: 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, 5th Ed.

The lower court carefully weighed these arguments, including the appellant's reliance on *Page*, and found:

Nowhere is the appellant's straw man argument more efficiently exposed than in appellant's reliance on *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997) discussing a clear violation of the rule against perpetuities. There, the grantor conveyed property to the grantee, but reserving unto, not only the grantor, but also the grantee's heirs, for all time, to reacquire the property by assigning three appraisers to come up with

a value, which would require the grantee and the grantee's heirs to re-convey the property for the blended appraisal price no matter what offer grantee received from a third party. The facts in *Webb* are nothing like the present case. Not only is the respondent's right of first refusal limited by a specified time, but also the grantor, "should it wish to sell," controls the purchase price. As the lower court found, the right of first refusal here does not "restrain" alienation; rather, it guarantees the grantor top dollar. Here, because the defendant Robinson, RRJR, defaulted and did not participate in the case, no one knows whether she failed to notify Clarke by oversight or because she regarded the transaction as a loan, as she alleged in her lawsuit against Fine Housing (R.O.A. Vol. 2, page 403 [Exhibit 14]), but appellant stipulates no one notified Clarke. Had Robinson notified Clarke—or if appellant had not overlooked the lease in his title exam—then Robinson could have driven up the bidding and obtained top dollar for her property. On the other hand, it is just as plausible to conclude she never notified Clarke because she did not regard the transaction as a sale, but rather a loan because the record reveals that Robinson sued Fine Housing alleging the transaction was a loan. (R.O.A. Vol. 2, 403 [Exhibit 14]) Either way, Clarke's right of first refusal is the opposite of a restraint on alienation.

The core of the appellant's argument is that the lower court failed to appreciate appellant's assertion that the recorded lease constitutes a "restraint on alienation." The trial court carefully digested this assertion and concluded that every case cited by the appellant stands for a different proposition than the one being asserted by the appellant. As the trial court found:

However, unlike *Page*, but more importantly, unlike *Stylecraft*, this case does not present a *Stylecraft* issue of whether a restriction in the granting clause of a deed of conveyance is or is not effective. There is no question that Group Investment Company and/or RRJR, L.L.C. had fee simple title and the right to sell the property to any person in the world for the highest obtainable price. The Clarke lease in no way attempts to cut down the fee simple ownership. Here, the issue is whether a recorded lease—which the parties agree is: (1) of record, and (2) in full force and effect—does or does not contain a valid right of first refusal. Thus, the present case is more akin to a case of a missed mortgage or a missed judgment or a missed mechanic's lien. A properly recorded mechanic's lien is a "restraint on alienation" in once sense because whoever purchases the property, purchases it subject to the lien. This Court is not called upon to decide if a limiting reversion in the granting clause in a deed does or does not effectively cut down the fee simple of the grantee—especially because *Stylecraft* laid that issue to rest. Rather, the issue her is whether the defendant took title to the property subject to the plaintiff's lease. Since the defendant concedes he took title subject to the plaintiff's lease, the question distills down to whether the right of first refusal is or is not valid. Contrary to the defendant's argument, had RRJR, L.L.C. notified Clarke of its intent to sell, then it could have maximized its return instead of accepting what Fine Housing was willing to pay. Not to put too fine a point on it, but RRJR's haste deprived it of an opportunity to drive up the bidding. This is the opposite of a restraint on alienation.

R.O.A. Vol. 1, pages 14 – 15 [Order under review at pages 13-14]

This record supports the trial court's findings and conclusions.

1. While the lease limits respondent's right to use the property and restricts respondent's use to one-half of the parking spaces, there is no confusion as to the property covered by the right of first refusal because the recorded lease contains a precise legal description.

Appellant's argument here is that the lease "does not specifically state that the right applies to the entire parcel." (Appellant's brief at page 14) The appellant confuses succinct for ambiguous. While Article V of the lease is succinct, appellant ignores the detailed legal description attached and incorporated into the lease and recorded with it in the R.M.C. office in 1999. Most deeds in South Carolina are two pages long, comprised of only a few brief clauses: the granting clause, the habendum, the date of the instrument and the signatures. However, all of them are recorded with an appended legal description, which sets out the property description in detail. In construing a contract, a

party is required to construe the document and cannot ignore parts that are at variance with his or her legal position. As the trial court found:

> The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Thomas-McCain, Inc. v. Siter,* 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); *see also Barnacle Broad., Inc. v. Baker Broad., Inc.,* 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct.App.2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). "Documents will be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime,* 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct.App.1997) (citing 17A Am.Jur.2d *Contracts* § 385 (1991)). In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.,* 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); *Bruce v. Blalock,* 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); *Mattox v. Cassady,* 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986).
>
> In *Brady v. Brady,* 222 S.C. 242, 72 S.E.2d 193 (1952) the South Carolina Supreme Court asseverated:
>
> It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.
>
> Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties to a lease, the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the lease construed as a whole. Different provisions dealing with the same subject matter are to be read together. *Id.* at 246-47, 72 S.E.2d at 195.
>
> (R.O.A. page 17 – 18 [Order Under Review pages 16-17)

The record refutes the appellant's argument because the precise legal description is part of the lease and recorded with it. Had appellant performed a proper title exam, it would have discovered the lease, including the detailed legal description. In short, this record provides overwhelming evidence supporting the findings of the trial court.

2. The lease provides the method to determine the price at which the right of first refusal may be exercised, and the price is determined by the seller.

Appellant's argument here is the same as advanced in Argument 1 above. Appellant attempts to create an ambiguity where none exists. There is no "subjective understanding" of the right of first refusal. (Appellant's brief at page 16). The appellant seeks to take advantage of the undisputed fact that both Robinson and Fine Housing failed to notify Clarke of her intent to sell. Of course, as alleged in her complaint against Fine Housing, R.O.A. Vol. 2, page 403 [Exhibit 14], Robinson thought the transaction was a loan, and if the transaction were a loan, then a loan would not trigger the right of first refusal. The record demonstrates that the transaction was not a typical sale—it had no contract of sale, and the "seller" had the unequivocal right to demand the property back upon payment of a specified sum. (R.O.A. Vol. 2, pages 380 and 394 [Exhibits 10 and 11]) As such the record shows that the only ambiguity in this case is whether the court should characterize the transaction as a loan or a sale because it has elements of both. On one hand, Robinson transferred title, but on the other hand, she retained the right to reacquire the property in 24 months upon payment of a fixed sum. As alleged in her complaint against Fine Housing, filed February 19, 2014, [R.O.A. Vol. 2, page 403, Exhibit 14], Robinson alleged the transaction was a loan. However, Robinson and Fine Housing ended the potential for ambiguity through the course of their litigation over this issue. The record shows that Robinson sued Fine Housing 78 days after the closing, alleging Fine Housing defrauded her. (R.O.A. Vol. 2, page 403, Exhibit 14) At the time of this litigation, Robinson knew about Clarke's rights because she signed the original 1999 lease on behalf of Group Investment Company, and Fine Housing knew about Clarke's right of first refusal because the respondent recorded it in 1999 and Charles Feeley sent it to the

closing attorney on December 2, 2013.. In fact, the testimony of Fine Housing's closing attorney was that he discovered the lease, with the right of first refusal, on December 2, 2013—before he disbursed Fine Housing's money. See Record on Appeal Vol. 2, pages 275- 276 [tr. Page 108-109]:

Q Okay. When did he [Charles Feeley] complete that title examination?

A In the late afternoon of December 3rd -- excuse me, the late afternoon December 2nd, 2013.

Q Okay. And that title exam, did it or did it not reveal the existence of the Barry Clarke lease?

A He did pick it up.

Q Okay. But was it too late because of the urgency brought on by the pending foreclosure?

A Yes. I was in the conference room with Ms. Robinson at the time that Mr. Feeley e-mailed the title search to me.

However, to be fair to the closing attorney, Fine Housing placed him in an untenable position for demanding he close the transaction and transmit the check to the foreclosing creditor before 10:00 a.m. on the 3rd. Fine Housing created the pressure on the closing attorney by not providing adequate time to prepare and then compounded this pressure by declining to attend the closing, which would have afforded the two of them an opportunity to read the lease and react to the right of first refusal. The fact is that Fine Housing rushed the transaction, did not review the title, and did not provide adequate time for his closing attorney to prepare properly, and Fine Housing now grasps at straws to excuse his failure to take notice of Clarke's rights.

Because Robinson failed to notify Clarke, and because Fine Housing failed to examine the title, appellant now argues this Court should overlook its failure and place the loss on Clarke because there is no "identified procedure" for notifying him. Motorists employ this reasoning hundreds of times a day when they ask to be excused from a ticket because "I didn't see the sign." When a party ignores his or her legal responsibility under a recorded document, it is no excuse for a failure to perform that the party did not see the sign. The trial court considered this argument and rejected it, holding:

> At trial, the defendant concedes that it is on notice of the Clarke Lease, but argues that the right of first refusal is invalid for vagueness and for waiver, estoppel, and laches. Thus, it is not disputed that the South Carolina Recording Statute gave notice to the defendant of the plaintiff's lease, containing a right of first refusal, and neither Robin Robinson nor Fine Housing, Inc., placed the plaintiff on notice of their intent to close prior to the closing on December 3, 2013.
>
> R.O.A. Vol. 1, page 12 [order page 11]

The appellant asks this Court to check its common sense at the courthouse door. Neither life nor law require infinite instruction for common occurrences. If A says to B, "I have an offer for x," it requires no advanced training to realize that B can either take a pass or offer x + 1. The appellant refuses to acknowledge the obvious conclusion that the right of first refusal protected Robin Robinson, and that she alone determined the price at which she would sell. Moreover, the record of the financial transaction between Fine Housing and Robinson demonstrates Fine Housing was motivated to take advantage of her.[1] After driving Robinson's lawyer to such frustration that he hung up, DeStaso told his broker, Mark Alfredo: "I think they'll be coming back around" because "I was told that

[1] The caselaw of New York informs the DeStaso family abut the consequences of sharp practice. See *Vincent DeStaso v. Bottiglieri*, 861 N.Y.S.2d 676, 52 A.D.3d 2008) and *Vincent DeStaso v. Bottigliieri*, 2009 N.Y.S. Ct. Op. 52082, 25 Misc 3d 1213 (Aug 31, 2009). (Usurious note vacated.) Mr. DeStaso testified these cases involved his father.

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])

After DeStaso promised to pay Robinson $850,000.00, knowing how dire her situation was as she was up against a December 3rd foreclosure deadline, Destaso sent $815,000. He was not through exploiting though. Out of the $815,000.00 he did transfer to the closing attorney, he held back $35,000.00 as "security" for the transaction and then he paid himself $5,500.00 (Tamara Lane, Inc.) and his own flood insurance premiums of $9,311.00. He also sent his personal lawyer in New York $3,500.00 for preparing the Robinson lease even though the record shows the lease is a recycled Tamara Lane document with handwritten additions. (R.O.A. Vol. 2, page 373, Exhibits 4, 6, and 10) Thus, out of $850,000.00 he promised, he either retained or used to benefit himself $49,811.00, or 6%. The record of the financial arrangement between Fine Housing and Robinson demonstrates that Fine Housing, Inc. is a predatory lender. In light of that financial overreach, combined with the fact that appellant moved to eject Robinson the month after closing and his e-mail to start listing the property for sale (R.O.A. Vol. 2, page 442 [Exhibit 34] renders appellant's explanations hollow and pretextual. Thus, the appellant's contention the right of first refusal is insufficient because it did not contain detailed instructions is a little like an errant motorist saying: I didn't apply my brakes at a Stop sign because all it says is "Stop." The trial court rejected these arguments, and the record contains no evidence to call the trial court's conclusions into question.

3. The exercise of a right of first refusal does not require detailed instructions on how to exercise it to be valid.

Appellant's argument here is identical to the foregoing argument; to wit, that because every step in the process is not delineated, it is, therefore, invalid. Appellant's argument 3 contains two parts:

Part one is not precisely spelled out, but it appears to be a variation of a waiver argument. Appellant argues that Clarke waived his right because he did not exercise his right of first refusal when John and Robin Robinson transferred the property from one entity controlled by them, Group Investment Company, to another entity controlled by them, RRJR, for five dollars. (At Vol. 2, page 350 of the Record on Appeal [tr. Page 183], the parties stipulated that both entities were controlled by the same two persons: John and Robin Robinson.) As the record demonstrates Group Investment Company transferred the subject property to RRJR in May, 2007 for five dollars consideration. (R.O.A. Vol. 2, page 434 [Exhibit 33]) First, appellant ignores the evidence that the respondent had a long relationship with John Robinson and knew that the "transfer" was a name change only. Robinson and Clarke came up in the club business together and were involved for many years as collaborators and competitors. Respondent testified he knew about the transfer and made no claim because he knew it was a name change only and he had no right to demand the property for six dollars:

Q. Why didn't you exercise your right of first refusal when the property was transferred [to RRJR]?

A. Because it was the same people. I wouldn't bother John with something like that; it would be wrong." R.O.A. Vol. 2, page 328 [tr. page 161, lines 3-6]

This transfer from Group Investment to RRJR contains no indicia of being a "sale." It was

not an arm's length transaction; there was no *bona fide* offer to buy/sell; no consideration changed hands, and it did not result in any change in control of the property. See stipulation at page 350, Vol. 2 of R.O.A. [tr. Page 183].

By contrast, the record shows that Group Investment and Clarke signed the recorded lease in 1999, and the record shows that Robin Robinson signed this document on behalf of Group Investment Co. As the record shows, the transfer from Group Investment Company to RRJR is a name change only because the same principal conveyed to the same principal for five dollars consideration. The deed affidavit reflects that the deed is exempt from recording stamps because it did not involve consideration. Moreover, DeStaso, the principal of Fine Housing, testified he dealt only with Robin Robinson, and only Robin Robinson signed the documents at closing. Thus, there is not a shred of evidence in this record to support an assertion that the transfer from Group Investment to RRJR triggered the right of first refusal.

Second, the May 2007 transfer between Group Investment Company to RRJR occurred six years before Fine Housing showed up in Charleston as a potential lender for Robin Robinson. Appellant has no reason to address this transfer unless he is prepared to allege that the transfer to RRJR was improper, and if this is so, then Fine Housing does not have title. He has, of course, made no such assertion, and such a suggestion raised at this stage is another example of sharp practice by an out-of-state, predatory lender. Rather than confine the analysis to the germane legal point, appellant asks this Court to check its common sense on the courthouse steps to provide cover for its ethically questionable practices. In other words, appellant's effort to make the Group Investment

transfer an issue in this case is pure red herring that shines no illuminating analysis on the issues before the Court.

The second part of Appellant's argument is that because the right of first refusal does not spell out the manner of notification or the time for notification, it is invalid. Once again, the appellant seeks to excuse his failure to check the title before purchase by shifting the responsibility for his failure onto the respondent. The method of notice is nothing more than the seller notifying the holder of the right of her intent to sell: "A pre-emptive right merely requires the owner, when and if he decides to sell, to offer the property first to the holder of the pre-emptive right so that he may buy at a price set out in the pre-emption agreement." *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997). (The Court struck down the right of first refusal in *Webb v. Reames* because it violated the Rule Against Perpetuities.) Here, the right did not violate the Rule Against Perpetuities, and the purchase price remained in the exclusive control of the seller, and Robinson was free to set the price as she saw fit. Therefore, the right in this case is not a "pre-emptive" right because the seller controls the sales price.

As the trial court discussed in detail, a right of first refusal is a contract, and as the trial court found, South Carolina has a well-developed body of law governing the enforcement of contracts. The trial court held:

> 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)

R.O.A. Vol. 1, page 19 [Order page 18]

The trial court's reliance on *Hobgood* is important because the appellant in *Hobgood* made the same argument appellant asserts here. In *Hobgood* the tortfeasor interfered with Hobgood's contract of sale for a condominium because the date of closing set in the contract of sale expired without a closing, and the tortfeasor then asserted it was free to interfere with Hobgood's contract because it could no longer be enforced. A jury disagreed, and so did the trial judge and so did the Court of Appeals. The appellant here employs a similarly flawed strategy, seeking to profit from his own sharp practice and negligence in failing to examine the title to the subject property.

All of appellant's arguments spring from the same fountain, which is the assertion that the right of first refusal is too vague to be enforced. Nowhere in his well-written brief does the appellant mention, let alone discuss, the fact that respondent's lease is recorded at the R.M.C. Office and appellant ignored it. As the record below shows, there were many reasons the appellant's closing attorney missed the right of first refusal, the most salient being that he knew Robinson was facing an inflexible deadline of December 3rd and that the creditor refused to grant additional time. DeStaso even testified he attempted to purchase the creditor's position: "Q. Prior to going to the closing on December 2nd, did you contact us [*sic.*] or ask him if his foreclosing client would sell you the paper? A. Yes. Q. Okay. And he refused, correct? A. Correct. Q. But you explored that? A. Yes." (R.O.A. Vol. 1, page 228 [tr. Page 61, lines 17-24]) He knew that Robinson had no equal bargaining position, and so he pushed the closing to benefit himself, even to the point of transferring less money than he promised. In fact, and this is shocking, Robin

Robinson walked away from the closing with nothing. R.O.A. Vol. 2, page 271 [tr. Page 104, line 13]) Appellant used the time constraints to his advantage to drive a bargain less favorable to Robinson. In fact, she would have been in a better financial position to let her house go to foreclosure and keep her business. Appellant's sharp practice toward Robinson fits the pattern of coming up with every excuse he can formulate to justify the failure to notify Clarke of the pending "sale," which would have changed Robinson's bargaining position to her advantage. However, one controlling fact is not disputed and that it is that Fine Housing missed the right of first refusal in the recorded lease until after the closing. Thus, it is one thing to find the Lease and argue it is not enforceable because it is too vague, but quite another to miss it and then argue that missing it does not matter because it is too vague. In essence, the appellant's entire argument is the same as the inattentive motorist trying to talk his way out of a ticket by claiming he did not see the stop sign.

B. The trial court properly relied on well-developed South Carolina law including *Minter* and *Ecclesiastes*.

The trial court properly relied on *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (1996). The so-called "Grease Monkey" case is particularly germane to this case. Appellant argues the case illuminates nothing here because the Court of Appeals affirmed the lower court's decision that there was no proof of a separate fraudulent act accompanying the breach of contract. In South Carolina, a party cannot recover for breach of contract accompanied by a fraudulent act unless there is a separate fraudulent act accompanying the breach. "We agree with the trial court's decision to grant a directed verdict in favor of GOCT on the Minter's' cause of action for breach of contract

accompanied by a fraudulent act. In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act." *Minter v. GOCT, Inc. d/b/a Grease Monkey*, 322 S.C. 525, 473 S.E.2d 67 (1996) citing *Smith v. Canal Ins. Co.*, 275 S.C. 256, 269 S.E.2d 348 (1980)

In other words, if Clarke had sued Fine Housing alleging breach of contract (assuming *arguendo* the parties, Clarke and Fine Housing, had a separate contract) accompanied by a fraudulent act, the trial court would properly direct of verdict on this record because this record contains no evidence of a separate fraudulent act. Appellant is, therefore, arguing about an issue not before the trial court or this court. The issue before the trial court and this Court is simple: the appellant acquired a parcel of real estate without conducting a title exam and overlooked respondent's rights. This failure is why appellant is asserting a claim against his title company for failing to conduct a title exam even though Fine Housing deprived its closing attorney of a reasonable opportunity to be prepared properly. See *Fine Housing v. Sloan*, 2016-CP-18-00340 where appellant alleges damages against his closing attorney for not disclosing the right of first refusal. Not only did Fine Housing expect its lawyer to conduct a full title exam between November 26th and December 2nd, when November 28th was Thanksgiving, it compounded the difficulty by remaining absent. When appellant criticizes the trial court's reasoning, including its reliance on *Minter,* it is because appellant seeks to twist *Minter's* dismissal of a tort claim as somehow excusing it from examining the title prior to closing. In making this argument, appellant is advancing another classic straw man argument. The trial court

did not rely on *Minter* for its holding on the absence of an independent fraudulent act, but rather for the obvious principle that a right of first refusal does not require a magic formula to be effective. (See *Webb* quoted above on page 23.) It is fair for appellant to argue that *Minter's* right of first refusal involved business development of future *Grease Monkey* franchises, but that is a distinction that makes no difference. It is like saying the rules pertaining to motor vehicles only apply to electric cars because only electric cars have "motors," and internal combustion cars have "engines." The rules of the road obviously apply to both, and the rules of *Minter* obviously apply to all rights of first refusal.

As for the trial court's reliance on *Ecclesiastes*, while the case does involve an enforceable right of first refusal through a lease like *Minter* did, the trial court cited the case for the principle that in construing contracts, the Court's function is to enforce the parties' intent. At its core, appellant's argument is an argument against *stare decisus.* Appellant argues that because neither *Minter* nor *Ecclesiastes* have identical facts, the trial court "misreads" them because "[t]he parties in each action were in contractual privity with each other." (Appellant's brief at page 21) This statement is nothing more than an effort to divert the Court from applying the recording statute, which puts the parties in constructive privity with one another, and is nothing more than an explanation as to why respondent brought an action in equity for specific performance instead of an action at law to enforce a contract. Of course, respondent did sue the party with whom he is in privity, and that party, RRJR, chose not to participate in the litigation.

On the same page, however, appellant finally arrives at the issue in the case: **"Here, Clarke seeks to bind Fine Housing to the terms of the Right of First refusal**

because it is a recorded interest in real estate of which Fine Housing had record notice, not because it was a party to the contract." (Appellant's brief at page 21.)

Appellant's statement is notable for three reasons:

First, the effect of the recording statute **is** the issue in the case. The effect of the recording statute is the issue that the trial court analyzed in detail but which the appellant ignores; to wit, that he purchased property without examining the title and now complains there is an encumbrance he did not see.

Second, as a matter of pure logic, the appellant's statement refutes itself, which is simple to demonstrate. All one must do is look at the negative of appellant's statement and absurdity reveals itself. The inverse of appellant's statement is: **Here, Fine Housing seeks to escape the legal effect of the recorded lease because it never looked for it. Because Fine Housing never looked for or saw the recorded lease, the Court cannot bind Fine Housing to the terms of the Right of First refusal because Fine Housing did NOT see it and because it was NOT a party to the recorded lease.** This inverse statement is both logically meaningless and legally meaningless. It is logically meaningless because to assert one cannot believe anything one cannot see eliminates most of the world. It is legally meaningless because the respondent recorded the lease in 1999, which gave notice of it to the world. It is not legally (or logically) significant that the recorded document is a contract only between Robinson and Clarke because Fine Housing took title subject to it, just like it took title subject to other liens, which were contracts between other parties. We are all subject to rules that we did not prepare, and the reason the General Assembly adopted a recording statute is to put an end to such

nonsense. The purpose and effect of the recording statute is to put Fine Housing on notice that there is a lease on the property that contains a right of first refusal. Not only did appellant stipulate to this fact and to the application of the statute, but also the trial court thoroughly analyzed this issue. Nowhere does appellant address the effect of the recording statute even though the application of this statute is the primary legal issue in the case.

Third, and most importantly, appellant has not thought through his statement. If appellant states his legal position as: **"Here, Clarke seeks to bind Fine Housing to the terms of the Right of First refusal because it is a recorded interest in real estate of which Fine Housing had record notice, not because it was a party to the contract,"** then appellant is agreeing with the respondent's legal position in his cross appeal that the price for right of first refusal should be fixed at $150,001.00.[2] Fine Housing is correct: it was not a party to the contract between the Robinsons and Clarke just like any purchaser of real estate is not subject to the contracts that give rise to liens on the property, such as mortgages or mechanic's liens. The respondent sued RRJR and properly served RRJR by serving Robin Robinson. (See R.O.A. Vol. 1, page 59 [affidavit of service]. RRJR did not answer or appear. R.O.A. Vol. 1, page 60 [affidavit of default]. Appellant's allegation that the lease is a contract between RRJR and Clarke is a tautology, and respondent accepts the tautology is true. (All tautologies are true.) The respondent sued RRJR for breaching its contract with respondent and named appellant because he claims an

[2] Appellant's position conflicts with the legal position he asserts in Argument V. There, Fine Housing argues the Court erred in setting the purchase price. If the contract is only between Clarke and Robinson, then he has no grounds to complain, and the price is fixed by contract as respondent asserts.

interest in the property by virtue of the lease recorded in the R.M.C. Office. However, no one disputes that appellant took voidable title subject to all properly recorded encumbrances, and this is the legal issue appellant ignores. It is the purpose of § 30-7-10, S. C. Code, ann. Throughout the litigation, the respondent asserted **equitable** positions consistent with equity, which included respondent's acknowledgement that he offered more than $150,001.00 to settle the dispute because respondent attempted to resolve this case short of litigation and acknowledges that appellant might assert equitable liens on the property. Instead of asserting legal defenses or instead of relying on principles of equity, appellant asserted purely legal defenses in his effort to convince the trial court that the document is legally unenforceable.[3] Appellant adopted a legal position to try to shift the blame for his failure to examine the title by alleging the trial court did not understand its legal theories. Distilled to its essence, appellant argues he is not obligated to obey the rules everyone else follows.

C. The trial court made sufficient findings of fact to support its decision.

The appellant's arguments here are recycled from previous arguments. In fact, appellant says exactly this: "The offered Right of First Refusal lacks the specificity required to be an enforceable interest in real estate." Appellant's brief at page 22. Appellant once again complains that Clarke only testified as to what his intentions were and could not testify as to what the Robinson's intentions were. First, the right of first refusal does not require testimony to understand it because it is clear. Robinson's

[3] In Argument IV on pages 32-34, appellant argues that respondent should be **equitably** estopped from asserting his rights. In Yiddish, such an assertion, on this record, is called *chutzpah*. There is no word in English that serves as well.

intentions are expressed by the writing, and it is the function of the court to enforce the terms. The trial court stated this principle of law at pages 15-17 of the Order under review. (R.O.A. Vol. 1, pages 16 - 18) The appellant ignores the fact that the lease contains a precise legal description as part of the recorded document. Moreover, if the lease were ambiguous, as appellant points out, he was not a party to it, and RRJR did not appear in the action to assert ambiguity or unenforceability. Of course, the lease is not ambiguous, so the Court need look no further than the words used in the document to discover lessor and lessee's intentions. Whether looking at Group Investment Company or RRJR, the principal is either John or Robin Robinson, and Robin Robinson is who the respondent served at the commencement of this action and who handled the transaction with Fine Housing. See R.O.A. Vol. 1, page 59 [affidavit of service] In short, the appellant wants to discuss anything other than the facts that he purchased a parcel of real estate without either examining the title or calling Robin Robinson to testify if he thought she was necessary to his legal defense. Instead, he has the temerity to argue that this Court should protect him because "the right of First Refusal is an unreasonable restraint on alienation of real property that violates the public policy of the State of South Carolina." Appellant's brief at page 22. There is no evidence in this record to support appellant's unsupported speculation that RRJR felt restrained. As for public policy, the record here of predatory lending and sharp practice by Fine Housing demonstrates that this appellant is the least qualified person in South Carolina to cloak himself in the "public policy of the State of South Carolina." The predatory lending terms he imposed on Robin Robinson are unconscionable, and, even though Ms. Robinson put herself in the position of having

to turn to an unsavory lender to try to save her home, does not excuse the lengths Fine Housing went to in its plan to take advantage of her at every step in the process. If appellant wishes to ground his legal argument on the public policy of South Carolina, respondent accepts that characterization and replies that the public policy of South Carolina is for purchasers of real estate to examine title to real estate prior to acquiring it.

II There is no evidence supporting appellant's assertion that Clarke waived his right to enforce his right of first refusal.

The appellant's argument on waiver is demonstrably frivolous and contradicted by its own brief. On page 24, appellant points out the stipulation that Group Investment Company and RRJR are controlled by the same individuals. See R.O.A. Vol. 2, page 402 [Exhibit 13] As pointed out above, RRJR stands for "Robin Robinson/John Robinson." Appellant then relies on the spurious suggestion that there **may** have been other shareholders of Group Investment Company. Appellant ignores the record that Barry Clarke and John Robinson were friends and colleagues for over 40 years:

> Well, I just happen to have a picture with me of John Robinson and myself. It's a Polaroid as you can see, so it's a little old. But John asked me to take this picture of him. It had to be, my goodness, '80's or '90's. He had the club going on Market Street. The first time I met John, he was 19 years old. He wanted to go into the club business. I'm a little older than him by about nine years, and I said let me give you some good advice. He said, what? I said, don't go in the club business. You won't get but $10,000 to help with that. But he went in it anyway and became pretty successful. We were friends a very long time.
>
> R.O.A. Vol. 2, page 298 [tr. page 131, lines 6-16]

Barry Clarke had been both John Robinson's landlord and his tenant for years, which provided him with intimate knowledge of John's business. Moreover, Mr. Clarke testified in detail about his efforts to pay the lot rent on time to ensure that he kept his right of first refusal in effect. It is not credible for the appellant, who does not know the

area or the people or their background course of conduct, to offer an unsupported speculation that there **may** have been other shareholders of Group Investment Company when appellant knows for a fact there were not.

In addition, the record shows that the transfer between Group Investment Company and RRJR was for five dollars ($5.00) consideration. (R.O.A. Vol. 2, page 434 [Exhibit 33]. The trial court rejected appellant's contentions, pointing out: "First, the record shows that the transfer was a name change only, going from a corporation owned and operated by John and Robin Robinson to a limited liability company owned and operated by John Robinson and Robin Robinson for the consideration of five ($5.00) dollars. (See plaintiff's exhibits 31, 32, and 33, R.O.A. Vol. 2, pages 432, 433, 434 stipulation of William Swope, R.O.A. Vol. 2, page 350 [tr. Page 183] and testimony.)

Second, the consideration for the 2007 transfer is five dollars ($5.00), and the affidavit of true consideration demonstrates that it is a name change only. The instrument, Exhibit 33, at Vol. 2, page 434 of the R.O.A., shows that the deed was "EXEMPT from the deed recording fee because (exemption #1, no consideration)." Thus, the affidavit of true consideration demonstrates the transfer is a name change only because no consideration passed between Group Investment Company and RRJR, L.L.C., and the property remained in the hands of the same persons before and after the transaction.

Third, the plaintiff testified he was aware of the name change and knew it was not a sale to a third party. The defendant failed to produce evidence otherwise." R.O.A. Vol. 1, page 21 [Order under review at page 20]. See testimony of Barry Clarke quoted above at page 16. It strains credibility and approaches frivolous to assert that a transfer from

Group Investment Company to RRJR for no consideration triggered respondent's right of first refusal to purchase the property for six dollars. The transfer was an obvious name change since it had none of the indicia of a sale—no contract, no consideration, and the property remained in control of the same people as before the name change: John and Robin Robinson

Appellant's summary of the evidence at trial is incomplete at best, misleading at worst. In summarizing the testimony about Clarke's March 2014 phone calls to Vincent DeStaso, the appellant omits the key evidence. Vincent DeStaso closed the transaction with Robin Robinson on December 2, 2013, about six days after visiting South Carolina for the first time. 34 days after closing, DeStaso filed an ejectment action against Robinson. On February 19, 2014, 79 days after the closing, Robin Robinson sued Vincent DeStaso (R.O.A. Vol. 2, page 403 [Exhibit 14]) for four causes of action, including fraud, seeking to unwind the transaction and restore to her the ownership of her property, or as she put it in her complaint: "rescinding the entire agreement between the parties, including but not limited to ordering or otherwise causing to be recorded deeds transferring record title to the properties in Exhibit 'A' and Exhibit 'B' back to their respective prior owners. . ." Appellant resolved this lawsuit in his favor, but not until January 9, 2015. (R.O.A. Vol. 2, page 413 [Exhibit 15]) Until that time, ownership of the subject property was in dispute and only decided with finality on January 9, 2015. Only then did respondent know who owned the property. Up until that moment, respondent did not know if Fine Housing, Inc. owned the property or if Fine Housing was Robinson's creditor. Appellant makes much of the fact that "It was not until April 13, 2015, one (1)

year and twenty-four (24) days after Clarke learned of the transfer from RRJR to Fine Housing, and after Clarke's attempts to purchase the Property failed, that Clarke first raised the Right of First Refusal." (Appellant's brief at page 28) This statement is disingenuous because the appellant omits any discussion of the contents of the April 13th letter. It says:

> Dear Charlie,
>
> I see that your litigation with Robin Robinson came to an end by consent stipulation of dismissal filed January 9, 2015. As you are aware, my client, Barry Clarke, has a lease. The lease (recorded January 27, 1999, at Deed Book C 319 at Page 391) a copy of which I enclose for your convenience, contains a right of first refusal to purchase the property. We were aware that Robin Robinson was contesting your client's purchase of the property. In her pleadings, she alleged that it was not a sale, but rather collateral to secure a loan. It appears that in light of the January 9th Stipulation of Dismissal, that legal issue has been laid to rest, and there is no longer a challenge to your client claiming he purchased the property from Robin rather than foreclosing on a loan as she raised in her answer in the *Robinson v. Fine Housing, Inc.* (2014-CP-10-1035) case. In the run-up to the *Robinson* case, I sent your client a copy of the lease, and therefore he is aware that the property is subject to my client's right of first refusal. We suspected that we might be drawn in to your litigation as a result of that, but we were not. Under the right of first refusal, we can demand that your client convey the property to us for $150,001.00. Therefore, we are now exercising our right of first refusal, and we are prepared to tender to your client the sum of $150,001.00. Please let us know when we can schedule a closing in order to avoid the potential for conflict between us and leave your client with a clear path to liquidating the waterfront property, which is far more valuable. . . .
>
> (R.O.A. Vol. 2, page 480 [Exhibit 6])

The appellant ignores the legal challenge Robin Robinson filed against Fine Housing disputing ownership of the property. Notwithstanding the pending legal contest between them, this record shows that in spite of the controversy over ownership, Clarke was diligently asserting his rights. The record shows that immediately following the March 2014, visit of "the two Terry's," (Terry Hill and Terry Johnson, R.O.A. Vol. 2, page 307 [tr.

Page 140]) respondent attempted to exercise his right of first refusal, first by contacting Vincent Destaso and reaching an agreement with him and then by notifying counsel and authorizing counsel to make an offer to purchase:

Q Did Vincent Destaso ever call you or did you ever call him?

A I can't remember exactly. What I do remember. I remember a couple of things. I remember talking one time to Vincent -- I forgot his last name.

Q Destaso.

A Mr. Destaso, and somehow Ashley and I gave him that price of $650,000, right? And that was sort of a sweet spot for me because it was half a million more than it was worth, and I could afford to get the money for that, so I said, "Okay, we'll do that," and he has to say yes to this thing, right? So, he said, "I'll call you back in two weeks." So, I wait four weeks and I called him back. What he told me I will never forget this, "I forgot about it."

Now, a half a million dollars is pretty good money to make on something you paid $150,000 for. He said he forgot it and I turned around, and I believe it was Ashley who I was talking to, and I said, "I don't want to ever talk to him again." And I think from that time on, unless he called me, unless I'm mistaken, only Ashley spoke to him and you spoke to him.

Q Did you authorize Ashley Andrews to extend a purchase -- a proposed purchase agreement on your behalf to Mr. Destaso?

A Yes.

Q Did she do that?

A I believe so, Yes, sir.
(R.O.A. Vol. 2, page 308 – 309 [tr. 141, line 18—142, line 19])

. . .

Q. . . . Who made the first contact between you and Vincent DeStaso about the right of first refusal? Was it the nighttime visit between the two Terry's? Was that your first notice?

A. I believe that was the first time I heard that the property was being conveyed to someone else.

Q. As soon as you found out that there might be a claim to the property, did you attempt to exercise your rights in a diligent and straightforward, honest way?

A. I called Ashely. I believe she got in touch with you. And whatever you told me to do, that's what I did.

R.O.A. Vol. 2, page 312, [tr. page 145, lines 3-13]

Mr. DeStaso attempted to spin these facts by testifying that the purchase agreement Ashley Andrews transmitted to him on April 10, 2014, contained other terms not discussed. The document, of course, speaks for itself, R.O.A. page 420 [Exhibit 16], and it represents a standard purchase agreement, calling for an earnest money deposit of $50,000.00, and a 120-day inspection period. However, what is more important than the document is Mr. DeStaso's omission of the language in the correspondence conveying the purchase agreement:

April 10, 2014

Dear Mr. DeStaso:

I have attached the proposed Purchase Agreement for 2028 Pittsburgh Avenue for your review. The attachment is in Word format so that you and/or your attorney may redline it if necessary. Please contact me if you have any questions or concerns.

April 23, 2014

Dear Mr. DeStaso:

Thank you for taking the time to speak to Barry and me last week. Barry wanted me to convey to you that he is ready, willing and able to purchase the property without owner financing and only mentioned that as an option if you were interested in it.

I have attached the most recent draft of the Agreement for Purchase and Sale. I made a few changes and I added a provision that would allow Barry to lease the property should the property become vacant during the time the contract is contingent (Section 17 and Exhibit B). Barry is concerned that if the property is vacant that the county and/or state may not issue liquor and business licenses in the future. What he proposes is that he lease the property for $750.00 per month so that he can apply for the licenses. During the time he is leasing the property for $750 he does not intend to operate a business there.

R.O.A. Vol. 2, 420 and 421 [Exhibits 16 and 17]

Respondent sent these proposals less than 30 days after the late-night visit of the "two Terry's." They not only demonstrate that respondent was operating with alacrity in good faith, and tailoring his proposals to assist Fine Housing, which was currently in litigation to eject its tenant, Robin Robinson, but also demonstrate Fine Housing's lack of credibility. Mr. DeStaso ignored Ms. Andrews' request for comment or changes [Exhibit 16], and Mr. DeStaso pretends that the lawsuit filed against him by Robin Robinson to unwind their transaction posed no risk to Clarke. However, one looks at the evidence here, there is no evidence to support an allegation of waiver.

Waiver is an affirmative defense that must be plead and proved. See Rule 8(c), *South Carolina Rules of Civil Procedure*. The appellant had the burden of proof to produce sufficient evidence to prove, by a preponderance of evidence, that Barry Clarke voluntarily, knowingly, and intentionally waived his right of first refusal. Yet, appellant produced no evidence other than his unsupported legal argument that the doctrine of waiver exists in South Carolina jurisprudence. The record is clear that Clarke acted

forcefully and prudently following the late-night visit of the "two Terrys" in March of 2014:

> A couple of guys came to my house, called me up, and one was a friend and one I didn't know. They explained to me that they thought the property sold. I said it can't be sold, because I have first right of refusal.
>
> R.O.A. Vol. 2, page 307 [tr. page 140]

The record is undisputed that upon hearing this information three months after the closing, respondent did everything possible to: A) find out what the facts were, and B) made an offer of settlement of $650,000.00 to avoid litigation. Normally, offers of settlement are inadmissible. Rule 408 *S. C. Rules of Evidence*. Notwithstanding the rule, such offers are admissible to negate "a contention of undue delay," and respondent's quick action eviscerates any claim of "waiver." The evidence shows that the respondent acted with alacrity and generosity.

On the witness stand, Mr. DeStaso simultaneously lied and contradicted himself in the same testimony. First, he testified that Clarke's offer of $650,000.00 contained numerous conditions that the two of them did not discuss. It does not. See R.O.A. Vol. 2, page 310 and 421 [tr. page 143, lines 6-13, and Exhibit 17]: "Barry wanted me to convey to you that he is ready, willing, and able to purchase the property without owner financing and only mentioned that as an option if you were interested in it." Second, he claimed that respondent insisted that he, DeStaso, get rid of Robin Robinson. However, the evidence shows that DeStaso lied about this as well because the record shows he filed an ejectment proceeding against Robinson 33 days after the closing. (See R.O.A. Vol. 1, page 214 and Vol. 2, page 380 [tr. Page 47, line 9—line 19, Exhibit 10]) When

asked directly if he took any action that can be construed as a "waiver," respondent testified: "Absolutely not." (R.O.A. Vol. 2, page 311 [tr. page 144, line 17].

Thus, the appellant fails to identify any evidence that supports his assertion that Clarke "waived" his rights. As the trial court held: "While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons." R.O.A. Vol. 1, page 21 [Order under review page 20]) Here, appellant attempts to use "waiver" or "estoppel" as offensive weapons to preempt plaintiff's equitable claim of specific performance to enforce the contractual right he had with RRJR as the successor of Group Investment Company.

The elements of "waiver" are: an intentional relinquishment of a known right. An implied waiver results from acts and conduct from which an intentional relinquishment of a right is reasonably inferable. It is an affirmative defense, and the burden of proof is with the party asserting it, who must demonstrate by a preponderance of the evidence that Clarke possessed all of the material facts on which a waiver depended. *Parker v. Parker*, 313 S.C. 482, 443 S.E.2d 388 (1994): Waiver is a question of fact for the finder of fact. *Janaski v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992)

However, this record contains no evidence to support a finding of respondent's "knowing or voluntary relinquishment of a right." As the trial court found:

. . . the defendant asserts that the plaintiff waived his right to enforce his right of first refusal because of his inaction upon the transfer to Fine Housing, Inc. There is no

evidence in this record to support any theory based on plaintiff's alleged inaction. Fine Housing, Inc. acquired title on December 3, 2013. Two months later Robin Robinson filed suit against Fine Housing, seeking to unwind the transaction. Fine Housing admits it never gave notice of the transfer to Clarke. RRJR, L.L.C. is in default and has walked away from the entire dispute. Mr. Clarke testified he received a late-night visit from "Terry and Terry" sometime in March 2014, telling him that "something was up with the club." Mr. Clarke then testified he contacted Mr. DeStaso that same month, informed him of his right to purchase the property, and Mr. DeStaso promised to call him back with two weeks. When DeStaso failed to call Clarke back, Clarke testified he called him a second time, and DeStaso told Clarke "he forgot." It was at that point, Clarke testified, that he turned the matter of to his lawyers, and on April 10, 2014, Clarke's lawyer sent DeStaso a proposed purchase agreement. (Plaintiff's Exhibits 16 and 17.)

In light of these facts as applied to South Carolina law, the appellant's assertion of waiver or estoppel or laches is frivolous.

III For the same reason as set forth above, there is not a scintilla of evidence in this record supporting a claim of laches.

Appellant's argument here is identical to the argument advanced above. Appellant sets forth a correct statement of law on laches: "The equitable doctrine of laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Appellant's brief at page 31, citing *Robinson v. Estate of Harris*, 389 S.C. 360, 698 S.E.2d 801 (2010), quoting *Hallums v. Hallums*, 296 S.C. 195, 371 S.E.2d 525 (1988). The Supreme Court explained in *Robinson* why a **thirty-nine-year delay** in

making a claim constituted laches, explaining:

The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee County* 315 S.C. 418, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and *(3) prejudice. *Hallums*, 296 S.C. at 1999, 371 S.E.2d at 528. (The delay in *Hallums* was 22 years.)

Appellant asks this Court to grope in the dark as to what evidence exists in this record to support a finding of "neglect for an unreasonable and unexplained length of time." Respondent filed his claim for specific performance within four months after the court determined Fine Housing owned the property. Moreover, the record shows that respondent contacted appellant within days of discovering appellant's claim to the property, and only appellant's unreasonable demands made litigation necessary. There is no evidence in the record to support an assertion of "unreasonably" delayed. Likewise, the appellant suffered no prejudice by any delay because there was no delay.

Respondent made efforts to resolve the matter the same month he discovered "something is up with the club" in March of 2014. Within days he telephoned DeStaso, and after DeStaso told him he "forgot" about respondent's offer to purchase for $500,000.00, respondent concluded he was dealing with a liar:

Q Did Vincent Destaso ever call you or did you ever call him?

A I can't remember exactly. What I do remember. I remember a couple of things. I remember talking one time to Vincent -- I forgot his last name.

Q Destaso.

A Mr. Destaso, and somehow Ashley and I gave him that price of $650,000, right? And that was sort of a sweet spot for me because it was half a million more than it was worth and I could afford to get the money for that, so I said, "Okay, we'll do that," and he has to say yes to this thing, right? So, he said, "I'll call you back in two weeks." So, I wait four weeks and I called him back. What he told me I will never forget this, "I forgot about it."

Now, a half a million dollars is pretty good money to make on something you paid $150,000 for. He said he forgot it and I turned around, and I believe it was Ashley who I was talking to, and I said, "I don't want to ever talk to him again." And I think from that time on, unless he called me, unless I'm mistaken, only Ashley spoke to him and you spoke to him.

Q Did you authorize Ashley Andrews to extend a purchase -- a proposed purchase agreement on your behalf to Mr. Destaso?

A Yes.

R.O.A. Vol. 1, pages 308 – 309, [tr. Page 141, line 18—142, line 17]

Once respondent determined appellant was unreliable, he authorized his lawyer to send a written proposal to purchase on April 10, 2014, within 30 days of the visit of the "two Terry's." When negotiations failed, and when Robinson's effort to unwind the transaction ended on January 9, 2015, respondent filed his suit 4 months later, well before the statute of limitations expired. If a litigant files a claim within the statute of limitations, then laches will rarely apply because laches means:

Unreasonable delay [that] causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. *Rabon v. Maili*, 289 S.C. 37, 344 S.E.2d 608 (1986); *Mack*

v. Edens, 306 S.C. 433, 412 S.E.2d 431 (S. C. App. 1991). The court is vested with wide discretion in determining what is an unreasonable delay. *Ham v. Flowers*, 214 S.C. 212, 51 S.E.2d 753 (1949)

Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner. *Privette v. Garrison*, 235 S.C. 119, 110 S.E.2d 17 (1959). Furthermore, in determining whether a party is barred by laches, the circumstances of each case should be considered, including whether the delay has worked injury, prejudice, or disadvantage to the other party. *Id.*

Chambers of South Carolina, Inc. v. Lee County, 315 S.C. 468, 434 S.E.2d 279 (1993)

This record is silent as to: respondent's undue lapse of time, negligence, opportunity to act earlier, or resulting injury, prejudice, or disadvantage to appellant. In fact, the evidence shows that the only reason this dispute exists is because appellant took title to property without examining the title. The evidence proves that respondent swung into action within days of learning "something was up with the club," and when negotiating failed, respondent filed suit within four months after the court determined Fine Housing did possess title. Appellant turns the law of laches on its head, grasping at straws to excuse his own negligence.

Moreover, in constructing a lifeboat of equity, Fine Housing, Inc.'s conduct here is not the conduct of clean hands. Since there is no evidence in this record of delay, especially unreasonable delay when the respondent asserted his rights within four months of the court resolving the title issue and after appellant made generous overtures to appellant to avoid this litigation, there is not a shred of evidence in this record to support a claim of laches. Looking at the evidence in this case in the light most favorable to appellant—the opposite of the standard—the appellant's reliance on laches is a waste of limited judicial resources.

Moreover, appellant's claim of laches must contain an essential element of

prejudice, and since the appellant created his own dilemma, and since respondent filed his claim well within a statute of limitations in a law case, there can be no prejudice as a matter of law because the law sets an outer limit for filing claims. Even though Courts have more discretion in equity cases, the appellant must identify the evidence supporting his claim, including prejudice. The only prejudice identified by Fine Housing is self-inflicted because it purchased property without examining the title. In essence, the appellant asks this Court's assistance in relieving it from its own negligence. While Fine Housing complains about having to "manage" the property (Appellant's brief at page 32), it misleads this Court by omitting mention of the rent it improperly collected on the property that rightfully belongs to the respondent. See R.O.A. Vol. 1, page 232 [tr. page 64]:

Q But you've been collecting rent since the new tenant came in at what, $15,000 a month, 20?

A Incorrect. Initially, I had to give up 20 or 30, over $30,000 because of issues with the building and improvements that were needed. Since then, our new current lease is for $15,000 a month.

Q Okay. And you've been collecting that rent?

A Well, that lease commenced just January of this year.

Q Okay. So, you've had the property since 2013, correct?

A December 2nd, 2013 is when I bought the property.

Q Okay. You sold Sol Legare for $500,000?

A Yes.

Q You've collected rent on 2028 Pittsburgh in some amount of money?

A Yes.

. . .

A Well, again, at the time when I purchased the property, there were multiple problems that were there that I eventually was able to correct and get rid of the non-paying tenant and put a paying tenant in there and maintain the licensing, which is where the value is.

In complaining about having to "manage" the property, not once does the appellant mention the compensation he receives. The record shows that in exchange for a $805,000.00 investment, the appellant has already received $500,000.00 for the sale of the Sol Legare property R.O.A. Vol. 2, page 427 [Exhibit 26] and at least $15,000.00 a month in rent. What the appellant does not analyze is his responsibility to examine the title to real estate prior to purchasing it or the existence or application of the South Carolina recording statute.

IV The record does not include proof of the elements necessary for equitable estoppel.

The appellant's argument here is frivolous. The existence of the South Carolina Recording Statute bars the application of equitable estoppel. The appellant cannot assert it was not in possession of the true facts by refusing to look at them. § 30-7-10 S. C. Code, ann. governs the manner and effect of recording in South Carolina. Applying the statute to the facts of this case, the trial court found:

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)
R.O.A. Vol. 1, page 11 [Order page 10]

The appellant concedes that the respondent's recorded lease gave notice to the appellant of his lease and that his recorded lease contains a right of first refusal. As cited

above, the appellant admits he did not see it until **after** the closing, and the appellant admits that no one gave notice to respondent of the proposed sale. Thus, the appellant's legal position is to ask this Court to excuse him from the operation of South Carolina law and reward him for his negligence in not looking at the record.

Had he looked at the agreement, appellant would have seen the right of first refusal prior to closing. As the Supreme Court said in *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017):

> Indeed, an unambiguous, written contract is inherently incompatible with the doctrine of equitable estoppel. To succeed on a claim for equitable estoppel, a party must prove "lack of knowledge, and the means of knowledge, of the truth as to the facts in question." *Rodarte* at page 918. Here, the appellant's lack of knowledge was because of his lack of due diligence not because respondent suppressed the information, another essential element missing. "In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct. [citations omitted] The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury." *Rodarte* at 916. "The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (2) lack of knowledge, and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the part being estopped." *Rodarte* at page 916.

Appellant identifies none of these factors, and as pointed out above on pages 27 - 28 and 30 – 31, asserts that he is not bound by the right of first refusal because he was not a party to it. This logical inconsistency escapes appellant.

In short, there is not a scintilla of evidence in this record supporting appellant's assertion that equitable estoppel applies in this case. As the closing attorney, William

Sloan testified:

Q Now, you did hire a separate title examiner abstractor to check the title, correct?

A Yes.

Q And who was that?

A Charles Feeley, Esquire.

Q Okay. When did he complete that title examination?

A In the late afternoon of December 3rd -- excuse me, the late afternoon December 2nd, 2013.

Q Okay. And that title exam, did it or did it not reveal the existence of the Barry Clarke lease?

A He did pick it up.

Q Okay. But was it too late because of the urgency brought on by the pending foreclosure?

A Yes. I was in the conference room with Ms. Robinson at the time that Mr. Feeley e-mailed the title search to me.

Q Okay. What were your instructions upon learning that information?

A I'm sorry, could you repeat that?

Q Once Mr. Feeley transmitted ---

THE COURT: What was the date that Mr. Feeley produced the title?

MR. GOLDSTEIN: December 2nd.

THE COURT: Of '13?

MR. GOLDSTEIN: Yes, 2013. It was just hours after the closing.

A It was December 2nd, 2013, around 4:30 in the afternoon at the time I was in the conference room with Ms. Robinson doing the closing.

Q Okay. And once you received that information, what were your instructions then?

A Once I had received ---

Q The Feeley report.

A Oh, okay. I had a very few minutes to review Mr. Feeley's search and there was one tax lien that I was concerned about that was not reported in Mr. Swope's search. So, I made a nervous phone call to Mr. Swope and sent him an e-mail about that tax lien and he called me back moments later and reassured me that that lien was only against now the late John Robinson, Ms. Robinson's husband and not Ms. Robinson. I relied on that representation by Mr. Swope. So, at that point, I moved forward the next morning to get the bank check and take it to Mr. Altman's office to stop an imminent foreclosure sale.

Q At that moment, were you or were you not aware that the lease contained a right of first refusal?

A Unaware.

Q Unaware?

A Unaware.

Q And is that because of the urgency of the closing and the lack of time to prepare adequately?

A Yes.

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 275 – 278 [tr. Page 108, line 18 through page 111, line 12])

The appellant stipulated that neither he nor RRJR gave respondent notice of the proposed sale. Finally, the appellant's closing statement (R.O.A. Vol. 2, page 373 [Exhibit 4], shows an astonishing amount of sharp practice and overreaching. Such conduct makes the appellant ineligible to assert equitable defenses. This predatory lending when combined with the fact that the appellant has been collecting rent to which he is not entitled makes his appeal to equity hollow.

V. The trial court erred in calculating the purchase price, which it should have calculated at $150,001.00.

The issue of fixing the purchase price is cross-appealed by the respondent, and respondent addresses this legal issue fully in his Opening Brief on Cross Appeal, which is incorporated here. As set forth more fully in the cross-appellant's opening brief, the right of first refusal is not ambiguous, and the purchase price is controlled entirely by the seller, RRJR. When RRJR decided to accept $150,000.00 for the property, that decision fixed the purchase price and established the respondent's threshold for purchase.

VI. Additional sustaining Ground

In his well-written and well-constructed brief, not once does appellant acknowledge

South Carolina's recording statute's effect on this transaction. The existence and application of the recording statute governs every legal issue in this case.

CONCLUSION

The lower court correctly determined that the respondent holds an enforceable right of first refusal. This is a case brought in equity for equitable remedy of specific performance because the appellant chose to purchase real estate without examining the title. The appellant fails to explain why the application of § 30-7-10 does not apply to him. 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. The terms of the contract are clear, and the law provides that the terms must be fulfilled in a reasonable time in a reasonable manner. The trial court set forth specific findings of fact and conclusions of law, which are supported by the overwhelming weight of the evidence, and for these reasons, the Order of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

May 15, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-03038

Barry Clarke, Respondent/Appellant,

v.

Fine Housing, Inc. and RRJR, LLC, Defendants,

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

FINAL REPLY BRIEF OF APPELLANT/RESPONDENT

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ARGUMENT

This matter concerns the validity of a right of first refusal that the Respondent/Appellant Barry Clarke ("Clarke") claims in real property located on Pittsburg Avenue in Charleston County (the "Property"). Clarke's argument attempts to divert the Court's attention from this simple issue, unnecessarily complicating the matter with facts that are not relevant.

Not only are these facts irrelevant, they are also either misstated or not found anywhere in the record. Rule 210(h), SCACR directs the appellate court not to consider any fact that does not appear in the Record on Appeal. Clarke's brief to this Court includes gross misstatements of facts and matters not found in the record of the proceedings below.

1. Clarke misstates the facts.

The following are seven (7) examples of Clarke's material misstatements in his Brief of Respondent/Appellant. This is not an exhaustive list.

a. Clarke misrepresents the trial testimony concerning his exercise of the claimed right of first refusal.

At least three times in his brief to this Court, Clarke offers that, upon learning of the transfer of the Property from RRJR to Fine Housing, he immediately attempted to exercise his right of first refusal by contacting DeStaso and offering to purchase the Property. Brief of Respondent/Appellant, pp. 10, 35, 40. An examination of the testimony offered at trial indicates that Clarke waited more than a year after he learned that RRJR sold the Property to Fine Housing before attempting to exercise the claimed right.

There were only three witnesses who testified at trial – DeStaso, Sloan and Clarke. Each of the witnesses testified concerning Clarke's conduct after he learned of the sale from RRJR to

Fine Housing. The record establishes that Clarke learned of the transfer on or before March 21. 2014. There is no testimony that he attempted to exercise his claimed right until April 13. 2015.

(1) Clarke's Testimony.

Clarke had several opportunities to testify that he exercised the right of first refusal when he learned of the transfer of the Property from RRJR to Fine Housing; but he did not. On direct examination Clarke first stated, three times, that he did not recall exactly what transpired after he discovered the sale from RRJR to Fine Housing. (R. p. 308, line 9 to p. 309, line 19). Then, instead of testifying that he exercised the right of first refusal by offering to pay the $150,001.00 that he now claims is the price at which he can exercise his right, he testified that he offered to purchase the property for $650,000.00 and did not mention the right of first refusal. *Id.* Clarke even explained his rationale behind the $650,000.00 offer. (R. p. 310, line14 to p. 311, line 3). The initial inquiry to Clarke of what transpired after he learned of the sale reflects that Clarke made a conscious decision not to exercise the right of first refusal.

Clarke's counsel made a second attempt to elicit testimony from Clarke that he immediately exercised his right of first refusal when he discovered the sale that triggered the right:

> Q As soon as you found out that there might be a claim to the property, did you attempt to exercise your rights in a diligent and straightforward honest way?
> A I called Ashley. I believe she got in touch with you. And whatever you told me to do, that's what I did.

(R. p. 310, lines 9-13). Again, when he was given the opportunity, Clarke did not testify to the immediate exercise of the right of first refusal that he asserts in his brief to this Court.

On cross examination Clarke had an opportunity to testify concerning his exercise of the right of first refusal in March of 2014, but failed to do so. In fact, he even testified that he failed

to raise the right of first refusal with his counsel. (R. p. 330, line 15 to p. 331, line 16). This testimony is consistent with Clarke's statements on direct examination – he elected not to exercise the right of first refusal in favor of an offer at a price that he believed Fine Housing would not refuse.

On redirect examination, Clarke's counsel made a final attempt to secure the needed testimony from Clarke.

> Q Okay. Now, Mr. Moore asked you when you would exercise the right of first refusal. Would it be to your benefit to exercise it as quickly as possible or to drag your feet?
> A I would do it as quickly as possible. I don't know if it would be to my benefit or not, but I would be too anxious to find out what the heck is going on and deal with it. Now, I don't know what the advantage would be. I'm not sure about that.
> Q Okay. Now, if you're in control of the club and you're running it properly, are you making a profit, based on your past experience?
> A Yes.
> Q Okay. And if you make a profit operating these clubs, would you rather start operating it sooner or later?
> A The sooner the better. Start making profit right away. Well, not right away, but you know.
> Q And is that why you offered $650,000 to get it?
> A Well, yes, the sooner I got the property, the better -- every minute that goes by I'm losing -- a guy that wants the property and knows how to operate a place is losing money.

(R. p. 332, line 24 to p. 333, line 18). Instead of testifying to the prompt exercise of the right of first refusal, Clarke continued to suggest that he abandoned the right to demand the property on the payment of $150,001.00 in favor of offering $650,000.00, hoping to score a quick purchase.

(2) Sloan's Testimony.

Sloan was the attorney that represented Fine Housing in the sale of the Property from RRJR. Clarke contacted him by telephone on March 21, 2014 to inquire about the transfer from RRJR to Fine Housing. (R. p. 285, line 25 to p. 286, line 17). This was the only communication

with Clarke to which Sloan testified. Sloan testified that Clarke did not state that he intended to exercise a right of first refusal during this call. (R. p. 286, lines18-24).

Sloan also testified that he communicated electronically with Mr. Goldstein, Clarke's counsel, concerning Clarke's discovery of the sale of the property by RRJR to Fine Housing.

> Q Have you ever had a conversation with Mr. Goldstein where he said Mr. Clarke has a right of first refusal if he wants to exercise that right.
> A In the two e-mails, there was no more than two that I had with Mr. Goldstein. He sent me the first e-mail. I sent him a reply e-mail and asked him what does Mr. Clarke want to do and as **I recall Mr. Goldstein e-mailed me back and said he, referring to Mr. Clarke, was unsure what he wanted to do**.

(R. p. 286, lines 18-24). (emphasis added). This testimony does not support an immediate exercise by Clarke of his alleged right. Rather, it suggests that Clarke's immediate reaction was uncertainty.

(3) DeStaso's Testimony.

DeStaso testified that Clarke did not raise the claimed right of first refusal in his first conversation with Clarke. (R. p. 240, line 13 to p. 241, line 25). In fact, DeStaso testified that it was not until April 13, 2015 that Clarke first asserted the claimed right of first refusal in a letter his attorney wrote to Fine Housing's counsel. (R. p. 251, line 8 to p. 252, line 3).

The record is devoid of any testimony or evidence to support Clarke's position that he exercised the claimed right of first refusal when he learned of the transfer from RRJR to Fine Housing in March 2014. Clarke stated that he does not recall specifically what happened, but does remember that he turned to his attorneys for guidance. One of Clarke's attorneys told Sloan that Clarke had not decided if he wanted to buy the Property and another lawyer prepared a contract for Clarke to purchase the Property from Fine Housing for $650,000.00 that did not reference the Lease or the right of first refusal in the Lease. The evidence shows that Clarke did

not exercise the claimed right under the Lease when he learned of Fine Housing's purchase. Rather, he abandoned the right in favor of a strategy to quickly purchase the Property for a price he believed Fine Housing would not refuse. Clarke tried to revive the claimed right more than a year later when his strategy failed.

b. Clarke's account of Fine Housing's minimal investment in the Property is inaccurate.

Clarke challenges Fine Housing's statement in the Brief of the Appellant that it spent its time and money improving the Property and resolving title issues. He submits that the record only includes evidence that the proceeds from the purchase of the Property from RRJR and the Sol Legare Road Property from Robin Robinson resolved tax liens and judgments, provided Fine Housing with a security deposit on the Property, and paid insurance premiums due on the Property. Clarke's assertion only considers part of the record and ignores other portions of testimony offered at trial that support Fine Housing's recitation of the facts.

At trial, DeStaso testified to expenses incurred by Fine Housing after it purchased the Property. He outlined the following expenses:

- Hiring attorney Charles Altman to help resolve outstanding tax liens (R. p. 236, lines 13-16);
- Costs associated with the eviction of Robin Robinson as a tenant (R. p. 236, line 17 to p. 237, line 7);
- Payments and rent concessions made to Robin Robinson (R. p. 236, line 17 to p. 237, line 7);
- Time, effort and expense related to curing problems with permitting and licensing (R. p. 237, lines 8-17);

- A $102,000.00 settlement with former employees who had placed a lis pendens on the Property (R. p. 237, line 18 to p. 238, line 1);
- Expenses related to improvements made to the Property and building code violations (R. p. 238, lines 2-13); and
- Rent concessions to a tenant to account for improvements to the Property (R. p. 238, lines 2-13).

c. Clarke's statement that Sloan reviewed the Lease on the date of the closing of the sale from RRJR to Fine Housing is unsupported by the record.

Sloan clearly testified at trial that he did not see the Lease until March 21, 2014 following a telephone call made by Clarke to Sloan (R. p. 285, line 10 to p. 286, line 17). Yet, Clarke's statement of facts includes the representation that Sloan and Fine Housing knew of the Lease on the date of the closing of the sale from RRJR to Fine Housing, December 2, 2013. Clarke implies that because Sloan received a title report during the closing that contained a copy of the Lease, he reviewed the Lease at that time. That was not Mr. Sloan's testimony. The portions of the trial transcript to which Clarke directs this Court's attention are only part of the picture.

Clarke asks the Court to consider only part of the testimony elicited by his attorney on direct examination - Transcript, pp. 108-111. He omits the other part of the testimony provided in response to his attorney's questions on this topic.

> Q When did you discover that there was a lease on file at the RMC office in favor of Barry Clarke?
> A March 21st, 2014.

(R. p. 270, lines 16-18). The testimony on which Clarke focuses is in response to questions posed by his counsel. The questions mistakenly assume that Sloan saw the Lease notation on the title report and read the Lease. That was not Sloan's testimony. The conclusion Clarke

suggests from this assumption is that Sloan missed the language creating the claimed right of first refusal because of his haste. In fact, Sloan's testimony is that he did not review or even see the Lease on December 2, 2013 because the author of the title abstract did not provide him with a copy of the Lease. Sloan did not review the Lease until March 21, 2014 following Clarke's telephone call. (R. p. 270, lines 16-18 and p. 285, line 10 to p. 286, line 17).

d. Clarke misrepresents the date that Sloan first became involved in this matter.

Clarke's attack on Fine Housing includes several suggestions that Fine Housing was culpably unreasonable in the demands that it made concerning the timing of the closing of the sale of the Property from RRJR to Fine Housing. He argues "[t]he fact is that Fine Housing rushed the transaction, did not review the title, and did not provide adequate time for his closing attorney to prepare properly...". Brief of Respondent/Appellant, p. 18. To support this contention, Clarke maintains that Sloan was not engaged until November 26, 2013 and that Fine Housing demanded a closing on December 2, 2013, noting that the Thanksgiving Holiday occurred between the date of engagement and the closing date. Consideration of all of the relevant facts demonstrates that Clarke's argument is misleading.

Attorney William Swope ("Swope") represented Robin Robinson. (R. p. 281, lines 10-12; R. p. 282, lines 3-7; and R. p. 283, lines 11-19). Swope refers legal work to Sloan. (R. p. 284, lines 7-18). In the summer of 2013 Swope contacted Sloan about doing a refinance for Robin Robinson. (R. p. 283, line 20 to p. 284, line 2). Swope contacted Sloan again in the fall of 2013 to discuss a refinance transaction. (R. p. 284, lines 4-6). On November 17, 2013, Swope provided Sloan with his title examination in anticipation of a transaction concerning the Property. (R. p. 284, lines. 7-19). Fine Housing became Sloan's client on November 26, 2013. (R. p. 285, lines 14-15).

Fine Housing did not control the date of the closing of the sale from RRJR. The timing was dictated by an imminent foreclosure sale of Robin Robinson's residence that was scheduled for December 3, 2013. (R. p. 266, lines 13-16).

Swope knew for some period of time that a transaction concerning the Property was imminent. Clarke's assertion that Swope was surprised and pressured by an emergency retention by Fine Housing seven (7) days before the required closing has no support in the record.

e. Clarke misstates the significance of the title policy Sloan issued.

As evidence of his conclusion that Sloan knew of the Lease on the date of the closing, December 2, 2013, Clarke argues that Sloan took exception to the Lease in the title policy that he issued concerning the transaction. Brief of the Respondent/Appellant, p. 9. While it is true that Sloan testified that he included the Lease as an exception in the title policy that he issued to Fine Housing, that policy was not issued until after March 21, 2014. (R. p. 289, lines 14-23). Sloan also testified that he did *not* take exception to the Lease in the title insurance policy commitment (R. p. 289, lines 14-23) that would have been issued before the title insurance policy. Under these facts, the inclusion of the Lease as an exception in the title policy does not indicate that Sloan knew of the Lease on December 2, 2013.

f. Clarke's statement that Fine Housing did not review title is false.

A recurring theme in Clarke's factual summary is that no one knew of the Lease containing the claimed right of first refusal because Fine Housing did not examine title to the Property (*see, e.g.*, Brief of the Respondent/Appellant, p. 18). This statement is false.

The examination of the title to real property in South Carolina is the practice of law and can only be performed under the supervision of an attorney licensed to practice law in this state. *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987). Testifying as Fine Housing's

witness at trial, DeStaso stated that he was not aware that the closing attorney was responsible for the title examination in South Carolina because his experience in New York was that the title company preformed the examination of title. (R. p. 206, lines 15-24).

Sloan was Fine Housing's attorney for the transaction at issue (R. p. 311, lines 1-9) and he made the conscious decision to close the transaction in reliance on title work provided to him by Swope. (R. p. 270, lines 7-9). He had that title work in his possession on November 17, 2013. *Id.*

Swope's title work failed to reveal the Lease. (R. p. 270, lines 12-15). That is why Fine Housing and its counsel, Sloan, did not know of the Lease at the closing.

g. Clarke's statements concerning Fine Housing's relationship with Sloan are incorrect.

In his argument, Clarke states "[h]owever, to be fair to the closing attorney, Fine Housing placed him in an untenable position for demanding he close the transaction and transmit the check to the foreclosing creditor before 10:00 a.m. on the 3rd." Brief of the Respondent/Appellant, p. 18. This is one of several instances in his Brief where Clarke attempts to distract the Court from the true issues before it by fabricating a feud between Fine Housing and Sloan at the time of closing as the source of all that went awry.

The time constraints on the closing were not created by Fine Housing, as Clarke suggests. A looming foreclosure sale is what drove the timing of the transaction. (R. p. 180, lines 13-16).

Clarke tried to elicit testimony from Sloan at trial that Fine Housing placed undue and unreasonable demands on Sloan, causing Sloan to cut corners and miss the recorded Lease that contained the claimed right of first refusal. However, Sloan did not testify as Clarke represents in his Brief. Rather, he simply stated that he chose to rely on a title examination provided to him

by Swope that did not contain a reference to the Lease. (R. p. 270, lines 4-11).

For reasons not explained by his trial testimony, Sloan decided to order a second title examination. (R. p. 275, line 20 to p. 277, line 24). The record does not reflect when Sloan ordered the examination, but he received the title report during the closing on December 3, 2013. *Id.* The report contained a reference to the Lease, but Sloan did not see it because he was focused on new tax liens contained in the report that were not included in Swope's title report. *Id.* It was not pressure exerted by Fine Housing that caused Swope to miss the Lease in the second report; it was the timing of the receipt of the second report and Swope's failure to completely review that report.

2. Clarke relies upon evidence that is not in the record.

Many of the facts that Clarke uses throughout his argument in his Brief of the Respondent/Appellant are not found in the record of this matter. Several appear to be assumptions made by Clarke and his counsel or facts known to them that were not offered at trial. This Court's review is limited to the record that has been established and should not include matters not contained in the record of this case. Examples of these statements of fact follow.

a. Clarke's assertion that Sloan did not have time to conduct a title examination is not found in the record.

In his argument to this Court, Clarke repeatedly states that Sloan did not have sufficient time to conduct the title examination needed to close the sale transaction from RRJR to Fine Housing. However, Sloan did not testify that he lacked the time to conduct an examination of the title to the Property. Rather, his testimony was that he chose to rely on title work provided to him by Swope on November 17, 2013. On examination by Clarke's counsel, Sloan testified:

Q Okay. Did you have enough time to conduct a full 40-60-or even 20 year search without relying on information that was provided to you?
A Mr. Swope, I relied on the title work of Mr. Swope that he furnished sometime earlier in the month, sometime around -- around November the 17th, sometime around there.

(R. p. 270, lines 4-9). Sloan consistently testified to this reliance throughout his examination. (R. P. 265, lines. 17-22 and p. 284, lines 7-19).

b. The notion that Fine Housing had a copy of the Lease before the proceeds of the sale from RRJR to Fine Housing is not in the record.

Clarke challenges Fine Housing's explanation of why it did not notify Clarke of its purchase of the Property from RRJR. Fine Housing explained that it did not provide the notice because it did not have actual knowledge of the Lease at the time of purchase. Clarke submits that this statement is inaccurate because "appellant had the lease prior to disbursing." Brief of the Respondent/Appellant, p. 10. There is nothing in the record indicating that Fine Housing had actual possession of the Lease until March 21, 2014.

c. Clarke did not state in his testimony that he concluded DeStaso was a "liar."

Clarke states that "respondent concluded he was dealing with a liar" (Brief of the Respondent/Appellant, p. 42), referring to Mr. DeStaso. Clarke directs the Court to the Trial Transcript, p 141, l. 18 to p. 142, l. 17 as authority for that conclusion. The cited trial testimony does not contain any opinions by Mr. Clarke as to Mr. Destaso's propensity for telling the truth.

d. Clarke's statements concerning the ownership and control of RRJR and Group Investment are not found in the record.

Clarke states as fact that:

- Group Investment Company, Inc. ("Group Investment") was "a company comprised of the husband and wife team of John and Robin Robinson. Brief of Respondent/Appellant,

p. 4;

- "RRJR stands for Robin Robinson and John Robinson". Brief of Respondent/Appellant, p.4;
- Group Investment was owned and operated by John and Robin Robison and that RRJR was owned and operated by John and Robin Robinson. Brief of Respondent/Appellant, p. 33.

These assertions are not contained within the stipulation to which the parties agreed at trial concerning the composition of Group Investment and RRJR.

At trial, the parties stipulated as follows:

> MR. GOLDSTEIN: The stipulation is that the parties are stipulating that the shareholders of Group Investment Company, Inc., were Robin Robinson and John Robinson and that two members of RRJR were Robin Robinson and John Robinson, although there may have been other members.
> MR. MOORE: Same thing with the shareholders. There may have been other shareholders. We will stipulate that Robin Robinson and John Robinson were both shareholders of Group Investment and members of RRJR, LLC.
> THE COURT: They were the same members in both corporations?
> MR. MOORE: We just don't know if there were other members.
> THE COURT: Okay. So you don't know if it was just the two of them or other people?
> MR. MOORE: Right.
> THE COURT: In the corporation or the LLC?
> MR. MOORE: Right. They both have those two in common.
> THE COURT: All right.

(R. p. 350, lines 7-25). The stipulation specifically left room for the fact that there were other shareholders of Group Investment and other members of RRJR. The stipulation did not mention the other facts concerning Group Investment and RRJR that Clarke offers in his Brief.

e. <u>There is no testimony that by not attending the closing on December 2, 2013, Fine Housing created any problem.</u>

Clarke contends that Fine Housing "compounded" the pressure on Sloan by "declining to

attend the closing." Brief of the Respondent/Appellant, p. 18. There is no testimony that Fine Housing declined to attend the closing on December 2, 2013. There is no testimony of compounded pressure or any adverse effect generated by Fine Housing's absence from the closing. The only testimony on this point was simply that DeStaso did not attend the closing. (R. p. 274, line 22 to p. 275, line 1).

f. There is no testimony or other information in the record as to when DeStaso first visited South Carolina.

The Brief of the Respondent/Appellant contains the statement, twice, that DeStaso's first visit to South Carolina was on November 26. Brief of the Respondent/Appellant, pp. 8 and 24. Fine Housing does not understand the relevancy of this fact, but is not contained anywhere in the record.

Most of the misstatements of fact and all of the facts identified as not being in the record are irrelevant to the issues before this Court. From the beginning of this dispute, Clarke has attempted to make this case about the character and conduct of Vincent DeStaso. Those matters are not germane to whether the right of first refusal is enforceable or not.

Furthermore, both at trial and in his brief, Clarke treats Fine Housing as DeStaso's alter ego. He does not acknowledge that DeStaso is only a shareholder of Fine Housing. Clarke made DeStaso his first witness at trial and never questioned him about his relationship to Fine Housing. It was not until Fine Housing's counsel's cross-examination that the shareholder relationship was revealed (R. p. 235, lines 1-5). That is the only record of DeStaso's relationship to Fine Housing. Clarke's treatment of Fine Housing's alter-ego has no foundation in the record.

CONCLUSION

Setting aside these misstated facts and the facts not contained in the record guts Clarke's argument. Clarke is left with his position on the law that does not support the decision of the lower court.

Respectfully submitted,

May 7, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-03038

Barry Clarke, Respondent/Appellant,

v.

Fine Housing, Inc. and RRJR, LLC, Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellant/Respondent complies with Rule 211(b), SCACR.

May 7, 2018

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In The Court of Appeals

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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.

APPELLANT'S FINAL BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF ISSUES ON CROSS APPEAL

I. Did the trial court err in in fixing the acquisition price for the property at $350,000.00 when appellant paid $150,000.00 for it?

II. Did the trial court err in excluding admissible, relevant evidence?

STATEMENT OF CASE

This interesting case originates in 1999, when the respondent, Barry Clarke, signed a lease with Group Investment Company, Inc., which the parties recorded on January 17, 1999, in the Charleston County Register of Mesne Conveyance at Deed Book C 319 at Page 791. (R.O.A. Vol. 2, page 355 [Exhibit 1]) The property subject to the lease is located at 2028 Pittsburgh Avenue in North Charleston, S.C. For convenience, the respondent refers to this property throughout the brief as the "subject property." The respondent signed the lease in his individual capacity, and Robin Robinson 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. (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 affairs. Her financial condition deteriorated to the point that she faced the loss of her home located at 2347 Sol Legare Road, Charleston, S. C. 29412 by foreclosure sale scheduled

for December 3, 2013. (R.O.A. page 266 [tr. page 99]). The respondent refers to this property throughout as the "Sol Legare property." 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 subject property to the appellant, Fine Housing Inc., for the sum of $150,000.00, which is recorded at Book 0377 at Page 843 on December 9, 2013. At the same time Robin Robinson executed a deed to Fine Housing for the Sol Legare property for $700,000.00, which is recorded at Book 0377 at Page 369 (R.O.A. Vol. 2, pages 269 and page 369 [Exhibit 3)

Fine Housing stipulated that neither Fine Housing nor RRJR notified Barry Clarke of the transaction. (R.O.A. Vol. 1, pages 228 and Vol. 2, page 270 and 492 [tr. Page 61, line 13, 103, line 18 and stipulation] Clarke testified he first learned of the putative sale when to 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 appellant to sell the property to him, and when that failed, his lawyer sent a proposed purchase contract on April 10, 2014, offering to purchase the subject property for $650,000.00. (R.O.A. Vol. 2, page 420 [Exhibit 16]) Appellant refused, and after further efforts at negotiation failed, respondent 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. At the conclusion of 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 the appellant to exercise his right of first refusal. The appellant 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, the appellant filed a Notice of Appeal, and on November 10, 2017, the respondent 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)

STATEMENT OF FACTS

There are no material facts in dispute. The appellant concedes that the respondent holds a recorded lease on the subject property and that the recorded lease contains a right of first refusal as follows:

ARTICLE V

Section 5.1: Option to renew: There are no options to renew.

Section 5.2: Right of first refusal: Lessor grant Lessee the right of first refusal should it wish to sell.

R.O.A. Vol. 2, page 355 [Lease]

The parties stipulated that neither RRJR nor Fine Housing provided notice to the respondent of the intent to sell. (R.O.A. Vol. 2 page 402 [Exhibit 13]

The other facts developed at trial demonstrated that after her husband died in

2008, Robin Robinson assumed the duties of running his various businesses. As may be seen by the numerous pay-offs listed on the settlement statement between Robin Robinson and the appellant in this case (R.O.A. Vol. 2, page 373 [settlement statement, Exhibit 4], her finances were dire, and she could not turn to conventional lending sources. Facing the loss of her home to foreclosure sale, RRJR scheduled the transaction between appellant and Robin Robinson 1 day before the Charleston County Master-in-Equity was selling her home at a foreclosure sale. Because she was facing the imminent loss of her home, she turned to appellant to make her a loan to save her home and her business.

As the record shows, the agreement between appellant and Robin Robinson was a non-traditional loan, a hybrid bond-for-title. In exchange for paying off the loan to her home, several tax liens and judgments, Robin Robinson conveyed title to her home and the subject property to respondent but reserved the right to lease both back at the agreed upon monthly rental of $12,750.00 per month for 24 months and then reacquire both parcels by paying a fixed sum. (R.O.A. Vol. 2, pages 380 and 394 [Exhibits 10 and 11]) On page 6 of his brief, respondent asserts that he spent time and money "improving the Property and resolving issues that clouded title to the property." To the extent such statement implies appellant spent additional money, it is not correct. As the Settlement Statement demonstrates, the $850,000.00 loan cleared up all the tax liens and judgments, and in fact, the appellant held back $35,000.00 out of the "purchase price" for himself as a security deposit for Robinson's performance of the parties' buy-back agreement. He also paid himself $5,500.00 for acting as "broker," and he also paid $9,311.00 to cover his insurance premiums. See Record on Appeal Vol. 2, page 269 – 272 and pages 275 – 274 [tr. page 102, line 19 – 105, lines 20-22, and page 106, line 4 – page 107, lines 5-

8]. The record demonstrates that the appellant and Robinson agreed in writing that after 24 months, the appellant would re-convey the property to Robinson 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 page 373 of the Record on Appeal. [Exhibit 4]

There is no dispute that the appellant and Robinson rushed the transaction as they were up against an inflexible December 3rd deadline to save Robinson's home. Appellant's first visit to South Carolina was on November 26th, two days before Thanksgiving, and seven days before the foreclosure sale. (R.O.A. Vol. 2, page 264 [tr. Page 97, line 23] The record demonstrates Fine Housing hired a lawyer, William H. Sloan, Jr., to handle what he originally thought was a "refinance" on November 26, 2013. (R.O.A. Vol. 2, page 283 [tr. page 116, lines 11-19]) In 2013, Thanksgiving was on November 28th and the appellant gave Sloan a closing deadline of December 2, 2013. Thus, there is no factual dispute that appellant's closing attorney did not have sufficient time to conduct a proper title exam and relied on title information supplied by Robinson's personal lawyer. (R.O.A. Vol. 2, pages 264 and 283 [tr. Pages 97 and 116]) There is no dispute that from the time Robinson and DeStaso began negotiating in late November, 2013, up through the closing on December 2nd, neither Robinson nor appellant notified respondent of a contemplated "sale." Likewise, there is no dispute in the record that Respondent first heard about the "sale" three months later when two employees of the tenant informed respondent "that something is up with the club." (R.O.A. Vol. 2, page 307 [tr. page 140]) Respondent's closing attorney testified he did not have time to check the title and that he missed the lease to respondent. (R.O.A. Vol. 2, page 270 [tr. page

103, line 15]) Respondent's brief at page 4 states that Sloan learned of the lease after Clarke spoke to him: "On March 21, 2014, Clarke spoke with Mfr. Sloan and advised him of the Lease." This is an incorrect statement of fact. The record shows that Sloan conduced a proper search **after** the closing by asking a lawyer, Charles M. Feeley, to examine the title. Mr. Feeley discovered the recorded lease and right of first refusal and then informed Sloan of the Clarke lease on March 21, 2014. R.O.A. Vol. 2, page 270 [tr. Page 103, line 18]. See also Record on Appeal Vol. 2 at page 12 [Exhibit 12]

The record shows that respondent first heard of the putative sale about three months later in March 2014, after a visit from "the two Terry's." (R.O.A. p. 312 [tr. page 145, lines 7-8]) Once he learned the property had been transferred without notice to him, he attempted to resolve the matter by contacting the appellant directly in March 2014, and tried to purchase appellant's interest in the Pittsburgh property for an agreed upon sum. (R.O.A. Vol. 2, page 420 [Exhibit 16]) When appellant ignored him, he contacted counsel and attempted again to resolve the matter without litigation. When that failed, he filed a summons and complaint on May 28, 2015, 17 months after the putative sale, alleging that Robinson failed to notify him of his right of first refusal and asking the Court to order the property conveyed to him after he tendered the acquisition price. Appellant argues on page 7 of his brief that ". . . Goldstein first raised the Right of First Refusal to Fine Housing and advised that Clarke was exercising his right." This is misleading because the record shows that Clarke attempted to resolve the matter with the appellant directly in March, but appellant ignored him, forcing respondent to consult with counsel. R.O.A. pages 308 and 309 [tr. page 141, line 24-142, line 13]

The most important statement of fact in appellant's brief is found on page 9 where

appellant writes: "Fine Housing also stipulated that no one gave Clarke notice of the transfer from RRJR to Fine Housing, a transfer that would trigger the right of first refusal Clarke claims. **Fine Housing did not provide notice to Clarke because it did not have actual knowledge of the Lease.**" (emphasis added) This is, of course, an inaccurate statement of fact because, as discussed below, the recorded lease gave constructive notice to the world of the respondent's right of first refusal, and the only reason appellant did not have "actual knowledge" is because he failed to look.

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)

ARGUMENT

I. The trial court erred by not fixing the acquisition price for the property at $150,001.00 when appellant paid $150,000.00 for it?

The trial court has wide discretion in equitable matters. However, as the Supreme Court instructs in *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017):

> 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. Cf. Eagle Container Co. v. County of Newbery, 379 S.C. 564, 567-68, 666 S.E.2d 892, 894 (2008) (noting that interpretation of an unambiguous ordinance is a question of law and the Court has a broader scope of review in those instances than when it reviews questions of fact.

Here, there is no dispute that the right of first refusal (R.O.A. Vol. 2, page 355 [Exhibit 1]) is succinct. The appellant's attack on it is not that it is ambiguous, but incomplete, an issue fully analyzed in respondent's brief. However, as our Supreme Court instructs in *Rodarte*"

"In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." *28 Am. Jur.2d* Estoppel and Waiver § 27 (2011); see *e.g., Parker v. Parker*, 313 S.C. 482, 488, 443 S.E.2d 388, 391 (1994) (holding that equitable estoppel was a valid defense to a paternity challenge brought by the children of an intestate decedent against a putative heir because the children had "lulled her into a position where she could no longer defend her parentage"). "The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury." *S. C. Publ. Serv. Auth. V. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). "The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007) The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequent attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estopppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. *Id.* at 84-85, 650 S.E.2d at 470.

Here it is not disputed that appellant demonstrates none of these factors; in fact, without realizing the duality of his position, argues in his opening brief that the right of first refusal cannot be asserted against him because he was not a party to contract. Of course, appellant neglects to mention that the party to the contract, RRJR, defaulted and did not participate in the litigation. The undisputed point is that Barry Clarke did nothing to Fine Housing. The legal dispute arises from Fine Housing's decision to purchase real estate without examining the title and nothing more. The legal error committed by the trial court was in using its discretion to fashion an equitable remedy even though the parties' relationship is governed by an unambiguous, recorded right of first refusal. As the Supreme Court held in *Rodarte*, equitable claims are not permitted against unambiguous enforceable contracts. "Indeed, an unambiguous, written contact is inherently

incompatible with the doctrine of equitable estoppel. To succeed on a claim for equitable estoppel, a party must prove 'lack of knowledge, and the means of knowledge, of the truth as to the facts in question.' [citation omitted] However, an unambiguous contract is by definition capable of only one reasonable interpretation." *Rodarte* at page 918.

Therefore, because the contract is clear, recorded, and enforceable, the trial court is obligated to enforce it as written. As written, the respondent has the right to purchase the subject property for any amount greater than the seller's sales price. Since the seller is in complete control in setting the purchase price and accepted $150,000.00 for the property, the respondent is entitled to acquire it for any amount greater than the consideration paid by the appellant.

II. The trial court erred by not allowing the respondent to introduce the cancelled checks related to appellant's payments to himself and others.

The trial court admitted the appellant's closing statement, R.O.A. Vol. 2, 373, Exhibit 4, but denied respondent's effort to offer the specific checks to Cherie DuMez Agency for $9,3111.00 for flood insurance (Exhibit 5), $3,500.00 to Joseph Scarmato for allegedly preparing a lease that is nothing more than a recycled form with handwriting on it(Exhibit 6), $5,500.00 to AAA (which was voided in favor of the next exhibit) (Exhibit 7) and $5,500.00 to Tamara Lane, which was Vincent DeStaso paying himself for acting as "broker" (Exhibit 8). (R.O.A. Vol. 2, pages 455 – 459) Even though the trial court allowed respondent/appellant a full and fair opportunity to cross-examine on the four exhibits, it refused to admit them into evidence on the ground that the four checks were "cumulative":

MR. GOLDSTEIN: Well, before we release this witness, can I renew my request to -- you said Five, Six, Seven and Eight are not in?

THE COURT: Right.

MR. GOLDSTEIN: I'm renewing my request to move them in, in light of his testimony.

MR. MOORE: Same objection.

THE COURT: All right. He has the same objection.

MR. GOLDSTEIN: I understand.

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 dispersed 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.

R.O.A. Vol. 2, pages 294 – 298 [tr. pages 127-128]

Under the rules of evidence, all evidence "having any tendency to make the existence of any fact that is of consequence . . . more probable" is relevant. Rule 401. Rule 403 authorizes a court to exclude relevant evidence if represents a "needless presentation of cumulative evidence." The respondent concedes he cannot show prejudice resulting from the exclusion of this relevant evidence at the non-jury trial of this equity matter, but the exclusion prejudices a party on appeal when the reviewing court may make its own findings based only on a printed record. Moreover, since the trial was a non-jury trial, there was no chance of confusion or the possibility of "needlessly" complicating a record. Since the trial court agreed with respondent/appellant that the

evidence is relevant, it was error to exclude relevant evidence when the documents are not numerous and provide a reviewing court a full opportunity to view all the relevant evidence of the facts below. Since the evidence is relevant and material and does not amount to a "needless presentation," the evidence should be admitted, and the trial court erred in excluding it.

The trial court also erroneously excluded the lawsuit Fine Housing filed against William Sloan, *Fine Housing, Inc. v. Sloan*, 2016-CP-18-00340, Exhibit 30, but the cross appellant concedes he cannot demonstrate prejudice since this Court, in making its own findings of fact, can take judicial knowledge of a lawsuit pending in the South Carolina judicial system. Rule 201, *South Carolina Rules of Evidence.* "A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability. *Bowers v. Bowers*, 349 S.C. 85, 561 S.E.2d 601 (S.C. App. 2002), *cert. den.*

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. The

appellant never explains why § 30-7-10 does not apply to him. 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, and for that reason the trial court is obligated to make the property available to the respondent for the amount of $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 as to the amount respondent must pay to acquire the property.

Respectfully submitted,

May 15, 2018

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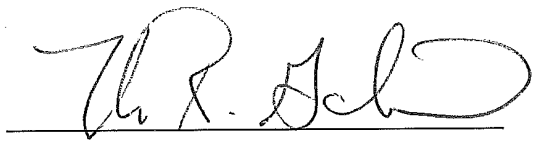
CERTIFICATE OF COUNSEL

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



May 15, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-03038

Barry Clarke, Respondent/Appellant,

v.

Fine Housing, Inc. and RRJR, LLC, Defendants,

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

RESPONDENT'S FINAL BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF THE CASE

The Appellant/Respondent, Fine Housing, Inc., relies on the Statement of the Case and the Facts set out in the Brief of the Appellant. This Brief also incorporates the terms and definitions contained in the Brief of the Appellant.

ARGUMENT

1. The Right of First Refusal in the Lease does not fix a price, or method of determining price, at which Clarke could exercise the right.

Fine Housing contends that the claimed right of first refusal is not valid because it is ambiguous and incomplete. As set out in the Brief of the Appellant, the right of first refusal in the Lease is not valid for many reasons. One of the several essential provisions that it lacks is the price, or a method to determine the price, at which Clarke can exercise his right. Clarke's challenge of the lower court's ruling spotlights the absence of this necessary term.

To reach its decision that Clarke timely exercised his right of first refusal, the lower court determined that an offer to purchase the Property for Six Hundred Fifty Thousand Dollars ($650,000.00) was an exercise of that right. Yet, the lower court decided that Clarke should only be required to pay Three Hundred Fifty Thousand Dollars ($350,000.00) to exercise his right. On appeal Clarke argues he should only be required to pay One Hundred Fifty Thousand and One Dollars ($150,001.00). Each of the offered exercise prices is arbitrary. A properly worded right of first refusal would have resolved the matter.

In support of his suggestion that One Hundred Fifty Thousand and One Dollars ($150,001.00) is the correct number, Clarke retreats again to contract law and offers an analysis that characterizes the right of first refusal as an unambiguous contract. However, the right of first refusal in the Lease is incomplete and ambiguous concerning the essential term on which Clarke bases his appeal– the price at which Clarke may exercise the right of first refusal. The

language in the Lease does not mention price and does not provide a process for determining price. As Fine Housing argued in its Brief of the Appellant, Courts may not add or modify terms in a contract to make it enforceable or comport with public policy. *See Poynter v. Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010); *Stonhard, Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005). A determination that the right of first refusal in the Lease requires a payment of One Hundred Fifty Thousand and One Dollars ($150,001.00) would require an impermissible judicial re-writing of the Lease.

Moreover, Clarke's contract analysis of the right of first refusal in the Lease is only a valid analysis of any dispute he may have with Group Investment, the other party to the Lease. Clarke's claim against Fine Housing is not in contract. Clarke alleges that Fine Housing's interest in the Property is burdened with the right of first refusal because Fine Housing had record notice of the Lease, not because it was a party to a contract.

Fine Housing has always acknowledged that it had constructive, record notice of the Lease, and notice is not the issue on appeal. Rather, Fine Housing argues that the language in the Lease does not create a valid interest in real estate and therefore cannot be enforced against it, as the owner of the Property. This case is not about contract interpretation; it is about the creation of a valid interest in real estate.

The provision of the Lease that attempts to create a right of first refusal is ambiguous and leaves the price at which the right can be exercised open for debate. This is a fatal flaw and destroys Clarke's ability to enforce the right against anyone who was not a party to the Lease.

2. The evidence excluded by the lower court is not relevant and Clarke has not shown that prejudice resulted from the exclusion.

Clarke is relentless in his effort to weave irrelevant information into the record in an attempt to cloud the real issue on appeal with Fine Housing's business practices and DeStaso's character. Clarke apparently believes that these matters can suffocate the real questions on appeal. Fine Housing refused to engage Clarke on these irrelevant matters and offered no evidence to counter the suggestions made at trial. This has fueled Clarke's efforts, and he insists on continuing his quest to have this Court consider these matters, even though he has acknowledged that the exclusion did not prejudice him.

Clarke wants this Court to consider checks issued by Fine Housing's attorney from the settlement proceeds of the sale by RRJR to Fine Housing and claims that they were improperly excluded as evidence by the lower court. 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.

Clarke also wants this Court to consider the lawsuit that Fine Housing filed against its attorney, Sloan, for, among other things, his failure to discover and disclose the Lease containing the right of first refusal. Despite Clarke's repeated argument that "[t]he legal dispute arises from Fine Housing's decision to purchase real estate without examining the title and nothing more" (Brief or the Respondent/Appellant, p. 12), he believes that Fine Housing's action against Sloan for failure to reveal the recorded Lease is sinister and reflects poorly on Fine Housing and DeStaso. Fine Housing's lawsuit against Sloan has absolutely no bearing on the validity of Clarke's interest in the Property or Clarke's attempt to enforce his interest in the Property.

To succeed in his effort to have this Court reverse the exclusion of the identified evidence by the lower Court, he must prove error and resulting prejudice. *Timmons v. S.C. Tricentennial*

Comm'n., 254 S.C. 378, 175 S.E.2d 805 (1970). Clarke cannot show error and admits that there was no resulting prejudice.

a. Clarke does not show error.

Clarke's argument only refers to a portion of the lower court's consideration of the excluded exhibits. This partial presentation is misleading.

The portions of the trial transcript recited in Clarke's brief recall Clarke's efforts to elicit testimony from DeStaso concerning documents marked for identification purposes as Plaintiff's Exhibits 5, 6, 7, and 8. (R. pp. 294-295). Fine Housing's objection that is referenced in the offered portions of the transcript, which was sustained by the lower court, makes reference to a prior objection when Clarke first attempted to introduce the exhibits during his direct examination of DeStaso. (R. p. 225, lines 10-25 and p. 226, line 16 to p. 227, line 2).

When Clarke first posed questions to DeStaso about Plaintiff's Exhibits 7 and 8, Fine Housing objected on grounds of relevancy, and the objection was sustained. (R. p. 225, lines 10-25). When Clarke first posed questions to DeStaso about Plaintiff's Exhibit 5, Fine Housing objected because of a lack of foundation. The lower court sustained the objection and not only excluded Plaintiff's Exhibit 5, it also excluded Plaintiff's Exhibit 6 and again excluded Plaintiff's Exhibits 7 and 8.

Clarke's argument on appeal refers to the lower court's exclusion of "the lawsuit Fine Housing filed against William Sloan, *Fine Housing, Inc. v. Sloan*, 2016-CP-18-00340, Exhibit 30." Brief of Respondent/Appellant, p. 15. The record contains no reference to "Exhibit 30" and Clarke made no effort to introduce any exhibit concerning the referenced lawsuit into the record. In fact, Clarke actually questioned DeStaso about the lawsuit. (R. p. 204). Clarke has fabricated

this controversy to highlight his irrelevant character assassination of Fine Housing and DeStaso that he believes will lead to success on appeal.

Clarke's argument fails to address the lower court's ruling on the admissibility of the checks he claims were improperly excluded. The record contains nothing about an "Exhibit 30" or efforts to introduce documents from the Sloan litigation. Therefore, Clarke fails to show error by the lower court, the first requirement of *Timmons*.

b. Clarke admits there is no prejudice.

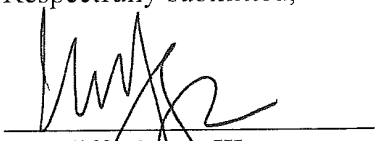
The second *Timmons* requirement is that the error must have resulted in prejudice to Clarke. By Clarke's own admission, there is no prejudice. In his brief to the Court, Clarke concedes "he cannot show prejudice resulting from the exclusion of this evidence at the non-jury trial of this equity matter" (Brief of Respondent/Appellant, p. 14) and "he cannot demonstrate prejudice" as it relates to the exclusion of the Sloan lawsuit document. Brief of Respondent/Appellant, p. 15.

Clarke's arguments concerning excluded evidence are so hollow that the only conclusion to be drawn from them is that he hopes to smear Fine Housing and Clarke's reputations. Such information is not relevant, and such tactics are not appropriate.

CONCLUSION

The two points Clarke makes in his challenge to the lower court's Order are diversions from the true issues on appeal in this matter– the enforceability of the claimed right of first refusal and the consequences of Clark's conduct as it relates to the enforcement of the right of first refusal. Clarke's belief that he can subjectively fabricate, and then justify, the price at which he can exercise his right of first refusal speaks to the necessity of specifically stated terms for a right of first refusal to be enforceable. His efforts to broaden the scope of the appeal to the irrelevant by including self-defeating arguments and non-existent records should be ignored.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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J. C. Nicholson, Jr., Circuit Court Judge

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief of Appellant/Respondent complies with Rule 211(b), SCACR.

May 7, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2015-CP-10-03038
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Barry Clarke..... Respondent/Appellant,

vs.

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

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

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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

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[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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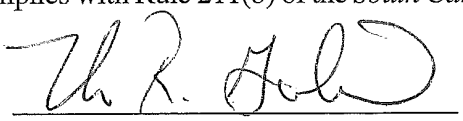
CERTIFICATE OF COUNSEL

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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