

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity

Appellate Case No. 2012-213333

The St. Clements Homeowners
Association, Inc.,

Appellant,

v.

BE-MI, Inc.,

Respondent.

BRIEF OF APPELLANT

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SC COURT OF APPEALS
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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 1

Facts 2

Arguments.....3

1. BECAUSE THE SIDE DECK WAS BUILT WITHOUT VALID CONSENT AND IN VIOLATION OF NUMEROUS TERMS, CONDITIONS AND RESTRICTIVE COVENANTS OF THE MASTER DEED AND BYLAWS, THE MASTER ERRED IN FINDING THAT RESPONDENT IS ENTITLED TO RETAIN AND MAINTAIN THE SIDE DECK WITH ITS EXISTING IMPROVEMENTS, OR THEIR REPLACEMENTS, IN THEIR CURRENT LOCATION.....5

2. BECAUSE THE SIDE DECK WAS BUILT WITHOUT VALID CONSENT AND IN VIOLATION OF NUMEROUS TERMS, CONDITIONS AND RESTRICTIVE COVENANTS OF THE MASTER DEED AND BYLAWS, THE MASTER ERRED IN FAILING TO FIND THAT THE APPELLANT IS ENTITLED TO AN INJUNCTION TO REMOVE THE SIDE DECK.....5

3. BECAUSE THE RESPONDENT KNEW OR SHOULD HAVE KNOWN AS A MATTER OF LAW THAT THE APPELLANT’S PRESIDENT [OR ITS BOARD] DID NOT HAVE ANY AUTHORITY TO PERMIT THE CONSTRUCTION OF THE SIDE DECK, THE MASTER ERRED IN FINDING THAT THE APPELLANT’S CLAIM IS BARRED BY

EQUITABLE ESTOPPEL.....	10
4. BECAUSE THERE IS INSUFFICIENT EVIDENCE TO DETERMINE WHAT MATTERS WERE INCLUDED AND WHAT FINAL JUDGMENT MAY HAVE BEEN ENTERED IN THE 2003 LAWSUIT IN WHICH THE PARTIES TO THIS CASE WERE PARTIES, AND/OR BECAUSE THE EVIDENCE CONCERNING THAT EARLIER SUIT INDICATES IT CONCERNED DIFFERENT SUBJECT MATTER, DIFFERENT EVIDENCE, DIFFERENT TRANSACTIONS OR OCCURRENCES, AND DIFFERENT PRIMARY WRONGS, THE MASTER ERRED IN FINDING THAT THE APPELLANT’S CLAIM IS BARRED BY <i>RES JUDICATA</i>	15
5. BECAUSE A BALANCING OF THE EQUITIES BASED UPON THE EVIDENCE PRESENTED IN THIS CASE CLEARLY FAVORS THE ISSUANCE OF AN INJUNCTION TO REMOVE THE SIDE DECK, THE MASTER ERRED IN FINDING THAT THE APPELLANT’S CLAIM IS BARRED BASED UPON A BALANCING OF THE EQUITIES.....	18
6. BECAUSE THE MASTER ERRED IN FAILING TO FIND THAT THE APPELLANT IS ENTITLED TO AN INJUNCTION TO REQUIRE REMOVAL OF THE SIDE DECK, THE MASTER ALSO ERRED IN FAILING TO FIND THAT THE APPELLANT IS ENTITLED TO RECOVER ALL COSTS AND EXPENSES OF THIS ACTION, INCLUDING REASONABLE ATTORNEY’S FEES AS ALLOWED UNDER THE MASTER DEED.....	22
Conclusion	23

TABLE OF AUTHORITIES

CASES

Cedar Cove Homeowners Association, Inc. v. DiPietro, 368 S.C. 254,
628 S.E.2d 286 (Ct. App. 2006).....3, 20, 21, 22

City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535,
677 S.E.2d 574 (2009).....4

Ex parte Wheeler v. Estate of Green, 381 S.C. 548,
673 S.E.2d 836 (Ct. App. 2009).....4

Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545,
658 S.E.2d 80 (2008).....3

Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991).....4

Ingram v. Kasey’s Assocs., 340 S.C. 98, 531 S.E.2d 287 (2000).....4

Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009).....16, 17

Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399,
656 S.E.2d 775 (Ct. App. 2008).....4

Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975).....17

Murphy v. Yacht Cove Homeowners Ass’n, 289 S.C. 367,
345 S.E.2d 709 (1986).....13

Plum Creek Dev. Co. v. City of Conway, 328 S.C. 347,
491 S.E.2d 692, 694 (Ct. App. 1997), aff’d as modified,
334 S.C. 30, 512 S.E.2d 106 (1999).....17

Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471,
451 S.E.2d 924 (Ct. App. 1994).....11

S.C. Dep’t of Natural Res. V. Town of McClellanville, 345 S.C. 617,
550 S.E.2d 299 (2001).....3

Settlemyer v. McCluney, 359 S.C. 317,
596 S.E.2d 514 (Ct. App. 2004).....4

Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81,
221 S.E.2d 773 (1976).....3, 5

STATUTES

S.C. Code Ann. § 27-31-80 (2007).....6, 14, 19, 21, 22
S.C. Code Ann. § 27-31-170 (2007).....7, 11, 13

OTHER AUTHORITIES

Myrtle Beach Zoning Ordinance Section 32-5, Off-Street
Parking Requirements, with copy of section of applicable
Zoning Map, in effect for St. Clements 1987-1995.....10, 20

STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER ERR IN FINDING THAT RESPONDENT IS ENTITLED TO RETAIN AND MAINTAIN THE SIDE DECK WITH ITS EXISTING IMPROVEMENTS, OR THEIR REPLACEMENTS, IN THEIR CURRENT LOCATION?
2. DID THE MASTER ERR IN FAILING TO FIND THAT THE APPELLANT IS ENTITLED TO AN INJUNCTION REQUIRING REMOVAL OF THE SIDE DECK?
3. DID THE MASTER ERR IN FINDING THAT THE APPELLANT'S CLAIM IS BARRED BY EQUITABLE ESTOPPEL?
4. DID THE MASTER ERR IN FINDING THAT THE APPELLANT'S CLAIM IS BARRED BY *RES JUDICATA*?
5. DID THE MASTER ERR IN FINDING THAT THE APPELLANT'S CLAIM IS BARRED BASED UPON A BALANCING OF THE EQUITIES?
6. DID THE MASTER ERR IN FAILING TO FIND THAT THE APPELLANT IS ENTITLED TO RECOVER ALL COSTS AND EXPENSES OF THIS ACTION, INCLUDING REASONABLE ATTORNEY'S FEES?

STATEMENT OF THE CASE

On March 6, 2007, by the filing of a Summons and Complaint, the Appellant condominium homeowners' association sought an injunction to require the removal of a side deck constructed by the Respondent atop two parking spaces on part of the general

common elements¹. Respondent served an Answer and Counterclaim asserting, *inter alia*, equitable estoppel, *res judicata*, balancing of the equities, and a claim for a declaratory judgment allowing the side deck to remain. The Appellant served a Reply dated April 11, 2007, denying the Respondent's claims. The case was referred to the Master-in-Equity with finality and was tried before the Master on August 24 and 25, 2009. The Master ruled on the three defenses stated above, denied the Appellant's claim for an injunction, attorney's fees and costs, and ordered that the Respondent has the right to retain and maintain the side deck with its existing improvements, or replacements, in their current location. The only amount involved on appeal is \$29,652.66 for Appellant's attorney's fees and costs through trial, plus its attorney's fees and costs from the conclusion of the trial through this appeal. The Master issued her ruling by Final Order dated December 20, 2010. The Appellant timely filed and served its Motion to Alter or Amend dated January 7, 2011. The Master denied that Motion by Order dated September 19, 2012, received by Appellant's attorney on October 12, 2012. Appellant's Notice of Appeal was served October 31, 2012.

FACTS

The St. Clements Horizontal Property Regime is a high-rise condominium established on oceanfront property in Myrtle Beach by Master Deed filed December 8, 1987. The Regime has a total of only 70 on-site parking spaces for 66 condominium units consisting of 64 residential units and 2 commercial units. One of the commercial units is the Respondent's "pool bar" designated as Unit Pool-1, consisting of a small

¹ Sometimes also referred to in the condominium documents and herein as "common areas."

stand-alone building located between the swimming pool and a portion of the parking lot. The Respondent purchased Unit Pool-1 in 1988 and has at all times since owned and operated it for business purposes, selling food and beverages. In 1990, the Respondent constructed adjoining Unit Pool-1 a side deck that covers two of the paved parking spaces constituting a part of the St. Clements general common elements. The Appellant seeks an injunction for removal of the side deck, plus a judgment for Appellant's reasonable costs and expenses in bringing this action as provided in the Master Deed. The Respondent claims to have had Appellant's consent for construction of the side deck and raised a general denial and various equitable defenses, all of which the Appellant denies, and only three of which were ruled upon by the Master. (References to the locations in the Record of all these salient facts may be found in the Arguments, *infra*.)

ARGUMENTS

Standard of Review

All questions of law are reviewed *de novo*. *E.g.* Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). Review of the Master's factual findings, however, depends upon whether the underlining action is an action at law or an action in equity. *See* Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775-76 (1976).

The primary purpose of the Appellant's claim was to obtain injunctive relief, which is equitable in nature. *See* S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622 550 S.E.2d 299, 302 (2001) (holding that an action to enforce restrictive covenants by injunction is in equity); Cedar Cove Homeowners Association, Inc. v. DiPietro, 368 S.C. 258, 628 S.E.2d 284, 286 (Ct. App. 2006) ("Because the

[plaintiff's] action is one to enforce restrictive covenants by injunction, it is in equity, and we may find facts in accordance with our own view of the evidence.”)

Although the Respondent mentions a “contract” or “agreement” in its counterclaims (R. pp. 30-33), those allegations are not necessarily determinative of whether the counterclaims were legal or equitable. “To determine whether an action is legal or equitable, this Court must look to the action’s main purpose as reflected by the nature of the pleadings, evidence, and character of relief sought. Ex parte Wheeler v. Estate of Green, 381 S.C. 548, 673 S.E.2d 836, 839 (Ct. App. 2009). The only evidence presented in this case as to any “contract” or “agreement” between the parties was that a president of the Appellant allegedly gave the Respondent oral “permission” to build the side deck. (R. p. 239, line 20 – p. 240, line 1; and R. p. 190, line 25 – p. 191, line 22). The main purpose of the Respondent’s counterclaims was to seek specific performance of an alleged oral contract, which would be an equitable claim. See Ingram v. Kasey’s Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290-91 (2000) (applying the equitable standard of review to the trial court’s findings of fact in a specific performance action); Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 406, 656 S.E.2d 775, 779 (Ct. App. 2008) (holding that an action for specific performance lies in equity); Settlemyer v. McCluney, 359 S.C. 317, 320, 596 S.E.2d 514, 516 (Ct. App. 2004) (applying equitable standard of review to action for specific performance of an alleged oral contract for the conveyance of land). Also, a suit of declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. See City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (quoting Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782

(1991). The Respondent's claim for a declaratory judgment in this case is based solely upon equitable claims including allegations of detrimental reliance, bad faith, lack of clean hands, lack of equity, or estoppel. On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

I. BECAUSE THE SIDE DECK WAS BUILT WITHOUT VALID CONSENT AND IN VIOLATION OF NUMEROUS TERMS, CONDITIONS AND RESTRICTIVE COVENANTS OF THE MASTER DEED AND BYLAWS, THE MASTER ERRED IN FINDING THAT RESPONDENT IS ENTITLED TO RETAIN AND MAINTAIN THE SIDE DECK WITH ITS EXISTING IMPROVEMENTS, OR THEIR REPLACEMENTS, IN THEIR CURRENT LOCATION.

II. BECAUSE THE SIDE DECK WAS BUILT WITHOUT VALID CONSENT AND IN VIOLATION OF NUMEROUS TERMS, CONDITIONS AND RESTRICTIVE COVENANTS OF THE MASTER DEED AND BYLAWS, THE MASTER ERRED IN FAILING TO FIND THAT THE APPELLANT IS ENTITLED TO AN INJUNCTION TO REMOVE THE SIDE DECK.

Appellant shall combine its arguments as to issues I and II, since one is the converse of the other. In 1990, the Respondent constructed and has since maintained a wooden side deck with a teal colored awning adjoining Respondent's Unit Pool-1. The side deck, awning, and any gutters, lighting, electrical wiring and other property of every description attached to or servicing the deck and located upon the common elements were collectively referred to at trial and shall be referred to herein as the "side deck" or "Side Deck." (R. p. 108, line 11 - p.109, line 3). The side deck is constructed atop 1.5 parking

spaces, effectively eliminating for parking two entire parking spaces that constitute a portion of the general common area of the St. Clements condominiums. (R. p. 29, paragraph 33; R. p. 157, line 16 – p. 158, line 20; p. 290, line 24 – p. 291, line 13; R. p. 471, see parking spaces 16 and 17; and, R. p. 491 showing side deck view from lobby 1992). No written consent of the Appellant’s board of directors has ever been given to allow the Respondent to use the parking spaces upon which the side deck is located. (R. p. 293, lines 15–25). Furthermore, there is abundant evidence that the board of directors never voted to grant the Respondent permission to build the side deck on any common area of the condominium project. (R. p. 110, line 17 – p. 111, line 5; p. 322, line 23 – p. 323, line 14). The side deck was constructed and exists in direct violation of the following, applicable provisions of the Horizontal Property Act, the St. Clements Master Deed, the Appellant’s Bylaws, and the Myrtle Beach zoning ordinance:

HORIZONTAL PROPERTY ACT:

- USE OF COMMON ELEMENTS

Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners. (Emphasis added.) S.C. Code Ann. § 27-31-80 (2007).

- COMPLIANCE WITH BY-LAWS, ETC.

Each co-owner shall comply strictly with the By-Laws..., and with the Covenants, Conditions and Restrictions set forth in the Master Deed.... Failure to comply with any of the same shall be grounds for civil action to recover sums due for damages or injunctive relief, or both, maintainable by the administrator or

Board of Administration, or other form of administration specified in the Bylaws, on behalf of the Council of Co-owners.... (Emphasis added.) S.C. Code Ann. § 27-31-170 (2007).

ST. CLEMENTS MASTER DEED:

- ARTICLE V – DESCRIPTION OF GENERAL COMMON AREAS

5.0 The general common areas of The St. Clements Horizontal Property Regime shall be as follows:

....

(d) All... parking and drive areas....

....

(f) All other portions of the real property and the improvements thereon which are not specifically part of the units themselves, as herein above defined ... shall be common areas and facilities intended for the common and necessary or convenient use and enjoyment, existence, maintenance or safety of the condominium units. (Emphasis added.) (R. pp. 417-418).

- ARTICLE VI – NATURE AND INCIDENTS OF UNIT OWNERSHIP

....

6.2 General Common Elements and facilities shall be, and the same are hereby declared to be, subject to a perpetual non-exclusive easement in favor of all of the owners of units in The St. Clements, for their use and the use of their immediate families, guests or invitees, for all proper and normal purposes, and the furnishing of services and facilities for which the same are reasonably intended, for the enjoyment of said owners of units. (Emphasis added.) (R. pp. 418-419).

- ARTICLE VII – USE AND RESTRICTIONS ON USE

- 7.0 – RESTRICTIONS ON USE

....

(b) No...unlawful use may be made of ...the common areas..., nor any part thereof, and all laws, zoning ordinances and regulations of all governmental authorities having jurisdiction of the unit[s] shall be observed.

....

(d) No owner shall cause any improvements or changes to be made on the exterior of the condominium (including...the installation of awnings...) or in any manner alter the appearance of the exterior portion of any building without the written consent of the board of the association being first had and obtained. **No unit owner shall cause any object to be fixed to common areas** and facilities...**or in any manner change the appearance of the common areas** and facilities...**without the written consent of the board of the association being first had and obtained.**

(e)**No business activity** of any kind whatever shall be conducted...on any portion of the property not designated as commercial area....
(Emphasis added.) (R. pp. 419-420).

....

- ARTICLE VIII – EASEMENTS

8.0 In addition to easements and rights established and/or reserved elsewhere in this MASTER DEED, the following easements and rights are hereby established as covenants and burdens running with the real property and the

improvements thereon:

....

(d) Ingress and egress is reserved...for vehicular traffic over, through and across such portions of the common areas and facilities as from time to time may be paved or intended for such purposes, for all unit owners of The St. Clements, their guests, families, invitees, lessees, the Association, ..., its successors and assigns. (Emphasis added.) (R. p. 422).

BY-LAWS OF THE ST. CLEMENTS HOA, INC.

• ARTICLE IV – BOARD OF DIRECTORS

....

(j) The Board of Directors shall manage and direct the affairs of the Association and **subject to any restrictions imposed by law, by the Master Deed, or by these By-Laws,** may exercise all of the powers of the Association subject only to approval by the co-owners when such is specifically required of these By-Laws. (Emphasis added.) (R. p. 455).

....

(l) The undertakings and contracts authorized by the first Board of Directors shall be binding upon the Association in the same manner as though such undertakings and contracts had been authorized by the first Board of Directors duly elected by the membership... **so long as any undertakings and contracts are** within the scope of the powers and duties which may be exercised by the Board of Directors of the Association of [sic] **and in accordance with all applicable condominium documents**.... (Emphasis added.) (R. p. 457).

MYRTLE BEACH ZONING ORDINANCE - PARKING REQUIREMENTS:

St. Clements has a total of 64 residential condominium units plus 2 small commercial units (R. pp. 442-443). The Myrtle Beach zoning ordinance in effect when St. Clements was established as a condominium in late 1987 required that a minimum of 70 off-street parking spaces be maintained at St. Clements. At all times from the establishment of St. Clements to the present, St. Clements has had a total of 70 such parking spaces, including the two spaces now covered by the Respondent's side deck. Subsequent amendments to the zoning ordinance have increased the parking requirements, but St. Clements is currently "grandfathered," provided it maintains as parking spaces at least the 70 spaces originally provided at the inception of the Regime. (R. p. 169, line 20 – p. 173, line 8; and R. pp. 520-526). The taking of 2 parking spaces for the side deck by the Respondent violates the zoning ordinance and therefore Master Deed section 7.0 (b), which states, "No...unlawful use may be made of ...the common areas..., nor any part thereof, and all laws, zoning ordinances and regulations of all governmental authorities having jurisdiction of the unit[s] shall be observed." (R. p. 419).

Because the side deck was built on St. Clements general common area without the written consent of the Appellant's board in violation of numerous provisions of the Master Deed, Bylaws and Horizontal Property Act as cited above, the Master should be reversed and an injunction issued for the removal of the side deck.

III. BECAUSE THE RESPONDENT KNEW OR SHOULD HAVE KNOWN AS A MATTER OF LAW THAT THE APPELLANT'S PRESIDENT [OR ITS BOARD] DID NOT HAVE ANY AUTHORITY TO PERMIT THE CONSTRUCTION OF THE SIDE DECK, THE MASTER ERRED IN FINDING THAT THE APPELLANT'S CLAIM IS

BARRED BY EQUITABLE ESTOPPEL.

A claim of estoppel includes elements for the party asserting estoppel and for the party estopped. *E.g.*, Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct.App.1994) (listing the elements of equitable estoppel: as to the estopped party, [1] a misrepresentation or nondisclosure, [2] intent to induce the other party to act, and [3] actual or constructive knowledge of the true facts; and as to the party claiming estoppel, [1] **lack of knowledge, or means of acquiring knowledge of the true facts**, [2] reasonable reliance, and [3] prejudicial change of position). The Master found that in 1990, Marshall Melton in his capacity as president of the Appellant² gave the Respondent permission to build the side deck and that there was "...no reason for the [Respondent] to believe the former President of the Plaintiff...did not have authority to grant him permission..., and he relied on that belief, and ... apparent authority, to his detriment." (R. p. 11).

The first reason the Master erred in finding that equitable estoppel applies in this case is that the Respondent most certainly did NOT have "...lack of knowledge, or means of acquiring knowledge of the true facts." Provident, *supra*. Mr. Melton had no actual authority as president or as a board member, under the facts and law of this case, to grant any such permission, and the Respondent had the knowledge, or means of acquiring knowledge of the true fact that the president had no actual authority to grant such permission. The SC Horizontal Property Act provides in S.C. Code Ann. § 27-31-170 (2007) that: **"Each co-owner shall comply strictly with the Bylaws..., and with the**

² The Master also seems to imply that the developer may have granted permission (R. p. 11, sect. 7), but a developer would have no such authority once a Master deed is filed, and there is no evidence of the developer having any such authority in this case.

Covenants, Conditions and Restrictions set forth in the Master Deed. (Emphasis added.).... Failure to comply with any of the same shall be grounds for civil action ... for ... injunctive relief ... maintainable by the ... Board of Administration ... on behalf of the Council of Co-owners....” The Master Deed provides in Article 7.3 that, “....The acceptance of a Deed of Conveyance...shall constitute an agreement that the provisions of this Master Deed, By-Laws, and any rules...are accepted and ratified by such owner...and all such provisions shall be deemed and taken to be covenants running with the land and shall bind any person having, at any time, any interest or estate in such unit as though such provisions were made a part of each and every Deed of Conveyance.... (R. pp. 421-422). The Master Deed further provides in Article 7.0 (d) that “**No unit owner shall cause any object to be affixed to common areas...** or in any manner change the appearance of the common areas and facilities... **without the written consent of the Board of the Association being first had and obtained.**” (Emphasis added.) (R. p. 420).

There is no evidence that the Appellant’s board ever voted to give the Respondent consent, and certainly never gave any written consent, to affix the side deck to the St. Clements paved parking spaces, which are clearly designated as common area in the Master Deed. (R. p. 293, lines 15–25; p. 110, line 17 – p. 111, line 5; p. 322, line 23 – p. 323, line 14; and R. pp. 417-418). The Respondent had no right to rely upon any “permission” from the Association’s president, since the Respondent either knew (he testified that he helped sell some of the condominium units when the project was originally developed in 1988, and that he was familiar with the Master Deed (R. p. 278, line 14 – p. 279, line 9) or certainly had the means of acquiring knowledge of the true fact

that the Master Deed, which by statute must be strictly complied with by each co-owner, required the written consent of the board of the association being first obtained before any object could be fixed to a common area. Furthermore, the Master Deed constitutes a contract among the Association and its members. Murphy v. Yacht Cove Homeowners Ass'n, 345 S.E.2d 709, 289 S.C. 367 (S.C. 1986). The Respondent is a member of the Association by virtue of its ownership of the pool bar Unit Pool-1. (R. pp. 472-474; R. p. 278, lines 12-13). Each party to a contract is charged with knowledge of and compliance with the terms thereof by common law, and in this case also by the provisions of S.C. Code § 27-31-170 (2007), "Each co-owner shall comply strictly with the...Covenants, Conditions and Restrictions set forth in the Master Deed...." Any permission to construct the side deck on a common area, as allegedly given verbally by president Melton to the Respondent, could not have been a misrepresentation by the Appellant, as a matter of law, since the Respondent knew or should have known that the Association's president had no authority to give any such permission under the terms of the Master Deed, a contract to which the Respondent was and is a party and charged by statute to comply with.

The second reason why the doctrine of equitable estoppel cannot apply in this case is that the Respondent knew or had the means of acquiring knowledge of the true fact that both the Appellant's president Mr. Melton and the Appellant's board lacked the authority to allow the construction of the side deck on a general common element restricted to parking. Even if such permission had been granted in writing by the board, which the evidence shows did not occur, the Respondent knew or had the means of acquiring knowledge of the true fact that any such action would have been beyond the

scope of power of the board, since:

1) ARTICLE IV of the Bylaws provides in subparagraph (j) that, “The Board of Directors shall manage and direct the affairs of the Association and **subject to any restrictions imposed by law, by the Master Deed, or by these Bylaws**, may exercise all powers of the Association subject only to approval of the co-owners when such is specifically required of these By-Laws.” Also, subparagraph (l) of the same Article provides that undertakings and contracts of the Board of Directors shall be binding upon the Association “... **so long as any undertakings and contracts are** within the scope of the powers and duties which may be exercised by the Board of Directors of the Association of (*sic*) and **in accordance with all applicable condominium documents**...” (Emphasis added.) (R. pp. 455, 457).

2) S.C. Code Ann. § 27-31-80 (2007) provides that: “Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.”

3) ARTICLE V of the Master Deed provides that the general common elements of the regime include “(d) All...parking and drive areas...”, and “... (f) All other portions of the real property and the improvements thereon which are not specifically part of the units themselves....” (R. pp. 417-418).

4) Master Deed ARTICLE VI, 6.2 states that: “General Common Elements [including all parking areas] and facilities shall be, and the same are hereby declared to be, subject to a perpetual non-exclusive easement in favor of all of the owners of units in The St. Clements... for all proper and normal purposes... **for which the same are reasonably intended**...” (Emphasis added.) (R. p. 418).

5) Master Deed ARTICLE VII (e) provides that: “...**No business activity of any kind whatever shall be conducted... on any portion of the property not designated as commercial area...**” The Master Deed further provides that only the two commercial units are “commercial area”, and of course the paved parking lot upon which the side deck was constructed is not a commercial area. (Emphasis added.) (R. p. 420).

For the foregoing reasons, the Respondent knew or should have known that neither the president nor the board of the Appellant had any authority under the terms of the SC Horizontal Property Act, the Master Deed, and the Bylaws to permit the construction of the side deck atop the paved parking lot of the general common area in violation of numerous provisions of the Master Deed. The Respondent thus has no right to claim equitable estoppel in this case.

It should also be noted that the Master Deed contains the following provision in Article 7.2: “....The failure to enforce any right, reservation or conditions contained in this Master Deed, however long continued, shall not be deemed a waiver of the right to do so hereafter, as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affect its enforcement. The remedies set out herein for such violation or breach are cumulative with any other legal or equitable rights available to any entity or person.” (R. p. 421).

For the reasons stated, the Master erred as a matter of fact and law in finding that equitable estoppel is a valid defense.

IV. BECAUSE THERE IS INSUFFICIENT EVIDENCE TO DETERMINE WHAT MATTERS WERE INCLUDED AND WHAT FINAL JUDGMENT MAY HAVE BEEN ENTERED IN THE 2003 LAWSUIT IN WHICH THE PARTIES TO THIS

CASE WERE PARTIES, AND/OR BECAUSE THE EVIDENCE CONCERNING THAT EARLIER SUIT INDICATES IT CONCERNED DIFFERENT SUBJECT MATTER, DIFFERENT EVIDENCE, DIFFERENT TRANSACTIONS OR OCCURRENCES, AND DIFFERENT PRIMARY WRONGS, THE MASTER ERRED IN FINDING THAT THE APPELLANT'S CLAIM IS BARRED BY *RES JUDICATA*.

A valid defense of *Res judicata* requires proof of three elements: (a) that a final, valid judgment was entered on the merits of the first suit; (b) that the parties to both suits are the same; and (c) that the subsequent action involves matters properly included in the first action. Judy v. Judy, 383 S.C. 1, 8, 677 S. E. 2d 213, 217 (Ct. App. 2009). The Master found that *res judicata* should bar the Appellant's claim in this case because it "could" have been raised as an issue in a previous lawsuit between the same parties filed in 2003 in which a final, valid judgment was entered. (R. pp. 14-16). This was error in that there was insufficient evidence presented at the trial of this case for the Master to determine that elements (a) and (c) of *res judicata* cited above apply. Neither the pleadings nor the record, the judgment, or any other document from the 2003 lawsuit was introduced as evidence at the trial of this case.

To any extent that evidence was presented in this case concerning what occurred in the 2003 lawsuit, such evidence indicates that the only issue in the previous action was bad conduct in violating rules concerning the operation of the pool bar owned by the Respondent, while the current action is based not upon bad conduct, but solely upon an encroachment onto real property constituting a St. Clements general common element. (R. p.311, line 24 - 315, line 2).

The Master found that Respondent "could" have raised the issue of the side deck

in the first lawsuit. The test is not whether a plaintiff “could” have done so, but rather whether the issues in the current case “might” have been raised in the prior action, as the term “might” has been interpreted and applied by our courts. “The rule precluding relitigation of issues which **might** have been raised in the prior action applies only where the two actions involve the same cause of action....” (Emphasis added.) Lowe v Clayton, 264 S.C. 75, 82, 212 S.E. 2d 582, 585-86 (1975), as cited in Judy, supra. “The test utilized by this court for comparing two causes of action is to determine whether the primary right and duty **and the delict or wrong are the same** in both actions.” (Emphasis added.) Plum Creek Dev. Co. v City of Conway, 328 S.C. 347, 350, 491 S.E. 2d 692, 694 (Ct. App. 1997), aff’d as modified, 334 S.C. 30, 512 S.E. 2d 106 (1999), as cited in Judy. “South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: 1) when there is identity of the subject matter in both cases; 2) when the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; 3) when there is the same evidence in both cases; and recently 4) when the claims arise out of the same transaction or occurrence.” (Emphasis added.) Judy. None of those tests can be met in the this case, since: 1) the subject matter in the prior case was bad conduct at the pool bar, while the subject matter in the current case is the physical encroachment of the side deck onto a common area; 2) the two cases do not involve “one primary wrong”, since the primary wrong in the first case was bad conduct and the primary wrong in the second case was the physical encroachment of the side deck; 3) the evidence is far from the same in the two cases, since the evidence in the first case would have been evidence of bad behavior in the violation of rules, while the evidence in the second case is related solely to a physical

encroachment; and 4) the claims in the two cases do not arise out of the same transaction or occurrence, since the transaction or occurrence litigated in the first case was bad behavior, while the transaction or occurrence litigated in the second case was the construction and maintenance of an encroachment onto real property.

It should also be noted that the St. Clements Master Deed contains the following provisions in Article XIV:

(d) “The failure of the Association or any unit owner to enforce any right, provision, covenant or condition which may be granted by this MASTER DEED or the other above mentioned documents, shall not constitute a waiver of the right of the Association...to enforce such right, provision, covenant or condition in the future.”

(e) “The rights, remedies and privileges granted to the Association...pursuant to any terms, provisions, covenants or conditions of this MASTER DEED or the above mentioned documents, shall be deemed to be cumulative, and the exercise of one or more shall not be deemed to constitute an election of remedies, nor shall it preclude the party thus exercising the same from exercising such other and addition rights, remedies or privileges as may be available to such party at law or at equity.” (R. p. 437).

The Master erred as a matter of fact and law in finding that *Res judicata* is a valid defense in this case.

V. BECAUSE A BALANCING OF THE EQUITIES BASED UPON THE EVIDENCE PRESENTED IN THIS CASE CLEARLY FAVORS THE ISSUANCE OF AN INJUNCTION TO REMOVE THE SIDE DECK, THE MASTER ERRED IN FINDING THAT THE APPELLANT’S CLAIM IS BARRED BASED UPON A BALANCING OF THE EQUITIES.

The Master erred in finding that it would be inequitable to issue an injunction requiring removal of the side deck based upon a balancing of the equities analysis, taking into account the benefits to the Appellant versus the detriment to the Respondent. (R. p. 14) On the contrary, a balancing of the equities based upon the evidence presented in this case clearly favors the issuance of such an injunction. Consider first the consequences to the respective parties should the side deck be allowed to remain as the Master found "...with its existing improvements, or their replacements..." (R. p.17) as a permanent encroachment upon the St. Clements paved parking lot:

1) The Respondent would be allowed to keep and use for its own commercial purposes in perpetuity, in direct violation of S.C. Code Ann. § 27-31-80 (2007) and multiple provisions of the Master Deed as described *supra*, almost three hundred (300) square feet (R. p. 471, spaces 16 and 17, shows 16.5 feet X 18 feet = 297 sq. ft.) of very valuable ocean front land, which land is general common area owned by all sixty-six unit owners at St. Clements, and for which land the Respondent would have paid zero to the other owners and/or to the Appellant.

2) Such a perpetual easement would in many respects be even better for the Respondent than fee simple title, since under the terms of the Master Deed the annual real property taxes on the land occupied by the side deck would be paid 98.5%, in perpetuity, by the other 65 unit owners (Respondent's pool bar unit has only a 1.5% interest in the common elements under the Master Deed), and the paved parking lot upon which the side deck is affixed would be required under the terms of the Master Deed to be maintained, in perpetuity, by the Appellant, with 98.5% of that expense being paid by the other 65 unit owners.

3) The other 65 unit owners at St. Clements would permanently lose their rights, held inviolate under the terms of the Horizontal Property Act and the Master Deed, to a perpetual parking easement on two of the most desirable, ocean front, ground level parking spaces in the Regime. (R. p. 471, parking spaces 16 and 17).

4) The Appellant and its members would be at risk that the city of Myrtle Beach may seek legal redress under the city's zoning ordinance arising from the permanent elimination of any ability to park vehicles on two of the designated paved parking spaces required under the parking provisions of the ordinance.

On the other hand, if the Court grants an injunction to remove the side deck:

1) The Respondent will have received more than its money's worth out of a relatively small \$11,000.00 investment made in 1990 (a portion of which funds were used to construct an awning around the pool bar, not just over the side deck) plus maintenance costs (R. p. 235, line 25 – p. 236, line 5), and

2) The Respondent will still own the pool bar and will have all of the rights and privileges to which it was entitled when it purchased the pool bar.

The Master cited Cedar Cove Homeowners Association, Inc. v. DiPietro, 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2006) as supportive of the Master's finding on balancing of the equities. However, Cedar Cove is easily distinguishable and actually supports the Appellant's position in this case for the following reasons:

1) Cedar Cove applied to residential lots in a subdivision, not to a condominium, so there was no Master Deed at Cedar Cove requiring that the common elements encroached upon be used "... for all proper and normal purposes... for which the same are reasonably intended..." (R. p. 418), prohibiting business activity on the common

elements (R. p. 420), or granting an easement for parking and vehicular traffic to all unit owners over the portion of the common elements encroached upon (R. p. 422).

2) The Horizontal Property Act did not apply at Cedar Cove, which Act requires in the present case that “Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.” S.C. Code Ann. § 27-31-80 (2007).

3) The encroachment at Cedar Cove consisted of a “slight” encroachment onto a dirt common area by a small portion of a brick patio to be used for residential purposes. Cedar Cove, p. 256. In the present case there is a major encroachment by a side deck used for commercial purposes, eliminating 2 oceanfront parking spaces in a paved parking lot restricted to residential purposes.

4) The respondent in Cedar Cove submitted plans in advance to that association’s architectural review committee, that review committee recommended approval and then gave the plans to the president of the board, and the Cedar Cove covenants Article V contained the following provision: “PROVIDED HOWEVER, that if approval or disapproval is not submitted, or no suit to enjoin construction is commenced prior to substantial completion thereof, it shall be presumed that the party has complied with this restriction [requiring architectural review approval].” (Emphasis added.) Cedar Cove, pp. 256-257; 259-260. The Court in Cedar Cove found that, “Article V of the restrictive covenants **controls** the resolution of this appeal...” (Emphasis added.) Cedar Cove, p. 260. The Court cited the above quoted provision of the Cedar Cove covenants Article V in **bold print** in ruling that, “We adhere to the unambiguous terms of the restrictive

covenants.” Cedar Cove, p. 260. In the present case, the unambiguous terms of the Master Deed require the written consent of the Appellant’s board before any unit owner may cause any object to be fixed to a common area, and it is undisputed that the Respondent never obtained any such written consent. (R. p. 293, lines 15-25). A straightforward application by this Court of the unambiguous terms of the restrictive covenants contained in the Master Deed at St. Clements will require an injunction to remove the side deck.

5) In Cedar Cove, the association had the authority under its covenants to allow the encroachment complained of, while in the present case neither the president nor the board had the authority to permit the encroachment of the side deck onto the paved parking lot in violation of express easements granted in the Master Deed to all owners for vehicular traffic and parking, in violation of the Master Deed’s prohibition of business activity “of any kind whatsoever” in the common areas, and in violation of the Horizontal Property Act’s restriction that: “Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.” S.C. Code Ann. § 27-31-80 (2007).

The Master erred as a matter of fact and law in finding that a balancing of the equities prohibits an injunction to remove the side deck.

VI. BECAUSE THE MASTER ERRED IN FAILING TO FIND THAT THE APPELLANT IS ENTITLED TO AN INJUNCTION TO REQUIRE REMOVAL OF THE SIDE DECK, THE MASTER ALSO ERRED IN FAILING TO FIND THAT THE APPELLANT IS ENTITLED TO RECOVER ALL COSTS AND EXPENSES OF THIS

ACTION, INCLUDING REASONABLE ATTORNEY'S FEES AS ALLOWED UNDER THE MASTER DEED.

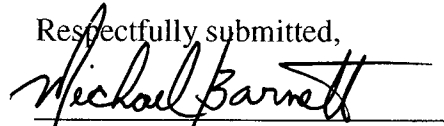
The Master denied the Appellant's claim for attorney's fees and costs because the Master failed to find that the Appellant is entitled to an injunction to require removal of the side deck. The Master Deed provides in Article 14(c) that, "In any proceedings arising because of alleged default by a unit owner, the Association, if successful, shall be entitled to recover the costs of the proceeding and such reasonable attorney's fees as may be determined by the court, but in no event shall any unit owner be entitled to such attorney's fees." (R. p. 436). If the Master's ruling on the injunction is reversed, the Appellant should be awarded its costs in this action, including reasonable attorney's fees.

CONCLUSION

For the reasons stated, this Court should reverse the Masters rulings, issue an injunction to remove the side deck, and award Appellant's reasonable costs and attorney's fees.

April 15, 2013

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity

Appellant Case No. 2012-213333

The St. Clements Homeowners
Association, Inc.,

Appellant,

v.

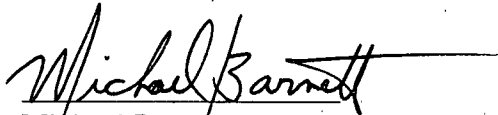
BE-MI, Inc.,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the final Brief of Appellant and the final Reply Brief filed herein comply with Rule 211(b), SCACR.

April 16, 2013


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THE STATE OF SOUTH CAROLINA
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Respondent.

PROOF OF SERVICE

I certify that I have served the final Brief of Appellant and the final Reply Brief on the Respondent by depositing copies of them in the United States Mail, postage prepaid, on April 16, 2013, addressed to its attorney of record, Fred B. Newby, Newby Sartip Masel & Casper, LLC, 4593 Oleander Drive, Myrtle Beach, South Carolina 29577.

April 16, 2013



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