THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

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Case No. 2015-CP-10-03038
Court of Appeals Opinion No.: 20 UP 238
Appellate Tracking No.: 2017-002285

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Barry Clarke……Petitioner;

vs.

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

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

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# PETITIONER'S BRIEF

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STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals err in finding the Right of First Refusal to be an unlawful restraint on alienation and/or too vague to be enforced by specific performance?

## STATEMENT OF CASE

This interesting case originates in 1999, when the petitioner, Barry Clarke, signed a lease for parking on a parcel located at 2028 Pittsburgh Avenue in Charleston. In 1999, Group Investment Company owned and operated an adult business on that site. Group Investment Company was the husband and wife team of John and Robin Robinson. In 2007, Group Investment Company, Inc., became RRJR, a limited liability company comprised of the same husband and wife (RR = Robin Robinson; JR = John Robinson), and as part of the reformation, Group Investment conveyed the subject property to RRJR on February 19, 2007 for $5.00 consideration. (Appendix Vol. 1, page434 [quitclaim deed]) RRJR is the defendant named in this action because it owned the parcel in question, and it signed the Lease with Barry Clarke that is the subject of this case. However, it never answered the complaint or participated in the case. In 1999, the year of the Lease, Barry Clarke owned the parcel of real estate located directly across from the Robinsons at 2015 Pittsburgh Avenue in Charleston, on which John Robinson operated another adult club as the tenant of Barry Clarke. John Robinson and Barry Clarke were close friends for many years, and very early John Robinson approached Barry about getting into the club business. Clarke advised Robinson not to do so, but notwithstanding Clarke's advice, John Robinson leased the Clarke property for years and operated a successful adult business there as well as the one across the street on the parcel he owned. At that point in time, Barry Clarke was the landlord, and John Robinson was the tenant at 2015 Pittsburgh. (Appendix pages 298-299 [tr. page 131, line 6—page 132, line 22])

Two years prior to the Lease that is the subject of this action, in 1997, John Robinson purchased 2028 Pittsburgh, the property directly across the street from Barry Clarke's property and the subject of this dispute. For years, John Robinson operated the twin adult businesses across the street from one another, and after John Robinson opened a business at 2028 Pittsburgh, Barry Clarke approached him about granting Clarke a lease to parking and a right of first refusal on the property. This lease, which is the center of this controversy, is in the Appendix at page 355 of Volume 1. Robin Robinson signed the recorded lease as President of Group Investment Company, Inc., which later became RRJR, L.L.C. (See Appendix Vol 1, page 350 [tr. Page 183] for a stipulation that Robin Robinson and John Robinson were shareholders and members, but that there might have been other members.) On February 19, 2007, for the consideration of $5.00, Group Investment Company, Inc. deeded the subject property to the named defendant in this action, RRJR, L.L.C. This transfer occurred subject to the petitioner's recorded lease. Appendix Vol. 1, page 434 [Exhibit 33, Quitclaim Deed] The recorded lease provides Clarke the right to occupy one-half of the parking spaces at 2028.

ARTICLE 1 states:

Section 1.1 Demises: Subject to and upon the terms, conditions, covenants and undertakings hereinafter set forth, Lessor hereby leases and permits the use to Lessee, and Lessee hereby leases from Lessor the property generally described in Exhibit "A" attached hereto, located in the County of Charleston, State of South Carolina (hereinafter referred to as "the premises."). Appendix, Vol. 1, page 355 [Exhibit 1]. ARTICLE VII of the Lease describes how Clarke can "use and occupy the premises jointly with the Lessor

for his purposes. The Lessee and Lessor shall be entitled to use of one half (1/2) of the spaces contained in the parking lot [which encumbrances all of the property described in Exhibit A." (Appendix, page 357. Exhibit A is on page 366 and is the legal description, including derivation, for the entire parcel.)

The recorded Lease provides further in § 5.2 a right of first refusal as follows:

ARTICLE V

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

As stated above, the parties signed the Lease on January 8, 1999, and recorded it in the R.M.C. Office for Charleston County on January 27, 1999 at Deed Book C 319 at Page 791. (Appendix Vol. 1, page 355 [Exhibit 1])

Until 2006, Robinson operated businesses on both sides of the street. (See Appendix, Vol. 1, page 299, line 14.) In December, 2006, John Robinson vacated the Clarke property at 2015 Pittsburgh and concentrated on his club at 2028 Pittsburgh. Clarke leased his property to a new tenant. Robinson's departure from 2015 Pittsburgh in 2006 soured the relationship.

After Robinson vacated 2015 Pittsburgh, and after Clarke leased to a new tenant, the customers of 2015 Pittsburgh continued to utilize the parking lot at 2028 as allowed under the 1999 lease. Clarke testified that it made sense for the two parcels to cooperate with parking, which was the impetus for the 1999 lease, which granted to Clarke the right to use up to one-half of the parking across the street and granted him a Right of First Refusal "should [the owner] wish to sell." Appendix, Vol. 1, page 357.

After Clarke and Robin Robinson signed and recorded the lease on January 17, 1999, in the Charleston County Register of Mesne Conveyance at Deed Book C 319 at Page 791, things ran smoothly until the lease at 2015 Pittsburgh expired in 2006, and Robinson vacated. (For the convenience of the reader, the Robinson property at 2028 Pittsburgh Avenue is shortened to the "subject property.") In 2008, John Robinson died, and Robin Robinson took over managing his affairs. Because she lacked John's business acumen, her financial condition deteriorated to the point that by 2013, she faced the immediate loss of her waterfront home located at 2347 Sol Legare Road, Charleston, S. C. 29412 by foreclosure sale scheduled for December 3, 2013. (Vol. 1, Appendix, pages 224 and 254 [tr. Page 57 lines 5-11, page 87, line 2]). (Again, for convenience, the petitioner refers to Ms. Robinson's residence throughout as the "Sol Legare property" to distinguish it from the "subject property" that is the subject of this action.) On December 2, 2013, the day before the scheduled foreclosure sale, Ms. Robinson executed two putative "deeds," one for the subject property, and one for the Sol Legare property, to the respondent, Fine Housing. (Petitioner puts "deeds" in quotation marks because Robin Robinson reserved to herself an irrevocable right to require Fine Housing to transfer both properties back to her, provided she made 24 monthly installment payments followed by a balloon payment of 1.25 million dollars. Lawyers of a certain age recall such financial arrangements as "bond-for-title" transactions. In addition, almost immediately after the "closing," she filed suit in the Charleston County Court of Common Pleas on February 19, 2014, seeking to reform the transaction into a mortgage. See Appendix at page 403 of Vol. 1 [Exhibit 14]) This buy-back provision is discussed more fully below, but a definition

of the transaction is not essential to the issue being reviewed on certiorari. The "deed" for the subject property to the respondent, Fine Housing Inc., establishes the consideration for the property as $150,000.00, and Fine Housing recorded this deed on December 9, 2013 at Deed Book 0377 at Page 843, along with an affidavit of true consideration. At the same time Robin Robinson executed a "deed" (bond for title) to Fine Housing for her home, the Sol Legare property, and the recorded document recites consideration of $700,000.00. Fine Housing recorded this instrument at Deed Book 0377 at Page 842 (Appendix, Vol. 1, page 369 and 373) again, along with an affidavit of true consideration. (Appendix, Vol. 1, pages 369 and 373 [Exhibit 3, deed and Exhibit 4, Settlement Statement])

Fine Housing stipulated that neither it nor RRJR notified Barry Clarke of the pending transaction. (Appendix, Vol. 1 page 228, 270 and 402 [tr. Page 61, line 13, 103, line 18 and request for admission, 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." (Appendix Vol. 1, page 307, 312 [tr. Page 140, line 6 and 145, line 7]) When the petitioner learned of the putative sale of the subject property, he made a demand upon the Fine Housing to sell the property to him as required by the Right of First Refusal, and when that failed, his lawyer sent to Fine Housing a proposed purchase contract on April 10, 2014, offering to purchase the subject property for $650,000.00. (Appendix Vol. 1, pages 420 and 422 [Exhibits 16 and 22]) Fine Housing refused, and after further efforts at negotiation failed, Clarke filed suit on May 28, 2015, seeking specific performance to enforce his right of first refusal. (Appendix

Vol 1, page 32 [complaint]; see also Exhibit 6, Appendix page 480 [explanation of timing of suit]) Fine Housing Inc. timely answered. RRJR never answered, and the petitioner filed an Affidavit of Default with the Court on August 3, 2015. (Appendix Vol 1, page 60).

Both parties moved for summary judgment, which the Court of Common Pleas denied by written Order dated August 29, 2016. (Appendix Vol. 1, page 28) Thereafter, the Clerk of Court called the case for trial on July 26, 2017. After examining the evidence and testimony of the parties and the witnesses, the trial, the Court entered a written Order on September 28, 2017, finding that the defendants failed to notify petitioner of RRJR's intent to sell, and required the plaintiff to tender the sum of $350,000.00 within 60 days to Fine Housing in order 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. (Appendix Vol. 1, page 1) On October 31, 2017, Fine Housing filed a Notice of Appeal, and on November 10, 2017, the petitioner filed a Notice of Cross Appeal as to the trial court's calculation of purchase price. (Appendix Vol. 1, pages 482 and 484)

The Court of Appeals reviewed the decision of the circuit court without granting oral argument and on August 12, 2020, the Court of Appeals issued Opinion No. 20-UP-238 (Appendix Vol. 2, page 488) in which it found the Right of First Refusal is not enforceable on the single ground that it lacked specificity in three particulars. The Court of Appeals found that:

(1) the description of the property covered by the Right of First Refusal is not sufficiently identified,

(2) the method of determining the purchase price is not set forth in the document, and

(3) the timing for the exercise of the right of first refusal is not defined stating as follows at Appendix, Vol. 2 page 494:

> 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 Frist 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.

Because the Court of Appeals found that the right of first refusal lacked sufficient specificity to be enforced, it declined to reach petitioner's appeal regarding the formula the circuit court employed in calculating the purchase price.

On August 24, the petitioner asked the Court of Appeals to reconsider its decision (Appendix Vol. 2, page 498), and by Order dated September 21, 2020, the Court of Appeals denied the petitioner's request for reconsideration (Appendix Vol. 2, page 496). On October 15, 2020, petitioner asked this Court to review the decision of the Court of Appeals (Appendix Vol. 2, page 507), and on May 28, 2021, this Court granted the petitioner's request for writ of certiorari.

## STATEMENT OF FACTS

There are no material facts in dispute, only the conclusions to be drawn from them. Respondent, Fine Housing, concedes that only the property described in the Lease can be governed by the terms contained in the document. It is undisputed that the recorded Lease grants Petitioner the right to use up to one-half of the parking on the parcel, and appended to the Lease is an "Exhibit A," which contains the precise legal description of

the entire parcel including its derivation. (See Vol. 1, page 366 for legal description.) The parties agree further 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.

Appendix Vol. 1, page 355 [Exhibit 1, Lease]

The parties stipulated that neither RRJR nor Fine Housing provided notice to Clarke of RRJR's intent to sell to Fine Housing. (Appendix Vol 1, page 402 [Exhibit 13]) As set forth above, almost immediately after the closing, Robinson, RRJR, filed suit against Fine Housing, seeking equitable recission and alleging that the transfers were illegal and that the transaction was in the nature of a mortgage, not a transfer of title. This dispute ended by Court Order filed January 9, 2015. (Appendix Vol. 1, page 413.)

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 for debts in arrears listed on the settlement statement between Robin Robinson and Fine Housing, (Appendix Vol. 1, page 373 [settlement statement, Exhibit 4]), her financial status was desperate, and she could not turn either to conventional lending sources or to the Bankruptcy Court, a fact exploited by Fine Housing to its advantage. Facing the immediate loss of her home to foreclosure scheduled for December 3, 2013, Robinson, under great duress and out of options,

entered into her arrangement with Fine Housing the day before the Charleston County Master-in-Equity was auctioning her waterfront home at the courthouse steps. Because she was facing the immediate loss of her home, she turned to Fine Housing to make her a loan as the only way to save her home. The record demonstrates that the loan was highly predatory (and the disbursement of proceeds suspicious), but it did provide a method to redeem both properties provided Robinson made the agreed upon 24 monthly payments of $12,730.00 followed by a balloon payment of $1.25 million dollars. If paid out, this arrangement would yield Fine Housing $1,555,520.00 from a $815,000.00 investment in 24 months, or, nearly a 100% return on the initial investment. (Appendix, Vol. 1 at page 380 [Exhibit 10] and page 394 [Exhibit 11]).

As the record shows, the agreement between Fine Housing and Robin Robinson was a non-traditional sale/loan, a hybrid bond-for-title. (For a powerful analysis, exposing the predatory nature of bond-for-title arrangements, see Richard Rothstein, *The Color of Law*, W. W. Norton Co., New York (2017) ) In exchange for Fine Housing satisfying Robinson's debts, including several tax liens and judgments, Robin Robinson conveyed title to both her home and the subject property to Fine Housing, reserving the right to lease both back at the agreed upon monthly rental of $12,750.00 per month for 24 months. At the expiration of the 24-month rental period, she had the right to reacquire both parcels by paying a fixed sum of 1.25 million dollars to Fine Housing. (Appendix Vol. 1, pages 380 and 394 [tr. Pages 46-47, Exhibits 10 and 11]) On page 6 of Fine Housing's brief to the Court of Appeals, Fine Housing's principal, Vincent Destaso, asserts that he spent time and money "improving the Property and resolving issues that clouded title to

the property." To the extent this statement implies Fine Housing spent additional money beyond the acquisition price to clear title, it is not correct, and there is no evidence in the record identifying improvements to the real estate. As the Settlement Statement demonstrates, and as Fine Housing's principal admitted in testimony at Appendix Vol. 1, 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, when there was money left over from satisfying judgements and liens, Fine Housing paid itself $35,000.00 out of the "purchase price" as a security deposit for Robinson's performance of her lease obligations under the parties' buy-back agreement. Not only did Fine Housing keep a $35,000.00 "security deposit" for itself, but also it paid its principal $5,500.00 for acting as "broker," and $9,311.00 to cover Fine Housing's insurance premiums. See Appendix Vol. 1, page 269 and 273-274 [tr. page 102, lines 19 – 105, lines 20-22, and page 106, line 4 – page 107, lines 5-8] and Appendix Vol. 1, page 443 [Exhibit 35]. The entire transaction is summarized in the settlement statement found at page 373 of Vol. 1 of the Appendix. [Exhibit 4]

There is no dispute that Fine Housing and Robinson rushed the transaction as they were up against an inflexible December 3rd sales deadline to save Robinson's home. As discussed below, Fine Housing was in no rush to come to terms with Robinson because the longer it waited, the more desperate she became. With this immutable deadline looming, Fine Housing's principal arrived for his first visit to South Carolina on November 26th, two days before Thanksgiving, and seven days before the foreclosure sale. (Appendix Vol. 1 page 264 [tr. Page 97, line 23]) The record demonstrates Fine Housing hired a lawyer, William H. Sloan, Jr., to handle what Sloan originally thought was a

"refinance" on November 26, 2013. (Appendix Vol. 1, page 283 [tr. page 116, lines 11-19]) In 2013, Thanksgiving was on November 28th and Fine Housing gave Sloan a closing deadline of December 2, 2013. Thus, there is no factual dispute that neither Sloan, nor any closing attorney, had sufficient time to conduct a proper title exam, especially thinking the transaction was a refinance, and for that reason, Sloan had no choice but to rely on previously gathered incomplete title information supplied by Robinson's personal lawyer. (Appendix Vol. 1, 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 Fine Housing notified petitioner of a contemplated "sale." And as the record further demonstrates, Robinson thought the transaction was a mortgage as alleged in her civil suit filed February 19, 2014, as Case No.: 2014-CP-10-1035. (Appendix, Vol. 1, page 404) Likewise, there is no dispute in the record that Clarke's first opportunity to learn about a putative "sale" occurred three months later in March when two of Robinson's employees (the "two Terry's") informed Clarke "that something is up with the club." (Appendix Vol. 1, page 307 [tr. page 140]) Fine Housing's closing attorney testified to the obvious when he testified that Fine Housing did not provide him either accurate information about what it was asking him to do or provide him sufficient time to check the title, and because he had insufficient time, he missed the recorded lease to Clarke (Appendix Vol 1 page 270 [tr. page 103, line 15]) even though he asked another lawyer, Charles Feely to rush him a title exam, which he received as he was meeting with Ms. Robinson to execute closing documents on December 2, 2013. (The testimony on this

point is set out on page 32 below.) Respondent's brief to the Court of Appeals 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—not wrong, but incomplete. The record shows that Sloan, because he is a conscientious lawyer, attempted as best he could in the inadequate time afforded him by Fine Housing to conduct a proper search **during** the run-up to closing by asking another lawyer, Charles M. Feeley, to rush down to the courthouse and examine the title because. Obviously, Fine Housing hamstrung Mr. Sloan and precluded him from having a reasonable opportunity to examine the title by conveying him inaccurate information about what he was expected to do and not affording him a reasonable amount of time to do it. He could not be at two places at the same time. While Mr. Sloan was rushing to prepare for closing, Mr. Feeley discovered the recorded lease, including the Right of First Refusal, and he immediately transmitted this information to the closing attorney on December 2nd **while the closing attorney was meeting with Ms. Robinson** at 4:30 on December 2, 2013 to execute the closing documents. (Appendix Vol. 1, page 276 [tr. page 109, lines 20-22]) The closing attorney said he was "unaware" of the Right of First Refusal because of the time constraints prevented him from examining what Mr. Feely faxed him. Appendix page 277 [tr. page 110, lines 12-24]. It is undisputed that Robin Robinson made no effort to call Clarke to inquire if he would meet the price or offer better terms. While Fine Housing prevented Sloan from having an opportunity to prepare—because the Master-in-Equity was selling the Sol Legare property the next morning on the courthouse steps—it cannot escape the effect of the South Carolina Recording

Statute. Undeniably, Sloan, Fine Housing, and Robinson were under intense time pressure to get the transaction completed before it was too late, but that rush was brought on by Fine Housing because doing so allowed it to dictate harsh terms. In the rush, Sloan overlooked the right of first refusal contained in the lease even though Mr. Feely emailed the document to him at closing, and thereafter Mr. Clarke called him on March 21, 2014 to inquire. Appendix Vol. 1, page 270 and 286 [tr. Page 103, line 18, page 119, line 19]. See also Vol. 1, page 401, Exhibit 12, March 21, 2014 Sloan e-mail: "This [Lease] was not picked up in the title search that Will [Swope] sent me." It is true that Mr. Sloan did not detect the right of first refusal contained in the lease until after Mr. Feely alerted him. Thereafter, Mr. Clarke called on March 21, 2014 to inquire. (Appendix Vol. 1, pages 270 and 286, and page 401 [tr. Page 103, line 18, page 119, line 19, Exhibit 12]) However, it is undisputed 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. Appendix, Vol. 1, pages 289 and 291 [tr. Page 122, line 25, 124, line 12].

In March 2014, after Clarke first heard of the putative sale from "the two Terry's" about three months after the closing, (Appendix Vol. 1, page 312 [tr. page 145, lines 7-8]), he immediately set out to investigate. Once he learned that the possibility existed that the defaulting defendant, RRJR, might have transferred the property to Fine Housing without notice to him, Clarke did the equitable thing and reached Fine Housing in March 2014 to resolve the matter with them directly. When Clarke got through to Fine Housing's principal, Vincent DeStaso, he informed DeStaso of his Right of First Refusal and tried to purchase its interest in the Pittsburgh property for an agreed upon sum that would provide

Fine Housing a generous return on its investment. (Appendix, Vol. 1, page 310, 421, and 464 [tr. page 143, line 16, Exhibit 17, and Exhibit 4]) When Vincent DeStaso ignored the offer—he said he "forgot" Clarke offered him $650,000.00 (Appendix Vol. 1, page 309 [tr. Page 142, line 6])—Clarke 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 and four months after the court dismissed Robinson's suit against Fine Housing in which she tried to unwind the transaction. In his complaint for specific performance, Clarke alleged that Robinson failed to notify him of her intent to sell the property so that he could have exercised his right of first refusal. Clarke asked the Court to order the property conveyed to him after he tendered the acquisition price. Fine Housing argued, as summarized on page 7 of its brief to the Court of Appeals, 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 Fine Housing directly in March 2014, but Fine Housing ignored him, forcing respondent to consult with counsel, and that counsel was Ashley Andrews, not Goldstein. Appendix Vol. 1, page 308-309 [tr. page 141, line 24-page 142, line 13]

The most important statement of fact in Fine Housing's brief to the Court of Appeals is found on page 9 where it 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) First, Fine Housing did

have actual knowledge of it because Charles Feely sent it over on December 2nd. However, Fine Housing ignores an indisputable principle of law, one that the trial court emphasized in its Order granting specific performance; to wit, that the South Carolina recording statute, § 30-7-10, S. C. Code., ann. imputes constructive knowledge of the Lease to Fine Housing even if Mr. Feely had not sent it over. In reversing the trial court, the Court of Appeals never mentioned the recording statute, let alone applied it, but in fairness to the Court of Appeals, it reversed on a different ground, that is that the Right of First Refusal is allegedly too vague to be enforced. As discussed throughout, Fine Housing had the lease prior to disbursing, and Fine Housing is the author of its own dilemma because it did not allow itself sufficient time to conduct a proper examination because it thought it was obtaining negotiating leverage over Robinson by pushing her to the brink of the judicial sale scheduled for December 3rd. In a court of equity, this fact deserves mention and sheds light on why Sloan could not pick up the full significance of the Lease. The recorded lease gave constructive notice to the world of Clarke's Right of First Refusal, and this is why the Court of Appeals erred in reversing the trial court.

## STANDARD OF REVIEW

Because this case is before the Court on a writ of certiorari, and because the Court of Appeals rendered its decision on a single basis—whether the contract (lease) contains sufficient particularity for the Right of First Refusal to be enforceable, the standard of review on certiorari is the same as before the Court of Appeals especially because the legal issue before the Court has narrowed down to a single question—whether the Right of First Refusal is insufficiently precise to be enforceable. (The Court of Appeals asserted

a side issue not raised by the parties in briefing to the Court; to wit, what inferences are proper from John and Robin Robison's absence at trial. Because there was no oral argument before the Court of Appeals, Petitioner is uncertain why their absence became noteworthy to the Court of Appeals in reaching its decision, but in an abundance of caution, the petitioner briefly addresses it in the Argument section of the brief.) Before the Court of Appeals, the case raised mainly an equitable legal issues, but the Respondent asserted a legal defense, and thus the standard of review before the Court of Appeals posed "mixed questions" of law and equity depending on which issue the Court of Appeals was addressing. The plaintiff's, petitioner's, complaint (Appendix page Vol. 1, page 32) sounded in specific performance, and specific performance cases are tried in equity.

An action for specific performance is one in equity. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 170 n.2, 568 S.E.2d 361, 362 n.2 (2002); *Wright v. Trask*, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct. App. 1997). In an action in equity, tried by the judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Townes Assocs., LTD v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence." *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).

*Raymond C. Campbell v. Martha M. Carr and Ruth Riley Glover*, 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004)

Here, the Court of Appeals identified the correct standard of review as being one in equity, but, notwithstanding acknowledging the suit is one in equity, the Court of Appeals analyzed the case as a matter of law by examining the contract for sufficiency of the language used without addressing or applying the factors reviewing courts normally apply in testing contracts for justification to apply the remedy of specific performance. See *Campbell v. Carr*, 361, S.C. 258, 603 S.E.2d 625 (Ct. App. 2004):

"Specific performance should be granted only if there is no adequate remedy and specific enforcement is equitable between the parties." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) Equity will not decree specific performance unless the contract is fair, just, and equitable. *Anthony v. Eve*, 109 S.C. 255, 263, 95 S.E. 513, 515 (1918); *McChesney v. Smith*, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916). "The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case." *Guignard v. Atkins,* 282 S.C. 61, 64, 317 S.E.2d 137, 140 (Ct. App. 1984); *accord Bishop v. Tolbert*, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967) ("The rule is well settled that the granting of specific performance is not a matter of absolute right, but rests in the sound or judicial discretion of the Court, guided by established principles, and exercised on a consideration of all the circumstances of each particular case."). "Specific performance will not be ordered unless the contract expresses the true intent of the parties and is fair, just and equitable." *Amick v. Hagler*, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct.App. 1985). "[S]pecific performance . . . is only available to enforce a contract that is fair, just, and equitable." *Hodge v. Shea*, 252 S.C. 601, 612, 168 S.E.2d 82, 87 (1969). "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." *Ingram*, 340 S.C. at 106, 531 S.E.2d at 291. "Mere inadequacy of consideration is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud." *Id.*

If the Court of Appeals had applied that standard to these facts, this brief would

end here because the record demonstrates Fine Housing employed predatory lending to exploit a vulnerable and defenseless borrower, and had the Right of First Refusal been communicated to Barry Clarke, Robin Robinson would have been in a much stronger bargaining position with Fine Housing by inviting a second bidder for the property. Instead of applying the principles of equity to the facts, the Court of Appeals employed a purely legal contractual construction analysis of the evidence to determine if the contract is sufficiently clear to be enforceable. This legal analysis does not belong in applying the rules of contractual construction to a contract involving a litigant who was never in privity with the drafting parties when they negotiated the Right of First Refusal. Here we have someone challenging a contract who was never a party to it and who never examined it prior to "buying" the subject property. By allowing a litigant with no connection to the contract to challenge it for vagueness, the Court of Appeals allows an unworthy litigant to turn the rules of equity on their head. By contrast, in a law case, the Court of Appeals held a similar Right of First Refusal enforceable in *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (1996), a case relied upon by the trial court. There, the Court of Appeals reversed a directed verdict and sent the case back to a jury to determine damages when the "Grease Monkey" franchise holder allowed two new franchises to open while ignoring the agreement it had with the plaintiff to grant it the right of first refusal. The Right of First Refusal in that case stated: that the plaintiff had a "first right of refusal on any other Grease Monkey sites developed by GOCT in Richland or Lexington County, South Carolina." The Right of First Refusal in that case was, of course, between the parties—and not recorded—which is usually how such cases arise. Not to put too fine a point on the error

here, but the Court of Appeals misapplied a standard of review to construe a contract to which Fine Housing had no role in drafting, was not in privity with the parties who made the contract, and who was not a third-party beneficiary. Neither did the Court of Appeals consider whether the agreement has been partly carried into execution, or whether Clarke, who seeks the remedy of specific performance, is prepared to perform. The Court of Appeals incorrectly treated the case as if it were a law case construing the drafting of an agreement between the two parties who drafted it, but even the "Grease Monkey" Right of First Refusal was sufficient to go to the jury on damages. The Court of Appeals grounded its decision on a single point; to wit, it found the language of the contract was not sufficient to describe an enforceable right. In short, the Court of Appeals not only treated the case as an action at law, which could only evaluate vagueness as between the Landlord, RRJR, and the tenant, Clarke, not as to someone who is a stranger to the contract. The Court of Appeals misapplied the standard of review. Aside from reciting the correct standard of review, the Opinion under review never applies the equitable standard it acknowledges controls.

Unlike the present case, which involves the effect of the South Carolina Recording Statute, cases raising the sufficiency of contract language are evaluated as actions at law construing contracts between the parties who make them. When a party to a contract—and Fine Housing is not that—alleges that the construction of a contract is ambiguous or capable of more than one construction, that challenge raises a question of construction for the court. *Sirrine v. C. E. Graham Trust Fund*, 136 S.C. 448, 134 S.E. 415 (1926), *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1987). Likewise, the

construction of a clear and unambiguous deed is a question of law for the court. *Hammond v. Linday*, 277 S.C. 182, 284 S.E.2d 581 (1981).

In the so-called "mixed case," when a party asserts an equitable defense to an action in law, the case can be transformed from law to equity. Here, the plaintiff, petitioner, Clarke, brought an action in equity to which the respondent, Fine Housing interposed eight equitable and legal defenses. (Appendix, Vol. 1, page 62) At trial, Fine Housing abandoned all except the sufficiency of the Right of First Refusal. Thus, an appellate court is authorized to adjust its standard of review based on its view of the case as to what it perceives to be the main question and has considerable discretion how to treat the case:

> The line between questions of law and those of fact is not always an easy one to draw, and there is a fairly wide "shadow area" in which the two types of questions coalesce, the issue being whether the evidence is so strong or so weak on an issue that a decision one way or the other is required as a matter of law, and since the determination as to whether the issue is in fact one of law or one of fact clearly presents an issue of law for appellate decision, it is apparent that the reviewing court has considerable discretion in classifying a particular matter as one of fact or law, and consequently in determining whether it is or is not reviewable under the rule in question.
>
> 5 Am. Jur2d, *Appeal & Error*, § 829 (1962)

When asked to evaluate whether the Court of Appeals erred in holding that equitable estoppel could be applied in defense of an unambiguous contract, this Court reversed the Court of Appeals and reviewed the case as a question of law *de novo*: "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 briefing this case to the Court of Appeals, Fine Housing cited the correct standard of review citing *Wachovia Bank Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014), but it cited the standard as if it were in a vacuum, ignoring the nuances of the question as discussed above. Here, the plaintiff brought an action in equity seeking specific performance. The defendant resisted, setting up eight defenses, some legal, some equitable, but the Court of Appeals settled on one—a contract analysis that the contract lacked sufficient specificity to be enforced on behalf of a party who was not a signatory to the contract. The plaintiff brought a suit in equity, which the defendant defended in both law and equity. Thus the issue before the Court is either a suit in equity or it creates a "mixed action," but it is obvious that the main purpose of the suit is the equitable prayer for specific performance, and the Court of Appeals erred in ignoring and failing to apply the three equity factors set forth above, identified in South Carolina case law since 1825. *Thomson v. Scott*, 6 S.C. Eq. (1 McCord Eq.) 32 (1825) 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) On the other hand, if the Court decides that the defense sounds in law and that this is the predominant strain of the case, then this Court reviews the decision for legal error and will not disturb the findings of the trial judge unless the Court finds the decision to be without evidence that reasonably supports

the trial judge's findings. See *Townes Associates, Ltd. V. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976):

> In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E. (2d) 876 (1974).
>
> In an action in equity, tried by the judge alone, without a reference, on appeal the Supreme Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Crowder v. Crowder*, 246 S.C. 299, 143 S.E. (2d) 580 (1965).

## ARGUMENT

### 1. The Court of Appeals erred in drawing inferences from John and Robin Robinson's absence from trial.

As set forth above in the Standard of Review discussion, the plaintiff brought an action in equity seeking specific performance for the conveyance of a parcel of real estate. The plaintiff's right of first refusal is memorialized in a lease recorded in the Charleston County R.M.C. The trial court recognized the significance of the recording statute and recognized the self-refuting nature flowing from a litigant who was not a party to a contract complaining about its drafting, especially one who never bothered to look at it. Fine Housing does not possess standing to challenge the sufficiency of the language because it lacks privity to the contract or the contracting parties. See *Bell v. Progressive Direct Insurance Company*, 407 S.C. 565, 757 S.E.2d 399 (2014) where this Court affirmed the Court of Appeals' finding that the boyfriend of a named insured could not bring himself within insurance coverage by claiming that he intended to marry the insured as some undefined future date. This Court did not allow the plaintiff to rewrite the contract of insurance or bring himself under the umbrella of the "doctrine of reasonable expectations"

because he was not a member of the insured's household. Likewise, in *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014) this Court authorized the intended beneficiary of a trust to bring an action for malpractice because she was a third party beneficiary. Here, Fine Housing articulates no standing under either the doctrine of reasonable expectations or as a third party beneficiary of the Lease and the Right of First Refusal contained therein, and the Court of Appeals erred in examining the contract for sufficiency in the first place for a litigant who lacked privity and never examined it.

The trial court properly disposed of this issue. Its Order reads in applicable part:

> 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.
>
> Appendix, Vol. 1, page 12 [order page 11]

Thus, the Court of Appeals' drawing an adverse inference from John and Robin Robinson's absence at trial under these circumstances is error. Not only is their testimony unnecessary because the document is clear, but also this record makes clear why Fine Housing did not want Robin Robinson in the courtroom. The Court of Appeals reversed the trial court because it construed the contract and found it vague, a discussion that occupies the remainder of this brief. However, as to the availability of witnesses, John Robinson is not available to anyone because he was not immortal, but Robin Robinson was just a subpoena away—the plaintiff had no difficulty serving her with the complaint. If the Court of Appeals were to draw a proper inference from her absence, it would be an adverse inference that Fine Housing did not want her near the Courthouse after it required

her to pay back nearly double what she borrowed over 24 months to redeem her property. The Respondent never alleged the Right of First Refusal was ambiguous—it argued it was too vague by lacking essential terms and yet it declined to call a witness available to it to testify about the agreement.

**2. The Right of First Refusal is Not a Restraint on Alienation.**

The trial court found the Right of First Refusal enforceable and ordered that Fine Housing convey the property to Clarke upon Clarke's tendering $350,000.00 to Fine Housing within 60 days of the Court's Order. (Appendix Vol 1, page 26). The Court of Appeals reversed this decision because it found the Agreement to be too vague and explained its reversal thus:

> 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.
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> Opinion 2020 UP 238, page 6, Appendix Vol. 2, page 494

This conclusion is erroneous because: (1) the Lease contained a precise legal description, (2) any sales price is determined entirely by the seller, (3) and the time for exercise is not only controlled by the seller, but also the contract does not make time an essence of the agreement, and South Carolina law requires that every contract be performed in a reasonable amount of time. "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." *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989)

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)
> Appendix 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 Fine Housing made to the Court of Appeals. In *Hobgood* a 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. However, here, the Court of Appeals departed from its own holding in *Hobgood* to shelter a predatory lender for whom the equities do not favor. The fact is that Fine Housing sought to exploit Robinson's weak bargaining position by waiting to the last second when she had no options, and the Court of Appeals never explains why it is rewarding this sharp practice in an equity case when Fine Housing is the author of its own dilemma by running out the clock to exploit a vulnerable debtor.

For a reason never explained, the Court of Appeals placed great weight on the fact that John Robinson was unavailable to testify and that Robin Robinson did not testify, an irrelevant fact. The parties' agreement is set forth in the recorded Lease and contains their agreement in unambiguous terms. Moreover, although Robin Robinson did, in fact, default after the plaintiff served her with the summons and complaint (Appendix Vol. 1, pages 59 and 60 [affidavit of personal service and affidavit of default]), Fine Housing could have subpoenaed her and deposed her or called her to trial if it thought it was in its interest to do so. Based on the terms of the agreement between Robinson and Fine Housing and the treatment of her both pre and post-closing, the only reasonable inference is that Fine Housing did not want her anywhere near this case. As discussed above, the Court of Appeals erred in drawing an adverse inference from Ms. Robinson's lack of testimony because the Right of First Refusal is succinct and unambiguous. However, if the Court of Appeals were properly drawing an inference against anyone, it should be drawn against Fine Housing who is challenging the Right of First Refusal and to whom Robin Robinson was a subpoena away from being called, and Fine Housing's decision not to call her is not a decision the Court can construe against Clarke. That error alone is sufficient to reverse the decision of the Court of Appeals.

The Court of Appeals' decision is grounded on its finding of vagueness on three points, but it makes a gratuitous suggestion that the right of first refusal in this case is a "restraint on alienation." Citing *61 Am. Jur. 2d* § 61 Perpetuities, etc. § 109 (2002), the Court of Appeals held: "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 facts of this case demonstrate beyond any ability to contest that Robin Robinson's financial situation would have been considerably stronger if there were two bidders vying for her property, and the realization that the Court of Appeals missed this is no less surprising than construing inferences to benefit a predatory lender. The record makes clear that Fine Housing waited until the last possible moment to commit to the loan/purchase because doing so made Fine Housing the only interested buyer, thereby strengthening its hand.

Fine Housing "purchased" 2028 Pittsburgh Avenue for $150,000.00. In the run up to litigation, Clarke attempted to exercise his Right of First Refusal by upping the offer to pay $650,000.00 for the same property, an important fact when balancing the equities. After listening to the witnesses and weighing their believability and credibility, the trial court balanced the equities and ordered Clarke to pay $350,000.00 for the property within 60 days of the date of the Order. (Appendix, Vol. 1, page 25 [Order]) As the trial court found, the Right of First Refusal was the opposite of a "restraint." It was more like a safety net for Robin Robinson because, as Clarke testified, it makes sure there are always at least two bidders for the property. Appendix page 303 [tr. page 136, lines 3-18]:

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.

Q. . . . Now putting a right of first refusal in a lease, was that unique to this property or is that something you do as a matter of course?

A. As I got experience with property, I found that's the way to do it.

Q. . . . And for what reason?

A. Because if someone offered me $1,000.00, he'd have competition because the other person may have $1,050 and it would be competition and they would be bidding on the same property, and I'd get the best price.

The logic of Clarke's testimony is undeniable, but it is understandable how, in the stress of desperate borrowing to stave off a foreclosure sale in six days, Robinson may have overlooked the Right of First Refusal that would have allowed her to pit Barry Clarke against Fine Housing to drive up the bidding or negotiate more favorable terms for herself. As Clarke testified at trial, the whole purpose of the agreement is to net Robinson more money: "It gives the owner of the property a better shot at getting more money." (Appendix, Vol. 1, page 303) The Court of Appeals missed this obvious conclusion. In fact, in today's real estate market, it has become common for a prospective purchaser to offer more than the listing price to stave off competition from other bidders. It is obvious that competition for the same parcel is going to drive up the bidding, so there is no explanation as to why the Court of Appeals veered off to a concern about the Right of First Refusal being a restraint on alienation. Cases in South Carolina, such as *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997), on which the Court of Appeals relied, produced the precise opposite effect of the Right of Frist Refusal here because here, the seller remained in complete control of price, timing, and terms. In *Webb*, not only did the Right of First Refusal tie up the property in perpetuity, but also it dictated the noncompetitive manner in which the acquisition price was set. Whichever lawyer drafted

the Right of First Refusal in this case insured the opposite effect by avoiding both the Rule Against Perpetuities and making sure the sale price stayed entirely in the hands of the Robinsons to set the price wherever they wanted. The heartbreak of this sad case is that Robin Robinson overlooked the Right of First Refusal, an oversight that left her more vulnerable to the predatory lending of Fine Housing than she otherwise would have been. A Right of First Refusal is a "restraint" if, and only if, it inhibits a property owner's right to free alienation. Here, had Robinson or Fine Housing invoked it, the Right of First Refusal would have touched off a bidding competition for the property that would benefit Robinson. Fine Housing concedes it was on at least constructive notice of the Right of First Refusal, and whether Fine Housing suppressed it to avoid a bidding competition, or more plausibly, overlooked it, Fine Housing cannot complain about a document it never participated in drafting or saw being a "restraint." It took the property subject to the Lease and all its terms, and it knew this prior to the closing. See Appendix Vol. 1, page 276 [tr. Page 108-109] where Mr. Sloan testified:

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.

Whatever the reason Fine Housing now claims it did not see the Right of First Refusal, no one gave Clarke an opportunity to exercise it, and there is no evidence in this record to support the Court of Appeals' finding that it inhibited Mrs. Robinson in any way or was a "restraint on alienation."

By contrast with the Court of Appeals, the trial court rejected the notion that the Clarke Right of First Refusal is a restraint on alienation. The definition of each makes the difference clear:

**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 trial court carefully weighed the testimony and the documentary evidence arguments and allowed Fine Housing a lot of leeway in relying on an unpublished opinion with no precedential value and found nothing in the Right of First Refusal that constituted a "restraint on alienation" because the Right of First Refusal did not constrain the Robinson's by price or manner. They were free to sell to anyone at any time and for any price. If there is a criticism to be leveled against the Right of First Refusal in this case, it is that it left Clarke vulnerable to bidding against a straw man for an inflated price to see if Clarke would match it. The trial court found the facts in this case do not support the restraint of alienation articulated by the Court of Appeals. Both the trial court and the Court of Appeals relied on the same case to reach opposite conclusions. *Webb v.*

*Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997) is a case articulating the first year law student's nightmare: the Rule Against Perpetuities. In *Webb*, the grantor conveyed property to a grantee, but reserved, not only to the grantor, but also his heirs, for all time, the Right of First Refusal to reacquire the property at a price fixed 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 was on the table from a third party. The facts in *Webb* are the opposite of the present case because it restrained the grantee from selling the property for the highest price because the three appraisers set the price, not what a willing third party purchaser was willing to pay! Here, not only is the Right of First Refusal limited by specific conditions—paying the yearly rent—but also by a specified time drafted to avoid the Rule Against Perpetuities, and most importantly, the Robinson's exclusively control the Right of First Refusal. Clarke can only buy the property "should [RRJR] wish to sell," and they controlled the purchase price by requiring Clarke to match whatever offer they received. As the trial court found, the Right of First Refusal here does not "restrain" alienation; rather, it guarantees the Robinson's 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 Fine Housing transaction as a loan rather than a sale, as she alleged in her lawsuit against Fine Housing (Appendix page R.O.A. page 403 [Exhibit 14]). Either way, no one disputes that no one notified Clarke. Had Robinson notified Clarke—or if Fine Housing had addressed the right of first refusal in its 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 understand the transaction as a sale, but rather a loan as she alleged in her complaint against Fine Housing. Either way, Clarke's Right of First Refusal is the opposite of a restraint on alienation.

When the trial court evaluated Fine Housing's assertion that the Right of First Refusal constituted a restraint on alienation, the trial court carefully digested this assertion and concluded that every case cited by Fine Housing stands for a different proposition than the one Fine Housing asserted. 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 one 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.
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> Appendix Vol. 1, page 14-15 [Order under review at pages 13-14]

Thus, the Court of Appeals erred in concluding that the Clarke Lease is a restraint on alienation or lacked essential terms.

**3. While the lease limits petitioner's right to use the property to occupy one-half of the parking lot during the lease, there is no confusion or ambiguity as to**

**the property covered by the Right of First Refusal because the recorded lease contains an exact legal description, including a derivation.**

As set forth above, the Court of Appeals found the Right of First Refusal unenforceable because it was too vague on three points: (1) insufficient legal description, (2) method for determining price, and (3) procedure for exercising the right. (Appendix at Vol. 2, page 493) As to the first, Fine Housing argues the lease "does not specifically state that the right applies to the entire parcel." (Appendix at Vol. 2, page 569 [Appellant's brief at page 12]) Fine Housing conflates succinct for ambiguous. While Article V of the lease is succinct, the Court of Appeals ignored the detailed legal description attached and incorporated into the lease, which the parties recorded in the R.M.C. office in 1999. By contrast, 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 as a whole 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.

(Appendix Vol. 1, R.O.A. page 17-18 [Order pages 16-17])

The record does not support the Court of Appeals' conclusion that the contract lacked a precise legal description because the precise legal description, including the derivation, of the entire parcel is part of the lease and recorded with it. Moreover, the Court of Appeals never explains how a litigant can complain about vagueness in a document it was never a party to or which it never examined. Fine Housing waited to the last possible moment to enter into a transaction with Mrs. Robinson because doing so allowed it to exploit her, and if it had provided Mr. Sloan with either accurate information about what Fine Housing was asking him to do, or allowed him to perform a proper title exam, it would have discovered the lease, including the detailed legal description, in sufficient time to implement the Right of First Refusal as required by the Lease, which in turn would have touched off competitive bidding. In short, this record provides overwhelming evidence supporting the findings of the trial court.

**4. The lease provides the method to determine the price at which the right of first refusal may be exercised because the price is determined by the seller.**

The Court of Appeals erred in concluding the Right of First Refusal is invalid

because it did not "describe the method for determining the price at which the right can be exercised." (Appendix Vol. 2, page 493) The Robinson's controlled the price at which the right can be exercised because they can sell their property for any price they choose, and as the Court of Appeals instructs in *Webb v. Reams*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997), if the Right of First Refusal fixes the acquisition price, then it becomes a restraint on alienation! As discussed throughout this brief, the Robinson's solely controlled the price at which the property would be sold. The issue in this case is not that the Right of First Refusal's sales price was too vague to be enforced. Rather, it is the fact that Fine Housing perceived a financial advantage in waiting to the last minute to exploit Robin Robinson and proceeded recklessly in a transaction without allowing sufficient time to act on the Right of First Refusal turned up in the title search of December 2nd 2013. The fact is that Fine Housing's predatory lending prevented Robinson from harnessing the potential energy in the Right of First Refusal, and now Fine Housing seeks to compound its predatory lending on a second innocent victim, Barry Clarke. Everything Fine Housing did was designed to drive the price down to exploit Robinson's weak bargaining position. The record of the transaction 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 they were unable to find anybody to invest given the problems that were there." (Appendix Vol. 1, page 205 [tr. Page 38, lines 8-19])

[1] The case law of New York warns the DeStaso family about the risks 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.

After DeStaso promised to pay Robinson $850,000.00, knowing how dire her situation was as she was facing a foreclosure deadline of December 3rd, instead of sending the $850,000.00 he promised, he sent $815,000, holding back $35,000.00 for himself as a "security deposit" for Robinson's lease. He was not through exploiting though. Out of the $815,000.00 he did transfer to the closing attorney, 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 nothing more than a recycled Tamara Lane document with handwritten additions. (Appendix, Vol. 1, pages 373, 380, and 457 [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, which undercuts the Court of Appeals' concern that the "price at which the right can be exercised" is not specifically defined. (Appendix Vol. 2, page 493 [Court of Appeals' Opinion]). In light of that financial overreach, combined with the fact that Fine Housing moved to eject Robinson the month after closing and list the property for sale (Appendix Vol. 1, page 442 [Exhibit 34] erodes the Court of Appeals' undue concern for Fine Housing because it found the Right of First Refusal's failure to provide a "method for determining the price." (Appendix Vol. 2, page 493 [Opinion]) Thus the Court of Appeals committed two errors, the first overlooking that the selling price of the property was controlled exclusively by the Robinson's and second in construing the evidence in a case brought in equity to benefit a predatory lender.

The current that runs deep in this case is how can Fine Housing complain about vagueness in a document to which it was not a party and to which it never bothered to examine? As the trial court found:

> As for defendant's suggestion that the right of first refusal fails to set the price, the Court is persuaded not only by the lease itself, but also by the testimony of the plaintiff, 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. Such a process is the opposite of a "restraint" on alienation. Instead of being a "restraint," it is a facilitator. However, (as discussed below) a holder of a right of first refusal cannot waive the right to exercise it when the seller and the purchaser—who are on notice of the right—keep the holder of the right of first refusal in the dark and deprive him of an opportunity to exercise it. Such conduct is inequitable.
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> Appendix, Vol. 1, page 19 [Order]

Thus, there is no "methodology" needed to compute the selling price. As owners, the Robinson's set the price at whatever figure they desired. Fine Housing cannot complaint about the vagueness of a document when the undisputed fact is that no one notified Clarke of Robinson's intent to "sell." Of course, as alleged in her complaint against Fine Housing filed on February 19, 2014, Appendix, Vol. 1, page 403 [Exhibit 14], Robinson regarded the transaction as a loan because she had the irrevocable right to redeem the property. If the transaction were a loan, then a loan would not trigger the Right of First Refusal, and there would be no purchase price, a point that emphasizes further the inequitable conduct of Fine Housing (and the subject of Richard Rothstein's book, *The Color of Law*, where he traces the development of the bond-for-title financial instrument as an instrument of predatory oppression).

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

The last ground articulated by the Court of Appeals in reversing the trial court is that the Court of Appeals found the Right of First Refusal did not set out the "procedure" for exercising the right. (Appendix, Vol. 2, page 493 [Opinion])

Applying the standard rules of contract construction (quoted above on page 36-37), 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). As discussed above, the Court of Appeals struck down the right of first refusal in *Webb v. Reames* because it violated the Rule Against Perpetuities and because **it constrained the price at which the owner could sell**. Here, Robinson was free to set the price as she saw fit. Therefore, the Right in this case cannot be "pre-emptive" because the seller exclusively controls the sales price, and it is no criticism of the Right of First Refusal to say because it leaves the seller free to set any price she chooses, that freedom makes the agreement to vague. The seller's freedom here is the exact opposite of the restriction on price the Court of Appeals used in *Webb* to strike down the right of first refusal in that case. Discretion does not equal vague. (To be fair to all the parties and all the judicial investment in this case, it is impossible to imagine that John Robinson foresaw his wife evaporating a collection of thriving businesses in less than five years, leaving her vulnerable to a predatory lender, but the point is: the Right of First Refusal was there to guarantee her top price "should she wish to sell.")

**Conclusion**

The Court of Appeals reversed the trial court because it found the agreement too vague to be enforced on the three grounds discussed in detail above. However, nowhere in Fine Housing's carefully crafted, well-written, and well-argued briefs to the Court of Appeals does Fine Housing mention, let alone discuss, the fact that Robinson/Clarke Lease is recorded at the R.M.C. Office or the application of the South Carolina Recording Statute. It is impossible to complaint about a document being too vague that one never examined. The Court of Appeals also ignored the recording statute—it does not get even a mention. At trial, Fine Housing alleged equitable estoppel, waiver, and laches, but later abandoned these defenses. (This is no criticism—the *Rules of Civil Procedure* allow pleading in the alternative, and lawyers file pleadings at the beginning of a case, not at the end.) Notwithstanding the defendant's reliance on a single legal theory—vagueness—the application of the South Carolina Recording Statute and the well-developed body of law construing contract construction still control the outcome in this case because Fine Housing cannot simultaneously assert it is not bound by an agreement because it did not draft it or see it. § 30-7-10 S. C. Code, ann. governs the manner and effect of recording in South Carolina and 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)
Appendix, Vol. 1, page 11 [Order page 10]

As set forth above repeatedly, Fine Housing knew Robinson was in desperate

straits, and it exploited her weakness to fashion an unconscionable transaction. As the record below shows, there were many reasons Fine Housing's closing attorney missed the Right of First Refusal, and none of them are the fault of the lawyer. All of them arose because Fine Housing knew Robinson was facing an inflexible deadline of December 3rd and that the creditor controlling the judicial sale refused to grant additional time. Fine Housing's principal, Vincent DeStaso, 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." (Appendix, 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 the brink of the judicial sale 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. Appendix, Vol. 2, page 271 [tr. Page 104, line 13]) Fine Housing used the time constraints to its advantage to drive a bargain less favorable to Robinson, and now seeks a safe harbor from its inequitable conduct in the courts of South Carolina. Robinson would have been in a better financial position to let her house go to foreclosure and keep her business. Fine Housing'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 bettered Robinson's bargaining position. However, one controlling fact is not disputed and that it is that Fine Housing ignored the Right of First Refusal in the recorded lease which turned up just before the closing on December 2nd. 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, Fine Housing'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.

The Court of Appeals therefore erred in evaluating this case brought in equity by construing all the evidence against Clarke and failing to apply settled principles of South Carolina contract construction. While the Right of First Refusal may be succinct, it contains all the elements necessary to be enforceable. It contained an exact legal description, it did not offend the Rule against Perpetuities like the Right of First Refusal in *Webb*, and the purchase price and the time for performance remained with the sellers, making it as least restrictive as a Right of First Refusal can be. The trial judge fashioned a remedy, fixing the purchase price at $350,000.00 (an amount Petitioner challenged on cross appeal), and ordered the Petitioner to pay the sum within 60 days or release the Right of First Refusal. Therefore, the Petitioner prays that the Supreme Court will review the decision of the Court of Appeals, reverse Opinion Number 2020-UP-238, and remand the case to either the Court of Common Pleas or to the Court of Appeals to re-determine the acquisition price in light of the Clarke cross-appeal that the Court of Appeals never reached. Respectfully submitted,

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