

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

**In re EGBERT R. SMITH TRUST.**

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**GLEN PHILLIPS and DALE PHILLIPS,**

**Petitioners/Appellees,**

**Supreme Court Docket No. 133462  
Court of Appeals Docket No. 269549  
Sanilac County Circuit Court  
Case No. : 81-21856 TT**

**-v-**

**BETTY HOMER, Successor Trustee,**

**Respondent/Appellant.**

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**APPELLANT'S BRIEF ON APPEAL  
ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF JURISDICTION**

Pursuant to MCR 7.301(A)(2), the Michigan Supreme Court has jurisdiction to review by appeal after a decision by the Court of Appeals. The Appellant timely filed an Application for leave to Appeal on March 19, 2007. The Michigan Supreme Court granted the application for leave to appeal the February 15, 2007 judgment of the Court of Appeals on July 20, 2007.

**QUESTION PRESENTED FOR REVIEW**

**DID THE COURT OF APPEALS ERRONEOUSLY PERMIT THE PETITIONERS' SPECIFIC PERFORMANCE OF A RIGHT OF FIRST REFUSAL DESPITE THE FACT THAT THE OFFER TO SELL WAS RESCINDED AND REVOKED BY THE RESPONDENT PRIOR TO ANY ACCEPTANCE OR PERFORMANCE ON THE PETITIONERS' BEHALF AND THEIR FAILURE TO STRICTLY COMPLY WITH THE CONTRACT TERMS?**

Respondent/Appellant contends the answer to this question should be "yes".

Petitioners/Appellees contend the answer to this question should be "no".

## STATEMENT OF FACTS

This case stems from the lease of a seventy-five acre track of land between the successor trustee and the Phillips over a period of years.<sup>1</sup> The Successor Trustee prior to Betty Homer entered into this lease with very detrimental provisions for the lessor; especially the rental amount and payment terms. However, Betty Homer's sister died shortly after entering into the lease; and the court appointed Ms. Homer as Successor Trustee. Unsure of what to do with the property, she talked to several people regarding the value.

An investor approached Ms. Homer and wanted to make an offer. When she was approached by Mr. Ganstine for the possible purchase of the farm she did not know if she wanted to sell the farm. However, as successor trustee, when she received the purchase agreement **only signed by Orville Ganstine** for the prospective purchase of the farm, at which time she notified the lessees of the offer to purchase and indicated that the lease terms provided 30 days to match the offer.<sup>2</sup> Pursuant to the language of the lease, any bona fide offers to purchase the land described in the lease were to be presented to the Phillips. The Respondent argued to the trial court that this was not a bona fide offer because of the contingencies places within the purchase agreement and had not been accepted by Ms. Homer<sup>3</sup>.

Ms. Homer did not want to accept or reject Mr. Ganstine's offer due to the right of first refusal by Petitioners. There is not any dispute that Ms. Homer did not sign the purchase

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<sup>1</sup>Appendix page 81a - Transcript of Motions for Summary Disposition, December 16, 2005 p. 14.

<sup>2</sup>Appendix page 42a - Deposition of Ganstine, p. 20.

<sup>3</sup>Appendix page 79a - Transcript of Motions for Summary Disposition, December 16, 2005 p. 12.

agreement with Mr. Ganstine.<sup>4</sup> The Court even found that Mr. Ganstine did not consider this a binding deal until the lease and right of first refusal were dealt with.<sup>5</sup> Another reason that the Respondent did not feel this was a bona fide offer. However, the trial court stated that presentment of that offer triggered the 30 day period in which the Phillips had to exercise that option.<sup>6</sup>

However, within days, Ms. Homer reconsidered the sale of her parents' farm and on August 6 and 7, 2004, Ms. Homer notified her attorney and the prospective buyer of her intention not to sell and that she would not be entering into any purchase agreement with Mr. Ganstine.<sup>7</sup>

August 9, 2004 Ms. Homer's attorney sent the Petitioners' attorney a letter that declined the offer to purchase and revoking her offer to sell.<sup>8</sup> Mr. Ganstine believed and understood by her rejection of his offer that the property was no longer for sale.<sup>9</sup> Further, the Court agreed that even though the Phillips had a maximum of 30 days to accept or reject the offer, the offer was withdrawn on August 9<sup>th</sup>, 2004. Therefore, the Court denied specific performance.<sup>10</sup>

The Petitioners' appealed the Judge's decision granting summary disposition in favor of

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<sup>4</sup>Appendix page 36a - Deposition of Ganstine, p. 14.

<sup>5</sup>Appendix page 82a - Transcript of Motions for Summary Disposition, December 16, 2005 p. 15.

<sup>6</sup>Appendix page 83a - Transcript of Motions for Summary Disposition, December 16, 2005 p. 16.

<sup>7</sup>Appendix page 25a - Appellant's Motion for Summary Disposition Exhibit C.

<sup>8</sup>Appendix page 24a - Appellant's Motion for Summary Disposition Exhibit B.

<sup>9</sup>Appendix page 41a - Deposition of Ganstine, p. 19.

<sup>10</sup>Appendix page 84a - Transcript of Motions for Summary Disposition, December 16, 2005 p. 17.

the Respondent after oral arguments on competing motions for summary disposition. The Court of Appeals reversed the trial court's order of summary disposition. The Court of Appeals ruled that the right of first refusal transmuted into an option which was irrevocable for the specified time period.<sup>11</sup>

Further, the Court of Appeals determined that the Respondent abandoned any right to address the strict compliance with the terms of the right of first refusal. The Respondent did briefly argue to the trial court in its responsive brief that the Petitioners failed to strictly comply with the right of first refusal, however, the issue was not fully addressed before the trial court because it determined that the right of first refusal was revoked prior to any acceptance. The Petitioners' compliance with the right of first refusal argument ended before it began when the trial court granted summary disposition in the Respondent's favor. Therefore, the issue can not be abandoned. Further, plain error occurred that affected the Respondent's substantial rights.

Paragraph 15 of the lease states "Upon Tenant's exercising his offer to purchase, Tenant shall pay to Landlord in cash the purchase price less the deposit herein specified and less any and all rental payments made during the lease term."<sup>12</sup> The Petitioners failed to provide the cash purchase price upon exercising the offer. The Court must interpret the contract to give the words actually used their plain and ordinary meaning expressed by the intent of the contracting parties. **The Respondent was not obligated to recite the entire lease provisions that pertained to the exercise of the Petitioners' right of first refusal.** The Court of Appeals asserted an obligation

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<sup>11</sup>Appendix page 90a - Opinion, February 15, 2007, p. 3.

<sup>12</sup>Appendix page 57a - Petitioners' Brief in Support of their Motion for Summary Disposition, Exhibit A.

on behalf of the Respondent where one did not exist. The Petitioners knew the terms of the lease very well and had a duty to strictly comply with its terms. The Petitioners were the ones that had the lease drafted for the Respondent's dying sister.

The Court of Appeals quickly determined this right of first refusal transmuted into an irrevocable option. However, the Court of Appeals blended the right of first refusal and option to favor certain facts. These are two very distinct rights conferred to parties of contract. Rights of first refusal are very limited and narrowly construed with very little rights conferred to the holder of the right. In addition, even options are limited in time and scope of the agreement and must be strictly complied with. Neither one grants any property interest right until properly and strictly exercised according to the terms of the agreement.

## ARGUMENT

### I. THE COURT OF APPEALS ERRONEOUSLY PERMITTED THE PETITIONERS' SPECIFIC PERFORMANCE OF A RIGHT OF FIRST REFUSAL DESPITE THE FACT THAT THE OFFER TO SELL WAS RESCINDED AND REVOKED BY THE RESPONDENT PRIOR TO ANY ACCEPTANCE OR PERFORMANCE ON THE PETITIONERS' BEHALF AND THEIR FAILURE TO STRICTLY COMPLY WITH THE CONTRACT TERMS.

#### A. STANDARD OF REVIEW

The Court of Appeals reviewed the trial court's granting of a motion for summary disposition under a de novo standard of review. Kelly v. Builders Square, Inc., 465 Mich 29, 34; 632 NW2d 912 (2001). The Court reviews equitable actions de novo and reviews a trial court's findings of fact supporting the decision for clear error. Webb v. Smith, 224 Mich App 203, 210; 568 NW2d 378 (1997). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. Tuttle v. Department of State Highways, 397 Mich 44, 243 NW2d 244 (1976). The interpretation of contractual language is an issue of law, which the Court reviews de novo. Morley v. Automobile Club of Michigan, 458 Mich 459, 465; 581 NW2d 237, reh den 459 Mich 1204 (1998).

#### B. RIGHT OF FIRST REFUSAL WAS REVOCABLE

Michigan distinguishes between rights of first refusal and option contracts and has long established the difference. Further, whether the agreement establishes a right of first refusal or option, substantial compliance with the terms is insufficient to constitute acceptance. The terms must be minutely complied with under the option. Beecher v. Morse, 286 Mich 513, 282 NW 226 (1938) In addition, this Court issued a decision that reiterated a principle stating that unless

a contract provision violates law or one of the traditional defenses to the enforceability of a contract, a court must construe and apply unambiguous contract provisions as written. Rory v. Continental Insurance Company, 473 Mich 457, 703 NW2d 23 (2005).

Therefore, whether an option or right of first refusal; they are only offers which require strict compliance with the terms of the agreement, failure to comply results in loss of the rights under the option. Oshtemo Twp v. Kalamazoo, 77 Mich App 33, 37; 257 NW2d 260 (1977); Brauer v. Hobbs, 151 Mich App 769, 777; 391 NW2d 482 (1986).

The Courts have held that options are specifically enforced in Michigan if supported by adequate consideration. Board of Control v. Burgess, 45 Mich App 183, 186; 206 NW2d 256 (1973). However, the Petitioners were not granted an option to purchase and that is clear from the intentions of the parties. The Petitioners by the terms of the lease were granted a right of first refusal which is conditional and dependant on the owner's willingness to sell and is not subject to enforcement as an absolute option and required presentment of a bona fide offer. Brauer v. Hobbs, 151 Mich App 769, 775-776; 391 NW2d 482 (1986); Ackerman Electrical Supply v. Koukious, 16 Mich App 527, 168 NW2d 433 (1969). The agreement was not intended to bind a party involuntarily.

The only common feature between options and rights of first refusal, is that each must contain a definite time period for performance, however, they are not void merely because they lack a specific time. The Court must look to the intent of the parties within the agreement.

First Refusal rights are also interpreted narrowly. LaRose Market v. Sylvan Center Inc., 209 Mich App 201, 530 NW2d 505 (1995). The Plaintiff tried to enforce its right of first refusal after the Defendant sold its stock. The Court held that absent a showing of bad faith or

wrongdoing on the part of the corporate lessor, such transactions to not trigger a lessee's right of first refusal. Since the corporate lessor did not sell the real property just the stock, the lessee was in the same position as originally held. Id. Likewise, the Petitioners are in the same position as originally held after the Respondent, Betty Homer's revocation of the offer prior to their attempted tender of acceptance. Ms. Homer was approached by Mr. Ganstine for the purchase of the farm, however, was not under any obligation to sell or knew if she wanted to sell the farm. She entertained the idea briefly and submitted the offer to the Phillips. However, prior to any acceptance by any parties involved she decided to keep the farm and not sell to anyone at this time. Undoubtedly, the Petitioners after the revocation of the offer were in the same position as before the offer. The Petitioners still possessed the right if Betty decided to sell during the term of the lease as were the Plaintiffs in LaRose Market Inc.

At the heart of the analysis is the landowner's willingness to sell the property. Once that willingness is taken away, so is the offer and it may be withdrawn prior to acceptance. This Michigan Supreme Court stated that where a lease contains a purchase option in favor of tenant but does not fix price, the option becomes a definite offer when the optionor fixes the price at which he is willing to sell and **when accepted by optionee ripens into a mutually binding contract.** Brenner v. Duncan, 318 Mich 1, 27 NW2d 320 (1947). The Supreme Court further stated that an **offer to sell property is not binding on vendor until accepted, but its acceptance before withdrawal makes a complete and mutual contract capable of specific enforcement.** Id. Therefore, the Court realized that there may be a time when a withdrawal prior acceptance would occur and not bind the parties.

There are other Courts in support of this position that a tender is revocable prior to

acceptance and that not all courts agree with the Texas holding in Henderson v. Nitschke, 470 SW2d 410 (Texas Court of Civil Appeals, 1971) as cited by the Petitioners and relied upon by the Court of Appeals in its Opinion.<sup>13</sup> The Supreme Court Appellate Division of New York held that **a right of first refusal does not create an irrevocable right to purchase where a proposed third-party transaction has been terminated in good faith.** It clearly supports the position that the right to purchase is conditional on the owner's willingness to sell and contingent upon the existence of a valid, outstanding contract to a third party. If the deal is canceled, the owner is not precluded from withdrawing the offer made to the other party so long as the other party has not yet exercised its option. Lin Broadcasting Corp., Metromedia, Inc., 139 AD 2d 124 (1988). An exclusive right to buy does not preclude revocation especially in the absence of a clause compelling the sale to the other party. Id.

The Court did review two other cases which held to the contrary and one being the Henderson case to decide on the issue of revocable rights of first refusal. However, after its analysis, the New York Supreme Court determined that the rule enunciated in Anderson, supra, was the preferable one. Lin at 132. It found that the distinction between the definite and indefinite time period to exercise the right was insignificant.

The New York Court stated that unless the language of the contract specifically stated in the contract that the right was irrevocable, **there was nothing to prohibit the owner from in good faith changing its mind about selling at any time prior to the invocation of the right of first refusal.** Lin at 133. The lease in the instant case does not set forth a provision stating that the right was irrevocable. The Petitioners did not have a irrevocable right of first refusal.

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<sup>13</sup>Appendix page 93a - Opinion, February 15, 2007, p. 4.

Once the offeree receives notice of the proposed sale, he has “received the bargained-for performance” and can not require that the offer remain open after the third sale is terminated.

Lin concerned two partnership agreements, which contained rights of first refusal. The agreements required written notice of an offer, and the other party had 45 days to exercise its right to purchase by matching that offer.

Metromedia entered into a contract to sell its assets to Southwestern Bell, and provided Lin with notice of the contract. *Id.* at 58. The proposed sale was terminated before Lin exercised its first refusal rights. Metromedia notified Lin that the sale was canceled and Lin brought suit for specific performance.

In Lin, the Court held that the offer was "not irrevocable," and that its ability to exercise its right of refusal was terminated because it had not accepted the offer before the contemplated third-party sale was abandoned. The Lin Court observed that the "effect of a right of first refusal, also called a preemptive right, is to bind the party who desires to sell not to sell without first giving the other party the opportunity to purchase at the price specified." *Id.* at 60 The Lin Court determined that while an option is "in essence, an offer which by contract is to be kept open," the only offer involved with a right of first refusal "is one to be made in the future, if and when the owner reaches agreement with a third-party purchaser." *Id.* Furthermore, while an option "creates in the optionee a power to compel an unwilling seller to sell at the agreed price," a right of first refusal requires "a willing seller who desires to part with the property." *Id.*

The Lin Court rejected the notion that "a first refusal offer, once made, is irrevocable for the period specified in the first refusal clause," holding that such a rule would not comport "with general principles of contract law or with the theory of first refusal rights." *Id.* In reaching this

conclusion, the Lin Court noted that the agreements between Lin and Metromedia contained "a standard right of first refusal," and did not "purport [] to bestow an irrevocable right to compel a sale." Id. at 61. The Lin Court further reasoned as follows:

The obvious effect of the right of first refusal is to give to the nonselling party a power to control and restrict the other party's right to sell to a third party. The clause itself operates as a restriction by preventing a party from making a sale without first making the first refusal offer. When, as here, the selling party has fully complied with its obligations under the first refusal clause by not selling without first making the required offer, the nonselling party has received the bargained-for performance...

In Leb v. Hoover, No. 5717, 1982 WL 5637 (Ohio Ct. App., Dec. 28, 1982) the court stated the first refusal right "is dependent upon the seller's intent to sell he may, as with offers in general, revoke that intent, and therefore the offer, at any time prior to acceptance thereof". In addition, many other courts have determined that a right of first refusal is not an irrevocable option which would permit an offeree to compel a sale that has been abandoned.

For example, in Bloomer v. Phillips, 164 A.D.2d 52, 562 N.Y.S.2d 840 (3d Dept 1990), the parties had entered into a "purchase contract option" which provided that plaintiffs had "an irrevocable right and first option to purchase" a parcel of land. Id. at 53. The contract stated that if defendants attempted to sell the property, they had to provide notice to the plaintiffs, who would then "have 30 days thereafter within which to exercise their option." Id. at 54. Subsequently, defendants provided notice to plaintiffs that they intended to sell the property. Within 30 days, however, defendants "withdrew the option to purchase," and promptly notified plaintiffs that they had decided not to sell. Thereafter, and before the 30 day period expired, plaintiffs delivered an "exercise of option" to defendants. When the defendants refused to sell, the plaintiffs brought an action for specific performance. Id. The trial court ruled for the

plaintiffs, concluding they had held an irrevocable option, and the Appellate Division reversed.

Relying on Lin, the Bloomer Court rejected the trial court's conclusion. The Bloomer Court held that unlike an option, a right of first refusal does not "create a power to compel a sale," and instead requires "a willing seller who desires to part with the property." *Id.* If the seller decides not to sell before the right of first refusal is exercised, "the selling party has fully complied with its obligations under the first refusal clause by not selling without first making the required offer." *Id.* The Bloomer Court further noted that the parties could have chosen to include irrevocable language but did not do so. *Id.* at 55.

In Anderson v. Stewart, 149 Neb 660, 32 NW2d 140 (1948) the Court stated that "the appellants not having unconditionally accepted the offer before it was withdrawn cannot, in the absence thereof, have it enforced and, in the absence of any evidence to show that the appellee has sold or conveyed the property to another during the term of the lease, are not in position to complain."

Further, the facts of this instant case are not in dispute. Three letters set forth a sequence of events. A letter was sent informing the Petitioners of a mere offer, a letter was sent to the Petitioners revoking the offer and a letter sent by the Petitioners acknowledging the revocation but stating acceptance to the Ms. Homer. There is not any dispute regarding the withdrawal happened prior to the Petitioners' acceptance and no indication or allegation by the Petitioners that the revocation was done in bad faith by Ms. Homer. In fact the Petitioners' acceptance was not even unconditional as it did not include the cash purchase price with its tender of acceptance as required by the terms of the lease.

The lease in paragraph 15 states in pertinent part "The Tenant shall have the right of first

refusal to match any **bona fida [sic] offer** to purchase made with regard to the subject property. In the event the Tenant fails to exercise his option within 30 days following presentment of said bona fida [sic] offer to purchase the option herein granted shall terminate.”<sup>14</sup> Ms. Homer did not have a bona fide offer only a mere offer by Mr. Ganstine.

The Phillips’ claims were properly dismissed for failure of a contract formed between the parties. Ms. Homer simply communicated an offer by letter dated July 28, 2004 to the Phillips’ who held a right of first refusal. An offer to sell property, the acceptance of which is optional with purchaser, is not binding on vendor until accepted, but its acceptance before withdrawal makes a complete and mutual contract capable of specific performance. Brenner et al v. Duncan et al, 318 Mich 1, 27 NW2d 320 (1947).

The Court properly found that Ms. Homer, the offeror, could revoke the offer prior to the acceptance by the Phillips. An offeror may revoke an offer anytime before the offeree’s acceptance. South Branch Cheese Co. v. American Butter & Cheese Co., 191 Mich 507; 158 NW 158 (1916); Board of Control v. Burgess, 45 Mich App 183; 206 NW2d 256 (1973). A revocation does not even have to be in writing as long as it is effectively communicated to the offeree. Burgess, 45 Mich App at 186. An offer is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.

A letter dated August 9, 2004 was mailed to the Phillips’ counsel declining the offer and

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<sup>14</sup>Appendix 57a - Petitioners’ Brief in Support of their Motion for Summary Disposition, Exhibit A.

extinguishing the right of first refusal.<sup>15</sup> Prior correspondence from the successor trustee, Betty Homer, dated August 7, 2004 shows the intent to revoke the offer prior to the acceptance of the original offer by Mr. Ganstine and the acceptance of the Phillips.<sup>16</sup>

In order for this transaction to be binding upon the parties or a legally enforceable obligation, there must be both an offer and an acceptance. Mathieu v. Wubbe, 330 Mich 408; 47 NW2d 670 (1951). Acceptance is the manifestation of assent to the terms of an offer. An acceptance may be mailed. Further, acceptance by mail is operative from the moment that the acceptance is dropped in the mailbox or deposited at the post office. Kutsche v. Ford, 222 Mich 442; 192 NW 714 (1923).

The letter dated August 13, 2004 acknowledges the declination letter of August 9, 2004, therefore, Ms. Homer's offer was revoked prior to the depositing of the August 13, 2004 letter of acceptance. Mr. Ganstine admits in his deposition that Betty Homer did not accept his offer and he was well aware of her concerns with the right of first refusal.<sup>17</sup> Mr. Ganstine was not surprised by the declining of his offer and stated people do that all the time.<sup>18</sup> The facts indicate that the third party purchase agreement was nothing more than an mere offer declined in good faith by Ms. Homer. In addition, the withdrawal of the offer was also completed in good faith as her willingness to sell changed.

The trial court stated that the tender given to the Phillips invoked the 30 days in which to

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<sup>15</sup>Appendix page 24a - Appellant's Motion for Summary Disposition, Exhibit B.

<sup>16</sup>Appendix page 25a - Appellant's Motion for Summary Disposition, Exhibit C.

<sup>17</sup>Appendix page 36a - Deposition of Ganstine, p. 14.

<sup>18</sup>Appendix page 41a - Deposition of Ganstine, p. 19.

exercise their option. However, it found that the tender was revocable by the Court's decision in Rory v. Continental Insurance Co., 473 Mich 457, 703 N W2d 23 (2005).<sup>19</sup> The lease provision allowed the Phillips 30 days **to do something**, either let it pass or accept and pay in cash the purchase price. They could not on the 31<sup>st</sup> day accept or wait until the 45<sup>th</sup> day, it provided a maximum time allowed to make a decision - a time to exercise the option otherwise it would be lost. It's a time frame to the offeree to consider the offer that was on the table. However, it was only a time frame subject to withdrawal by the offeror by an unwillingness to sell. Ms. Homer had she desired to sell, she would have had to wait until 30 days passed before continuing with the sale to the third party. The trial court did not use judicial interpretation by using "maximum." The actual meaning of the word "**within**" stated in the lease plainly and ordinarily means when used relative to time, has been defined variously as meaning "any time before, at or before, at the end of, before the expiration of, not beyond, not exceeding, not later than." Blacks Law Dictionary, Revised Fourth Edition, West Publishing Co. 1968.

The Court would not read the provision to contain more than what was in the four corners of the lease and was precluded by contract principles, Rory, supra. Paragraph 6 states in pertinent part ". . . and hereby **irrevocably** appoints the Landlord the attorney-in-fact of the Tenant to execute and deliver any such instrument or instruments for and in the name of the Tenant."<sup>20</sup> The lease uses the term irrevocable in this paragraph of the lease, however, chose to exclude it in paragraph 15. The trial court discerned the intent of the contracting parties by the

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<sup>19</sup>Appendix page 84a - Transcript of Motions for Summary Disposition page 17.

<sup>20</sup>Appendix page 57a- Petitioners' Brief in Support of their Motion for Summary Disposition, Exhibit A.

language actually used in the contract and used the plain and ordinary meaning to the words used.

The Court of Appeals relied upon 17 CJS, Contracts, Sec. 56 to find in the Petitioners favor. However, the Court of Appeals failed to address the circumstances provided by the facts of this case. Essentially, the Court of Appeals ignored if the owner wanted the lessee to have an option or unconditional right to purchase the property, the owner would have provided such language within the contract. No such language was incorporated within the document to give the Petitioners an unconditional or irrevocable right to purchase, only a right to match a bona fide offer when it was presented to them. When the third-party's offer was revoked by the owner, there was nothing to match and the owner's willingness to sell was no longer present, therefore, the holder of the "transmuted" option reverted back to a right of first refusal. The Petitioners did not even have a bona fide offer presented to them to invoke their right and allow it to be irrevocable.

### **C. FAILURE TO STRICTLY COMPLY**

Although the Respondent asserts that the Petitioners failed to strictly comply with the terms of the contract to have a valid option, the Court of Appeals arbitrarily concluded that the Respondent failed to preserve the argument. The Court acknowledged that this case involved the interpretation of a contract. Therefore, the contract determines the how to manifest acceptance not the parties. Further, the Court of Appeals used a brief analysis of the plain error rule to justify its decision that the error was not obvious and the Respondent forfeited her appellate challenge.<sup>21</sup>

The trial court found that the Petitioners' right of first refusal was invoked upon the

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<sup>21</sup>Appendix page 92a - Opinion February 15, 2007, p. 3.

presentment of an offer even though it was not a bona fide offer per the contract but that the Respondent properly revoked it prior to any acceptance.<sup>22</sup> The parties' issue of right of first refusal was resolved and concluded upon that fact decided by the court. The trial court did not address any further issues between the parties as the ruling ended the arguments. The trial court did not address if the Petitioners' strictly complied with the terms of the lease. Therefore, the Court of Appeals should have remanded the issue to the trial court for further findings regarding the issue of strict compliance. Plain error occurred and affected the substantial rights of the Respondent.

"To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, ie. clear or obvious, and 3) the plain error affected substantial rights." Kern v. Blethen-Coluni, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting People v. Carines, 460 Mich 750, 763; 597 NW2d 130 (1999). The Respondent argued that the offer was not bona fide or election within strict compliance.

The Respondent lost her right to assert the failure to strictly comply with the terms of the contract by the Court of Appeals assertion that the issue was not preserved although the trial court did not address the issue. The fact that the issue was not resolved in the trial court or fully addressed constitutes an error. The error was obvious and the Court of Appeals should have remanded for further proceedings on the issue instead of asserting that it was unpreserved. The error substantially affects the Respondent's rights as to the property and under the contract. Public policy further supports the finding of plain error in that it mandates a duty upon one

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<sup>22</sup>Appendix page 84a - Transcript of Motions for Summary Disposition, December 16, 2005 p. 17

contracting party to reiterate the terms of a contract to be enforced. Contract terms would become a nugatory if they could be superceded by a subsequent letter between the parties.

The evidence presented during oral arguments of the motion for summary disposition did not illicit any formal arguments regarding the strict compliance of the terms of the right of first refusal. The oral arguments presented by the parties focused upon the element of revocation. Once the trial court determined that the Respondent properly revoked the offer, the trial court's analysis ended any further discusses to the validity of the right of first refusal or its transmission into an option and the strict compliance of its terms. At the very least, the Court of Appeals should have remanded for further evidence to determine if the Petitioners complied with the terms of the contract. This greatly affects the outcome of the case. Substantial compliance is insufficient to exercise an option; rather, "exact compliance with the terms of the option agreement" is necessary. Beecher v. Morse, 286 Mich 513, 516; 282 NW2d 226 (1938).

The issue of strict compliance and lack of attention in the trial court should not preclude this Court from taking notice of this plain error affecting substantial rights of the Respondent. Wischmeyer v. Schanz, 449 Mich 469, 483; 536 nW2d 760 (1995). The strict compliance of the right of first refusal once transmuted to an option according to the Court of Appeals could be decisive of the outcome of the case and the issue of whether it was a bona fide offer, had the trial court determined that the right was irrevocable. People v. Carines, 460 Mich 750, 597 NW2d 130 (1999). This plain error affects the fairness, integrity and public reputation of judicial proceedings and thus supports reversal of the Court of Appeals opinion. The certainty of knowing what actions would exercise the option benefitted both parties as mutual assent created the contract. Otherwise waiving strict compliance by letter without knowing that it is waived

creates confusion and uncertainty among parties to a contract. Kamalnath v. Mercy Memorial Hospital Corp., 194 Mich App 543, 548-549; 487 NW2d 499 (1992); 17A Am Jur 2d, Contracts Sec. 26, p. 53.; Sec. 50 p. 81 and Sec. 72 p. 96.

Instead the Court of Appeals charges the Respondent with a duty to inform the Petitioners of every step required to comply with the contract and that by sending the letter dated July 28, 2004 changed the requirements for exercising the right of first refusal. One party can not create mutual assent by a unilateral waiver of strict compliance of the parties agreed manner of manifesting acceptance. Quality Prods & Concepts Co. v. Nagel Precision Inc., 469 Mich 362, 666 NW2d 251 (2003). If an acceptance is not in strict compliance with the offer, no contract is formed. Koster v. Simon, 339 Mich 556, 64 NW2d 607 (1954). The parties contract specifically stated in paragraph 15 "Upon Tenant's exercising his offer to purchase, Tenant shall pay to Landlord in cash the purchase price less the deposit herein specified and less any and all rental payments made during the lease term."<sup>23</sup>

#### **D. CONCLUSION**

Therefore, the facts and case law correctly depict and set forth a logical sequence of events leading to the conclusion that specific performance was not warranted as Ms. Homer was no longer willing to sell the land and rescinded the offer in good faith and the Phillips were informed prior to their acceptance. The trial court correctly held that the contract by its plain and ordinary meaning did not give the Phillips an irrevocable time period to accept or reject. The Petitioners not only failed to tender their acceptance prior to the withdrawal of Ms. Homer's

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<sup>23</sup>Appendix page 57a - Petitioners' Brief in Support of their Motion for Summary Disposition, Exhibit A.


revocation, they failed to accept in conformity with the strict compliance of the terms of the lease.

There are numerous reasons why the Court should reverse the Court of Appeals' February 15, 2007 opinion reversing the Huron County Probate Court's January 12, 2006 order granting the Respondent's motion for summary disposition. In addition to the obvious and direct impact which the Court of Appeals' decision has on the Respondent in the confines of the present case, the ruling has statewide repercussions and ramifications as to the interpretation and application of right of first refusal agreements in Michigan. If left standing, the Court of Appeals' decision effectively allows a greater right than historically given under agreements for right of first refusal and blurs the line between options and rights of first refusal. Michigan courts must have guidelines and some certainty to follow in deciding future cases. Adherence to controlling law and public policy are clear reasons to support the distinction between agreements for right of first refusal and options.

#### **REQUEST FOR RELIEF**

The Respondent respectfully requests this Honorable Court to find in her favor on the issues presented, and reverse the Court of Appeals and reinstate the Trial Court's grant of summary disposition in favor of the Respondent.

Dated: September 6, 2007

  
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