

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Mikell R. Scarborough

Case No. 2017-CP-10-03099

Appellate Case No. 2022-001479

Elizabeth Heatley, Neil B. McCann, Jr., David Neil Monk, Thomas V. Bessent, and
Mariner's Cay Marina Council of Co-Owners, Inc.,.....Respondents,

v.

Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC, George A. Farmer.,
Jr., and South Atlantic Bank, Defendants,

Of which Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC, and George
A. Farmer., Jr. are the.....Appellants.

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT MISCONSTRUED THE STATUTORY SCHEME FOR THE CREATION AND REMOVAL OF COMMON ELEMENTS IN A HORIZONTAL PROPERTY REGIME WHERE A COMMON ELEMENT WAS CONVERTED INTO A UNIT UNDER THE HORIZONTAL PROPERTY ACT AND UNDER THE TERMS OF AN AMENDED MASTER DEED AND THERE WAS CLEAR “ACQUIESCENCE” TO THAT CHANGE BY UNIT OWNERS AND THE HORIZONTAL PROPERTY REGIME ITSELF IN COMPARING CODE SECTIONS 27-31-60 AND SECTION 27-31-70 AND RELIED UPON CLEARLY DISTINGUISHABLE CASES IN DOING SO

II. THE TRIAL COURT SHOULD HAVE APPLIED JUDICIAL ESTOPPEL TO THE PLAINTIFFS’ CLAIMS WHERE THEY APPEARED IN AN EARLIER MATTER AND TOOK A POSITION DIRECTLY ANTITHETICAL OF THAT COMPLAINED OF AND UPON WHICH RELIEF WAS SOUGHT IN DIRECT OPPOSITION TO THAT EARLIER POSITION TAKEN IN AN EARLIER MATTER BEFORE THE SAME COURT

STATEMENT OF THE CASE

This matter is before this Court appealing the Orders of the Honorable Mikell R. Scarborough dated May 16, 2022, and September 22, 2022. (Orders, 5/16/2022; 9/22/22) In his original Order Granting Declaratory Relief, Judge Scarborough ruled that the Appellant Mariner’s Cay Marina Condo, LLC, and Mariner’s Cay Fuel Dock, LLC, wrongfully held title to certain Units at the Mariners Cay Marina Horizontal Property Regime (*Id.*) Judge Scarborough applied Section 27-31-70 the South Carolina Horizontal Property Act instead of apply Section 27-31-60 regarding the “acquiescence of the co-owners” in order to change the percentage interests in a horizontal property regime. Currently, there is no case law interpreting these Sections of the South Carolina Horizontal Property Act as they apply to changing ownership percentages in a Master Deed.

This case began with the filing of the Summons and Complaint and Lis Pendens on June 16, 2017, by Alben D. Neighbors, Dan G. Nekola, and the Mariner’s Cay Council of Co-owners, Inc., “on behalf of themselves and others similarly situated” to declare invalid the Amended and

Restated Master Deed for Mariner's Cay Marina Horizontal Property Regime filed on March 19, 2007, in Book X618 at Page 603 in the Office of the Register of Deeds for Charleston County (Summons, Complaint, Lis Pendens)(Amended and Restated Master Deed). A majority of the Units are dock slips. (Amended and Restated Master Deed). The original Plaintiffs brought the case as a purported class action pursuant to Rule 23 SCRCivP. (Summons and Complaint)

The Appellants Mariners Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, were named as Defendants and the Lis Pendens filed applied to Units those two limited liability companies had purchased as follows:

Mariner's Cay Marina Condo, LLC: The "Ship Store"

Mariner's Cay Fuel Dock, LLC: Dock Unit C21 and C22.

These limited liability companies had closed on these Units on May 19, 2016 (Deeds to Mariner's Cay Fuel Dock and Mariner's Cay Marina Condo)(Deeds, Book 0555 at Page 946, Book 0556 at Page 511).

These transfers arose out of a foreclosure of these Units and a deed from the Honorable Mikell Scarborough to Emerald Portfolio, LLC, recorded October 14, 2015, in Book 0510 at Page 674 in the Office of the Register of Deeds for Charleston County (Master's Deed). Emerald Portfolio, LLC, transferred the Units to Emerald McDonough Road Holdings, LLC (Deed, Book 0517 at Page 162), which then transferred the Units to The Appellants Mariners Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC,

On July 21, 2017, the original Plaintiffs filed an Amended Summons and Complaint adding the Appellant George A. Farmer, Jr., as a Defendant and asserting additional causes of action claiming damage to a security gate, lack of access to a sewer pump out service, lack of access to the area below the Unit known as the Ship Store, and claiming the need for immediate possession and a judgment for actual and punitive damages. (Amended Complaint)

On September 1, 2017, the Plaintiffs filed a Motion for Temporary Injunction. (Motion, 9/5/2017) The Motion largely reflected the Amended Complaint's additional causes of action while also claiming that the Appellants had blocked access to the bathrooms and the fuel docks and waste water pump out station at the marina. To support the motion, the Plaintiffs filed an Affidavit of Thomas Bessent who supported the allegations and claimed the marina's permit to operate could be in jeopardy were the motion not granted. (Affidavit of Bessent).

On September 22, 2017, the Appellants filed their Answer to the Amended Complaint and the Counterclaim and Third-Party Complaint of Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC (Answer, Counterclaim, Third-Party Complaint) The Appellants asserted affirmative defenses of waiver, estoppel, laches, and/or unclean hands due to the Plaintiffs' actions in knowing of the Amended and Restated Master Deed since it was filed in 2007 but taking no action until after the Appellants Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, purchased the Units in 2016 having filed suit in 2017. (*Id.*) The Appellants also set forth that class action treatment of the case was not necessary due to the identifiable nature of each Unit owners at the marina. *Id.* Further, the Appellants set forth defenses of failure to name all necessary and interested parties, estoppel by deed, the statute of limitations, laches, lack of standing, ratification, collateral estoppel, res judicata. *Id.*

The two limited liability companies set forth a counterclaim regarding the purchase of their Units for Two Hundred Fifty Thousand (\$250,000.00) Dollars in May of 2016. *Id.* The counterclaim set forth the facts surrounding the purchase and that the Mariner's Cay Marina Council of Co-Owners, Inc., had attempted to buy part of the Ship Store at its annual meeting the day after Mariner's Cay Marina Condo, LLC, had closed on the Units. *Id.* There were numerous discussions about the sale and purchase of the Ship Store by the Mariner's Cay Marina Council of Co-Owners, Inc., from the time of purchase through the filing of the lawsuit. *Id.* As set forth

in the Counterclaim, the Plaintiff Mariner's Cay Marina Council of Co-Owners, Inc., acting through its Board of Directors and then President Laurie Hull acknowledged ownership, accepted dues and other payments, and tried to buy the Units from the Appellant limited liability companies. *Id.* They even made an offer of Eighty Thousand and No/100 (\$80,000.00) Dollars to purchase part of the Ship Store, Unit 1-A, and two fuel dock boat slips. *Id.* That offer was declined and countered. *Id.*

The offer was later increased to One Hundred Forty Thousand and No/100 (\$140,000.00) Dollars for the portion of the Ship Store and a Twenty Thousand and No/100 (\$20,000.00) Dollars for one fuel dock and to trade the other fuel dock for another dock Unit. *Id.* That offer was later put in writing in December of 2016. *Id.* From December 2016 until the filing of the original Plaintiffs' Summons and Complaint, discussions continued as to the Mariner's Cay Marina Council of Co-Owners, Inc., buying some or all of the Units. *Id.* In May of 2017, the Appellant limited liability companies offered to sell the dock Units for their appraised value and to donate the bathrooms at Unit 1-A to the Mariner's Cay Marina Council of Co-Owners, Inc. *Id.*

The first cause of action under the counterclaim was brought for unjust enrichment as to the repairs made to the Units by the Appellant limited liability companies from the time of purchase. *Id.* They also sought indemnification from Emerald Road McDonough Holdings, LLC, by virtue of the deed conveying title as well as causes of action for breach of contract. *Id.* They also filed a nuisance claim for the disturbance of the quiet enjoyment of the Units. *Id.* Lastly, they filed a claim for civil conspiracy, including a listing of "special damages" as was required at that time of filing. *Id.*

On November 9, 2017, the Plaintiffs submitted a Memorandum in Support of their Motion for Temporary Injunction. (Memo, 11/9/17)

On November 13, 2017, the Appellant George A. Farmer, Jr., submitted his Affidavit prior to the hearing of the Plaintiff's Motion for a Temporary Injunction. (Affidavit, 11/13/17). Mr. Farmer is the member of the two Appellant limited liability companies. *Id.* He set forth how he came to purchase the Units and that they had been subject to foreclosures in the case of *First South Bank v. Tiger River Capital, LLC*, Case No. 2013-CP-10-00850 in which the Mariner's Cay Marina Council of Co-Owners, Inc., appeared and filed an Answer asking the Court to protect its interest in the Units, but did not assert that they owned the Units. *Id.* Mr. Farmer attached a copy of that Answer to his Affidavit. *Id.* In his Affidavit, Mr. Farmer agreed to allow access to the bathrooms, to the ramp to same, to the pump under the property with reasonable notice, to allow access to repair the dock security system. *Id.* He also offered to make the fuel docks available on reasonable notice and that the bathrooms were accessible. *Id.*

On November 14, 2017, the Honorable J.C. Nicholson, Jr., heard the Motion for Temporary Injunction.

On November 22, 2017, the Plaintiffs' filed their Reply to the Counterclaim. (Reply)

On December 6, 2017, Judge Nicholson filed his Order Granting in Part and Denying in Part the Plaintiffs' Motion for Temporary Injunction. (Order, 12/6/17). Judge Nicholson's Order was never appealed and remains the law of the case. In his Order, Judge Nicholson denied the motion as to the handicap ramp and the electrical control panel. *Id.* Judge Nicholson allowed the access to the waste water pump out station with conditions set forth in his order about hours of operation, giving twenty-four hours' notice, and moving boats at the fuel docks to allow access to the pump out stations. *Id.* He also limited the use to any vessel being twice monthly and required the Marina Council of Co-Owners, Inc., to pay for the maintenance *Id.* Judge Nicholson also required the Plaintiffs post a Five Thousand Dollar (\$5,000.00) bond with the Clerk of Court for Charleston County. *Id.*

On December 7, 2017, council for Emerald McDonough Road Holdings, LLC, filed his Notice of Appearance. (Notice of Appearance)

On December 20, 2017, the Plaintiffs mailed their check to Clerk of Court (Letter, 12/20/17). The Notice of Posting Bond was filed December 27, 2017. (Notice of Bond)

On February 22, 2018, the Plaintiffs filed their motion to Amend Complaint to add South Atlantic Bank, the lender with a mortgage on the Units owned by the Appellants Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, as Defendant in the case. (Motion, 2/22/18). That same day the Honorable Kirsti Lea Harrington filed a Consent Order to Amend Complaint agreed upon by the Plaintiffs and Defendants and Third-Party Defendants. (Order, 2/22/18)

On February 26, 2018, co-counsel for the Defendant Mariner's Cay Marina Condo, LLC, filed their Notice of Appearance. (Notice of Appearance, 2/26/2018)

On February 28, 2018, the Plaintiffs filed their Second Amended Summons and Complaint, adding South Atlantic Bank as Defendant. (Second Amended Summons and Complaint) The Defendant South Atlantic Bank was served with the Second Amended Summons and Complaint on March 5, 2018, as shown by the Affidavit of Service filed March 13, 2018. (Affidavit of Service)

On March 19, 2018, the Appellant George A. Farmer, Jr., filed his Answer to the Second Amended Complaint. (Answer, 3/19/2018). That same day, Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, filed their Answer, Counterclaim and Third-Party to the Plaintiff's Second Amended Complaint (Answer, Counterclaim, Third Party Complaint to Second Amended Complaint)

On April 2, 2018, the Qualey Law Firm was relieved as counsel of record for the Appellant George A. Farmer, Jr., individually by Consent Order of the Honorable Kristi Lea Harrington. (Consent Order Relieving Counsel, 4/2/18).

The Defendant South Atlantic Bank filed its Answer to the Plaintiff's Second Amended Complaint on April 5, 2018.

The Plaintiffs filed their Reply to the Counterclaim of Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, on April 16, 2018. (Reply, 4/16/2018)

On April 23, 2018, the Appellants filed their Amended Summons and Answer to the Second Amended Complaint and Counterclaim and Third-Party Complaint. (4/23/2018) In that pleading, the Appellants asserted an additional affidavit defense of judicial estoppel arising out of the pleadings filed by the Mariner's Cay Marina Council of Co-owners, Inc., in the foreclosure case from 2013. *Id.*

On April 30, 2018, the Honorable Kristi Lea Harrington entered a Consent Scheduling Order. (Order, 4/30/18)

The Plaintiffs submitted their Reply to the Counterclaim on May 7, 2018 (Reply)

On June 1, 2018, the Plaintiffs filed their Motion to Certify as a Class Action and to Approve Plaintiffs Nekola and Neighbors as Class Representatives. (Motion, 6/1/2018). Attached to the Motion were the Affidavits of the purported class representatives Dan G. Nekola and Alben D. Neighbors (Affidavits, 6/1/2018)

On June 25, 2018, the Plaintiffs filed a Motion to Compel (Motion, 6/25/2018)

The Third-Party Defendant Emerald McDonough Road Holdings, LLC, filed its Summons and Answer and Counterclaim on June 29, 2018. (Summons, Answer and Counterclaim, 6/29/2018). The Third-Party Plaintiffs filed their Reply on July 31, 2018 (Reply, 7/31/2018).

On December 17, 2018, the Plaintiffs filed a Withdrawal of Plaintiff's Motion to Certify Class Action and to Approve Plaintiff's Alben D. Neighbors and Dan G. Nekola as Class Representatives. (Withdrawal, 12/17/18).

The Defendants and Plaintiffs entered into a Consent Order regarding discovery filed by the Honorable Roger M. Young, Sr., on December 21, 2018. (Order, 12/21/2018).

The parties submitted an Amended Scheduling Order filed by Judge Young on December 27, 2018.

On January 24, 2019, the Plaintiffs moved to amend their Complaint for a third time. (Motion, 1/24/2018). The purpose was to remove Alben D. Neighbors as a Plaintiff and substitute Elizabeth W. Heatley as a Plaintiff. *Id.* Mr. Neighbors had since sold his Unit at Mariner's Cay. *Id.* The Honorable Thomas L. Hughston, Jr., granted the Motion by Consent Order.

The Third-Amended Complaint was filed on January 31, 2019. (Third Amended Complaint).

On February 5, 2019, the Plaintiffs filed their Motion to Certify as a Class Action and to Approve Plaintiffs Heatley and Nekola as Class Representatives. (Motion, 2/5/2019) Ms. Heatley filed an Affidavit in support of the Motion. (Affidavit).

On February 15, 2019, the Defendants filed their responsive pleadings to the Third-Amended Complaint to which the Plaintiffs replied on February 22, 2019. (Summons, Answer to Third-Amended Complaint, Counterclaim, and Third-Party Complaint)(Reply)

On March 6, 2019, the Third-Party Defendant Emerald McDonough Road Holdings, LLC, filed its Answer and Counterclaim arising from the Third-Amended Complaint. (Answer, 3/6/2019)

The Plaintiffs filed another Motion to Compel on March 29, 2019. (Motion, 3/29/2019)

The parties agreed to a Second-Amended Scheduling Order filed by Judge Young, or June 4, 2019. (Second Amended Scheduling Order).

On June 6, 2019, the Plaintiffs filed their Memorandum in Support of Class Certification with the Defendants filing their Memorandum in Opposition on June 10, 2019. (Memoranda, 6/6/2019)

The Honorable D. Craig Brown issued a Form 4 Order Denying Class Certification June 12, 2019. (Order 6/12/2019) The Plaintiffs moved to have Judge Brown reconsider that Order on June 21, 2019. (Motion, 6/21/2019) The Motion was denied by Judge Brown on July 2, 2019. (Order, 7/2/2019)

Discovery continued in the case from the time the case was filed.

The parties entered into a Third Amended Scheduling Order filed by the Honorable Jennifer B. McCoy on January 20, 2020. (Order, 1/20/2020)

On May 28, 2020, the Plaintiffs filed another motion to amend to file their Fourth Amended Complaint (Motion 5/28/2020).

On June 8, 2020, the Appellants moved for a temporary restraining order and injunction *pendente lite* due to circumstances caused by the global Covid-19 pandemic and use of the property during the pandemic and its attendant shut downs, lockdowns, and safety protocols. (Motion with Affidavit of George A. Farmer, Jr., 6/8/2020).

The Plaintiffs filed a memorandum in support of their motion to amend on June 19, 2020. (Memo, 6/19/20).

The Plaintiffs filed a motion for a temporary injunction on June 22, 2020, related to access to the bathrooms at the marina, also supported by Affidavits. (Motion, 6/22/20)

On July 6, 2020, the Honorable Bentley D. Price granted the Plaintiffs' motion to amend. (Order, 7/6/2020). The Fourth Amended Complaint was filed the same day. (Fourth Amended

Complaint). The Appellants and South Atlantic Bank filed their responsive pleading on July 17, 2020. (Answer, Counterclaim, Third Party Complaint). The Plaintiffs filed their reply on August 5, 2020. (Reply). The Third Party Defendant Emerald McDonough Road Holdings, LKLC, filed its Answer and Counterclaim on August 14, 2020. (Answer and Counterclaim, 8/5/20) On August 21, 2020, the Appellants and South Atlantic Bank filed their Reply (Reply 8/12/20) That was followed by a Stipulation of Dismissal as to the Third Party Complaint on October 6, 2020 (Stipulation of Dismissal, 10/6/2020)

A Consent Order of Substitution of Counsel was filed by the Honorable Jennifer B. McCoy on November 10, 2020. (Order of Substitution, 11/10/2020)

By an Order of Reference from the Honorable R. Markley Dennis, Jr., the parties stipulated that the Master in Equity for Charleston County to try the declaratory judgment aspects of the case with the remaining causes of action to be tried by a jury after the declaratory judgment.(Order of Reference 12/14/2020)

On March 9, 2021, the Appellants filed a Motion for Summary Judgment based upon the Plaintiffs acquiescence to changes in the Master Deed for Mariner's Cay Marina Horizontal Property Regime and based upon judicial estoppel. (Motion, 3/9/2021) On March 12, 2021, the Plaintiffs filed a Motion for Summary Judgment based upon Section 27-31-70 of the South Carolina Horizontal Property Act. (Motion, 3/12/2021)

The Appellants filed their Memorandum in Support of their Motion for Summary Judgment on April 2, 2021, with Exhibits, including deposition transcripts and excerpts taken during discovery. (Memorandum; 4/2/2021), The Plaintiffs filed a Return that same day. (Return, 4/2/2021)

On May 14, 2021, the Honorable Mikell Scarborough granted the Defendants' Motion for Summary Judgment based upon the acquiescence of the Plaintiffs to the Amended and Restated

Master Deed based upon S.C. Code Ann. §27-31-60 that states for property to be affixed as a common elements as a percentage of common ownership

[t]he percentage shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and shall not be altered without the **acquiescence of the co-owners representing all apartments of the property.**

(Order, p. 3)(Transcript, pp 5-6).

Judge Scarborough further based his Order upon the doctrine of judicial estoppel arising from the foreclosure case captioned *Emerald Road Portfolio, LLC v. Tiger River Capital, LLC*, Case No. 2013-CP-10-0850, in which the Mariner's Cay Marina Council of Co-Owners, Inc., filed its answer and did not object to the sale of the Units at issue in this matter.

On May 24, 2021, the Plaintiffs filed a motion to alter or amend claiming that S.C. Code Section 27-31-70 controlled over the language of S.C. Code Section 27-31-60, among other grounds. (Order, 5/14/21) The Defendants filed their Memorandum in Opposition to the motion to alter or amend on June 2, 2021. (Memorandum 6/2/21) The Plaintiffs submitted their reply to the Memorandum on June 4, 2021. (Reply, 6/4/21)

On July 8, 2021, Judge Scarborough vacated the Order Granting Defendants Summary Judgment and ordered that the case be set for a trial on the merits. (Order, 7/8/21)

On March 18, 2022, the Defendants submitted their Designation of Deposition Experts. (Notice of Filing and Depositions, 3/18/2022).

On March 21, the Defendants and the Plaintiffs both submitted their respective Trial Briefs to the Court. (Trial Brief, 3/21/22).

Judge Scarborough tried the case on March 22 and 23, 2022 (Transcript)

After the trial, all parties submitted their admitted Exhibits to the Clerk of Court's E-filing system (Trial Exs., 3/24/22; 3/35/33; 4/22/22;4/25/22)

The Appellants and the Plaintiffs submitted proposed orders for Judge Scarborough's consideration on May 9, 2022. (Proposed Orders, 5/9/22).

On May 16, 2022, Judge Scarborough entered his Order Granting Declaratory Relief, being one of the orders appealed here. (Order, 5/16/22). In that Order, Judge Scarborough relied upon Florida law, discussed the South Carolina Department of Health and Environmental Control's Office of Coastal Resource Management ("OCRM") issues vis-à-vis the marina at Mariner's Cay, relied on hearsay testimony of one witness, and relied upon S.C. Code Ann. §27-31-70 and a case involving a developer of a horizontal property regime, *see, e.g., Reyhani v. Stone Creek Cove II Horizontal Property Regime*, 329 S.C. 206, 494 S.E.2d 465 (1997), and concluded S.C. Code Ann. §27-31-60 language regarding the acquiescence of the co-owners to give it a tortured meaning as will be argued more fully below. (Order, 5/16/2022). His Order divested the Appellant limited liability companies of all right, title, and interest in the condominium Units for which they paid Two Hundred Fifty Thousand and No/100 (\$250,000.00) Dollars. *Id.*

On May 19, 2022, three days later, after the entry of the Order Granting Declaratory Relief, the Appellants and South Atlantic Bank filed their Motion to Reconsider pursuant to Rule 59(e) SCRCivP. That Motion set forth twenty-one (21) points for which the Appellants sought reconsideration from the Court. On May 26, 2022, the Plaintiffs filed their response inexplicably claiming that there was no basis or grounds in twenty-one (21) points asserted. (Response, 5/26/22)

On September 22, 2022, Judge Scarborough filed his Order on Defendants' Motion to Alter or amend after a hearing on September 7, 2022 (Order, 9/22/22; Transcript 9/7/22 pp. 1 -)

In that Order, Judge Scarborough did clarify that the original Order would be amended to read that the four (4) individually named Plaintiffs own an undivided interest in the Units at issue. (Order, *id.*).

This appeal followed with the filing of the Notice of Intent to Appeal on October 18, 2022 (Notice of Appeal) Based upon correspondence from this Court, an Amended Notice of Appeal was filed October 24, 2022. (Amended Notice of Appeal)

STATEMENT OF FACTS

The Plaintiffs in this matter brought this case seeking declaratory relief pursuant to S. C. Code Ann §15-53-10, *et seq.*, to determine the status of title to Units in the Mariner's Cay Marina Horizontal Property Regime, which Units this Court had previously sold as part of a foreclosure case. *See First South Bank v. Tiger River Capital, LLC, et. al.*, C/A No. 2013-CP-10-0850. The Defendants Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, purchased the Units as a result of those foreclosures after sale by the trial court in this case. (See, Deeds, recorded in Book 555 at Page 946 and Book 556 at Page 511).

Formerly, these Units were Common Elements of the Mariner's Cay Marina Horizontal Property Regime pursuant to the Master Deed recorded on May 18, 2006, in Book V583 at Page 584. (Master Deed) The Master Deed provided that the Declarant had the unilateral right to amend the Master Deed during its control period. (*Id.*) The early deeds for these Units provided a power of attorney from the Unit owner to the Declarant for those purposes. (*Id.*)

Subsequently, these once Common Elements were made Units and not Common Elements pursuant to the Amended and Restated Master Deed recorded March 19, 2007, in Book X618 at Page 603. (Amended and Restated Master Deed) The Declarant still controlled the Horizontal Property Regime at the time of the amendment. (*Id.*)(Transcript, p. 19). The Declarant

retained control until ninety percent of the Units were sold. (Amended and Restated Master Deed). The Amended and Restated Master Deed was recorded less than a year after the original Master Deed. Everyone who has owned a Unit at the Marina has been operating under the Amended Master Deed since March of 2007. The lawsuit giving rise to this appeal was filed ten (10) years after that amendment was of record. (Summons and Complaint)

There was no evidence presented that there were actual signatures from Unit Owners approving the changes to the Master Deed. (Transcripts) That means that in order for those changes to be valid, the acquiescence of the Co-owners had to be shown and or demonstrated according to the applicable statute which reads as follow as relates to Common Elements and percentages in those Common Elements of the Unit owners:

[t]he percentage shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and shall not be altered without the **acquiescence of the co-owners representing all apartments of the property.**

S.C. Code Ann. §27-31-60 (emphasis added).

There was evidence of such acquiescence from the time of the Amended and Restated Master Deed until the suit was brought some ten (10) years after the amendment as set forth herein.

The course of conduct of the Plaintiffs, individually, and by the Mariner's Cay Marina Council of Co-Owners, Inc., which is the Unit Owners association, demonstrated a course of acquiescence over the years since the filing of the Amended Master Deed as will be set forth herein and as was proven at trial.

Mariner's Cay Marina consists of ninety (90) boat slips located on the Folly River as well as a two-story building containing storage space and a Ship Store (the "Ship Store") as well as a Fuel Dock (the "Fuel Dock") (*Amended Complaint*, July 12, 2017). All parties admit that there are only ninety boat slips at the Mariner's Cay Marina. *Id.*

The Defendant Mariners Cay Marina Condo, LLC, owns the area called the “Ship Store” and the Defendant Mariners Cay Fuel Dock, LLC, owns the Fuel Docks as described herein as a result of obtaining title after the Master in Equity for Charleston County sold them at a foreclosure sale, the Master in Equity being the trial court in this matter. *See First South Bank v. Tiger River Capital, LLC, et. al.*, C/A No. 2013-CP-10-0850.

The Defendant George A. Farmer, Jr., is the member and manager of both of those limited liability companies. The Defendant South Atlantic Bank is the lender for those entities.

The Defendants Mariners Cay Marina Condo, LLC, and the Defendant Mariners Cay Fuel Dock, LLC, obtained title to their respective properties as a result of a foreclosure action in which the Mariner’s Cay Mariner Council of Co-Owners, Inc., appeared. *See First South Bank v. Tiger River Capital, LLC, et. al.*, C/A No. 2013-CP-10-0850. The Court issued its Master’s Deed pursuant to that foreclosure. *Id.* That deed transferred the Ship Store and the Fuel Docks to Emerald Portfolio on October 14, 2015, with the recording of that deed in Book 0510 at Page 674 in the Office of the Register of Deeds for Charleston County. (Deed)

The Board at Mariner’s Cay even had discussions about purchasing these Units, too, as part of the foreclosure during the pendency of that case. (Jeff Heatley Depo, p. 39)

The Association appeared in that case, having filed an Answer which Answer did not object to any sale of the property at issue in this case and which did not assert any claims to the property. (*See Answer filed April 3, 2013; Master’s Order of Judgment and Foreclosure, March 16, 2015; Master’s Report on Sale & Disbursements, July 23, 2015.*)

There was no appeal by any party in that case.

The Defendants Mariners Cay Marina Condo, LLC and the Defendant Mariners Cay Fuel Dock, LLC received title to both units at Mariner’s Cay in May, 2016. The Ship Store and the Fuel Dock have been owned by the Defendants (the “Property”) since that time.

This matter began as a suit to determine ownership of the Ship Store and the Fuel Dock within Mariner's Cay Marina by other named individual Plaintiffs Alben D. Neighbors and Dan G Nekola, neither of whom are Plaintiffs in this matter any longer, along with the Mariner's Cay Marina Council of Co-Owners, Inc (the Plaintiffs)(Summons and Complaint) The case began as a class action, which was never certified. *Id.*(Order Denying Class Certification)

The original Plaintiffs alleged that the Amended and Restated Master Deed for Mariner's Cay Marina Horizontal Property Regime recorded March 19, 2007, in the RMC Office for Charleston County in Book X618, Page 603 (the "Amended Master Deed") is invalid and that the Defendants' Property is a common element of the Mariner's Cay Marina Horizontal Property Regime (the "HPR") and should be forfeited to the Plaintiffs. The Defendants counterclaimed alleging that they rightfully and legally purchased the disputed Property, that the Amended Master Deed is valid and enforceable due to the provisions of the South Carolina Horizontal Property Act, S.C. Code Ann. §27-31-60, regarding the acquiescence of Unit owners to changes to Common Elements in a Horizontal Property Regime.

This dispute centers on the fact that the Defendants purchased Units at the Marina that the Plaintiffs wish to own but are unwilling to pay fair market value to obtain, and, instead, are attempting to claim the property as a common area belonging to the these Plaintiffs and/or the Council of Co-owners.

The Defendants contend that the Mariners Cay Marina Condo, LLC, and Mariners Cay Fuel Dock, LLC, have good title to these Units as the Plaintiffs acquiesced in the changes to the Master Deed that made these Units no longer common elements under the revised and amended Master Deed.

The Horizontal Property Act states that for common elements

[t]he percentage shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and shall not be altered without the **acquiescence of the co-owners representing all apartments of the property.**

S.C. Code Ann. §27-31-60 (emphasis added).

The General Assembly has not defined “acquiescence” and there is no case interpreting this Code section.

The only mention of this Code Section is in an unpublished opinion from the Court of Appeals affirming a ruling by Judge Scarborough in an earlier case. *See Rivers Point Row Horizontal Property Regime v. Palms Properties, LLC.*, Up. Op. No. 2013-UP-458 (Ct. App. 2013).

However, “Acquiescence” has been defined as follows:

Conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried into effect.

Black’s Law Dictionary (6th ed.)(1990)

The Plaintiffs have acquiesced by not objecting to the sale of the Units by this Court, by accepting dues and payments from the owners, by offering to purchase the Units, by not blocking the Farmers from moving into the Units, and by their course of conduct.

The Plaintiffs have clearly acquiesced to the changes to the Master Deed for Mariner’s Cay Marina Horizontal Property Regime, recorded March 19, 2007, in Book X618 at Page 603, in the Office of the Register of Deed for Charleston County. *See* S.C. Code Ann. §§27-31-60, 27-31-70. Those changes were put into effect in 2007, some ten years prior to this lawsuit being filed. No one objected in those ten years. The Plaintiffs recognized the existence of the transaction. Interestingly, the Plaintiffs failed to cite the acquiescence portion of the Horizontal Property Act in their motion and brief. Motion and Memorandum, March 12, 2021. They do not

cite that portion of the statute as they know they have acquiesced. The testimony as to acquiescence is clear.

In taking title to their dockominium slips, the Plaintiffs knew that the Master Deed would most likely be amended, and they consented. At trial, the Plaintiff David Neil Monk testified that in his own deed for a dockominium at Mariner's Cay contained specific language advising that the Mater Deed may be amended from time to time together with the undivided interest in the Common Elements. (Transcript, pp. 61-62)(Deed) He further testified that he did not read the Master Deed when he took title to his Unit. (Transcript, p. 76).

Another named Plaintiff, Neal McCann also testified at trial. He, too, acknowledged that that the deed to his dockominium unit contained language that states the "master deed may thereafter be amended from time to time." (Transcript, p. 93)(McCann Deed) All of the Plaintiffs took title with that amendment language being part and parcel of their deeds.

Elizabeth Heatley, also a named Plaintiff, learned of the Master Deed Amendment in 2010. (Transcript, p. 118) She did nothing about it. She knew that the Appellants purchased their Units in 2016. (Transcript, p. 124). Her husband, Jeff Heatley, has served on the Board of the Council of Co-Owners almost continuously since 2010. (Transcript p. 139) He also served on the Board in 2013. (*Id.*) She also knew that there were negotiations between the association and the foreclosing bank about purchasing these Units, too. (Transcript, p. 141). At the time of the amendment to the Master Deed, Ms. Heatley assumed it was done legally. (Transcript, p.142)

The Council of Co-Owners has assessed these Units with separate dues owed and paid. In fact, the Units which are the subject of this action have been assessed dues as separate Units and not as Common Elements from 2007 onward. As testified to by Ronald McGuire, a former Board member, they charged these Units monthly assessments.

Q. From 2007 forward, the ship store and dock units were regularly assessed general association dues; is that correct?

A. Yes.

(Ronald McGuire Depo., p. 240)

Tom Bessent, the President of the Board, and the Rule 30(b)(6) representative of the Mariners Cay Marina Council of Co-Owners, later-named Plaintiff, and witness at trial, also testified similarly:

Q. Mr. Bessent, we're back on the record after a break. Do you know if the Mariner's Cay Council of Co-Owners, the marina, has accepted payments from Mr. Farmer's entity for their pro rata share of maintenance? In other words, quarterly dues.

A. Yes.

Q. And do you know if the Mariner's Cay Marina Council of Co-Owners has ever filed a lien against Mr. Farmer's entities for nonpayment?

A. We've either filed a lien or we've sent a notice that a lien is forthcoming. I'm not really sure how far that went.

(Rule 30(b)(6) Deposition by Tom Bessent, p. 61)

Even while claiming that the Units are Common Elements, the Board has no plans to refund the assessments paid by Mr. Farmer on behalf of his entities. (Bessent Depo, *id.*) The Board cannot have it both ways.

Mr. Bessent stated that these funds were not returned and there are not necessarily plans to refund them. (30(b)(6) Depo, p. 41) Again, this is further evidence of acquiescence and acknowledgment of ownership.

In addition to his deposition as the Rule 30(b)(6) representative, Mr. Bessent also testified at trial. He formerly owned two dock slips at Mariner's Cay. (Bessent Deeds)(Transcript, p. 159-160) He continues to own a slip at the marina. (Transcript p. 161) Mr. Bessent knew of the amendment to the Master Deed in 2010 or 2011. (Transcript, p. 166)

He did not go to an attorney or take any action at that time. (Transcript, p. 238) Mr. Bessent served on the Board starting in 2016, soon after Mr. Farmer's entities closed on the Units through 2021. (Transcript, p. 195-196).

Mr. Bessent acknowledged that during his time on the Board, the Board made an offer purchase these Units. (Transcript p. 196) The Board even had an appraisal completed to determine the value of the Units. (Transcript p. 203). At the time their appraiser valued the first floor of Ship Store Unit at \$140,000.00. (Transcript, p. 204). The later offered \$80,000.00 for that purchase. (Transcript, p. 205). There was clear acknowledgment and acquiescence as to the Units being owned by the Appellants where Notice of Lien were filed on the Units. (Transcript, p. 232-233)(Notice of Lien).

At one point, the Board even discussed purchasing the Units, as confirmed in deposition testimony:

Q. And are you aware there were offers made to purchase; correct?

A. Yes.

....

Q. That's Exhibit 21 asking about revising the joint offer, and again, I think your testimony as earlier that the offer was not made because y'all just didn't have the money; correct?

A. The best I can remember, but, yeah, I hope I'm remembering accurately.

(Ronald McGuire Depo, p. 42, p. 97)

One of the former owners and a former named Plaintiff, Danny G. Nekola, even testified that Mr. Farmer was an actual owner of the Units.

Q. Well, it's a yes-or-no question. Is he an owner or is he not?

A. I guess the deed says that he is, yes.

(Nekola Depo, p. 32)

The Board filed liens against the Units for non-payment of dues, which is further evidence of acquiescence and acknowledgment of ownership by the Defendants Mariners Cay Marina Condo, LLC, and Mariners Cay Fuel Dock, LLC.

The testimony is as follows:

Q. You are aware, I'm sure -- maybe you are not aware. You are aware the board did file a lien against these entities at one point for nonpayment?

A. Yes.

Q. And then Mr. Farmer's entities caught those payments up and was the lien released?

A. Yes.

(McGuire Depo., pp.41)

Amanda Barnes is the property manager for the Marina who confirmed that liens were placed on the Unit. (Barnes Depo. P. 59) The Board also authorized the liens to be satisfied as well. *Id.* at 60. She, too, was aware that there were discussions by the Board about a potential sale by Mr. Farmer's entities of the Unit and dock slips. *Id.* at 40.

The Co-owners even had appraisals completed to determine the value of the property in an attempt to purchase the Units. (30(b)(6) Depo., p. 144). The Board had a directive from the membership to pursue purchase of the Units. (30(b)(6) Depo., p. 216) There were discussions with Mr. Farmer about such a purchase. (Heatley Depo, p. 39) They made him an offer of \$100,000.00 which was not accepted. (*Id.* at 85-86)

Laurie Hull, a former Board member, remembered being the person who made the offer to purchases to Mr. Farmer. (Laurie Hull Depo., p. 44). She also remembered a counteroffer from Mr. Farmer for \$500,000.00 which was not accepted. *Id.* It was she who ordered an appraisal of the Unit in July of 2016. (*Id.* at 82) She also testified to the same at trial. (Transcript pp. 316-322)

Why would they offer to purchase something they already own? Again, this more evidence of their understanding that Mr. Farmer and his entities owned what they indeed own to this day.

According to Ed Geiger, the dockmaster at Mariner's Cay, and contrary to the Plaintiffs' assertions, the Unit on high ground has not been in continuous operation as ship store or place of business until Mr. Farmer's entities purchased them. (Geiger Deposition, p. 28) It closed in 2011. *Id.* It has not been operational since that time. *Id.* at 29. Nobody has operated the ship store from 2011 to the present. *Id.* He, too, was aware the Unit and the fuel docks were sold at foreclosure. *Id.* at 59-60. Mr. Geiger even showed Mr. Farmer the Unit and the fuel docks prior to purchase. *Id.* at 60.

At trial, the testimony was clear that the individuals knew of the amendment to the Master Deed for years but did nothing about it, thinking and knowing that these Units were no longer Common Elements. Mrs. Heatley testified she knew of the amendment in 2010 but did nothing, and knew, too, of the foreclosure case, but, similarly, did nothing.

At trial, none of the individual Plaintiffs testified that they had ever been in possession of these Units nor had they ever claimed an interest in the Units until such time as their lawyer determined that the Master Deed had been amended without having signatures from every Unit owner.

Further, all testified that there were pump out stations, booms, places for the dockmaster to use the property, and no fines, notices, or correspondences from SC DHEC OCRM advising that the Marina was ever in danger of shutting down or being closed due to some violations of regulations. (Transcript – Testimony of Heatley & Bessent). This was the literal and proverbial red herring at trial.

At trial, Donal Furtado also testified. (Transcript p. 323) Mr. Furtado practiced law in Charleston from 1992 until 2014. (Transcript p. 324) He was responsible for amending the Master Deed on the part of the original developer. (Transcript p. 327)

At trial, Mr. Farmer, the member of Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, testified as to his negotiations and purchase of the Units. (Transcript pp. 388-389) He also testified as to the work he put into the Units to deal with the deferred maintenance. (Transcript pp. 389-91) Mr. Farmer has paid the insurance and taxes on the Units since closing. (Transcript p. 397) He further testified as to fines levied against him and his family by the Council of Co-owners for alleged violations of rules and regulations at Mariner's Cay. (Transcript pp. 400-401) Mr. Farmer had read the Amended Master Deed prior to closing knowing that these Units had been converted from common elements to Units. (Transcript, p. 420) Mr. Farmer testified that he and his wife are using one Unit as their residence. (Transcript, p. 463)

The Plaintiffs have acquiesced by not objecting to the sale of the Units by this Court, by accepting dues and payments from the owners, by offering to purchase the Units, by not blocking the Farmers from moving into the Units, and by their course of conduct.

STANDARD OF REVIEW

Actions for declaratory judgment are neither legal nor equitable; instead, the nature of the action depends on the underlying issues. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991). The interpretation of a deed is an equitable matter; therefore, this court reviews the evidence to determine the facts in accordance with its view of the preponderance of the evidence. *Heritage Federal Sav. Loan v. Eagle Lake & Golf Condominiums*, 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995); *Wayburn v. Smith*, 263 S.C. 518, 211 S.E.2d 650 (1975).

ARGUMENT

I. THE TRIAL COURT MISCONSTRUED THE STATUTORY SCHEME FOR THE CREATION AND REMOVAL OF COMMON ELEMENTS IN A HORIZONTAL PROPERTY REGIME WHERE A COMMON ELEMENT WAS CONVERTED INTO A UNIT UNDER THE HORIZONTAL PROPERTY ACT AND UNDER THE TERMS OF AN AMENDED MASTER DEED AND THERE WAS CLEAR “ACQUIESCENCE” TO THAT CHANGE BY UNIT OWNERS AND THE HORIZONTAL PROPERTY REGIME ITSELF IN COMPARING CODE SECTIONS 27-31-60 AND SECTION 27-31-70 AND RELIED UPON CLEARLY DISTINGUISHABLE CASES IN DOING SO

The trial court misconstrued the provisions of S.C. Code Section 27-31-60 in reading it in conjunction with S.C. Code Section 27-31-70 of the Horizontal Property Act and relied upon cases that are distinguishable in an area not yet decided by this Court or the Supreme Court as to the acquiescence of changes in a master deed under the Horizontal Property Act. Moreover, the master saw his function in the matter as "primarily an interpretation of these documents that have been submitted." (Transcript) The Master in Equity did recognize that the issue before it was “fairly novel”. (Transcript, p. 9)

Horizontal property regimes are governed by the South Carolina Horizontal Property Act, *Reyhani v. Stone Creek Cove Condominium*, 329 S.C. 206, 209-10 (S.C. Ct. App. 1997), which contains the Code Section truly at issue here: 27-31-60 and the interpretation of “acquiescence” as to an amended in the applicable Amended Master Deed.

The General Assembly has not defined “acquiescence” and there is no case interpreting this Code Section. The only mention of this Code section is in an unpublished opinion from the Court of Appeals affirming a ruling by this Court in an earlier case. *See Rivers Point Row Horizontal Property Regime v. Palms Properties, LLC*, Up. Op. No. 2013-UP-458 (Ct. App. 2013), which will be discussed below, as being distinguishable from the matter *sub judice*.

With no guidance from this Court or the Supreme Court, then it is up to using the common meaning of the language in order to interpret the intent of the General Assembly in enacting the Code Section.

“Acquiescence” has been defined as follows:

Conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried into effect.

Black’s Law Dictionary (6th ed.)(1990)

The Plaintiffs wish for the Court to view the Code Sections 27-31-70 and 27-31-60 in separate vacuums. (Transcript, p. 28) They must be read together. Code Section 27-31-60, however, is the controlling statute.

The Plaintiffs’ interpretation of Code Section 27-31-70 would render any amendment to change Common Elements ineffective as they urge a strict reading that says common elements, both general and limited, shall remain undivided and any covenant to the contrary shall be void. S.C. Code Ann. §27-31-70. That must be read with Code Section 27-31-60 that provides for changes to percentage ownerships as long as there is “acquiescence”, which the General Assembly did not define. S.C. Code Ann. 27-31-60. The percentage may be altered with the acquiescence of the Co-owners representing all of the apartments of the property. *Id.* Despite the Plaintiffs’ assertions, these are not conflicting Code Sections.

Section 27-31-60 deals with the procedure for amending a Master Deed in order to remove or add Common Elements. But, what does it mean to have “acquiescence”? Accepting payments from an owner for regime fees? Appearing in a court case and not objecting to a Unit being sold? Placing a lien on a Unit for non-payment of fees? Fining a Unit owner for violations? And, not objecting to the new deed for ten years? All are evidence of clear acquiescence.

The Appellants argue that the trial Court should have found that the actions of the Council of Co-owners show clear acquiescence as these Units being changed from Common Elements to individual Units over the course of dealing from 2007 to the filing of this action. For ten (10) years no one at the Association thought otherwise. To now claim that the Units are still Common Elements would be inequitable and render the Mariners Cay Condo LLC's member and his family homeless.

Surely that cannot have been the intent of the General Assembly in enacting the Horizontal Property Act: to render someone homeless who relied upon a recorded and amended Master Deed.

Our Supreme Court and Court of Appeals have a dearth of cases interpreting the South Carolina Horizontal Property Act. However, the cases cited by the Court in its Order are clearly distinguishable from the facts in this case.

This case is distinguishable from *Reyhani v. Stone Creek Cove Condo II HPR*, 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997) in which the Court of Appeals stated that co-owners may not be deprived of their interest in the common elements by a developer. That case involved the development of common elements after a foreclosure, not the foreclosure of individual units after the changes to a master deed to which no one objected. The facts are different from this case as that case involved property which was a common element and have never been changed to being Units. In *Reyhani*, the bank held a mortgage on the entire property which had been subjected to a Master Deed. *Id.* There were no amendments to the Master Deed in *Reyhani*. *Reyhani* also cites Section 27-31-70 but does not address the changes to a master deed contemplated and allowed for under Section 27-31-60. The Amended Master Deed removed the Units in question from being common elements, which is how they were foreclosed upon the underlying Foreclosure Case. Again, factually different from *Reyhani*, where there was an improper

foreclosure upon Common Elements. In *Reyhani*, the purchaser at the foreclosure attempted to convert property into a single family development. *Id.* That is not the case here. As documents are to be interpreted to be given their effect, if practical, the Appellants would urge the Court to differentiate this case from *Reyhani* on those grounds, too. *Id.* citing 17A Am.Jur.2d *Contracts* §385 (1991) Here, giving the Amended Master Deed its effect would be practical and equitable.

This case involves common elements that were converted to being Units, with ten (10) years of acquiescence by the other Unit owners. *Reyhani* case does not make any reference to S. C. Code Ann. §27-31-60. Instead, it only cites §27-31-70, the only section of the Horizontal Property Act with the Plaintiffs rely on in this case. Both Sections should be read together to create an equitable result for the parties.

This case is also distinguishable from the Eagle Lake cases of *Resolution Trust Corp. v. Eagle Lake and Gold Condominiums*, 310 S.C. 473, 427 S.E.2d 646 (1993) (the “RTC Case”) and the case of *Heritage Federal S&L Ass’n v. Eagle Lake & Golf Condos*, 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995)(the “Heritage Federal Case”). Neither of those cases involved the conversion of common elements to being Units. The facts are not the same. In both of these cases, the common element remained a common element and were never converted to be a Unit by any amendment to the Master Deed in those cases. Again, the facts are clearly distinguishable.

In the *RTC Case*, the Supreme Court held that a mortgage given by a developer on the entire project after the master deed has been filed was void under Code Section 27-31-230(a). *Id.* at 310 S.C. 473, 237 S.E.2d 646. That Code Section is not part of the dispute in this matter. The Supreme Court specifically addressed that Code Section’s applicability. *Id.* That statute states “No lien arising subsequent to recording the master deed...shall be effective against the

property”. S.C. Code Ann. §27-31-230(a). Again, that Code Section is not part of the dispute here and the trial court should not have relied on this case.

Likewise the *Heritage Federal Case* is not on all fours, or even all threes, or even all twos, with the case before this Court. In the *Heritage Federal Case*, another foreclosure issue arose. *Id* at 318 S.C. 535, 458 S.E.2d 561. That case dealt with the issues of allowing of additional apartments to be built and whether a clubhouse was part of the common elements preventing foreclosure and whether the condominium association lost rights to the clubhouse. *Id*. Interestingly, this Court held that the developer had the authority to amend the master deed without consent of all the until owners. *Id*. That is due to the clear agreement in accepting a Unit pursuant to the Master Deed that allowed for amendments, the very matter complained of in this case. Either way, the *Heritage Federal Case* is presented in Judge Scarborough’s order as to the ownership of the clubhouse, not for the amendment language. (Order, p. 12) At the time of foreclosure, the clubhouse was a common element. *Heritage Federal Case*, 318 S.C. at 543. At the time of the foreclosure in this case, everyone agreed that the Ship Store and Fuel Docks were separate units and were ultimately sold.

This Court reviewed mentioned Code Section 27-31-60 in the case of *Rivers Point Row HPR, LLC v. Palms Properties, LLC*, Unpublished Op. No. 2013-Up-458 (Ct. App. 2013). Also an appeal from Judge Scarborough, that case centered around the determination of the validity of a deed which the property owners association alleged was invalid due to the property being subject to a master deed. *Id*. Judge Scarborough ruled that the property at issue had become subject to a master deed so that it could not be transferred. *Id*. There is an oblique reference to Code Section 27-31-60 stating that the percentages in common elements “shall have a permanent character and shall not be altered without the acquiescence of the co-owners representing all the apartments of the property.” *Id*. There is no other explanation of that Section. Further, any

reliance is misplaced. Rule 268(d)(2), SCACR. Unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved. *Id.* This case does not directly involve the parties or the land or the horizontal property regime described in *Rivers Point Row*, and, accordingly, it should not have been relied upon as precedent by the trial court.

To take the Plaintiffs' position as the correct one, no master deed could ever be amended and the trial court equates the clear language of the statute as one leading to a forfeiture. (Order, p. 14) The only forfeiture contemplated would be that of the title of the Units in question belonging to the Appellant LLC's and for which they paid good and valuable consideration. For the first eleven months of ownership, the Plaintiff Council of Co-Owners and owners of the Units did nothing to object to ownership. They did nothing to object to ownership after the master deed was amended and the property foreclosed upon by the lender. They now claim to have been robbed of right, title, and interest of that which they did not find out they owned until 2017, some ten years after the amendment of the master deed. Again, a tortured interpretation where the course of dealings showed that no one, including the four named Plaintiffs, had any inkling that they may have had some interest in something until well after that interest was pointed out to them later on by an attorney. That can not be equitable in any way.

The Plaintiffs own deeds took into account that the Master Deed would be amended and could be amended from time to time. As set forth in the testimony above, the deeds into these Plaintiff state that the "master deed may thereafter be amended from time to time." (Deeds)(Transcript, pp. 61-62; 93) They also gave a Power of Attorney to that end. *Id.* (Deeds) They cannot now complain of the amendment after taking title with the reservation of the amendment being clearly on the face of their deeds.

II. THE TRIAL COURT SHOULD HAVE APPLIED JUDICIAL ESTOPPEL TO THE PLAINTIFFS' CLAIMS WHERE THEY APPEARED IN AN EARLIER MATTER AND TOOK A POSITION DIRECTLY ANTITHETICAL OF THAT COMPLAINED OF AND UPON WHICH RELIEF WAS SOUGHT IN DIRECT OPPOSITION TO THAT EARLIER POSITION TAKEN IN AN EARLIER MATTER BEFORE THE SAME COURT

The trial court should have applied the doctrine of judicial estoppel and denied the relief sought by the Plaintiffs due to their inconsistent positions taken in this matter and in the earlier case also decided by Judge Scarborough. The Plaintiffs should be judicially estopped due to those matters heard by Judge Scarborough in the case of *Emerald Road Portfolio, LLC v. Tiger River Capital, LLC*, Case No. 2013-CP-10-0850 (the "Foreclosure Case"). The Mariner's Cay Council of Co-Owners, Inc., appeared, filed an answer, and made no attempt to intervene in any way or object to any sale of the Units subject to this lawsuit. (See, Answer) The ultimate result of that case being Judge Scarborough issuing his Master's Deed recorded in Register of Deeds Office in Book 0510 at Page 674 on October 14, 2015. (Master's Deed). By bringing this very case, the Mariner's Cay Marina Council of Co-Owners, Inc., is asserting a position inconsistent or in direct conflict with that position it took in the Foreclosure Case and should be judicially estopped from doing so. *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004); *Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). The purpose of the doctrine of judicial estoppel is to ensure the integrity of the legal system. *Id.* To apply, there must be 1) two inconsistent position taken by the same party or parties in privity with one other 2) the positions must be take in the same or related proceedings involving the same party or parties in privity with each other, 3) the party taking the position must have been successful in maintaining that position and have received some benefit; 4) the inconsistency must be part of an intentional effort to mislead the court and 5) the two positions must be totally inconsistent. *Id.* Here, all the

elements are met. By appearing in the Foreclosure Case and allowing the Units to be sold, by being in two matters with parties who are in privity by virtue of actions of this Court, by appearing and saying that it had an interest and now saying it owns the Units, by allowing the sale to go through, by accepting dues, by allowing the Defendants to improve the properties, by placing liens on the property, by not refunding dues, and by now claiming it owns the Units as common elements, all five elements are met. This is an equitable doctrine best applied by this court sitting in equity. *Id.* Judicial estoppel generally applies to inconsistent statements of fact, such as those before this Court by the Mariners Cay Marina Council of Co-Owners, Inc. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). The inconsistency by the Plaintiffs should have stopped them asserting their claims in opposition to the position taken by the Mariner's Cay Marina Council of Co-Owners, Inc., in the earlier foreclosure action.

CONCLUSION

For the reasons stated herein, the Appellants respectfully request that this Court reverse the Order of the trial court and reinstate the ownership of the Units purchased by Mariners Cay Marina Condo, LLC, and Mariners Cay Fuel Dock, LLC.

Mt. Pleasant, South Carolina
May 16, 2023

Respectfully submitted:



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RECEIVED

May 16 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough

Case No. 2017-CP-10-03099

Appellate Case No. 2022-001479

Elizabeth Heatley, Neil B. McCann, Jr., David Neil Monk, Thomas V. Bessent, and
Mariner's Cay Marina Council of Co-Owners, Inc.,.....Respondents,

v.

Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC, George A. Farmer.,
Jr., and South Atlantic Bank, Defendants,

Of which Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC, and George
A. Farmer., Jr. are the.....Appellants.

APPELLANTS' DESIGNATION OF
MATTERS TO BE INCLUDED IN THE
RECORD ON APPEAL

The Appellants propose the following items to be included in the Record on Appeal:

ORDERS

1. Order Granting in Part and Denying in Part Plaintiffs' Motion for Temporary Injunction, December 6, 2017;
2. Consent Order to Amend Complaint, February 22, 2018;
3. Consent Order Relieving Counsel, April 2, 2018;
4. Consent Scheduling Order, April 30, 2018;
5. Consent Order to Fully Respond to Discovery Requests, December 21, 2018;
6. Amended Scheduling Order, December 27, 2018;
7. Consent Order to Amend Complaint, January 24, 2019;

8. Second Amended Scheduling Order, June 4, 2019;
9. Form 4 Order Denying Motion for Class Certification, June 12, 2019;
10. Form 4 Order Denying Plaintiffs' Motion to Reconsider, July 2, 2019;
11. Third Amended Scheduling Order, January 20, 2020;
12. Order Granting Plaintiffs' Motion to Amend, July 6, 2020;
13. Stipulation of Dismissal as to Third Party Defendant, October 6, 2020
14. Consent Order of Substitution of Counsel, November 10, 2020
15. Order of Reference, December 14, 2020;
16. Order Granting Defendants' Motion for Summary Judgment, May 14, 2021;
17. Form 4 Order Granting Plaintiffs' Motion to Reconsider, July 8, 2021;
18. Parties proposed Orders for Judge's consideration, May 9, 2022;
19. Order Granting Declaratory Relief, May 16, 2022; and
20. Order on Motion to Alter or Amend, September 22, 2022.

MOTIONS

1. Motion for Temporary Injunction and Affidavit of Thomas V. Bessent, September 5, 2017;
2. Memorandum in Support of Plaintiffs' Motion for Temporary Injunction, November 9, 2017;
3. Affidavit of George A. Farmer, Jr., November 13, 2017;
4. Plaintiffs' Motion to Amend, February 22, 2018;
5. Plaintiffs' Motion to Certify as Class Action with Affidavits of Dan G. Nekola and Alben D. Neighbors, June 1, 2018;
6. Plaintiffs' Motion to Compel, June 25, 2018;
7. Plaintiffs' Withdrawal of Motion to Certify Class Action, December 17, 2018;
8. Plaintiffs' Motion to Amend Complaint, January 24, 2019;
9. Plaintiffs' Motion to Certify as Class Action with Affidavit of Elizabeth Heatley, February 5, 2019;
10. Plaintiffs' Motion to Compel, March 29, 2019;
11. Plaintiffs' Motion to Amend Complaint, May 28, 2020;
12. Plaintiffs' Memo in Support of Motion for Class Certification, June 6, 2019;
13. Defendants' Memo in Opposition to Motion for Class Certification, June 10, 2019;
14. Plaintiffs' Motion for Reconsideration, June 21, 2019;
15. Defendants' Motion for TRO with Affidavit of George A. Farmer, Jr., June 8, 2020;
16. Plaintiffs' Memo in Support of Motion to Amend Complaint, June 19, 2020;
17. Plaintiffs' Motion for Temporary Injunction with Affidavit of Thomas Bessent, June 22, 2020;
18. Plaintiffs' Memo in Support of Temporary Injunction, June 22, 2020;
19. Defendants' Motion for Summary Judgment, March 9, 2021;
20. Plaintiffs' Motion for Summary Judgment, March 12, 2021;
21. Letter in re: Attach Exhibits to Motion for Summary Judgment, March 12, 2021;
22. Defendants' Memo in Support of Motion for Summary Judgment, April 2, 2021;
23. Plaintiffs' Return to Defendants' Motion for Summary Judgment, April 2, 2021;
24. Plaintiffs' Motion to Alter/Amend or Reconsider, May 24, 2021;
25. Letter in re: Exhibit to Motion/Amend, May 24, 2021;

26. Defendants' Memo in Opposition to Plaintiffs' Motion to Alter/Amend, June 2, 2021;
27. Plaintiffs; Reply to Defendants' Memo in Opposition, June 4, 2021;
28. Defendants' Motion to Reconsider, May 19, 2022; and
29. Plaintiffs' Response to Motion to Reconsider, May 26, 2022.

PLEADINGS

1. Summons and Complaint, June 16, 2017;
2. Lis Pendens June 16, 2017;
3. Amended Summons and Complaint, July 21, 2017;
4. Defendants' Answer, Counterclaim and Third-Party Complaint, September 22, 2017;
5. Affidavit of Service as to Third-Party Defendant Emerald McDonough, October 27, 2017;
6. Plaintiffs' Reply to Counterclaim, November 22, 2017;
7. Notice of Appearance for Emerald McDonough Road Holdings, LLC, December 7, 2017;
8. Letter from Attorney Barr in re: money on deposit, December 20, 2017;
9. Notice of Posting Bond, December 27, 2017;
10. Notice of Appearance for Defendant Mariner's Cay Marina Condo, LLC, February 26, 2018;
11. Plaintiffs' Second Amended Complaint, February 28, 2018;
12. Defendant South Atlantic Affidavit of Service, March 13, 2018;
13. Defendant George Farmer's Answer, March 19, 2018;
14. Defendants Mariner's Cay Marina Condo LLC and Mariners Cay Fuel Dock, LLC's Amended Third Party Summons, Answer, Counterclaim and Third-Party Complaint, March 19, 2018;
15. South Atlantic's Answer, April 5, 2018;
16. Plaintiffs' Reply to Counterclaim, April 16, 2018;
17. Mariners Cay Marina Condo LLC's Amended Answer Counterclaim and Third-Party Complaint 4.23.18;
18. Plaintiffs' reply to Counterclaim, May 7, 2018;
19. Third-Party Defendant Emerald McDonough's Summons, Answer and Counterclaim, June 29, 2018;
20. Third-Party Plaintiffs Mariners Cay and Mariners Cay Fuel Dock LLC's Reply to Counterclaim, July 31, 2018;
21. Plaintiffs' Third Amended Complaint, January 31, 2019;
22. Defendants Mariners Cay and Mariners Cay Fuel Dock LLC's Summons, Answer, Counterclaim and Third-Party Complaint, February 15, 2019;
23. Defendant George Farmer's Answer February 19, 2019;
24. Plaintiffs' Reply to Counterclaim, February 22, 2019;
25. Third-Party Defendant Emerald McDonough's Summons, Answer and Counterclaim, March 6, 2019;
26. Third-Party Plaintiffs' Reply to Counterclaim, March 25, 2019;
27. Plaintiffs' Fourth Amended Complaint, July 6, 2020;
28. Defendant South Atlantic's Answer, July 17, 2020;

29. Defendants Mariners Cay and Mariners Cay Fuel Dock LLC's Summons, Answer, Counterclaim and Third-Party Complaint, July 17, 2020;
30. Plaintiffs' Reply to Counterclaim, August 5, 2020;
31. Third-Party Defendant Emerald McDonough's Summons, Answer and Counterclaim, August 14, 2020;
32. Third-Party Plaintiffs Mariners Cay and Mariners Cay Fuel Dock LLC's Reply to Counterclaim, August 21, 2020;
33. Defendants' Designation of Deposition Excerpts, March 18, 2022;
34. Defendants' Trial Brief, March 21, 2022;
35. Plaintiffs' Trial Brief, March 21, 2022;
36. Defendants' Refiled Designation of Deposition Excerpts, March 24, 2022;
37. Plaintiffs' Trial Exhibits, March 24, 2022;
38. Defendants' Trial Exhibits, March 25, 2022;
39. Plaintiffs' Designation of Deposition Excerpts, April 22, 2022;
40. Plaintiffs; Designation of Deposition Excerpts, April 23, 2022;
41. Objection to the Defendants' Designation of Deposition Excerpts, April 25, 2022;
42. Notice of Appeal, October 18, 2022; and
43. Amended Notice of Appeal, October 24, 2022.

DEPOSITIONS AND TRANSCRIPTS

1. Transcript of Hearing, November 14, 2017;
2. Deposition of Ronald McGuire, June 14, 2018;
3. 30(b)(6) Deposition of Mariner's Cay Marina Council of Co-Owners, Inc. (Thomas V. Bessent), June 15, 2018;
4. Deposition of Danny G. Nekola, August 2, 2018;
5. Deposition of Edward M. Geiger, Jr., August 6, 2018;
6. Deposition of Amanda Barnes, August 9, 2018;
7. Deposition of Jeffrey E. Heatley, August 10, 2018;
8. Deposition of Laurene A. Hull, January 30, 2019;
9. Transcript of Hearing, April 5, 2021;
10. Trial Transcript, March 22-23, 2022; and
11. Transcript of Hearing, September 7, 2022.

EXHIBITS

1. Master Deed for Mariner's Cay Racquet and Yacht Club a South Carolina Horizontal Property Regime, recorded in Book J128 at Page 300 on May 12, 1982;
2. Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club a South Carolina Horizontal Property Regime, recorded in Book H131 at Page 292 on April 25, 1983;
3. Master Deed for Mariner's Cay Marina Horizontal Property Regime recorded in Book V583 at Page 584 on May 18, 2006;
4. List of Owners who purchased prior to the Master Deed Amendment;
5. Dock Unit B-1 Deed to June W. Hopkins and Jill H. Sneed recorded in Book V589 at Page 151, July 5, 2006;

6. Dock Unit B-10 Deed to Edgar W. Hull, Jr. and Laurene A. Hull recorded in Book O590 at Page 267, July 11, 2006;
7. Dock Unit C-1 Deed to W.K. Taylor, III recorded in Book T590 at Page 110, July 12, 2006;
8. Dock Unit B-6 Deed to Randolph C. Romeo and Ann K. Romeo recorded in Book F592 at Page 885, July 25, 2006;
9. Dock Unit B-11 Deed to Kevin Roerden and Antoinette Roerden recorded in Book G592 at Page 015, July 25, 2006;
10. Dock Unit A-6 Deed to George W. Aimar, Jr. recorded in Book G592 at Page 023, July 25, 2006;
11. Dock Unit A-8 Deed to Jack Hughes and Donna Hughes recorded in Book W592 at Page 811, July 28, 2006;
12. Dock Unit B-21 Deed to Stephen V. Wynn and L. Ann Sparks-Wynn recorded in Book X 592 at Page 120, July 31, 2006;
13. Dock Unit B-5 Deed to John C. Hall and Norma T. Hall recorded in Book A593 at Page 523, August 1, 2006;
14. Dock Unit B-14 Deed to Edward A. Shields, Donna M. Shields, and Judith MacGovern Stock recorded on Book C593 at Page 582 on August 3, 2006;
15. Dock Unit B-7 Deed to David R. Schooff and Jane L. Schooff recorded in Book J593 at Page 574, August 3, 2006;
16. Dock Unit B-16 Deed to John C. Wynn recorded in Book T593 at Page 899 on August 7, 2006;
17. Dock Unit B-18 Deed to John C. Wynn recorded in Book T593 at Page 891 on August 7, 2006;
18. Dock Unit B-12 Deed to Debbie's Folly I, LLC recorded in Book C594 at Page 052 on August 9, 2006;
19. Dock Unit B-13 Deed to Debbie's Folly I, LLC recorded in Book C594 at Page 044 on August 9, 2006;
20. Dock Unit C-6 Deed to William L. Frye recorded in Book N594 at Page 733, August 11, 2006;
21. Dock Unit B-20 Deed to Mary Ann Meyers recorded in Book S594 at Page 872, August 15, 2006;
22. Dock Unit A-14 Deed to Michael K. Sutton and Shelly L. Sutton recorded in Book S594 at Page 864, August 15, 2006;
23. Dock Unit A-10 Deed to James J. Ledwith recorded in Book S594 at Page 888, August 15, 2006;
24. Dock Unit A-2 Deed to Edward M. Geiger and Sharon C. Geiger recorded in Book H595 at Page 393, August 21, 2006;
25. Dock Unit A-4 Deed to Angus W. Graham and Caroline C. Graham recorded in Book J596 at Page 240, August 29, 2006;
26. Dock Unit B-9 Deed to Ronald G. McGuire, JR. recorded in Book V596 at Page 089, September 1, 2006;
27. Dock Unit C-9 Deed to Daniel W. Painter and Alisa W. Painter recorded in Book T597 at Page 492, September 11, 2006;
28. Dock Unit C-10 Deed to Nelson H. Maier, Jr. and Jean E. Maier recorded in Book A598 at Page 886, September 13, 2006;

29. Dock Unit A-15 Deed to R. Keith McCann and Kristin L. McCann recorded in Book P594 at Page 146, September 26, 2006;
30. Dock Unit A-1 Deed to Ernest B. Vance recorded in Book Z601 at Page 574, October 16, 2006;
31. Dock Unit B-8 Deed to Neal B. McCann recorded in Book N617 at Page 404, March 6, 2007;
32. Dock Unit B-17 Deed to David Neil Monk recorded in Book C618 at Page 028 on March 12, 2007;
33. Amended and Restated Master Deed for Mariner's Cay Marina Horizontal Property Regime recorded in Book X618 at Page 603 on March 19, 2007;
34. First Amendment to Amended and Restated Master Deed for Mariner's Cay Marina Horizontal Property Regime recorded in Book Z661 at Page 509 on June 12, 2008;
35. Master's Deed recorded in Book 0510 at Page 673 on October 14, 2015;
36. Mariners Cay Marina Council of Co-Owners' Answer, April 3, 2013;
37. Master's Order of Judgment for Foreclosure and Sale, March 16, 2015;
38. Master's Report on Sale & Disbursements, July 23, 2015;
39. Minutes from Annual Meeting, May 21, 2016;
40. Purchase and Sale Agreement, March 21, 2016;
41. Board Member Notes, May 23, 2016;
42. First Amendment to Purchase and Sale Agreement April 28, 2016;
43. Deed to Mariners Cay Fuel Dock LLC, recorded in Book 0555 at Page 946 on May 24, 2016;
44. Deed to Mariners Cay Marina Condo LLC recorded in Book 0556 at Page 511 on May 25, 2016;
45. Valbridge Appraisal Report, July 5, 2016;
46. Notice of Lien for #C21, December 1, 2016;
47. Notice of Lien for #C22, December 1, 2016;
48. Satisfaction of Lien for #C21, April 3, 2017;
49. Satisfaction of Lien for #C22, April 3, 2017;
50. Re-recorded Deed to Mariners Cay Fuel Dock LLC with Bill of Sale recorded in Book 0555 at Page 946 on June 28, 2017;
51. Plaintiffs' responses to Defendants' 1st Requests to Admit, October 24, 2017
52. Email to Jeff Heatley from Capers Barr re: auction of Ship store and Fuel Dock, November 28, 2017;
53. First Amendment to Amended and Restated Master Deed, June 12, 2018;
54. Mathisen Appraisal for Unit 1A, October 29, 2019;
55. Mathisen Appraisal for Unit 1B, October 29, 2019; and
56. Expenses and Repairs.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

Mt. Pleasant, South Carolina
May 16, 2023



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May 16 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough

Case No. 2017-CP-10-03099

Appellate Case No. 2022-001479

Elizabeth Heatley, Neil B. McCann, Jr., David Neil Monk, Thomas V. Bessent, and
Mariner's Cay Marina Council of Co-Owners, Inc.,.....Respondents,

v.

Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC, George A. Farmer.,
Jr., and South Atlantic Bank, Defendants,

Of which Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC, and George
A. Farmer., Jr. are the.....Appellants.

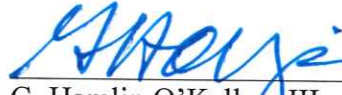
PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter by depositing a copy of same Via Email cgb@barrungermcintosh.com, DCleveland@clawsonandstaubes.com, and Via U.S. regular mail, postage paid, addressed to Capers G. Barr, III, Barr, Unger & McIntosh, LLC, 11 Broad Street, PO Box 1037, Charleston, SC 29402 and David C. Cleveland, Clawson and Staubes, LLC, 126 Seven Farms Drive, Suite 200, Charleston, SC 29492-8144.

[SIGNATURES ON FOLLOWING PAGE]

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May 16, 2023

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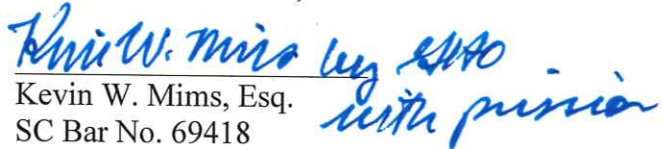
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May 16, 2023

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AND US MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29211

RECEIVED
May 16 2023
SC Court of Appeals

*RE: Elizabeth Heatley v Mariners Cay Marina Condo, LLC et al.,
C/A No.: 2017-CP-10-3099 Appellate Case No. 2022-001479
Client File No.: 1219.0019*

Dear Ms. Kitchings:

Enclosed please find the following items in the above-referenced matter:

1. An original and one (1) copy of the Appellants' Initial Brief
2. An original and one (1) copy of the Appellants' Designation of Matters to be Included in the Record on Appeal; and
3. Proof of Service.

Please file the original and return the filed-stamped copies to me in the enclosed envelope. By copy of this letter, I am serving same upon all counsel.

Should you have any questions, please feel free to contact me. With kindest regards, I remain

Yours very truly,

G. Hamlin O'Kelley, III

GHOIII/atd

Cc: w/ Encl Via Email and US Mail

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