

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Mikell R. Scarborough, Charleston County Master-in-Equity

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Case No. 2011-CP-10-9513

Appellate Case No. 2014-002742

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JUL 21 2015

**SC Court of Appeals**

AMH-Ashley Marina, LLC, and AMH Management, LLC ..... Appellants,

v.

The Harborage at Ashley Marina Horizontal  
Property Regimes, The Harborage at Ashley  
Marina Condominium Association, Eddie  
McCoy, Stuart Reeves, Brian Swan, Rich  
Cone, and Ed Miskotten, individually, ..... Respondents.

**REPLY BRIEF OF APPELLANTS**

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July 17, 2015

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**STATEMENT OF ISSUES ON APPEAL**

- I. **DID THE COURT ERR IN RULING THAT PARAGRAPH 2.3 OF THE MASTER DEED DID NOT GRANT APPELLANTS A LONG-TERM RIGHT TO MANAGE THE HARBORAGE AT ASHLEY MARINA CONDOMINIUM ASSOCIATION?**

## STATEMENT OF THE CASE

The Statement of this Case previously set out in Appellants' Initial Brief is reaffirmed. This Statement is set out for the purpose of this Reply Brief. Appellants, AMH-Ashley Marina, LLC, and AMH Management, LLC (hereinafter collectively referred to in the singular as "AMH"), would argue that Respondents, The Harborage at Ashley Marina Horizontal Property Regimes, The Harborage at Ashley Marina Condominium Association (hereinafter referred to as the "Association"), Eddie McCoy, Stuart Reeves, Brian Swan, Rich Cone, and Ed Miskotten, individually (hereinafter collectively referred to in the singular as "Ashley Marina"), reiteration of the facts and procedural history of this case set forth in its Initial Brief are disingenuous and AMH now seeks to clarify the inaccuracies set forth in Ashley Marina's Initial Brief.

Ashley Marina's assertion that AMH failed to preserve any issues for appeal is contradicted by its own admissions in its Initial Brief. Ashley Marina concedes that both parties presented their arguments to the Charleston County Master-in-Equity on June 23, 2014. (Resp. Initial Brief, p. 2). The absence of a proposed order from AMH in no way changes the fact that it raised the issues and is relevant to nothing.

Furthermore, it was agreed by AMH and Ashley Marina that since the entire matter centers on whether Paragraph 2.3 of the Master Deed grants AMH a perpetual right to manage the Association (hereinafter referred to as the "Right to Manage"), it made no sense to waste the resources of the court and parties presenting testimony and evidence on the other causes of action until the issue of the Right to Manage was resolved<sup>1</sup>. As a part of the agreement, it was agreed

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<sup>1</sup> This was done for two reasons. First, the issue of whether AMH has a right to manage is based on the language of Paragraph 2.3 of the Master Deed, and, thus is a question of law to be decided by the court, whereas the remaining causes of action involve questions of both law and fact, and, thus require the services of a finder of fact. Second, AMH and Ashley Marina wished to streamline the process. It should be noted that AMH and Ashley Marina also agreed to limit discovery to the issue of AMH's Right to Manage until after the issue of whether AMH has a Right to Manage was decided.

that if it was determined that if Paragraph 2.3 of the Master Deed does not grant AMH a Right to Manage, then the remaining causes of action would be dismissed since the viability of those causes of action hinges on AMH's Right to Manage. If, on the other hand, it was determined that Paragraph 2.3 of the Master Deed grants AMH a Right to Manage, a trial on the remaining causes of action would be scheduled at which time testimony and evidence on the remaining causes of action would be introduced into the record for a decision by the Court.

Once the Master determined – albeit incorrectly – that AMH has no Right to Manage, its dismissal of the remaining causes of action – just as AMH and Ashley Marina agreed – naturally flowed from this ruling since those causes of action and issues turn on the outcome of the issue of whether AMH has a Right to Manage<sup>2</sup>. However, once this Court, as it must, reverses the Master's erroneous decision and holds that AMH has a Right to Manage – vacating the premise upon which the Master dismissed the remaining causes of action - it must remand this matter to the Master for further proceedings in which - as AMH and Ashley Marina agreed – testimony and evidence relating to the remaining causes of action would be introduced into the record for a determination by the Master. Thus to now suggest that AMH has abandoned these causes of action by failing to appeal their dismissal is, aside from being clearly incorrect, quite disingenuous given the agreement between AMH and Ashley Marina<sup>3</sup>.

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<sup>2</sup> Of course the Master's Final Order all but says as much. The introductory paragraph of the Master's Final Order only references a ruling on AMH's Right to Manage, the denial of which, barred the rest of AMH's claims. (Order, p. 1). In fact, the structure of the Master's Final Order makes clear that the remaining issues were derivative of the overarching issue of management rights. Though highly unorthodox and inappropriate, Ashley Marina has admitted that it drafted the Master's Final Order.

<sup>3</sup> AMH notes that Ashley Marina's brief was signed, and, thus, presumably drafted by Thomas Rode, Esq., who was neither present during any of the discussions which lead up to the agreement between AMH and Ashley Marina, or the hearing before the Master nor was he part of the conversations that determined the protocol in addressing the submission of the issue of the Right to Manage to the Master. Consequently, AMH is of the belief Ashley Marina's claim that AMH failed to raise certain issues and that it has abandoned certain issues on appeal is a result of a failure to communicate, in that Mr. Rode was never informed of the agreement, rather than an intentional attempt to breach the agreement on the part of Ashley Marina.

## AMH'S REPLY TO ASHLEY MARINA'S ARGUMENTS

As previously stated, Ashley Marina's position that AMH failed to preserve its issue for Appeal is patently false. Reading its brief, Ashley Marina would have this Court believe that AMH's attorney did not open his mouth from the filing of the Complaint until after the Master published his Order. AMH set forth its arguments in the Complaint it filed on December 22, 2011. The absence of a proposed Order submitted by AMH does not erase arguments that were made at the hearing before the Master on June 23, 2014. Following the adoption of Ashley Marina's proposed Order by the Master, AMH promptly filed a Motion to Alter or Amend a Judgment, pursuant to Rule 59(e), S.C.R.CIV.P., and sought relief from the holding that the right to manage was unenforceable, as, among other things, the Court incorrectly analyzed this as a contract issue rather than one sounded in property law. Thus, by raising these issues in the pleadings, and presenting arguments at both hearings, AMH conclusively preserved its issue for appeal. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 286 (2012) (finding core preservation requirements were met concerning return of a security deposit, where in its Complaint, the Plaintiff requested a return of its security deposit, testimony was presented regarding the security deposit, the issue accordingly was raised to the master, and the court of appeals erred in finding otherwise.)

Even if AMH had not filed its motion to alter or amend, the issue still would have been preserved for appeal. *Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001) (The "raised to and ruled on" rule of error preservation requires only a ruling, not necessarily a favorable one.") Accordingly, because the Master's order issued a decision as to the enforceability of the right to manage provision in the Master Deed, this issue was preserved for appeal.

**The Two-Issue Rule is Inapplicable to this Case.**

Similarly, Ashley Marina's assertion that AMH's appeal is barred by the "Two Issue Rule" is a mischaracterization of the relief sought in the underlying Action. Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). As previously stated, the remaining causes of action all hinge upon the Right to Manage. Likewise, there was no abandonment of the remaining causes of action by AMH because the parties agreed that settling the Right to Manage issue would navigate the next stage of the case. For Ashley Marina to now say that AMH's appeal fails because it did not appeal the ancillary decisions of the Master that no management contract exists, and the prior, expired agreement should not be reformed, is misleading and further demonstrates Ashley Marina's lack of understanding of the issues in this case. While AMH agrees their management contract with Ashley Marina did expire, its ability to enter in to a new management contract or the enforceability of the previous contract has nothing to do with whether the Master Deed grants AMH a Right to Manage. This argument is nothing more than an improper attempt to subvert the outcome of this appeal through misapplication of a hyper technical procedural mechanism, which is generally a last ditch attempt to snatch victory from the jaws of defeat when one's substantive position – as is the case with Ashley Marina's position – has no merit. *See Atl. Coast Builders & Contractors, LLC v. Lewis, supra* (discussing the Chief Justice's view that applying the two-issue rule is an "over-zealous application" of long-standing error preservation rules, and the Supreme Court's acknowledgment that it shares her concerns about a hyper technical application of a procedural bar to appellate arguments).

### AMH Did Not Waive Its Management Rights.

Alternatively, Ashley Marina argues that the Master's opinion should be affirmed on the basis that AMH waived its management rights. This argument is unfounded. As previously explained in AMH's Initial Brief, the Right to Manage is a valid and enforceable restrictive covenant, and, therefore, a property right.<sup>4</sup> To the extent a property right can be waived, which would mean that such right would be destroyed, there is no evidence to support that AMH intended such a result. Waiver is the *intentional* relinquishment of a known right. *Lyles v. BMI, Inc.*, 292 S.C. 153, 158, 355 S.E.2d 282, 285 (Ct. App.1987)(emphasis added). Courts have addressed this issue before in the context of a property owner who previously allowed a violation of a restrictive covenant but objected to others. *Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993)(no waiver to operation of an auto repair shop, despite prior lack of objection to operation of a blueberry farm in subdivision), *Kneale v. Bonds*, 317 S.C. 262, 452 S.E.2d 840 (Ct. App. 1994)(A party's waiver of the right to object to a minor violation of a covenant does not result in waiver of his right to object to a subsequent and more substantial violation.) Likewise, the expiration of the 2009 management agreement did not constitute a waiver of the right to manage provision in the Master Deed. Again, Ashley Marina confuses principles of contract law with property law. Modifications to the management agreements do not alter the core issue – that Paragraph 2.3(a) grants AMH a Right to Manage, and Ashley Marina can point to no evidence to support a finding that AMH intended to forfeit that right.

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<sup>4</sup> AMH remains dumbfounded that Ashley Marina believes there is a distinction between a property right and an economic interest. Black's Law Dictionary defines "interest" as the object of any human desire; esp. advantage or profit of a financial nature; and a legal share in something; all or part of a legal or equitable claim to or *right in property*. Black's Law Dictionary, 7<sup>th</sup> Ed. (1999) (emphasis added). Simply put, the two terms are interchangeable.

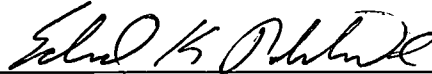
It was always intended that nature and level of the management services would change over the course of time based on varying circumstances the needs and desires of the Association, and, that cost of delivering those services would likewise change over the course of time. What those are and will be, what those needs and desires are and will be, and the cost of delivering those services are and will be were unforeseeable at the time the Master Deed was created. Consequently, the Master Deed contemplates that nature and level of the management services to be delivered by AMH and the cost of their delivery to Ashley Marina would be periodically revisited. The expiration of the 2009 management agreement only meant that it was time for AMH and Ashley Marina to revisit the nature and level of the services to be delivered to Ashley Marina in the immediate future (approximately three years) by AMH and the amount AMH would charge for those services until the nature and level of services to be delivered by AMH to Ashley Marina changed again. The problem is that Ashley Marina refused to enter into a new management agreement with AMH in violation of the Master Deed. Ashley Marina cannot rely on its own failure to comply with the provisions of the Master Deed to support an argument that AMH waived its Right to Manage.

### **CONCLUSION**

For the reasons set forth herein and those previously set forth in AMH's Initial Brief, the Final Order and Decision of the Charleston County Master-in-Equity must be reversed and the management provision contained in Paragraph 2.3(a) of the Master Deed upheld. After reversing the lower court and upholding the management provision, this court should remand this matter back to the Charleston County Court of Common Pleas for further proceedings.

***[SIGNATURE PAGE TO FOLLOW]***

Respectfully Submitted,  
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Charleston, South Carolina  
July 17, 2015

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In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
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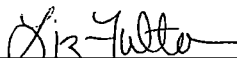
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The Harborage at Ashley Marina Horizontal  
Property Regime, The Harborage at Ashley  
Marina Condominium Association, Eddie  
McCoy, Stuart Reeves, Brian Swan, Rich  
Cone, and Ed Miskotten, individually, ..... Respondents.

**PROOF OF SERVICE**

I certify that I have served *Appellants' Reply Brief* on Respondents The Harborage at Ashley Marina Horizontal Property Regime, The Harborage at Ashley Marina Condominium Association, Eddie McCoy, Stuart Reeves, Brian Swan, Rich Cone and Ed Miskotten, individually, by depositing a copy of it in the United States Mail, postage prepaid on July 17, 2015, to their attorney of record, Michael A. Timbes, Esquire, at his office at 15 Middle Atlantic Wharf, Suite 101, Charleston, South Carolina 29401 on July 17, 2015.

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SC Court of Appeals

**VIA U.S. MAIL**

The Honorable Jenny Abbott Kitchings  
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**RE: AMH-Ashley Marina, LLC, et. al. v. The Harborage at Ashley Marina, et. al.**  
In the Court of Common Pleas, Charleston County, South Carolina  
Civil Action No.: 2011-CP-10-9513  
Appellate Case No.: 2014-002742

Dear Ms. Kitchings:

Enclosed, please find an original and one (1) copy *Appellants' Reply Brief*. Please file the original and return the clocked copy in the enclosed self-addressed stamped envelope.

By copy of this correspondence, I am providing a copy for Michael A. Timbes, counsel for Respondents. Should you have any questions or require anything further, please do not hesitate to contact me.

With warmest personal regards, I am

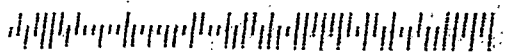
Yours very truly,



Edward K. Pritchard, III

Enclosures

cc: Michael A. Timbes, Esq.



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