

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Charleston County Master-In-Equity

Case No. 2011-CP-10-9513
Appellate Case No. 2014-002742

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

v.

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

RESPONDENTS' FINAL BRIEF

FOR THE RESPONDENTS:

Michael A. Timbes, Esquire
Thomas J. Rode, Esquire
THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: (843) 937-8000
Facsimile: (843) 937-4200
Email: mtimbres@tktylawfirm.com
Email: trode@tktylawfirm.com

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STATEMENT OF THE ISSUES

- I. Did Appellants fail to preserve any issue for appeal by making no arguments and citing no authorities to the Master in Equity to support their claim until after the Master entered its final Order?**
- II. Must this Court affirm the Order of the Master in Equity under the Two Issue Rule because Appellants failed to appeal from the Master's determination that Appellants' management contract expired, was not breached, and should not be reformed?**
- III. Should this Court affirm the Master in Equity's determination that Section 2.3(a) of the Master Deed does not, by itself, create an enforceable right to perpetually manage the Marina and Association?**
- IV. Should this Court affirm on the additional sustaining ground that Appellants waived any argument they are entitled to a perpetual right of management when Appellants freely entered into a management agreement that was for a limited duration?**

STATEMENT OF THE CASE

Appellants AMH Ashley Marina, LLC and AMH Management, LLC commenced this action in the Charleston County Court of Common Pleas on December 22, 2011, claiming they have an enforceable, perpetual right to manage a condominium association's affairs forever. In their Complaint, Appellants alleged causes of action for declaratory judgment, reformation of a contract, breach of contract, civil conspiracy and permanent injunctive relief. (R. pp. 17-25). Respondents, the Harborage at Ashley Marina Condominium Association, Inc. and the individual members of its Board of Directors named in the Complaint denied the material allegations of the Complaint. Respondents also brought counterclaims against Appellants for declaratory judgment and permanent injunctive relief, which Appellants denied. (R. pp. 26-43). Thereafter, the parties consented to refer the matter to the Charleston County Master in Equity for adjudication on the merits. (R. p. 16).

On June 23, 2014, the matter came before the Master for trial. Rather than holding a typical trial (*i.e.*, live testimony, arguments, etc.), the parties agreed to provide the Master with a Joint Stipulation of Facts, comprised of stipulated facts and exhibits. The parties also provided copies of the depositions taken by Respondents in the case. It was agreed the Master would decide the merits of the case based upon review of the factual record provided and after consideration of the parties' respective legal arguments. Those arguments were to be submitted, at a minimum, in the form of proposed orders from the parties. Proposed orders were due by August 1, 2014. (R. pp. 66-68).

Before the hearing, Respondents filed and served their Trial Brief and Memorandum of Law outlining the evidence and arguments supporting their position. (R. pp. 219-242). Respondents also timely submitted their proposed order as directed by the Master. Appellants did not present any legal briefs or memoranda to the Master, nor did they submit a proposed order by the deadline. Appellants requested and were given an extension of time to submit their proposed order, but did not submit one. (R. pp. 215-218). The Master thereafter entered its Final Order on September 19, 2014, finding in favor of Respondents. (R. pp. 2-12).

After the Master issued its decision, Appellants moved to alter or amend the Final Order pursuant to Rule 59(e), SCRCp. (R. pp. 211-212). Respondents filed a Memorandum in Opposition to this motion on October 7, 2014. (R. pp. 213-214). Following a hearing on November 17, 2014, the Master entered an Order dated November 25, 2014, denying the Appellants' Motion to Alter or Amend. (R. p. 1)¹. This

¹ Respondents moved for an award of attorney's fees and costs, having prevailed against Appellants' contract claims. These findings are not challenged in this appeal.

appeal follows.

STATEMENT OF THE FACTS

In the proceedings below, the parties stipulated to certain facts, which are contained in the Joint Stipulation of Facts and Joint Exhibits 1-5. Also, the parties agreed to provide the Master with complete copies of the Rule 30(b)(6) depositions² taken in this case. The facts are taken from these materials.

A. The Parties and Early Background of the Marina

The Harborage at Ashley Marina (the “Marina”) is a horizontal property regime located in Charleston County, South Carolina. The Marina was developed pursuant to The Master Deed of The Harborage at Ashley Marina Real Property Regime, recorded April 29, 2005 (the “Master Deed”). (R. pp. 178, 182).

Appellant AMH Ashley Marina, LLC (“AMH Ashley”) developed the Marina in its current state and is the Declarant under the Master Deed. AMH Ashley also formed The Harborage at Ashley Marina Condominium Association, Inc. (the “Association”), to serve as the owners’ association for the Marina. AMH Ashley is a member of the Association.³ (R. pp. 177-178).

Initially, AMH Ashley controlled the Association as the Declarant. During this time, AMH Ashley caused the Association to enter into a contract dated April 30, 2006, with its affiliate, Appellant AMH Management, LLC (“AMH Management”). (R. pp. 177-179). This “2006 Agreement” set forth a scope of services relative to management

² Joe Miller, Bruce Wallace, Rebecca McMenemy, and Christopher Ingram testified as 30(b)(6) designees for the Appellants. Appellants took no depositions.

³ AMH Ashley is a member of the Association by virtue of owning certain slips, but it does not perform any services for the marina. (R. p. 136).

of the marina operations only. (R. p. 179; R. pp. 185-188; and R. pp. 143-144). With regard to its term and termination, the 2006 Agreement provided:

Term. The term of this Agreement shall be for a period of one (1) year beginning as of the 30th day of April, 2006 and ending on the 29th day of April, 2007 and shall then automatically extend from year to year. **Either Party may terminate this Agreement by giving to the other party written notice** at least sixty (60) days prior to the end of the then current term, which termination shall take affect (sic) at the end of the then current one (1) year term.

(R. p. 185)(emphasis added). For all intents and purposes, Appellants negotiated these terms with themselves, considering AMH Ashley controlled both the Association and AMH Management at the time the 2006 Agreement was formed. (R. p. 177; R p. 47, lines 13-18).

Because the Marina is a condominium regime, there are additional responsibilities of operating the Association separate and apart from the functions of the Marina, such as payment of Association expenses, collection of regime fees from members, etc. (R. p. 179; R. pp. 189-193; and R. p. 92)⁴. Thus, AMH Ashley also caused the Association to enter into a management agreement with Southeastern Management Group, Inc., dated October 2, 2007, (the "Southeastern Agreement") to handle these affairs for the Association.

B. Turnover of the Association to the Board of Directors and subsequent bidding for management services

In December 2007, while the 2006 Agreement was in effect, AMH Ashley turned over control of the Association to a Board of Directors (the "Board") comprised of

⁴ Joe Miller controls both Appellant entities. (R. pp. 139-140).

members⁵ of the Association. (R. p. 179). At the time, AMH Management continued to manage the marina and Southeastern Management managed the Association.

In December of 2008, and in accordance with the “Term” provision found in the 2006 Agreement, the Board timely notified AMH Management its management contract would not be renewed after its expiration on April 29, 2009. (R. pp. 180, 185). The Board then requested proposals from potential managers to provide services for the period of May 1, 2009, to April 30, 2010. (R. pp. 179-180; R. p. 210; and R. p. 145). In response, AMH Management submitted a proposal, which was accepted. As a result, the Association entered into the “2009 Agreement” with AMH Management following negotiations between the parties. (R. pp. 179-180; R. pp. 196-209; R. pp. 80-81; and R. pp. 117-119).

The scope of work under the 2009 Agreement differed from that of the 2006 Agreement. Under the 2009 Agreement, AMH Management expanded its services to include management of the Association in addition to the operational services it provided to the Marina.⁶ (R. p. 92; R. pp. 96-97; and R. p. 171).

C. The expiration of the 2009 Agreement and Appellants’ claim of perpetual management rights

The provision defining the contract term of the 2009 Agreement also differs from the term that existed under the 2006 Agreement. (R. p. 122). Instead of automatically renewing unless terminated by either party (as was the case under the 2006 Agreement),

⁵ The individually named defendants in this action are members of the Board during times relevant to this action. (R. pp. 177-178).

⁶ The Southeastern Agreement did not expire until December 31, 2009. Thus, AMH Management did not commence the Association management services until January 1, 2010. (R. p. 179).

the 2009 Agreement had a predetermined expiration date. Specifically, the term of the 2009 Agreement was for 18 months, expiring December 31, 2010. A single 12-month extension was allowed. (R. pp. 196-197). The particular text reads:

Term. The initial term shall be **for a period of 18 months** effective on April 30, 2009 and **expiring on December 31, 2010. This Agreement shall provide one (1) additional 12 month extension.** This extension shall be at the discretion of the Board, acting on behalf of the association, and shall not be unreasonably withheld so long as the marina has been properly managed in accordance with the scope of services attached hereto and all of the duties outlined in this agreement have been satisfactorily carried out. ...

(R. p. 197) (emphasis added).

AMH Management managed both the Marina and the Association under the 2009 Agreement for the duration of the 18-month term, and the Board granted the 12-month extension through December 31, 2011. (R. p. 180; R. p. 197). The 2009 Agreement does not provide for any additional extensions or renewals.

Before the 2009 Agreement expired, the Board once again initiated a request for proposals for management services just as it had done under the 2006 Agreement. The Board also once again invited AMH Management to participate in the bidding process. (R. p. 180; R. p. 21). This time, however, the Appellants challenged the Association's right to hire any manager who is not an affiliate of AMH Ashley, asserting they have a perpetual right to manage the Marina under the Master Deed. (R. p. 21; R. p. 180; and R. p. 91).

Appellants rely on Section 2.3 of the Master Deed, which provides as follows:

2.3 Agreements.

The Association will and hereby is authorized to enter into such contractual agreement, including without limitation, management contracts, as it may deem necessary or desirable for the administration of

and operation of the Condominium and maintenance, repair, and replacement of the Common Elements, subject, however, to the following limitations:

(a) Property Manager; Agreement With Declarant Or Affiliate; Termination Only For Cause.

On or before the date of recording this Master Deed, the Declarant shall cause the Articles of Incorporation of the Association to be filed with the Secretary of State of South Carolina, the appointment of a Board of Directors and Officers of the Association to be made, the Bylaws to be ratified, confirmed and adopted, and an initial budget for the Association to be adopted. Additionally, the Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the Declarant, which management agreement shall provide that it may be extended in the sole discretion of the "Manager" under said agreement and may not be terminated by the Association except in the event it is terminated by the Association for cause as a result of the Manager's gross negligence or criminal activity in the discharge of such management duties assigned to it under the management agreement.

(R. pp. 183-184).

The Association disputed Appellants' claim to perpetual management rights, and Appellants commenced this action on December 22, 2011, just days before the 2009 Agreement expired⁷ per its terms. (R. p. 21).

STANDARD OF REVIEW

Actions for declaratory judgment are neither legal nor equitable; instead, the nature of the action depends on the underlying issues. *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 209-10, 494 S.E.2d 465, 467 (1997) (citing *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991)). The interpretation of a deed is an equitable matter; therefore, this Court reviews the evidence to determine the facts in accordance with our view of the preponderance of the evidence. *Heritage Federal Sav. &*

⁷ Without waiving any rights, the parties consented to allow AMH Management to continue its management services during the pendency of the litigation.

Loan v. Eagle Lake & Golf, 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995) (a case which depended mostly on interpretation of master deed and allied documents). “In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy.” *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987). The intention of the grantor must be found within the four corners of the deed. *Id.* The construction of a clear and unambiguous deed is a question of law for the court. *Id.* To the extent Plaintiffs’ claim the entitlement to perpetual management is a covenant that runs with the land,⁸ the covenant must be strictly construed against the grantor and all persons seeking to enforce it, with all doubts resolved in favor of the free use of the property. *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 542 (2006); *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). As voluntary contracts, restrictive covenants will be enforced according to their terms unless they are indefinite or contravene public policy. 17 S.C. Juris. *Covenants* § 100 (1993) (citing *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987)).

Appellants have limited their appeal to the sole issue of whether Section 2.3(a) of the Master Deed created a perpetual management right, despite the fact that the Master also rejected Appellants’ claims for reformation of the 2009 Agreement and for breach of contract.⁹ It is unnecessary to consider the standards of review on these separate findings, because they have not been appealed and are now the law of this case. *See, e.g.*

⁸ The flaw in this argument is that even if Section 2.3(a) runs with the land, the management agreement itself, which is all that really matters, does not. Section 2.3(a) means nothing without the collateral contract through which the services are provided.

⁹ Respondents’ addressed the merits of all issues in their Trial Brief, and the Master addressed all the issues in its Order. Contrary to Appellants’ assertion, the Master’s findings on these other issues are relevant to this appeal and are addressed herein as additional sustaining grounds.

Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 171-172, 714 S.E.2d 869, 878 (2011) (noting an unchallenged ruling, right or wrong, becomes the law of the case).

ARGUMENT AND ANALYSIS

The most basic tenet of appellate practice requires an appealing party to first present an argument to the trial court before it will be considered on appeal. Here, Appellants raised no arguments to the Master whatsoever. They presented no trial brief or legal memorandum to explain their legal basis for relief, cited to no legal authorities, and supplied no proposed order to the Master despite the parties' agreement and despite the Master granting Appellants additional time to do so. (R. pp. 215-218). As the record demonstrates, Appellants' first attempt at raising any legal argument occurred post-judgment, at the hearing on their Rule 59(e) motion to alter or amend, to which Respondents were quick to point out that arguments cannot be raised for the first time by way of a motion under Rule 59. (R. pp. 46-52). Also, Appellants have raised only one issue on appeal, while other unappealed findings are equally dispositive, invoking the two issue rule.

There are four reasons this Court should affirm the Master's Order: (1) Appellants cannot argue their case for the first time on appeal; (2) The two issue rule demands affirmance; (3) the record supports the Master's finding that Section 2.3(a) does not afford Appellants a perpetual management right; and (4) Appellants waived any right they may once have had.

I. APPELLANTS' SOLE ISSUE IS NOT PRESERVED FOR APPEAL.

South Carolina's Appellate Courts have repeatedly held that issue preservation has four basic and necessary components. A party "must" ensure that the argument was: "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a

timely manner, and (4) raised with specificity.” Toal, C.J., *Appellate Practice in South Carolina*, p. 57 (2002 2d. ed). As a practical matter, each of these requirements presupposes the appealing party will, at some point prior to the final judgment, make an argument to support his or her requested relief. In this case, it was expected and agreed the parties would provide the Master with pretrial briefs and/or proposed orders explaining their respective positions and grounds for relief in order to aid the Master in his review of the facts presented. (R. pp. 66-68). Appellants provided nothing of the sort, despite requesting and receiving additional time to do so. (R. pp. 215-218). When a party fails to advance any argument whatsoever to the trial court, all four preservation requirements are lacking.

Our Supreme Court has astutely noted that the “purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant’s contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal.” *I’on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (citing *Roche v. S.C. Alcoholic Beverage Control Comm’n*, 263 S.C. 451, 211 S.E.2d 243 (1975)). The appellate process requires that “the losing party [] **must both present his issues and arguments to the lower court** and obtain a ruling before an appellate court will review those issues and arguments.” *Id.* (emphasis added). Among other things, this “is meant to enable the lower court to rule properly after it has considered all the relevant facts, law **and arguments.**” *Id.* (emphasis added). An appellate court cannot pass judgment on something the trial court was not given the opportunity to consider. *See Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (“The rationale for

the rule [of issue preservation] is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [an appellate court] with a platform for meaningful appellate review.”).

For this Court to entertain Appellants’ arguments on appeal, which the Master never heard before making its ruling, would forsake all of the policies the preservation requirements stand to guard and would further ignore the rule that a party cannot use Rule 59(e) to raise an argument for the first time. Appellants’ decision not to submit any legal memorandum, proposed order, or some other vehicle for arguing its legal position came at their own peril considering the Master intended to evaluate the parties’ respective legal arguments in light of the factual record submitted to the Court. A party cannot complain on appeal when they have offered no argument or opposition at trial. *See Welch v. Whitaker*, 282 S.C. 251, 590 S.E.2d 758 (Ct. App. 1984) (finding that where party offers no opposition to the argument presented by the other side, or otherwise agrees, that party cannot be heard to complain on appeal). Motions to reconsider are not the proper forum to present one’s case for the first time. *Commercial Credit Loans, Inc., v. Riddle*, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999); *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (a party cannot use a motion to reconsider to present an issue he could have raised prior to the judgment but did not).

The Record is devoid of any effort by Appellants to support its case, aside from filing the Complaint and asserting a Rule 59(e) motion after the Order was issued.¹⁰ The trial court, not an appellate court, is the forum in which legal issues and arguments are to be developed and considered. The preservation requirements are intended to “prevent[] a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” *I’On*, at 422, 526 S.E.2d at 724. It flies in the face of South Carolina jurisprudence to suggest that a plaintiff could demand reversal of a trial court’s decision based on arguments the trial court never heard prior to deciding the case.

The arguments Appellants now present to this Court are not preserved for review because they have neither been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, nor (4) raised with specificity. Toal, C.J., *Appellate Practice in South Carolina*, at 57. The ruling of the trial court should be affirmed.

II. THE TWO ISSUE RULE REQUIRES THIS COURT TO AFFIRM THE MASTER’S RULING.

“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 the law of the case.” *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). The only issue raised on appeal from the judgment below is whether Section 2.3(a) of the Master Deed requires the Association to enter into a contract with Appellants for management services. Even if (for argument purposes only)

¹⁰ Appellants took no depositions, served no discovery requests, and were found conditionally in contempt by the Master for failing to respond to Respondents’ discovery requests. (R. pp. 13-15).

this is true, Appellants cannot prevail, because Section 2.3(a) is dependent upon the existence of a management contract made collaterally to the Master Deed. Here, the unappealed decision of the Master is that no such agreement exists and the prior, expired agreement should not be reformed.

Section 2.3(a) provides that “the Association **shall enter into an agreement** for the management of the Condominium . . .” and the “management agreement shall provide that it may be extended in the sole discretion of the ‘Manager’ **under said agreement**” (emphasis added). The true source of the management rights, including the scope,¹¹ compensation, **and term** lies within the contract, not Section 2.3(a). This is why Section 2.3(a) instructs that the management contract should define the extension rights. If Section 2.3(a) required the Association to enter into a contract with Appellants, it must be remembered that the Association did so, not once but twice. (R. p. 179; R. pp. 185-188; and R. pp. 196-203). Appellants’ real problem lies with the contracts it made, not Section 2.3(a).

Appellants essentially contracted with themselves in forming the 2006 Agreement. (R. p. 179; R. p. 47, lines 13-18). Whereas the 2009 Agreement was the product of meaningful negotiations between the Association and Appellants’ representatives, including Messers Miller and Wallace. (R. pp. 117-118). Thus, the 2009 Agreement signed by the parties contains those provisions that were mutually agreeable to them. *See McPherson v. J. E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 510

¹¹ The fact that the scope of duties dramatically expanded between the 2006 Agreement and the 2009 Agreement is proof that the contract terms control. Section 2.3(a) did not factor into the equation when the “scopes” of “such management duties assigned to it” under these contracts were negotiated. That is why Section 2.3(a) is dependent upon a collateral contract.

(1945) (“Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.” In dedicating the entirety of their argument on appeal to discussing Section 2.3(a) of the Master Deed, Appellants seemingly forget about the two management agreements given to them.

So, the issue is not whether the Association refused to contract with AMH Management for the work; rather, the real issue for Appellants is that the 2009 Agreement was created with a fixed expiration date rather than a provision allowing for indefinite extensions. It is for that reason Appellants included in their Complaint a demand for reformation of the 2009 Agreement. Appellants’ second cause of action alleges in part:

32. That the 2009 Management Agreement provides that it expired December 31, 2010, but provides for a twelve (12) month extension until December 31, 2011.

33. That the 2009 Management Agreement is in contradiction to the provisions of the Section 2.3(a) of the Master Deed, which is binding on all parties to this action.

34. That, on information and belief, the 2009 Management Agreement must be reformed to conform to the provisions of Section 2.3(a) of the Master Deed.

(R. p. 18). This is proof that Appellants’ real concern is with the term provision in the 2009 Agreement, not Section 2.3(a).¹² Without breathing life back into the 2009 Agreement, there is no contract between the parties for Appellants to carry out whatever duties it might have to perform.

¹² For sake of argument, had the 2009 Agreement provided for automatic renewals rather than a fixed expiration date and the Association refused to honor that provision, Appellants’ argument would lie for breach of the contract’s renewal provision, not Section 2.3(a). This explains why Appellants’ focus on 2.3(a) is misplaced. Appellants had to also appeal the Masters’ ruling on the issue of reformation to sustain a viable appeal.

The Master correctly ruled that reformation was not proper and found the 2009 Agreement was not breached, had expired, and its terms have no further force or effect. (R. pp. 9-12). Appellants did not appeal these findings and, right or wrong, these findings are now the law of this case. *See, e.g. Carolina Chloride*, at 171-172, 714 S.E.2d at 878. (“[A]n unchallenged ruling, right or wrong, becomes the law of the case”) (citing *Richland County v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973)). Because it is conclusively established that there is no contract between Appellants and the Association, Appellants cannot prevail. This is because Section 2.3(a) necessarily depends upon the existence of a contract.

The management rights contemplated in Section 2.3(a) are only those “management duties assigned to [the manager] **under the management agreement**” (emphasis added). Thus, whatever rights Appellants seek, they cannot practically exist in the absence of a contract entered into collaterally to Section 2.3(a). Appellants were granted such a contract on two separate occasions, and it is the law of this case that Appellants’ contract rights expired, were not breached, and should not be reformed. Accordingly, there is no longer any contract through which Appellants’ purported management right may be exercised. To hold Appellants are entitled to enter into a “new” contract would either require the Court to create a contract for the parties where none exists, or to force the parties to hereafter enter into terms to which they do not agree. Neither approach is permissible. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 90 749 S.E.2d 139, 151 (Ct. App. 2013) (“South Carolina’s general principle is that it is not the function of the court to rewrite contracts for the parties.”) (internal citations and quotations omitted). *Cf. 56 Leinbach Investors, LLC v. Magnolia*

Paradigm, Inc., 411 S.C. 466, 476, 769 S.E.2d 242, 248 (Ct. App. 2014) (“Reformation is not available for the purpose of making a new and different contract for the parties but is confined to establishment of the actual agreement; thus, a court of equity cannot, and should not, undertake to make a new contract between the parties by reformation. Thus, a court may not substitute by reformation an agreement that it thinks is proper but to which the parties had never assented.”).

There is good reason for these doctrines. If Appellants are correct, they can force the Association to sign whatever contract Appellants desire, regardless of its fairness. To illustrate this point, at one point after the 2009 Agreement expired AMH Management tried to condition the amount of fees it would charge under a future contract on the resignation of a particular member from the Association’s Board. “Were Mr. McCoy to agree to step down from the board and agree not [to] participate in any way in the future operation of the marina, AMH [Management] would continue to manage for the current management fee.” (R. p. 168). In other words, AMH Management, who is not a member of the Association, threatened to force the Association to pay more unless a Board member chosen by the members resigned. This is absurd, yet possible, if Appellants have their way and can force the Association to enter into a management contract even when the Association does not agree. Fortunately, South Carolina law does not permit this result. If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. *Shealy v. Fowler*, 182 S.C. 81, 89, 188 S.E. 499, 503 (1936). See 1 Arthur L. Corbin, *Corbin on Contracts* § 2.8 (Joseph M. Perillo ed., rev. ed. 1993) (“If the document or contract that the parties agree to make is to contain any material term that is

not already agreed on, no contract has yet been made; the so-called 'contract to make a contract' is not a contract at all.").

In this way, the present case bears no resemblance whatsoever to the line of cases from other jurisdictions relied upon by Appellants holding an association cannot terminate a management contract just because the declarant put it in place prior to turning over control. For example, in the Florida case of *Point East Management Corp. v. Point East One Condominium Corp.*, 282 So. 2d 628 (Fl. 1973), the developer of the condominium formed a long-term contract with itself to manage the condominiums prior to forming the owners association. After the owners association was formed, it brought an action to rescind the 25-year management contract. The Florida Court ruled that the mere fact that the contract was for a long duration did not make it objectionable, and the fact that the developer contracted with itself did not invalidate the agreement. *Id.* at 630. But, that is not what happened here. Appellants' contract was for a limited time and had an express expiration date. If Appellants had written the contract differently, the proper claim would focus on the management contract, as in *Point East Management*, not Section 2.3(a), as Appellants have done, here.

The 2009 Agreement simply expired per its negotiated terms.¹³ *Point East Management* lends no guidance to the question of whether Appellants can revive an expired agreement simply because the Master Deed provided for something different than

¹³ What is interesting is that the 2006 Agreement did allow for automatic renewals (subject to mutual right of termination), but that right was specifically changed in the 2009 Agreement, which included a fixed expiration date. Appellants could have drafted this provision any way they desired.

what the Association and the Appellants later entered into.¹⁴ Section 2.3(a) required the formation of a contract, which occurred. There is no minimum term required by Section 2.3(a). **Nothing** in Section 2.3(a) prohibits the making of an agreement that expires in accordance with contract's terms. If the expiration date was accidental,¹⁵ it was a unilateral mistake entirely of Appellants' making, affording them no relief in this appeal.

At bottom, neither the 2006 Agreement Appellants negotiated with themselves, nor the 2009 Agreement Appellants negotiated with the Association provide for perpetual or long term management. The opposite is true: the agreement Appellants negotiated provided for a fixed term ending December 31, 2011, at the latest. While the agreement could certainly have contained a longer term, the fact remains it did not. Appellants are simply unhappy with the bargain they struck when entering into the 2009 Agreement, particularly its length. Having failed to appeal the Master's findings that the 2009 Agreement expired,¹⁶ was not breached, and must not be reformed, Appellants cannot prevail in this appeal under the two issue rule. Because Section 2.3(a) expressly requires

¹⁴ Paragraph 21 of the 2009 Agreement is a merger clause, providing: "This Agreement constitutes the entire agreement pertaining to the subject matter hereof, and supersedes all prior oral and written agreements and understandings in connection herewith. **No covenant**, representation or condition not expressed in this Agreement will affect or be effective to interpret, change, or restrict the express provisions of this Agreement." (R. p. 202)(emphasis added).

¹⁵ There is ample proof the expiration date was not accidental. Paragraph 1 of the 2009 Agreement states: "AMH agrees to provide the Association, **for so long as this Agreement is in effect**, full marina management support...." (R. p. 196) (emphasis added). Thus, the services ended upon expiration of the agreement. Also, had the Board determined not to grant the 12-month extension, "this will constitute a termination of this agreement in its entirety." (R. p. 197). This is also consistent with the parties' prior dealings in that the Association chose not to renew the 2006 Agreement without any complaint about perpetual rights. (R. p. 179). The termination provision in the 2006 Agreement was followed, rather than Section 2.3(a).

¹⁶ As an aside, because the 2009 Agreement expired, and that finding was not appealed, Appellants cannot claim the agreement was "terminated" in violation of Section 2.3(a).

the making of a separate contract, which no longer exists in this case. Addressing Section 2.3(a) is only half the battle.

III. SECTION 2.3(A) OF THE MASTER DEED DOES NOT CREATE A PERPETUAL RIGHT TO MANAGE THE MARINA.

In order for Appellants to actually have a vehicle through which to conduct its management duties, Section 2.3(a) contemplates the making of a future agreement, which is essential and which occurred. But, because that agreement no longer exists (a finding which is not before this Court) all that is left is Section 2.3(a) itself. Section 2.3(a) is not a management contract and it cannot force the Association to enter into one at this point.

Regardless of the label Appellants assign to Section 2.3(a), the fact remains it contains none of the material terms necessary to the formation of a management contract, such as the scope of the services to be rendered or the price to be paid. *See W.E. Gilbert & Associates v. SC Nat'l Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 308 (Ct. App. 1985) (“In a contract for services two essential elements are the scope of the work to be performed and the amount of compensation.”). At most, Section 2.3(a) only requires that the “Association **shall enter into an agreement** for the management of the Condominium....” (emphasis added). The duties, scope of services, rates of compensation, and other essential terms under the management agreement to be formed is left to future settlement between the parties. This is why Appellants cannot rely on Section 2.3(a) alone. Nothing in Appellants’ brief explains this core question: What are the terms of the “management agreement” that it claims the Association must sign pursuant to Section 2.3(a)? No one knows, and any requirement to enter into a future contract upon unsettled terms simply is not enforceable.

South Carolina will not enforce a mere “agreement to agree.” In *Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602, 605 (2007), the South Carolina Supreme Court found unenforceable an agreement to convey land where the boundaries of the property were to be determined based on an agreement to a subsequent survey. The Court explained, “the signed form contract dated February 27 is nothing more than an agreement to agree which is unenforceable under the Statute of Frauds.” *Id.*; see also *Trident Constr. Co. v. Austin Co.*, 272 F. Supp. 2d 566, 575-76 (D.S.C. 2003) (finding no oral contract when the plaintiff alleged the defendant told it if the defendant won the bid to build an airplane hangar, it would give the plaintiff the supplier subcontract, because the parties never agreed on price); 1 Arthur L. Corbin, *Corbin on Contracts* § 2.8 (Joseph M. Perillo ed., rev. ed. 1993) (“If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called ‘contract to make a contract’ is not a contract at all.”).

The cornerstone of whether an agreement creates a binding contract or is an “agreement to agree” rests upon whether the underlying agreement itself contains the requisite terms necessary to the formation of an enforceable contract. See *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 396 S.C. 338, 346-347, 721 S.E.2d 455, 460 (Ct. App. 2011) (“Rather than focusing on whether the MOU calls for the parties to reach future agreements, the proper inquiry is to determine whether the MOU meets the elements of a contract.”); see also *Farr v. Barnes Freight Lines, Inc.*, 97 Ga. App. 36, 37, 101 S.E.2d 906, 907 (Ga. App. 1958) (“If any portion of the proposed terms is not settled, or no mode is agreed on by which it may be settled, there is no agreement.”). Section 2.3(a) contains none of the essential terms necessary to the formation of a management

agreement. Deposition testimony from Plaintiffs' 30(b)(6) witnesses proves that future negotiations were required in order to finalize the terms of any agreement. For example, AMH's Joe Miller testified:

... And we would certainly try and work with the Board and negotiate and discuss all the details. Anything that needed to be massaged or tweaked or changed, we would certainly have a back and forth discussion on. You know, **scope of services, levels of insurance, you know, fees, numbers of employees, hours, you know, all those things were always subject to, you know, -- you know, the board – its always their duty and right to set the terms of the management agreement within reason.** And we're going to – you know, **we work for them** [the Association]. **So, it – this has to be a two way street."**

(R. p. 86-87). (emphasis added). *See also* (R. pp. 83-85 and R. pp. 87-88) When asked what would happen if the Association and AMH Management reached an impasse in negotiating a particular term, such as compensation, Mr. Miller testified, "Well, I don't know. I assume we would have to be reasonable and get things figured out." (R. p. 88). Bruce Wallace, who was involved in the negotiation of the 2009 Agreement for AMH Management, similarly testified that any management agreement would have to be renegotiated after the 2009 Agreement expired. (R. pp. 123-124).

Because it is the law of this case that no contract currently exists, the foregoing facts underscore the conclusion that Appellants are essentially demanding a **new** contract from the Association despite having no real answer as to how the terms of that agreement will be fixed, especially if there is no meeting of the minds. *Shealy*, at 81, 188 S.E. at 499 (finding that if one of the parties has not agreed, then a prerequisite to formation of the contract is lacking); *see also Ford Motor Co. v. Kahne*, 379 F. Supp. 2d 857, 869-871 (E.D. Mich. 2005) (finding unenforceable a services contract in light of certain material terms that were left open to subsequent agreement between the parties).

Appellants' branding of Section 2.3(a) as a valuable "property right"¹⁷ does not change the outcome. An instrument affecting an interest in real property must, like all other contracts, contain the essential terms. South Carolina's Statute of Frauds specifically applies to "any contract or sale of lands, tenements or hereditaments **or any interest in or concerning them[.]**" S.C. Code Ann. § 32-2-10(4) (emphasis added); see also *Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121 (1975); *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948). Besides, the claimed "property right" is at most nothing more than the right to a management contract, which the Association twice gave to Appellants.

Likewise, the fact that Section 2.3(a) is a restrictive covenant in a Master Deed does not afford any relief to Appellants. "Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." *Seabrook Island Property Owners Assoc. v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). Restrictive covenants not only are "contractual in nature," but are strictly construed against the grantor and all persons seeking to enforce them. *Hardy*, at 165, 631 S.E.2d at 542; *Hoffman*, at 75, 202 S.E.2d at 365. The 2009 Agreement negotiated by Appellants, in hindsight, is not what it wanted. But Appellants cannot disguise a failed desire for reformation as a claim for property rights under a restrictive covenant and have it affect the outcome. As noted in *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998):

The Court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the

¹⁷ The record does not support this conclusory allegation. The evidence reveals Mr. Miller viewed the management right as an "economic" interest. (R. p. 89; R. pp.167-170). Branding it one or the other is irrelevant, though.

parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.

Section 2.3(a) is silent as to what services are required, for what price, and for how long. The Court should resolve this ambiguity in favor of the Association and should find that Section 2.3(a) does not create an enforceable perpetual management right. To the extent Section 2.3(a) requires the Association to enter into a contract that might set those terms, that requirement was twice fulfilled and a future agreement with unsettled terms cannot be fixed in this manner. Appellants' entire argument contravenes the settled rule of refusing to enforce an agreement to agree.

The Master Deed was prepared by AMH. (R. p. 74). If there is an ambiguity about what was intended in Section 2.3(a) where it states the management **agreement** (which has expired) shall "provide that it may be extended" that ambiguity must be resolved in favor of the Association. Restrictive covenants must be strictly construed against the grantor and all persons seeking to enforce them, with all doubts resolved in favor of the free use of the property. *Hardy*, at 165, 631 S.E.2d at 542; *Hoffman*, at 75, 202 S.E.2d at 365. The result is the same under contract theories. "It is well settled in South Carolina that ambiguous contract terms must be "interpreted **strongly** in favor of the non-drafting party." *S. Atl. Fin. Servs. v. Middleton*, 356 S.C. 444, 447 590 S.E.2d 27, 29 (2003).

This Court should affirm the Master's determination that no enforceable right exists for perpetual management.

IV. WAIVER AS AN ADDITIONAL SUSTAINING GROUND.

Although the Master resolved the merits of the dispute in favor of Respondents on other grounds and did not reach this issue, Respondents also argued below that if Appellants once had a right to perpetual management, that right was lost by way of waiver. As an additional sustaining ground above and beyond the foregoing arguments, Respondents return to that argument, which is supported by the evidence in the Record. Section 2.3(a) requires the making of a contract between the Association and Appellants, but to be clear, Appellants were not “locked in.” Instead, Appellants claimed the right to be able to manage for as long as they wanted to, without being obligated to do so. Joe Miller claimed Appellants had the power under the Master Deed to force the Association to contract with it, yet Appellants were not obligated to provide the management services if they chose not to. (R. p. 89). Viewed in this way, Appellants may have relied upon Section 2.3(a) to create the initial management right, but it would be the resulting contract that allowed them the option not to renew if they so chose.

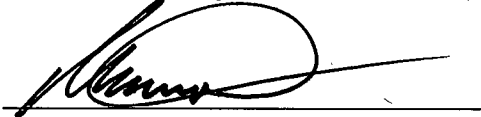
The parties made the 2006 Agreement, and then superseded it with 2009 Agreement. “It is well established that a written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract.” *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 405-406, 581 S.E.2d 161, 166 (2003) (internal citations and quotations omitted). It is not disputed that the 2009 Management Agreement was a valid contract during its term. By entering into the 2009 Agreement, Appellants, for valuable consideration, agreed to an expiration date, thus abandoning any infinite management rights, no differently than had Appellants opted at some point not to continue managing. Surely Appellants could not come back after

that fact and demand a new contract because they changed their mind. Here, Appellants voluntarily waived any right – assuming one existed – to infinite extension under Section 2.3(a). See *Thomas Drug Store v. National Surety Co.*, 104 S.C. 190, 196, 88 S.E. 442, 443-44 (1915) (“‘Waiver’ is the relinquishment of the rights under and the requirements of the contract as made and the substitution of a modified contract (*i.e.*, a new contract).”). For this additional reason, this Court should affirm the Master’s Order.

CONCLUSION

For the reasons set forth herein, Respondents request that this Court affirm the Order of the Master in Equity.

THURMOND KIRCHNER TIMBES YELVERTON, P.A.

By: 

Michael A. Timbes
Thomas J. Rode
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: (843) 937-8000
Facsimile: (843) 937-4200
mtimb@tktylawfirm.com
trode@tktylawfirm.com
Attorneys for Respondents

September 14, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Mikell R. Scarborough, Charleston County Master-In-Equity

Case No. 2011-CP-10-9513
Appellate Case No. 2014-002742

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

v.

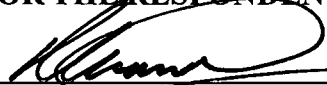
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The Harborage at Ashley Marina Condominium Association,
Eddy McCoy, Stuart Reeves, Brian Swan, Rich Cone, and Ed
Miskotten, individually, are.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the Final Brief of the Respondents
complies with Rule 211(b), SCACR.

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SC Court of Appeals

FOR THE RESPONDENTS:


Michael A. Timbes, Esquire
Thomas J. Rode, Esquire
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: (843) 937-8000
Facsimile: (843) 937-4200
Email: mtimb@tktylawfirm.com
Email: trode@tktylawfirm.com

Sworn to and subscribed before me
This 14th day of September.


Notary Public for South Carolina
My Commission Expires 11/16/2020.

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AFFIDAVIT OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner Timbes & Yelverton, P.A.,
attorneys for the Respondents, do hereby certify that I have on this date served via U.S.
Mail, three (3) true and correct copies of the Respondents' Final Brief to the following
counsel of record:

FOR THE APPELLANTS:

Edward K. Pritchard, III
Pritchard Law Group
129 Broad Street
Charleston, South Carolina 29402
(843) 722.3300 (o)
(843) 722.3379 (f)
epritchard@pritchardlawgroup.com

By: _____



Moira W. Kerrigan
Paralegal to Michael A. Timbes

September 15, 2015
Charleston, South Carolina