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S.C. SUPREME COURT

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,

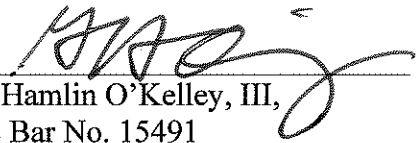
v.

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.

PETITIONERS' PETITION FOR A WRIT
OF CERTIORARI

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I. CERTIFICATE OF COUNSEL

Counsel for the Petitioners certified that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on March 17, 2026.

II. QUESTIONS PRESENTED

- A. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S INTERPRETATION OF 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 WHICH PRESENTS A NOVEL QUESTION OF LAW WHERE THERE IS NO PRIOR RULING ON THAT ISSUE BY THIS COURT?**
- B. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S REFUSAL TO APPLY 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?**

III. STATEMENT OF THE CASE AND FACTS

This matter is before this Court on this Petition for Certiorari following the final decision of the South Carolina Court of Appeals dated January 14, 2026, and denial of Petitioner's Petition for Rehearing dated March 17, 2026. (Op. No. 6141, 1/14/26; Order, 3/17/26). The Court of Appeals affirmed the Order of the Honorable Mikell R. Scarborough, Master in Equity for Charleston County, dated May 16, 2022, and Order denying the Petitioner's Motion to Reconsider dated September 22, 2022.

(ROA 111-130) (ROA 131-134)

In his original Order Granting Declaratory Relief, Judge Scarborough ruled that the Appellants 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 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 Petition presents a novel question of law to this Court.

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 Judge 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. (ROA 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 wastewater 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 Mariners 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)(emphasis added)

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)

IV. ARGUMENT

A. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S INTERPRETATION OF 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 WHICH PRESENTS A NOVEL QUESTION OF LAW WHERE THERE IS NO PRIOR RULING ON THAT ISSUE BY THIS COURT??

The Court of Appeals and 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. This Petition concerns a novel question of law regarding the interplay of those two statutes. There is no direct holding by this Court on the interplay of these Code Sections or defining and clarifying "acquiescence".

The Master in Equity did recognize that the issue before it was "fairly novel". (ROA 4818) The Court of Appeals ruling is as well.

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), being distinguishable from the facts of this case.

With no guidance from this 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 argued that the trial Court and the Court of Appeals had to read 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”? The facts here show that there was assent and agreement as to the ownership of the Units by the Petitioners.

Once again, the Petitioners 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 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.

Further, the Court of Appeals' Opinion ignored the acquiescence of the Council of Co-owners to the Appellants' ownership and the creation of the Units by the clear testimony from its own members and from some of the named Respondents, who, by this Court's Opinion now own an interest with their three (3) other individually named Respondents, in the Units paid for by the Appellants. The Court's Opinion glosses over the testimony and the actions of the Respondents in their acquiescence to the Amended Master Deed.

The Court's Opinion now creates ownership in the Dock Slips and Ship Store in the names of Elizabeth Heatley, Neil B. McCann, Jr., David Neil Monk, and Thomas V. Bessent. That cannot be the intent of the Court.

As the Court of Appeals noted, the cardinal rule of statutory construction is to give the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2001). The Opinion is not giving the intent of the General Assembly by its interpretation of South Carolina Code Section 27-31-60 which provides a method for altering Common Elements if there is the "acquiescence of the co-owners representing all the apartments of the property." S.C. Code Ann. §27-31-60. The plain meaning of "acquiescence" should apply where there is no statutory definition in the Horizontal Property Act and where the evidence clearly showed the acquiescence of the apartment owners since 2007. The plain language of the statute provides a mechanism for the amendment, removal, addition of Common Elements. This Court's Opinion makes that process almost impossible.

Further, this is not a partition nor a division of co-ownership as referenced in the Opinion and citing the *Vista Del Mar* decision. *Vista Del Mar Condo. Ass'n v. Vista Del Mar Condos, LLC*, 441 S.C. 223, 892 S.E.2d 532 (Ct. App. 2023).

The Record on Appeal is replete with evidence beyond "silent acquiescence" of the Amendment to the Master Deed. The Record on Appeal shows more than just not objecting. It shows acknowledgment, approval, and full on acceptance of the Units being Units and not Common

Elements. There were numerous offers made to purchase the Units and appraisals were obtained on both of the Units. (ROA 456). The Respondents acknowledged that they knew the Master Deed had been amended along with the undivided interest in the Common Elements (ROA 4870-4871, 5896-5902) Mr. McCann, Mr. Monk, Ms. Heatley, all knew and acknowledged the Amended Master Deed. (R 4870-71, 4902, 4927)

The Respondents' assessed the Dock Slips and Ships Store as Units, and accepted of payments from the Appellants and filed liens on the Units, which is more than acquiescence. (ROA 3181; ROA 3769) That evidence is omitted from this Court's Opinion. Respondent Bessent testified as to the attempts to buy the Units from the Appellants' limited liability companies, as well as attempts to purchase parts of the Ship Store, Unit 1-A, and two fuel dock boat slips, of which was both declined and countered. (ROA 5006) The amounts offered were based upon valid appraisals coming up with fair market value for the Units as Units and not as Common Elements. (ROA 5012-5014).

By filing liens on the Units shows that the owners acknowledged that these were separate Units and were intended to be so since 2007. (ROA 5041-5042, ROA 6464-6469) The Court of Appeals did not address that evidence in its Opinion. The Appellants' position is more than a lack of an objection to the changes and amendment to the Master Deed. The position is that there is direct evidence of the acquiescence and acknowledgement the Dock Slips and Ship Store had not been Common Elements since 2007

B. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S REFUSAL TO APPLY 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 position 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 Mariners Cay Marina Council of Co-Owners, Inc. *Hayne Federal Credit Unition 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. Judicial estoppel should apply due to the position taken by the Council of Co-Owners in the foreclosure case where it appeared and now has an inconsistent position as to the disposition of the ownership of the Dock Slips and Ship Store. The Petitioners do assert that the positions are inconsistent, that the same parties are involved – the Council of Co-owners, there was success in the foreclosure case with the Council being able to assess the Units, and that such positions are inconsistent and mislead the court.

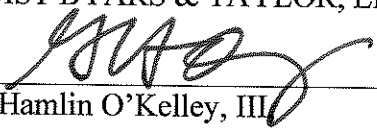
V. CONCLUSION

For the reasons stated herein, the Petitioners ask this Court to grant their Petition for a Writ of Certiorari.

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3/30, 2026

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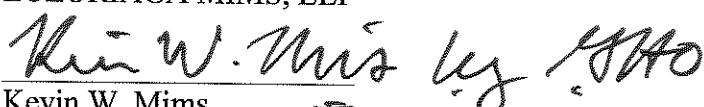
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