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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM BEAUFORT COUNTY  
IN THE COURT OF COMMON PLEAS  
MARVIN H. DUKES, III, CIRCUIT COURT JUDGE

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CASE NUMBER 2025-1276

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PALMETTO BAY MARINA, LLC.....APPELLANT,

vs.

YACHT CLUB OF HHI HOMEOWNERS, INC.....RESPONDENT.

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REPLY BRIEF OF APPELLANT

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COLTRANE & WILKINS, LLC  
Curtis L. Coltrane  
S. C. Bar Number 1344  
LaQuin J. Andrus  
S. C. Bar Number 106520  
Post Office Box 6808  
Hilton Head Island, SC 29938  
(843) 785-5551  
[curtis@coltraneandwilkins.com](mailto:curtis@coltraneandwilkins.com)  
[laquin@coltraneandwilkins.com](mailto:laquin@coltraneandwilkins.com)  
Attorneys for the Appellant

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REPLY ARGUMENT NUMBER 1

THE DEFENSE ARGUED IN RESPONDENT’S FIRST ARGUMENT WAS NOT INCLUDED AS A DEFENSE IN THE RESPONDENT’S ANSWER, WAS NOT RULED ON BY JUDGE DUKES, AND WAS NOT THE SUBJECT OF A RULE 59, SCRPC, MOTION MADE BY YACHT CLUB. YACHT CLUB IS PRECLUDED FROM RAISING A NEW DEFENSE ON APPEAL.

The first argument made by Yacht Club of HHI Homeowners, Inc. (herein, “Yacht Club”), is the deed restriction that encumbers the Yacht Club’s property is “too ambiguous and vague to be enforced.”<sup>1</sup>

The claim that the deed restriction is too ambiguous and vague is not one of the defenses raised by Yacht Club in its Answer.<sup>2</sup>

The July 1, 2025, Order of the Hon. Marvin H. Dukes does not include findings or conclusions that the deed restriction is ambiguous or vague, and the Order does not state that all or any part of the Court’s ruling was based on any claim that the deed restriction is ambiguous or vague.<sup>3</sup>

Yacht Club did not file a motion under Rule 59, SCRPC, for the purpose of seeking a ruling on whether the deed restriction text is ambiguous or vague. The law in South Carolina is:

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<sup>1</sup> Initial Brief of Respondent, pp. 7 – 8.

<sup>2</sup> Answer of Yacht Club, pp. 1 – 4. R., pp. 31 - 34.

<sup>3</sup> There are two findings of fact where the text of the deed restriction is mentioned, being finding of fact 2 and finding of fact 12. July 1, 2025, Order, p. 2 and p. 4, R., pp. 3 and 5. While Judge Dukes opines that the rate charged by Palmetto Bay is too high, he never states that the text is ambiguous or vague.

Generally, claims or defenses not presented in the pleadings will not be considered on appeal.<sup>4</sup>

Because Yacht Club did not raise ambiguity or vagueness of the deed restriction in its Answer, it is precluded from doing so now.

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<sup>4</sup> *McNeely v. S.C. Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 41, 190 S.E.2d 499, 499 (1972); *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182–83, 597 S.E.2d 152, 159 (Ct. App. 2004).

REPLY ARGUMENT NUMBER 2

THERE IS NO EVIDENCE IN THE RECORD FOR THIS CASE THAT REVEALS ANY DETRIMENTAL CHANGE IN POSITION BY YACHT CLUB BASED ON THE ACTIONS OF PALMETTO BAY MARINA, LLC. BECAUSE THERE IS NO EVIDENCE OF A DETRIMENTAL CHANGE IN POSITION, YACHT CLUB' LACHES DEFENSE FAILS.

In its Arguments Number 2 and 3, Yacht Club points to findings in Judge Dukes' Order regarding the length of time that Yacht Club has violated the terms of the deed restriction.<sup>5</sup> There is no finding from Judge Dukes, however, of any change in position by Yacht Club. Rather the finding is that the requiring Yacht Club to comply with its contract would be prejudicial.<sup>6</sup>

The lack of a finding that Yacht Club made a detrimental change in position is fatal to the laches defense. A disadvantage to the other party; delay alone in assertion of a right does not constitute laches.<sup>7</sup> Finally, as was stated in the Appellants Initial Brief, the passage of time alone is insufficient to establish laches.<sup>8</sup> But the passage of time alone is the sole basis for Judge Dukes' conclusion that the defense of laches was proved.<sup>9</sup> Because there is no evidence in the record showing that Yacht Club made any detrimental change

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<sup>5</sup> Respondent's Initial Brief, pp. 9 -10.

<sup>6</sup> Respondent's Initial Brief, p. 10. July 1, 2025 Order, R., p. 6.

<sup>7</sup> *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E.2d 357 (Ct.App.1985).

<sup>8</sup> *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct.App. 1999).

<sup>9</sup> The Order reads, in relevant part:

The extreme delay in asserting rights under Paragraph 10 of the Contract of Sale is unreasonable under the facts and circumstances and to enforce same after all these years would be prejudicial to Defendant.

Order, p. 5, R., p. 6. Completely missing is any finding of fact showing a detrimental change of position by Yacht Club. The conclusion that prejudice would result is wholly without support in the record.

to its position based on the claimed delayed enforcement, there is no evidence supporting Judge Dukes' conclusion that laches was proved.

The statute of limitations is not a viable defense in this case. The deed restriction runs with the title to the Yacht Club property. The title to the Yacht Club property also includes a document styled "Assignment and Termination Agreement" that expressly continues and incorporates the Deed Restriction, and includes a "non-waiver" term. The law in South Carolina is that non-waiver terms are valid and enforceable.<sup>10</sup> In the "Assignment and Termination Agreement" the following text appears:

No delay on the part of Assignee in exercising a power or right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any power of right hereunder preclude other or further exercises thereof or the exercise of any power or right.<sup>11</sup>

Because Yacht Club failed to prove any detrimental change in position, and because the Deed Restriction continues to bind the Yacht Club property and because there is an enforceable "Non-Waiver" agreement in the "Assignment and Termination Agreement," both the statute of limitations and laches defenses fail.

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<sup>10</sup> *Crotts v. Fletcher Motor Company*, 219 S.C. 210, 64 S.E.2d 540 (1951).

<sup>11</sup> Trial Transcript, Exhibit 2, R., p. 242. The exhibits in Yacht Club's chain of title were admitted without objection from Yacht Club. Trial Transcript, R., p.p. 63, l. 14, to p. 64, l. 6.

REPLY ARGUMENT NUMBER 3

ALL OF THE EVIDENCE ADMITTED UNDER THE BUSINESS RECORDS ACT WERE IMPROPERLY ADMITTED

S. C. Code Ann. § 19-5-510 (Supp. 2025), reads:

The term “business” shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

This section may be cited as the Uniform Business Records as Evidence Act.

At Trial, Yacht Club offered witnesses for the purposes of identifying purported business records of both the former “Yacht Club of Hilton Head Island” and Yacht Club.<sup>12</sup> At each point, an objection was made because: (a) none of the witnesses were the custodian of records for the former “Yacht Club of Hilton Head Island”; (b) none of the witnesses testified on personal knowledge as to the mode of preparation; (c) none of the witnesses testified on personal knowledge as to whether the purported records were made at or near the time of the act.<sup>13</sup>

In the Order, Findings of Fact 6 and 9 and Conclusions Of Law 3, 4 and 5 are based on the evidence that was admitted over objection because the evidence failed to comply with the requirements of S. C. Code Ann. § 19-5-510 (Supp. 2025). Because the Order is

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<sup>12</sup> These are two wholly different companies.

<sup>13</sup> Trial Transcript, R., p. 170, l. 6, to p. 173, l. 16; p. 174, l. 3, to p. 175, l. 9; p. 178, l. 16 to p. 180; p. 186, l. 14, to p. 187, l. 2; p. 187, l. 25, to p. 1189, l. 12.

founded on evidence that should not have been admitted, the factual foundations of Order collapse, and the Order is not sustainable.

#### REPLY ARGUMENT NUMBER 4

FINDING OF FACT 14, WHICH IS BASED ON EVIDENCE THAT WAS EXCLUDED AT TRIAL IS NOT AN INCONSEQUENTIAL OR HARMLESS ERROR.

Finding of Fact 14 was based on evidence that was excluded at trial. Yet, Finding of Fact 14 is stated in language that questions Palmetto Bay's motives and creates a basis to find that it has acted improperly. This is not a harmless or inconsequential error. The language appears in the order for a reason, and it informs the Conclusions of Law and the impact on the Order overall is patent.

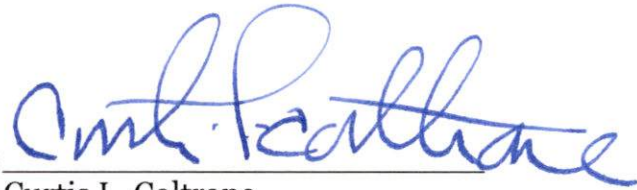
CONCLUSION

For the foregoing reasons, and the reasons stated in the Palmetto Bay's Initial Brief, Palmetto Bay urges the Court to reverse the Order of the Hon. Marvin H. Dukes, III, granting judgment in favor of Yacht Club, and finding that the Deed Restriction is enforceable against Yacht Club, and that Yacht Club's actions of storing boat of its members on the Yacht Club Property violates the Deed Restriction.

Respectfully Submitted:

COLTRANE & WILKINS, LLC

By:



Curtis L. Coltrane  
S. C. Bar Number 1344  
LaQuin J. Andrus  
S. C. Bar Number 106520  
Post Office Box 6808  
Hilton Head Island, SC 29928  
[curtis@coltraneandwilkins.com](mailto:curtis@coltraneandwilkins.com)  
[laquin@coltraneandwilkins.com](mailto:laquin@coltraneandwilkins.com)  
Attorneys for Palmetto Bay Marina, LLC

Hilton Head Island, South Carolina

This 2<sup>nd</sup> Day of January, 2026.