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Aug 27 2024

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,
Master in Equity

Case No. 2017-CP-10-03099

Appellate Case No. 2024-001221

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

vs.

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.

MEMORANDUM OF RESPONDENTS RE: APPEALABILITY

The Court has requested memoranda from counsel addressing the question whether the Order on Appeal in this case is appealable. For the reasons discussed in this memorandum, and principally because the Order on Appeal, on its face, is not a “final” order, it is not appealable. A copy of the Order at issue is attached as Exhibit “1”.

Statement of Facts.

This is a subsidiary appeal to a principal appeal on the merits of the case pending before this Court, styled in the same caption as above, and bearing appellate case number 2022-001479. (Hereafter referred to as the “Principal Appeal”.) In the Principal Appeal this Court has assigned tentative oral argument dates for September and October, 2024, pursuant to the Court’s letter to counsel dated June 12, 2024.

The Underlying Motion for Temporary Relief; and the Order for Temporary Relief:

The underlying motion for temporary relief, the Order for Temporary Relief, and the Principal Appeal, arise from disputed claims of ownership of certain units of a horizontal property regime (“HPR”), originally comprised of 90 marina boat slips and a related building (the “Ships Store Building”) at Mariners Cay Marina on the Folly River in Charleston County. In the underlying case, at issue in the Principal Appeal, the Master Deed creating the regime in 2006 had designated as “common elements”, among other things, two boat slip units used and denominated as “Fuel Docks”, and an onshore building known as the “Ship’s Store Building”, containing two “Commercial Units”. (The Fuel Docks and the Ships Store Building are herein referred to as the “Disputed Properties”.)

The individual Respondents purchased boat slips, and were conveyed title, under the original, 2006 Master Deed for Mariners Cay Marina, and thereby acquired vested title interests in the common elements, including the Disputed Properties, when they purchased their boat slip units; as had the owners of 34 other boat slip units sold during the period of time before the Master Deed was unlawfully amended in 2007.

In 2007, after 38 individual boat slips had been sold, the developer of the Marina purported to unilaterally amend the Master Deed, without notice to the four individual Respondents or to the

owners of the 34 other boat slips that had been sold during that period, by converting the former common elements consisting of the Fuel Docks and the Ship's Store Building to individual units; notwithstanding the fact that vested title interests in those common elements had been conveyed to the four individual Respondents, as well as to the owners of 34 other boat slips.

The Appellant LLC parties thereafter purportedly acquired ownership of the Fuel Docks and the Ship's Store Building under the provisions of the 2007 Amended Master Deed.

The trial judge concluded that the 2007 Amended Master Deed was void and a nullity, to the extent that it purported to unlawfully convert common elements consisting of the Fuel Docks and the Ships Store Building to individual units, in violation of the rights of boat slip owners who had acquired vested title interests in the common elements; and in violation of the terms of the 2006 Master Deed, and also in violation of Code Section 27-31-70.

Appellants filed the Principal Appeal on October 18, 2022, which operated to stay the operative effect of the trial court's order.

Appellants remain in possession and control of the Disputed Properties.

Because implementation of the trial court's order divesting Appellants of title to the Disputed Properties was stayed by the filing of their appeal, Appellants remain in possession, use, control and enjoyment of those Properties during the pendency of the appeal. However, because Appellants refuse to contribute to the expenses of the horizontal property regime, which are assessed and duly paid by all other unit owners as is required by the Master Deed by which Appellants claim title; and because Appellants refuse to conform or comply with other obligations of ownership as established in the Rules of the marina as detailed in the Master Deed by which they claim title, the Respondent Mariners Cay Council of Co-Owners filed its motion for temporary relief, pending final ruling by this Court on appeal, seeking an order: (1) that the

Appellants Mariners Cay Condo and Mariners Cay Fuel Docks must, during the pendency of the appeal, equitably pay their fair share of the burdens of the same ownership to which they claim and enjoy the benefits; and (2) requiring Appellants to comply with the same Rules that apply to other parties in possession of units at Mariners Cay Marina HPR.

The Trial Court filed its Temporary Order on June 17, 2024. A copy is attached hereto as Exhibit “1”. Notably, as relates to the appealability issue, the Order is plainly styled on its face as an Order on Motions for “Temporary Relief”.

The Applicable Law: “Appealability”

In the case of *Culbertson v. Clemens*, 322 S.C. 20, 471 S.E.2d 163 (S.Ct. 1996) the Supreme Court of South Carolina held that: “As a general rule, only final judgments are appealable. *Bolding v. Bolding* 283 S.C. 501, 323 S.E.2d 535 (Ct. App. 1984). ‘Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory (and not final).’ *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993).” (Emphasis added.)

In *Edwards v. SunCom* 369 S.C. 91, 631 S.E.2d 529 (S.Ct. 2006), the Supreme Court further held: “*Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends upon whether the order falls within South Carolina Code Section 14-3-330. Baldwin Const. Co., Inc. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004). Pursuant to S.C. Code Ann. Section 14-3-330 the following types of orders are appealable:

“(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon

appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

“(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

“(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

“(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

“We find the present order does not fall into any of these categories. It does not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken.

“An order which involves the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’ Mid-State Distributors, supra. Interlocutory orders affecting a substantial right may be immediately appealed pursuant to Section 14-3-330(2). Orders affecting a substantial right ‘discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense. Mid-State Distributors, supra. 310 S.C. at 335, note 4.”

Likewise, Rule 201(a), SCACR, provides, *inter alia*: “(a) Judgments, Orders and Decisions Subject to Appeal. Appeal may be taken, as provided by law, from any final judgment, appealable order or decision...” (Emphasis added.)

In the case of *Mid-State Distributors, Inc. v. Century Importers, Inc., et al, supra*, the South Carolina Supreme Court referred to South Carolina Code Section 14-3-330 as the “appealability statute”, and therein briefly discussed its evolution, applying the statute to the issue in that case, which implicated an Order claimed to be “involving the merits”.

There, the Supreme Court further reported: “South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory, *Adickes v. Allison & Bratton* 21 S.C. 245 (1884). If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment. *Good v. Hartford Accident Indemnity Co.*, 201 S.C. 32, S.C.2d 209 (1942).” *Mid-State, supra*, 310 S.C, at 335.

Discussion.

It is apparent on its face that the Temporary Order of Judge Scarborough here at issue only addresses the *status quo* of the parties temporarily, pending a ruling by this Court in the Principal Appeal. Moreover, the Temporary Order is substantially based upon the provisions of the 2007 Amended Master Deed of Mariners Cay Marina HPR, the very document by which Appellants claim title to the Disputed Properties. Appellants thus seek to claim and to enjoy the benefits of ownership under the 2007 Amended Master Deed, but at the same time they refuse to honor the obligations imposed upon them in the same instrument.

To be clear, Respondents repudiate the validity of the 2007 Amended Master Deed, to the extent that it privatized the former common elements consisting of the Ships Store Building with its two Commercial units, and the two Fuel Docks, and thus purported to strip from Respondents the vested title interests that were conveyed to each of them when they took title to their boat slip units.

Moreover, Respondents also repudiate the right of Appellants to continue in possession and enjoyment of the Disputed Properties, and at the same time to refuse to contribute their fair share of the expenses of the Marina, and to refuse to abide by the same Rules that apply to all other owners in the Horizontal Property Regime. This Court should, likewise, repudiate such hypocrisy.

Applying the criteria of the “appealability statute”, Section 14-3-330 and its subparts, to the case here at issue, the Order on Appeal is plainly not appealable for the following reasons:

14-3-330(1): The Temporary Order does not “involve the merits of the case”.

In *Mid-State Distributors, Inc, supra*, the Supreme Court defined an Order that “involves the merits” as an order which “must finally determine some substantial matter forming the whole or a part of some cause of action or defense”. 310 S.Ct. at 334, citing *Jefferson v. Gene’s Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988); and *Knowles v. Standard Savings & Loan Association*, 274 S.C. 58, 261 S.E.2d 49 (1979).

Here, the Temporary Order does no more than temporarily define and establish the *status quo* between the parties, and the duties owed by Appellants temporarily, pending this Court’s decision on appeal. In no way can it be credibly suggested that the Temporary Order touches on the merits, much less that it “finally determines some substantial matter forming the whole or any part of some cause or action or defense”, in the case. (emphasis added). Accordingly, it is not appealable.

14-3-330(2): The Temporary Order does not “affect a substantial right”:

Code Section 14-3-330(2), in its subparts (a), (b), and (c) defines what is meant by “a substantial right”, to wit: (a) where the order “in effect determines the action and prevents a judgment from which an appeal might be taken”, or (b), where the order “grants or refuses a new trial”, or (c), where the order “strikes out an answer or any part thereof or any pleading”.

It is obvious that the Temporary Order, here, does none of that. It is not appealable.

14-3-330(3): The Temporary Order is neither “final”; nor does it arise from any special proceeding or upon a summary application after judgment:

Accordingly, it is not appealable under Code Section 14-3-330(3).

14-3-330(4) Finally, the Temporary Order does not arise from an application for injunctive relief.

Accordingly, it is not appealable under Code Section 14-3-330(4) of the appealability statute.

Conclusion.

In conclusion, the Temporary Order, rather than adjudicating any permanent rights, merely declares the temporary rights of the parties relating to their mutual coexistence, in the factual circumstance where Appellants and Respondents are unwilling neighbors, and where Appellants retain possession and enjoyment, which is to say the benefits, of the Disputed Properties until a ruling by this Court in the Principal Appeal.

Moreover, the several categories of relief granted in the Temporary Order all derive from the terms of the very Master Deed by which Appellants claim title, or from the Rules of the Marina duly enacted pursuant to the Master Deed, all of which apply to every other unit owner in the Marina horizontal property regime. If Appellants continue to enjoy the benefit and enjoyment of the Disputed Properties, it is only equitable that they must also carry the same burdens of their claimed ownership that are carried by others, who do not complain.

For the reasons discussed: because the trial court’s Temporary Order filed June 17, 2024

is, as it plainly states, only temporary, there is clearly a “further act which must be done by the court prior to a determination of the rights of the parties”; which is to say, the determination by this Court of the issues joined in the Primary Appeal.

In the meantime, however, because the Temporary Order is not final, it is, therefore, not appealable.

Respectfully,

BARR, UNGER & McINTOSH, LLC

s/Capers G. Barr, III
Capers G. Barr, III
11 Broad Street
Charleston, SC 29401
(843) 577-5083
(843) 723-9039 (Facsimile)
cgb@barrungermcintosh.com
ATTORNEY FOR RESPONDENTS

Charleston, South Carolina
August 27, 2024

Exhibit "1"

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Elizabeth Heatley, Neal B. McCann, Jr., David)
 Neil Monk, Thomas V. Bessent, and Mariners)
 Cay Marina Council of Co-Owners, Inc.,)
)
 Plaintiffs,)
)
 vs.)
)
 Mariners Cay Marina Condo, LLC and)
 Mariners Cay Fuel Dock, LLC, George A.)
 Farmer, Jr., and South Atlantic Bank,)
)
 Defendants.)
)
)
)
)
)
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IN THE COURT OF COMMON PLEAS
 THE NINTH JUDICIAL CIRCUIT
 CASE NO.: 2017-CP-10-3099

**ORDER ON MOTIONS OF PLAINTIFF
 MARINERS CAY MARINA COUNCIL
 OF CO-OWNERS, INC., FOR
 TEMPORARY RELIEF**

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SC Court of Appeals

This case came before me for hearing on June 3, 2024 on seven motions for temporary relief filed by Plaintiff Mariners Cay Marina Council of Co-Owners, Inc.

Movant/Plaintiff appeared through its board members Adam Friend and David Nauheim, and was represented at the hearing by attorney Capers G. Barr, III of Barr, Unger & McIntosh, LLC. Defendants appeared through their attorneys, G. Hamlin O’Kelley, III of the firm Buist Byars and Taylor, and Whidbee S. Perrin of the firm Luzuriaga Mims, LLP.

Based upon the filed memoranda, arguments of counsel, and after reflecting on the issues, the Court finds that it has jurisdiction to consider the issues joined in the motions pending the appeal, and that Plaintiff/Movant is substantially entitled to the relief sought in its motions.

PROCEDURAL HISTORY

This case was tried before me on its merits on March 22 and 23, 2022, resulting in final orders filed May 16, 2022 and September 22, 2022, wherein this Court ruled that certain common element properties in Mariners Cay Marina Horizontal Property Regime, consisting of the Ships

Store Building and its Commercial Units 1A and 1B, and two Fuel Docks, Commercial Units 2, (the Fuel Dock Boatslips are also designated as Boatslips C-21 and C-22 in the Master Deeds);(all are hereafter referred to as the “Disputed Properties”), were unlawfully converted from Common Elements to individual units, which were ultimately conveyed to the Defendant LLCs, in contravention of the vested title interests held by the individual Plaintiffs, and in violation of statute and the plain language of the original 2006 Master Deed.

Defendants Mariners Cay Marina Condo (hereafter, “Marina Condo”) and Mariners Cay Fuel Dock, LLC (hereafter, “Marina Fuel Dock”) filed their appeal to the Court of Appeals of this Court’s orders, and the Court is informed that final briefings in the appeal were filed with the Court of Appeals on December 28, 2023.

The Pending Motions

Plaintiff Council of Co-Owners has filed seven motions, seeking temporary relief during the pendency of the appeal, summarized as follows and discussed in further detail below:

1. That Defendant LLCs pay assessments on the properties they continue to hold and enjoy;
2. That the on-shore restrooms located in the Ships Store Building, Commercial Unit Number 1-A, be re-opened on a 24/7 basis as they were prior to the COVID19 emergency;
3. That Defendant Mariners Cay Condo provide proof of liability insurance covering Commercial Units 1-A and 1-B of the Ship’s Store Building for coverage amounts of at least \$300,000.00 per person per incident.
4. That Defendants Mariners Cay Marina Fuel Dock provide proof of liability insurance covering the fuel docks, also known as Commercial Unit 2, and also known as boatslips C-21 and C-22, for a coverage amount of least \$300,000.00 per person per incident.

5. That Defendant Mariners Cay Marina Fuel Dock cease and desist from tapping into remote water and power sources, resulting in cluttered walkways with power extension cords and hoses;

6. That if any commercial use is made of any Disputed Property, the liability insurance coverage must be increased to \$1,000,000.00 per person per incident for such property;

7. That Defendant Mariners Cay Marina Condo cease and desist from blocking the pedestrian ramp that provides access to the Ship's Store Building and its restrooms.

Preliminarily, accordingly, Defendants argue that this Court lacks jurisdiction to decide the motions. Defendants' jurisdictional argument must be first addressed.

FINDINGS AND CONCLUSIONS OF LAW

Jurisdiction

Although they did not brief the issue to the Court, at the June 3, 2024 hearing, the Defendants orally argued that the within motions are not properly before the Court due to lack of jurisdiction. Defendants argue that, under Rule 241(a) of the South Carolina Appellate Court Rules ("SCACR"), the filing of a notice of appeal automatically stays matters decided in the order on appeal; except that the lower court retains jurisdiction over "matters not affected by the appeal"; and, likewise, that Rule 205, SCACR, provides that, upon service of a notice of appeal, the appellate court "shall have exclusive jurisdiction over the appeal"; provided, however, that "Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."

Defendants therefore argue that, because the relief sought in Movant's motions is "affected by the appeal", this Court lacks jurisdiction to hear and decide the motions.

In their filed motion and memorandum in support, Plaintiff/Movant cites SCACR Rules 205 and 241, and also the cases of *Binkley v. Burry* 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002); and *Stokes-Craven Holdings Corp. v. McKenzie* 416 S.C. 517, 787 S.E.2d 485 (2016), to support their position that the within motions involve matters “not affected by the appeal”. In oral argument, Defendants also cite *Stokes-Craven*.

Stokes-Craven is a 2016 Supreme Court case in which a car dealership sued its former attorney for legal malpractice, arising from the attorney’s representation of the dealership in a case brought by a consumer against the dealer, wherein the jury returned a verdict for actual and punitive damages against the car dealer.

Stokes-Craven, the car dealer, filed the legal malpractice case after the underlying verdict against it had been affirmed by the Supreme Court. By that date, however, over three years had elapsed since the adverse trial verdict had been rendered in the automobile defect case. The trial court in the legal malpractice case ruled that Plaintiff Stokes-Craven’s claim was barred by the statute of limitations because more than three years had elapsed since the adverse verdict against it and Plaintiff “should have known” that it had a claim against its lawyer.

The Supreme Court reversed, observing, *inter alia*, that the verb “affect” as used in the Appellate Court Rules is defined in Black’s Law Dictionary as “To produce an effect on; to influence in some way”. Because a cause of action for legal malpractice is predicated on an injury or damage to a client caused by a breach of duty by the lawyer, no such cause of action accrues until there is a final court ruling that the client who claims legal malpractice has suffered a loss. Therefore, because no loss was sustained by the client until after the trial court damage award was affirmed on appeal, a legal malpractice claim in the circumstances was “affected by the appeal”,

and no such cause of action could accrue until the final court ruling in the underlying automobile defect case.

Stokes-Craven cites the case of *Tillman v. Oakes* 398 S.C. 245, 728 S.E.2.d.45 (Ct. App. 2012), a Court of Appeals decision authored by then-judge, now Supreme Court Justice, John Few. In *Tillman*, a family court appeal, the family court had ordered a change of custody by splitting the custody of two sons, one to the father, the other to the mother, after a previous agreement and Family Court order had ordered shared custody, with primary custodial placement with mother.

Mother appealed. While the appeal was pending, father filed a petition to suspend visitation of the mother with the son to whom father had been awarded custody in the challenged order on appeal. The Family Court refused to rule on the visitation issue “unless the automatic stay is lifted”. Reversing the Family Court, and citing Rule 205, SCACR, the Court of Appeals held that the issue of visitation was “not a matter affected by the appeal” of the custody question. An examination of Mother’s appeal shows that she challenged only the custody portion of the Family Court Order. “Thus there is no action the appellate courts could take ... that would affect the visitation established in the appealed order.” (*Emphasis added*). *Tillman, supra*, 398 S.C. at 257.

Likewise, in this case, this Court’s order on appeal holds that the conveyance of the Ship’s Store Building and its Commercial Units 1-A and 1-B, and the conveyances of the Fuel Docks, Boat Slips C-21 and C-22, are void and a nullity. This Court’s trial order holds that Defendants do not hold title to the Disputed Properties. The motions presently before me, however, relate to the obligations and duties attendant to Defendants’ continued possession and use of the Disputed Properties, and do not relate to the issue of ownership. In fact, these issues address the *contra* of

this Court's prior ruling. Therefore, I find the issues addressed in the motions are not "affected by the appeal".

Plaintiff persuasively argues that if Defendants claim and enjoy the benefits of use and possession of the Disputed Properties under the 2007 Amended Master Deed, they must also accept the responsibilities and burdens of that possession as imposed by the terms of the same Master Deed, as does every other unit owner in the Marina; which responsibilities are plainly set forth in the Amended Master Deed by which Defendants claim title. Because the relief sought by Plaintiffs in the within motions will not be "affected by the appeal" of the title issues, I conclude that this Court retains the power to rule on the motions of Plaintiff Council of Co-Owners during the pendency of the appeal.

Accordingly, the arguments and objections of Defendant LLCs that this Court does not have jurisdiction to decide the issues joined in the motions for temporary relief are of no avail and accordingly, they are overruled.

The Motions

Movant Council of Co-Owner seeks equitable relief from the Court in seven particulars as discussed below. The relief sought by the motions is based upon the premise that the Defendant parties remain in possession, control, and enjoyment of the Disputed Properties while the appeal of this Court's Order is pending; that any claim by Defendants to ownership must be based upon the 2007 Amended Master Deed; and that, whereas this Court's order on appeal holds that the conveyances to Defendants were unlawful, equity demands that if Defendants continue to enjoy the benefits of using and possessing the Disputed Properties, they must also accept the burdens and responsibilities of co-ownership that they share with other unit holders at Mariners Cay Marina, in accordance with the terms of the 2007 Master Deed by which they claim the benefits.

1. The First Motion. In its first motion, the Defendant Council of Co-Owners seeks an order of this court that Defendants Marina Condo and Marina Fuel Dock be “ordered to pay past, present, and future assessments on the respective Disputed Properties”. The uncontradicted affidavit evidence of the past liabilities owed, is shown and explained in Exhibit “1” to Movant’s Motion, the Affidavit of Council President Adam Friend, and in Exhibit “7”, Mr. Friend’s spreadsheet calculation of past due assessments. Exhibits “1” and “7” show that Commercial Unit 1-A of the Ship’s Store Building is liable for past assessments in the sum of \$37,090.08; that Commercial Unit 1-B is liable for \$19,950.17; and the Fuel Docks, also known as Boat Slips C-21 and C-22 in the Master Deed, are liable for \$16,261.71, each. The grand total of past due assessment liabilities owed for all four units is \$89,563.67, through the first quarter of the year 2024 (January, February, and March).

Although Movants seek an Order of Judgment against the Defendant LLC’s for the total, current amount of past due sums owed, \$89,563,67, the Court will not order such judgment at the present time. However, Movant may file liens against the respective units for the past due sums in accordance with the terms of the Master Deed, Article X, Section 10.9 and the statute, South Carolina Code of Laws, Section 27-31-210.

As for the liabilities of Defendant LLCs for current assessments from the end of first quarter 2024, going forward in time: beginning with the second quarter of the year 2024 (April, May, and June of 2024), the Defendant LLCs are and shall be liable to pay the assessments on a current basis, and it shall be so ordered.

2. The Second Motion. In its second Motion, Movant seeks an order that the on-shore men’s and women’s restrooms in Commercial Unit 1-A of the Ship’s Store Building be reopened on a 24-hour per day, seven day per week schedule (hereafter referred to as “24/7”), as they were before

the limitations imposed on restroom use by the COVID 19 emergency and its attendant sequestration practices in 2020.

The uncontradicted evidence before me, in the form of the affidavits of current Council President Adam Friend (Exhibit “1” to Movant’s motions) and of former Council President Thomas Bessent, (Exhibit “9” to Movant’s motions); and the Regulations promulgated by the Office of Coastal Resource Management (“OCRM”) of the South Carolina Department of Health and Environmental Control (“SCDHEC”), (Exhibit “4” to Movant’s Motion, which is found at Recorders Book X618, Page 603 of the 2007 Master Deed), establish conclusively that a condition of the Marina Permit issued by OCRM for Mariners Cay Marina requires that separate on-shore restrooms must be provided and must be available for men and women; and that the separate men’s and women’s restrooms in Commercial Unit 1-A of the Ship’s Store Building were constructed for that purpose.

The affidavit evidence shows the on-shore restrooms were open on a 24/7 basis at least from the date of the recording of the original Master Deed in 2006 until the onset of COVID in 2020. The affidavit evidence also shows that many owners and users of the boatslips at Mariners Cay Marina, whose permanent residences are at a distance away from the Charleston/Folly Beach area, spend weekend overnights on their boats moored at the Marina, and that a valuable amenity acquired with their boatslip ownership, essential to the use and enjoyment of their property, is the availability of 24/7 access to on-shore restrooms and showers.

I find that it would be unreasonable to further delay the resumption of 24/7 use of the on-shore restrooms by boatslip owners and users at Mariners Cay Marina. The restroom use is a property right that was granted to them by their acquisition of boatslips at the Marina, and that had

long been available to them prior to COVID. I also find and conclude that Defendants fail to make any plausible or persuasive arguments to the contrary.

The Court will order the reopening of on-shore restrooms on a 24/7 basis.

2. The Third Motion. In their third motion, directed to Marina Condo, their Fourth Motion, directed to Marina Fuel Docks, and their Sixth Motion, directed to any commercial use of the Fuel Docks or the Ship's Store Units, Movants seek an Order requiring the Defendants to comply with Rules 5, 2, and 24 of the Mariners Cay Marina Rules and Regulations (see Exhibit "10" to the Motion), which require, in the instance of non-commercial use, that all Unit Owners carry and maintain liability insurance of \$300,000.00 per occurrence (Rule 5), and that, for any approved business use a unit owner must provide evidence of its business or Coast Guard license (if required), as well as proof of commercial liability insurance coverage of a minimum \$1,000,000.00 per occurrence.

At hearing, the Defendant LLCs offered no plausible argument why they should not be compelled to provide such proof of insurance, or proof of business license in the event of business activity.

Accordingly, the relief sought in Movant's Third, Fourth and Sixth Motions will be ordered.

3. The Fifth Motion. Here, the Council of Co-Owners seeks an Order that Marina Fuel Dock cease and desist from cluttering the dock walkways with electric extension cords and hoses. In its Affidavits, Movant presents evidence that Marina Fuel Dock, or its tenant(s), has run electric extension cords, and water hoses from water/electric service pedestals that are neither adjacent to, nor were they designated to serve, the Fuel Docks themselves. As explained, the reason that no service pedestals exist to serve the Fuel Docks is because those boatslips were never intended for

private use. The result is that dock walkways have become cluttered with hoses and electrical extension cords that present trip hazards for persons using the walkways. Particularly because this condition exists in a walkway constructed over a tidal waterway, this presents a dangerous condition; and the condition also violates the Marina Rules and Regulations.

Movant offered on the record to Marina Fuel Dock the opportunity to construct a service pedestal at its expense. However, the Court has not been informed of any negotiated resolution of this issue.

In the circumstances, the safety of users of the marina dock walkways is paramount. The Court takes notice that the marina boatslips exist on the Folly River, a waterway influenced by tides and currents. Not only is the practice of cluttering walkways with electric cords and water hoses unsafe, and not only is it hazardous, but it is also prohibited by the Marina Rules and Regulations. See Exhibit “10”, Rule 8: “Safety mandates that the docks be always kept clear. Lines must never cross the docks at any time and not items may be left on the dock other than in approved dock boxes including rugs, mats, or carpet material”. And Rule 9: “water hoses, power cords and boarding steps may be left on the docks when properly attended”. (*Emphasis added*).

This Court will order that Defendant Marina Fuel Docks cease and desist from connecting to power and water by electric cords and water extension hoses from service pedestals that are not dedicated to serve those boatslips.

4. The Seventh Motion. In its 7th Motion, Movant seeks an Order requiring that the Defendant Marina Condo cease and desist from blocking or otherwise interfering with access by all users of the Marina to the pedestrian ramp that allows access to the second level of the Ship’s Store Building (also known as Commercial Unit 1-A). Defendants offer no plausible argument for denying this access. Moreover, to the extent that the restrooms in the Ship’s Store Building

were constructed to serve all boatslip users, it is more than foreseeable that handicapped persons, in need of ramp access, would require access to the restrooms by that means.

This Court will order that the pedestrian ramp be made immediately accessible to all boatslip users.

Accordingly, it is hereby,

ORDERED ADJUDGED AND DECREED:

1. That this Court has jurisdiction to decide the within issues because they are not “affected by the appeal”, as previously found;

2. As to Movant’s First Motion, that Movant Council of Co-Owners may file a lien against the Disputed Properties to secure payment of past due assessments in the amounts heretofore found, that is to say, \$37,090.08 against Commercial Unit 1-A; \$19,950.17 against Commercial Unit 1-B; \$16,261.71 against the Fuel Dock known as Boatslip C-21; \$16,261.71 against the Fuel Dock known as Boatslip C-22; all for the time period ending on March 31, 2024

3. Further, as to the First Motion: That Defendant Mariners Cay Marina Condo, LLC and Defendant Mariners Cay Fuel Dock, LLC shall timely pay assessments due to the Council of Co-Owners beginning with assessments owed for the second quarter of 2024 (April, May, and June 2024), and for all future periods of time as billed, until further order of the Court.

4. As to the Second Motion: That the men’s and women’s restrooms in Commercial Unit 1-A of the Ship’s Store Building shall forthwith be, and they shall remain, open on a 24 hour per day, seven days per week schedule. Movant, Council of Co-Owners, shall continue to maintain and clean the restrooms in accordance with their past practices.

5. Further, as to the Second Motion, Movant Council of Co-Owners shall pay or

contribute to the payment of all costs attributable to water and power used for the operations of the on-shore restrooms. The Court shall retain jurisdiction of this issue, in the event the parties cannot agree.

6. As to the Third and Fourth Motions relating to liability Insurance covering any casualties or other insurable events arising from the use by Defendants of the on-shore restrooms in the Ships Store Building, and the Fuel Docks: That Defendants Mariners Cay Marina Condo, LLC and Mariners Cay Fuel Dock, LLC shall, respectively, provide to Movant Council of Co-Owners evidence of the placement of liability insurance coverage covering the Disputed Properties, with coverage limits of at least \$300,000.00 per person, per incident.

7. As to the Sixth Motion, in the event of any commercial use of Commercial Units 1-A or 1-B of the Ship's Store Building, or the commercial use of the Fuel Docks: That, in the event Defendants Mariners Cay Marina Condo and/or Mariners Cay Fuel Dock, LLC shall use any of the Disputed Properties for commercial purposes, or if their tenants or other users shall utilize the Disputed Properties for commercial purposes, proof of insurance coverage with a liability limit of \$1,000,000.00 per person per incident, shall be provided to Movant.

Further, as to the Sixth Motion, in the event of any commercial use, that Defendants shall provide evidence to Movant of the appropriate licensure of the business activity, including any Coast Guard approval as required for business use on navigable waters.

8. As to the Fifth Motion: That Defendant Mariners Cay Fuel Dock, LLC shall cease and desist from tapping into water and electric service pedestals that were not and are not dedicated to users of the Fuel Docks, also known as Boatslips C-21 and C-22, to obtain electric service or water to the Fuel Docks, until further Order of this Court. The Court shall retain jurisdiction of this issue

in the event the parties seek clarification, or in the event they require an Order approving any settlement of the issue of water and power supplied to the Fuel Docks;

9. As to the Sixth Motion: That, if any of the Disputed Properties is used by any person for commercial purposes, either Defendant Mariners Cay Marina Condo and/or Defendant Mariners Cay Fuel Dock, LLC, as the case may be, shall provide proof to Movant of liability insurance of at least \$1,000,000.00 per person per incident, for the Disputed Property element that is so-used commercially.

10. As to the Seventh Motion: That Defendants Mariners Cay Marina Condo shall, forthwith, re-open access to the pedestrian ramp attached to the Ship's Store Building, to all Boatslip users and guests.

AND IT IS SO ORDERED!

Charleston, South Carolina
_____, 2024

Mikell R. Scarborough
Master-In-Equity For Charleston County



Charleston Common Pleas

Case Caption: Alben D Neighbors , plaintiff, et al VS Mariners Cay Marina Condo LLC , defendant, et al

Case Number: 2017CP1003099

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough,
Master in Equity

Case No. 2017-CP-10-03099

Appellate Case No. 2024-001221

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

vs.

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

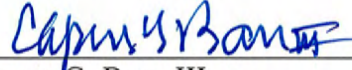
Of which Mariner’s Cay Marina Condo, LLC, Mariner’s Cay Fuel Dock, LLC
and George A. Farmer, Jr., are the Appellants.

PROOF OF SERVICE

I certify that I have served the Memorandum of Respondents in Re Appealability by email,
addressed to:

1. G. Hamlin O’Kelley, III, Buist Byars & Taylor, hamlin.okelley@buistbyars.com,
attorney for Appellants Mariner’s Cay Marina Condo, LLC, Mariner’s Cay Fuel
Dock, LLC, and George A. Farmer, Jr.;
2. Kevin M. Mims, Luzuriaga Mims, LLP KMims@lmlawllp.com; attorney for
Appellants;
3. Whidbee S. Perrin, Sr., wperrin@lmlawllp.com
4. David C. Cleveland, Clawson and Staubes, LLC,
DCleveland@clawsonandstaubes.com

5. The South Carolina Court of Appeals, via email to ctappfilings@sccourts.org.



Capers G. Barr, III
SC Bar No: 00542
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-577-5083
Facsimile: 843-723-9039
cgb@barrungermcintosh.com
Attorney for Respondents

Charleston, South Carolina
August 27, 2024

**BARR, UNGER
& MCINTOSH**
ATTORNEYS AT LAW

Capers G., Barr, III
Direct Dial: 843-377-1226
Email: cgb@barrungermcintosh.com

August 27, 2024

RECEIVED
Aug 27 2024
SC Court of Appeals

Hon. Catherine Harris
Deputy Clerk
ctappfilings@sccourts.org
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *Elizabeth Heatley, et al v. Mariner's Cay Marina Condo, LLC, et al (2)*
Appellate Case No: 2024-001221
Our File No: 2015-1172

Dear Madam Clerk:

Pursuant to your letter of July 31, 2024, as extended by Order filed August 21, 2024, enclosed is the Memorandum of the Respondent Parties addressing the Appealability of the Order at issue in this case. (Appeal #2.)

Also enclosed is our Proof of Service on opposing counsel, who are also copied with this letter.

Please advise if anything further is required in response to the Court's instructions.

Sincerely yours,



Capers G. Barr, III

CGBIII/jth
Enclosure

cc: G. Hamlin O'Kelley, III (hamlin.okelley@buistbyars.com)
David C. Cleveland, Esq. (DCleveland@clawsonandstaubes.com)
Kevin W. Mims, Esq. (KMims@lmlawllp.com)
Whidbee Sale Perrin, Sr., Esq. (wperrin@lmlawllp.com)
Adam Friend, David Nauheim, and Board Members, Mariners Cay Marina Council of Co-Owners (via email)