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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' FINAL BRIEF

G. Hamlin O'Kelley, III
SC Bar No. 15491
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
T: (843) 856-4488
F: (843) 856-0613
Hamlin.okelley@buistbyars.com
*Attorneys for Appellants Mariners Cay
Marina
Condo, LLC, and Mariners Cay Fuel
Dock, LLC
and South Atlantic Bank*

Kevin W. Mims
SC Bar No. 69418
Whidbee S. Perrin
Luzuriaga Mims, LLP
SC Bar No. 100396
50 Immigration St, Suite 200
Charleston, SC 29403
(843) 410-4713
kmims@lmlawllp.com
wperrin@lmlawllp.com
*Attorneys for Appellants Mariners Cay
Marina
Condo, LLC and George A. Farmer, Jr.*

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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 ANTI-THETICAL 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. (ROA 111-130) (ROA 131-134) 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 (ROA 1017-1027) (ROA 1028-1029) (ROA 5519-5713). A majority of the Units are dock slips. (ROA 5519-5713) The original Plaintiffs brought the case as a purported class action pursuant to Rule 23 SCRCivP. (ROA 1017-1027)

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. (ROA 6334-6358)

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 673 in the Office of the Register of Deeds for Charleston County. (ROA 6264-6270) Emerald Portfolio, LLC, transferred the Units to Emerald McDonough Road Holdings, LLC, recorded November 13, 2015, in Book 0517 at Page 166 in the Office of the Register of Deeds for Charleston County which then transferred the Units to The Appellants Mariners Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC. (S.R. 6578-6583) (ROA 6334-6358)

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. (ROA 1030-1043)

On September 5, 2017, the Plaintiffs filed a Motion for Temporary Injunction. (ROA 135-145) 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. (ROA 141-145)

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. (ROA 1044-1062) 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. (ROA 146-182)

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. (ROA 183-257) 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. (ROA 1066-178)

On December 6, 2017, Judge Nicholson filed his Order Granting in Part and Denying in Part the Plaintiffs' Motion for Temporary Injunction. (ROA 1-7) 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. (S.R. 6563-6567)

On December 20, 2017, the Plaintiffs mailed their check to Clerk of Court. (ROA 1079) The Notice of Posting Bond was filed December 27, 2017. (ROA 1080-1083)

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. (ROA 258-260) 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. (ROA 8-10)

On February 26, 2018, co-counsel for the Defendant Mariner's Cay Marina Condo, LLC, filed their Notice of Appearance. (S.R. 6568-6573)

On February 28, 2018, the Plaintiffs filed their Second Amended Summons and Complaint, adding South Atlantic Bank as Defendant. (ROA 1084-1104) 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. (S.R. 6574-6575)

On March 19, 2018, the Appellant George A. Farmer, Jr., filed his Answer to the Second Amended Complaint. (ROA 1105-1110) 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 (ROA 1111-1128)

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. (ROA 11-17)

The Defendant South Atlantic Bank filed its Answer to the Plaintiff's Second Amended Complaint on April 5, 2018. (ROA 1129-1135)

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. (ROA 1136-1145)

On April 23, 2018, the Appellants filed their Amended Summons and Answer to the Second Amended Complaint and Counterclaim and Third-Party Complaint. (ROA 1146-1149) 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. (ROA 18-21)

The Plaintiffs submitted their Reply to the Counterclaim on May 7, 2018. (ROA 1150-1161)

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. (ROA 261-270). Attached to the Motion were the Affidavits of the purported class representatives Dan G. Nekola and Alben D. Neighbors. (ROA 267-270)

On June 25, 2018, the Plaintiffs filed a Motion to Compel (ROA 271-277)

The Third-Party Defendant Emerald McDonough Road Holdings, LLC, filed its Summons and Answer and Counterclaim on June 29, 2018. (ROA 1162-1209) The Third-Party Plaintiffs filed their Reply on July 31, 2018. (ROA 1210-1217)

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. (ROA 278-282)

The Defendants and Plaintiffs entered into a Consent Order regarding discovery filed by the Honorable Roger M. Young, Sr., on December 21, 2018. (ROA 22-27)

The parties submitted an Amended Scheduling Order filed by Judge Young on December 27, 2018. (ROA 28-31)

On January 24, 2019, the Plaintiffs moved to amend their Complaint for a third time. (ROA 283-285) 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. (ROA 1218-1232)

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. (ROA 286-295) Ms. Heatley filed an Affidavit in support of the Motion. (S.R. 6576-6577)

On February 15, 2019, the Defendants filed their responsive pleadings to the Third-Amended Complaint to which the Plaintiffs replied on February 22, 2019. (ROA 1235-1252) (ROA 1260-1272)

On March 6, 2019, the Third-Party Defendant Emerald McDonough Road Holdings, LLC, filed its Answer and Counterclaim arising from the Third-Amended Complaint. (ROA 1273-1325)

The Plaintiffs filed another Motion to Compel on March 29, 2019. (S.R. 6549-6562)

The parties agreed to a Second-Amended Scheduling Order filed by Judge Young, on June 4, 2019. (ROA 36-28)

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. (ROA 310-317) (ROA 318-379)

The Honorable D. Craig Brown issued a Form 4 Order Denying Class Certification June 12, 2019. (ROA 39-43) The Plaintiffs moved to have Judge Brown reconsider that Order on June 21, 2019. (ROA 380-389) The Motion was denied by Judge Brown on July 2, 2019. (ROA 44-45)

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. (ROA 46-48)

On May 28, 2020, the Plaintiffs filed another motion to amend to file their Fourth Amended Complaint. (ROA 390-409)

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. (ROA 410-422)

The Plaintiffs filed a memorandum in support of their motion to amend on June 19, 2020. (ROA 423-427)

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. (ROA 428-456)

On July 6, 2020, the Honorable Bentley D. Price granted the Plaintiffs' motion to amend. (ROA 49-51). The Fourth Amended Complaint was filed the same day. (ROA 1330-1346) The Appellants and South Atlantic Bank filed their responsive pleading on July 17, 2020. (ROA 1347-1370) The Plaintiffs filed their reply on August 5, 2020. (ROA 1371-1381) The Third

Party Defendant Emerald McDonough Road Holdings, LKLC, filed its Answer and Counterclaim on August 14, 2020. (ROA 1382-1394) On August 21, 2020, the Appellants and South Atlantic Bank filed their Reply. (ROA 1395-1398) That was followed by a Stipulation of Dismissal as to the Third Party Complaint on October 6, 2020. (ROA 52-53)

A Consent Order of Substitution of Counsel was filed by the Honorable Jennifer B. McCoy on November 10, 2020. (ROA 54-57)

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. (ROA 58-62)

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. (ROA 487-489) 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. (ROA 490-916)

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. (ROA 926-961) The Plaintiffs filed a Return that same day. (ROA 962-965)

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. (ROA 63-74)

[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.**

(ROA 66) (ROA 4769-4770) (ROA 4765-4809)

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. (ROA 966-994) The Defendants filed their Memorandum in Opposition to the motion to alter or amend on June 2, 2021. (ROA 996-1002) The Plaintiffs submitted their reply to the Memorandum on June 4, 2021. (ROA 1003-1005)

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. (ROA 75-77)

On March 18, 2022, the Defendants submitted their Designation of Deposition Experts. (ROA 1399-1401)

On March 21, 2022, the Defendants and the Plaintiffs both submitted their respective Trial Briefs to the Court. (ROA 1402-1425)

Judge Scarborough tried the case on March 22 and 23, 2022. (ROA 4810-5299)

After the trial, all parties submitted their admitted Exhibits to the Clerk of Court's E-filing system. (ROA 1429-2878)

The Appellants and the Plaintiffs submitted proposed orders for Judge Scarborough's consideration on May 9, 2022. (ROA 78-110)

On May 16, 2022, Judge Scarborough entered his Order Granting Declaratory Relief, being one of the orders appealed here. (ROA 111-130) 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. (ROA 111-130) 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. (ROA 1006-1011)

On September 22, 2022, Judge Scarborough filed his Order on Defendants' Motion to Alter or amend after a hearing on September 7, 2022. (ROA 131-134) (ROA 5300-5334) 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. (ROA 2879-2907) Based upon correspondence from this Court, an Amended Notice of Appeal was filed October 24, 2022. (ROA 2908-2911)

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. (ROA 6334-6358)

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. (ROA 5337-5518) 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. (ROA 5519-5713) The Declarant still controlled the Horizontal Property Regime at the time of the amendment. (*Id.*) (ROA 4828) The Declarant retained control until ninety percent of the Units were sold. (ROA 5519-5713) 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. (ROA 1017-1027)

There was no evidence presented that there were actual signatures from Unit Owners approving the changes to the Master Deed. (ROA 4810-5299) 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 Marina 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. (S.R. 6578-6583)

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. (ROA 4546)

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. (ROA 6271-6277) (ROA 6278-6333) (S.R. 6547-6548)

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. (ROA 1017-1027) The case began as a class action, which was never certified. *Id.* (ROA 39-43)

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 d 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. (ROA 4870-4871) (ROA 5896-5902) He further testified that he did not read the Master Deed when he took title to his Unit. (ROA 4885)

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.” (ROA 4902) (ROA 5784-5791) (ROA 6137-6144)
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. (ROA 4927) She did nothing about it. She knew that the Appellants purchased their Units in 2016. (ROA 4933) Her husband, Jeff Heatley, has served on the Board of the Council of Co-Owners almost continuously since 2010. (ROA 4948) 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. (ROA 4949) At the time of the amendment to the Master Deed, Ms. Heatley assumed it was done legally. (ROA 4950)

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.

(ROA 3181)

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.

(ROA 3769)

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. (ROA 3749) 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. (ROA 5994-6001) (ROA 6153-6161) (ROA 4968-4969) He continues to own a slip at the marina. (ROA 4970) Mr. Bessent knew of the amendment to the Master Deed in 2010 or 2011. (ROA 4975) He did not go to an attorney or take any action at that time. (ROA 5041) Mr. Bessent served on the Board starting in 2016, soon after Mr. Farmer's entities closed on the Units through 2021. (ROA 5004-5005).

Mr. Bessent acknowledged that during his time on the Board, the Board made an offer purchase these Units. (ROA 5006) The Board even had an appraisal completed to determine the value of the Units. (ROA 5012) At the time their appraiser valued the first floor of Ship Store Unit at \$140,000.00. (ROA 5013) The later offered \$80,000.00 for that purchase. (ROA 5014) There was clear acknowledgment and acquiescence as to the Units being owned by the Appellants where Notice of Lien were filed on the Units. (ROA 5041-5042) (ROA 6464-6469)

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.

(ROA 2983) (ROA 3038)

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.

(ROA 957)

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.

(ROA 2982)

Amanda Barnes is the property manager for the Marina who confirmed that liens were placed on the Unit. (ROA 4456) 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. (ROA 3852) The Board had a directive from the membership to pursue purchase of the Units. (ROA 3924) There were discussions with Mr. Farmer about such a purchase. (ROA 4546) 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. (ROA 4688) 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. (ROA 5125-5131)

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. (ROA 4202) 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 know 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. (ROA 4810-5299) This was the literal and proverbial red herring at trial.

At trial, Donal Furtado also testified. (ROA 5132) Mr. Furtado practiced law in Charleston from 1992 until 2014. (ROA 5133) He was responsible for amending the Master Deed on the part of the original developer. (ROA 5136)

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. (ROA 5197-5198) He also testified as to the work he put into the Units to deal with the deferred maintenance. (ROA 5198- 5200) Mr. Farmer has paid the insurance and taxes on the Units since closing. (ROA 5205) 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. (ROA 5209-5210) Mr. Farmer had read the Amended Master Deed prior to closing knowing that these Units had been converted from common elements to Units. (ROA 5229) Mr. Farmer testified that he and his wife are using one Unit as their residence. (ROA 5272)

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." (ROA 4810-5299) The Master in Equity did recognize that the issue before it was "fairly novel". (ROA 4818)

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. (ROA 4837) 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. (ROA 111-134) 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. (ROA 111-134) The only forfeiture contemplated would be that of the title of the Units in question belonging to the Appellants’ 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 cannot 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.” (ROA 5725-6042) (ROA 6128-6161) (ROA 4870-4871) (ROA 4902) They also gave a Power of Attorney to that end. *Id.* (ROA 5725-6042) (ROA 6128-6161) 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. (ROA 6271-6277) 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. (ROA 6264-6270). 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 positions taken by the same party or parties in privity with one other 2) the positions must be taken 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 Mariner's 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
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Respectfully submitted:


G. Hamlin O'Kelley, III
S.C. Bar No. 15491
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
(843) 856-4488
Hamlin.okelley@buistbyars.com
*Attorneys for Appellants Mariners Cay
Marina Condo, LLC, and Mariners Cay Fuel
Dock, LLC and South Atlantic Bank*


Kevin W. Mims, Esq. *with Perrin*
SC Bar No. 69418
Whidbee S. Perrin, Esq.
Luzuriaga Mims, LLP
SC Bar No. 100396
50 Immigration St, Suite 200
Charleston, SC 29403
(843) 410-4713
kmims@lmlawllp.com
wperrin@lmlawllp.com
*Attorneys for Appellants Mariners Cay
Marina Condo, LLC and George A. Farmer,
Jr.*