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Jan 27 2026

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' PETITION FOR REHEARING
AND FOR A REHEARING *EN BANC*

The Appellants, by and through their undersigned counsel, hereby move the Court pursuant to Rule 221(a), Rule 219 and Rule 240 of the SCACR and petition the Court to reconsider and rehear the within appeal and the Court's opinion entered on January 14, 2026, as well as to have this Court hear the matter *en banc*, based on the following:

1. On March 19, 2007, the 2006 Master Deed for the Mariners' Cay Horizontal Property Regime was amended by the Declarant (Op. No. 6131)(ROA 1017-1027)(ROA 1028-1029)(ROA 5519-5713). That Amended Master Deed made

the Units owned by the Appellants into individual Units and not Common Elements. *Id.*

2. At that time, only thirty nine slips or Units has been sold (Op. No. 6131).
3. The Appellants purchased their Units out of foreclosure in which the Respondent the Mariner's Cay Counsel of Co-owners, Inc., appeared and did not object or in any other manner claim that the foreclosure was improper. (Op. No. 6131)(ROA 6264-6270)
4. The Court's 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.
5. The Court's Opinion glosses over the testimony and the actions of the Respondents in their acquiescence to the Amended Master Deed.
6. 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.
7. As the Court 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)
8. The Court's 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

9. 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.
10. 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.
11. 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.E2.d 532 (Ct. App. 2023).
12. The Record on Appeal is replete with evidence beyond “silent acquiescence” of the Amendment to the Master Deed.
13. 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.
14. 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)

15. 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.
16. Mr. 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).
17. 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 did not address that evidence in its Opinion.
18. 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.
19. 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.
20. Appellants 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.

Appellants also request and *en banc* review by this Court pursuant to Rule 219 SCACR as this matter is one of first impression under South Carolina jurisprudence and will be of exceptional importance to practitioners who draft master deeds, attempting to comply with the South Carolina Horizontal Property Act, S.C. Code Ann. 27-31-10, *et seq.*, write title insurance policies, or in any way litigate or try cases involve condominium disputes, of which there are many.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

Mt. Pleasant, South Carolina

January 26, 2026

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Jr., and South Atlantic Bank, Defendants,

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

PROOF OF SERVICE

I certify that I have served the Appellants Petition for Rehearing and for a Rehearing *En Banc* by Via Email to Capers G. Barr, III, at cgb@barrungermcintosh.com and to David C. Cleveland at Dcleveland@clawsonandstaubes.com and Via US Mail addressed to Capers G. Barr, III, Barr, Unger & McIntosh, LLC, 11 Broad Street, PO Box 1037, Charleston, SC 29402 and David C. Cleveland, Clawson and Staubes, LLC, 126 Seven Farms Drive, Suite 200, Charleston, SC 29492-8144.

[SIGNATURES ON FOLLOWING PAGE]

Mt. Pleasant, South Carolina
Jan 26, 2025

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January 26, 2025

VIA OVERNIGHT DELIVERY and EMAIL
ctappfilings@sccourts.org

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

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

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the following in the above-referenced matter:

1. Petition for Rehearing and for a Rehearing *En Banc*
2. Proof of Service
3. Our firm's check in the amount of \$50.00

Please file the original and return the filed-stamped copies to me in the enclosed envelope. By copy of this letter, I am serving same upon, Capers G. Barr, III, Esq. and David C. Cleveland, Esq.

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

Yours very truly,

A handwritten signature in blue ink, appearing to read "G. Hamlin O'Kelley, III".

G. Hamlin O'Kelley, III

VIA OVERNIGHT DELIVERY & EMAIL:

Cc: Capers G. Barr, III, Esq.
David C. Cleveland, Esq