THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

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Appellate Case No. 2016-001789

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The Edgewater on Broad Creek Owners Association, Inc. and the Council of Co-Owners of the Edgewater on Broad Creek Horizontal Property Regine Phase I, .....Plaintiffs

Of which The Edgewater on Broad Creek Owners Association, Inc. is the .....Respondent

v.

Ephesian Ventures, LLC.....Appellant.

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# APPELLANT'S FINAL BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

STATUTES



OTHER SOURCES

## STATEMENT OF THE ISSUES ON APPEAL

I. Did the Master err in holding that the terms of the Master Deed are unambiguous and do not reserve to Appellant the sole option as to any additional amenities or recreational facilities?

II. Should this Court vacate portions of the Master's Order that contain excessively broad language and are not material to the decision, but could prejudice Appellant as to its remaining claims not disposed of?

## STATEMENT OF THE CASE

This matter was commenced on July 19, 2011, when Respondent The Edgewater on Broad Creek Owners Association, Inc. (hereinafter "Edgewater," "the Association," or "Respondent"), filed a Complaint in Beaufort County seeking a declaratory judgment as to Appellant's rights under the Master Deed regarding, in pertinent part, the construction of improvements or amenities on Respondent's common property. Respondent also included a cause of action for nuisance, claiming that an unfinished structure on Appellant's property interferes with the Edgewater unit owners' use and enjoyment of their land. Appellant Ephesian Ventures, LLC (hereinafter "Ephesian" or "Appellant") answered and counterclaimed, also seeking a declaratory judgment regarding the Declarant's rights under the Master Deed, including Ephesian's claim to density rights and the construction of improvements or amenities. Ephesian also included counterclaims for breach of contract and nuisance.

Edgewater filed for partial summary judgment in February of 2015, and the matter was thereafter referred to the Master in Equity. Edgewater's motion was heard by Judge Marvin H. Dukes, III, on September 21, 2015. On February 26 of 2016, the Master issued an Order granting partial summary judgment in favor of Edgewater, finding no genuine issues of material fact and holding that none of the Declarant's rights reserved by the Master Deed operated to prevent or limit Edgewater from improving the contested property or constructing any common recreational amenities without Ephesian's approval. The Order also found that Ephesian had no right to use an existing clubhouse as a sales office or relocate Edgewater's ingress and egress. Ephesian moved to alter or amend the judgment pursuant to Rule 59(e), SCRCP, asking the Court to reconsider its holdings as to the reservation of rights now held

by Ephesian under the Master Deed. Following a hearing on July 11, 2016, the Master denied the motion by Form 4 Order.

Ephesian served Notice of Appeal on August 22, 2017. Edgewater moved to dismiss the appeal, citing jurisdictional issues surrounding the timeliness of Appellant's Notice of Appeal. That motion was denied by this Court on March 26, 2018, and this appeal proceeded accordingly.

## STATEMENT OF FACTS

This dispute concerns the extent and duration of certain rights reserved by the Declarant, Broad Creek Edgewater, LP, in a 2002 Master Deed establishing The Edgewater on Broad Creek Horizontal Property Regime ("the Regime") in Hilton Head, South Carolina. (See R. pp. 40–124 [hereinafter "Master Deed"]). Appellant Ephesian, the successor to the Declarant and not a part of the Regime, asserts that the plain language of the Master Deed reserves to it an exclusive option as to the development or construction of amenities or recreational facilities on Regime common property. (R. pp. 529–32). Edgewater acknowledges that the Appellant holds certain easements over the property, but argues that these easements are non-exclusive and should be narrowly construed against restriction pursuant to the common law of South Carolina and public policy. (R. p. 553, line 21–p. 555, line 4).

The real property at issue is composed of a total of 23.65 acres in Hilton Head, South Carolina, previously owned by Broad Creek Edgewater, LP ("Broad Creek"). (R. p. 8). By Master Deed dated December 31, 2002, Broad Creek Edgewater, LP, the Declarant, submitted 7.64 acres of that property to the Regime, subject to administration by the The Edgewater on Broad Creek Owners Association, Inc.; this 7.64 parcel is known as the "Phase I" property. (See R. p. 56). Twenty-three individual units and common elements, including a clubhouse, were subsequently constructed on the Phase 1 property, and by October of 2006, all twenty-three units had been purchased. (R. pp. 8–9, 44). These unit owners are presently represented by the Association.

The Master Deed includes additional provisions relevant to this appeal. First, it designated an adjacent 16.01 acres as eligible for addition to the Regime, provided the

Declarant exercised this option prior to December 31, 2010. (R. pp. 8, 56). These 16.01 acres are identified as the "Additional Property." (R. pp. 56, 81). Had the Additional Property been developed as described in the Master Deed and assimilated into the Regime, the combined 23.65 acres would have held a maximum of 147 units, along with various amenities and recreational facilities. (R. pp. 2, 55–57). It is undisputed that this contemplated "Phase 2" option was not exercised by the original Declarant or any of its successors, and the Additional Property is no longer eligible for addition to the Regime. (R. pp. 8–9).

In submitting certain rights and interests in a portion of its property to the Regime, Broad Creek retained and expressly reserved other rights affecting the Phase I property. In particular, the Declarant retained the following rights:

- § 6(b)(9), Page 16 of the Master Deed—"Any additional amenities or recreational facilities, which may or may not be in the additional Phases, are solely at the option of Declarant";

- Exhibit A, Page 38 of the Master Deed—Expressly reserving an ingress and egress easement "expressly for, but not limited to, the purpose of construction and all construction related activities on the Phase I Property and on the Additional Property";

- Exhibit A, Page 38 of the Master Deed—Retaining "title to and ownership of all water and sewer lines located on said Parcels or hereafter installed thereon, together with all pipes, pumps, pumping stations, or other equipment or facilities located thereon, together with an easement to such lines, equipment or facilities to allow for the maintenance repair or replacement of such lines, facilities or equipment or for the purpose of installing additional lines, equipment or facilities thereon from time to time.";

- Exhibit A, Page 38 of the Master Deed—Expressly reserving "the right to improve the aforementioned property by clearing, tree pruning, constructing additional parking and common facilities, including, but not necessarily limited to recreational facilities, drainage facilities, lagoons, and the like, pertaining to The Edgewater on Broad Creek Horizontal Property Regime."; and

- Exhibit A, Page 39 of the Master Deed—Expressly reserving "the right to install lines, equipment and facilities for utility and drainage purposes and to grant

easements over the property for the installation of additional lines, equipment or facilities for utility and drainage purposes from time to time."

(R. pp. 55, 78–79).

After the Master Deed was recorded, Broad Creek continued to develop the property, including the erection of all twenty-three units contemplated for Phase I and certain structures and amenities on the Additional Property, including a pool facility. However, Broad Creek was put into involuntary Chapter 7 bankruptcy on or around May 9, 2007. (R. p. 9). The Bankruptcy Trustee entered into a contract of sale to convey all 16.01 acres of the Additional Property to Bear Properties, LLC, a Georgia-based company. (See R. pp. 155–60). The Association was represented by counsel at that hearing and acknowledged that the Additional Property was purchased subject to the Master Deed, and that the proposed Order of Sale resolved the Association's concerns and did not need to be amended. The Order approving the sale transferred all rights and titles of the Declarant to the purchaser, including the following individually-identified rights regarding the adjacent Phase 1 property:

- A non-exclusive easement for ingress and egress over the Phase 1 property;
- "All developmental rights, easements, rights of way, ponds, lagoons, waterways, privileges, permits, licenses, appurtenances and other rights pertaining thereto, if any";
- "Water and sewage capacity and spray field rights . . . and any remaining such rights and/or capacity in (including a capacity which at a minimum would allow a density of twelve units per acre)"; and
- All rights of the Declarant, and "any other rights affecting the Property and all of Seller's interest in any roadways, bridges, access ways, easements, covenants, restrictions, or right affecting the Property."

(See R. pp. 159–60).

The bankruptcy purchaser, Bear Properties, LLC, subsequently assigned its rights and interests to Appian Visions, LLC, which in turn assigned all rights and interests to Ephesian.

(R. p. 9). The Chapter 7 Trustee subsequently executed a Quitclaim Deed in favor of Ephesian. (R. p. 9). The parties do not genuinely dispute that whatever rights and reservations that would have been possessed or retained by Broad Creek as Declarant, subject to the Master Deed, are now held by Ephesian. (R. p. 547, lines 7–15).

Later, in 2010, Edgewater undertook to construct a swimming pool and tabby walk on the Phase I property. (R. p. 10). Ephesian opposed the project and gave notice to the Town of Hilton Head Island that the construction may conflict with its rights and easements, pursuant to S.C. Code Ann. § 6-29-1145(B)(3). (R. p. 10). On receipt of this objection, the Town of Hilton Head refused to issue development permits for the proposed improvements pending resolution of the dispute. (R. p. 539, line 22–p. 540, line 4). Edgewater then initiated the present action, seeking a declaratory judgment finding, in pertinent part, that Ephesian's rights and reservations under the Master Deed do not preemptively restrict Edgewater's right to develop its common property or prevent the Town of Hilton Head Island from issuing development permits. (See R. pp. 26–39).

Edgewater filed for partial summary judgment on this limited issue on February 26, 2015, arguing that Ephesian was attempting to assert rights that had already been submitted or conveyed through the Master Deed, and that any rights or easements reserved were nonexclusive and could not operate to prevent Edgewater from constructing any facilities or amenities without Ephesian's prior approval. (See R. p. 190–206). In support of its Motion, Edgewater also submitted an Affidavit by William J. Eisenman, the President of the Association. (R. p. 520–28). By Affidavit, Mr. Eisenman complains that Ephesian "unilaterally" closed the pool facility located on the Additional Property and asserts that he and other Edgewater Unit Owners "relied on" the existence of a pool facility in purchasing

their property.[1] (R. p. 521). Mr. Eisenman also set forth his understanding of the series of events surrounding Hilton Head Island's issuance of a development permit, restating his belief as to Ephesian's position regarding the rights asserted, and setting forth the Association's desire to construct certain improvements and opinions as to Ephesian's asserted rights. (R. p. 522–23).

Ephesian opposed the Motion, arguing that the rights and easements reserved pursuant to the Master Deed and relevant deeds and orders provide it the exclusive option to approve or disallow additional amenities or recreational facilities on the Phase 1 property, pursuant to Section 6(b)(9) of the Master Deed. (R. p. 544, line 11–p. 551, line 10). Ephesian further referenced its reservation of additional rights and easements over the Phase 1 property, including its "title to and ownership of all water and sewer lines located on said Parcels or hereafter installed thereon," "right to improve the aforementioned property by clearing, tree pruning, constructing additional parking and common facilities, including . . . recreational facilities . . . pertaining to The Edgewater on Broad Creek Horizontal Property Regime," and related access rights preserved under Exhibit "A" of the Master Deed. (R. pp. 78–80; p. 549, line 2–p. 550, line 3). In light of these reservations, Ephesian argued that the Court lacked authority at the summary judgment stage to issue an order nullifying its rights by finding that Edgewater's proposed improvements would not interfere with Ephesian's expressly reserved easements and ownership of water and sewer lines. (R. p. 557, line 23–p. 559, line 8). Edgewater countered that Ephesian's rights, to the extent they exist under the

[1] As noted above, it is undisputed that the Additional Property where the existing pool is situated is not and has never been property of the Regime. Appellant's counterclaim alleges that the Association's continued right to use the pool was eventually revoked after the Association repeatedly failed to make contractually-required payments, which have still not been made. (R. p. 146).

Master Deed, are nonexclusive and should be construed narrowly under Butler v. Sea Pines Plantation Co., 282 S.C. 113, 120, 317 S.E.2d 464, 468 (Ct. App. 1984) ("Restrictive covenants are to be strictly construed, with doubts resolved in favor of a free use of property."). (R. p. 560, line 24–p. 562, line 9).

The Master issued an Order granting partial summary judgment in favor of Respondent Edgewater on February 26, 2016. (See R. pp. 5–22). Among the findings in that Order, the Master concluded that the Declarant's easements, "with minor exception," were not held for exclusive use, and further that some provisions of the Master Deed "could be deemed to conflict with public policy." (R. p. 12). In characterizing Appellant's position, the Order represents that Ephesian is seeking to assert both Broad Creek's formerly-held rights as "developer," predating the Master Deed, as well as those rights Broad Creek reserved to itself as Declarant. (R. pp. 14–15). The Master's Order also asserts that "[Ephesian] has submitted no evidence to avoid summary judgment." (R. p. 13).

In addressing the terms of Master Deed § 6(b)(9), the Master held that the Declarant had "essentially left itself a way out of any amenity shown in any sales or promotional literature," and that the provision did not provide the Declarant the "exclusive" right to construct or authorize amenities. (R. p. 18). In further addressing § 6(b)(9), the Master concluded that it referred only to "*additional* Phases," and under its plain meaning would not include improvements to Phase 1. (R. p. 18) (emphasis in original).

Ephesian submitted a Rule 59(e) Motion to Alter or Amend Judgment on March 8, 2016, asking the Court to reconsider its rulings as to the effect of the Master Deed and the Declarant's rights thereunder. (R. pp. 529–33). Appellant asked the Court to revise its ruling to expressly hold that "none of [Ephesian's] retained rights under the Master Deed have been

extinguished other than those that were expressly set to expire in 2010." (R. p. 531). Second, while the Appellant does not dispute that Edgewater could undertake to construct improvements or amenities on the Regime property, it argued that any such developments are subject to Ephesian's prior approval, "in order to protect [Ephesian's] interests in developing its own property or making improvements to the Phase 1 property to service [Ephesian's] property at a later date." (R. p. 531). Acknowledging that certain, enumerated rights had expired, counsel for Ephesian argued that all other rights that were not expressly submitted to the Regime or terminated in 2010 continue to exist, and that those continuing rights include the ability to control and direct the development of the Additional Property through the exercise of a right to approve or disallow proposed constructions or modifications to the Phase 1 property. (R. p. 599, line 4–p. 600, line 22). In referencing those continuing rights, Ephesian noted its pending counterclaim for density rights, which was not then before the court. (R. p. 604, line 20–p. 603, line 3).

Following a hearing on July 11, 2016, Judge Dukes denied Ephesian's Motion and affirmed the grant of partial summary judgment in favor of Edgewater by Form 4 Order. Ephesian served Notice of Appeal on August 22, 2017, seeking review of the Master's denial of its Rule 59(e) Motion. Following the review and adjudication of a motion to dismiss, this Court is now prepared to review the Master-in-Equity's Order below, granting partial summary judgment in favor of Respondent and denying Appellant's Motion to Alter or Amend pursuant to Rule 59(e), SCRCP.

## STANDARD OF REVIEW

The lower court characterized its Order as a grant of "partial summary judgment." Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Rule 56(a), SCRCP. Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Rule 56(c), SCRCP. The court must resolve all facts and inferences in the light most favorable to the non-moving party. Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). A movant who bears the burden of proof on an issue must put forward evidence clearly demonstrating the absence of a genuine dispute of material fact. See Rule 56(c), SCRCP; Griffin Plumbing & Heating v. JJ & G, 351 S.C. 459, 470, 570 S.E.2d 197, 202 (Ct. App. 2002).

## ARGUMENT

As owner of the 23.65 acres involved in this dispute, Broad Creek held the entire property in fee, subject only to any preexisting easements or reservations. Broad Creek submitted a portion of this property to the Regime, but reserved or retained any rights not conveyed by the Master Deed. In particular, the Master Deed expressly reserves to the Declarant certain easement and ownership rights. At the time of execution of the Master Deed, the Declarant had clearly contemplated the possibility of later phases, but with certain identified exceptions, its reserved rights and easements were not dependent on that later development ever occurring. But the Master's Order prematurely abrogates those rights by not only misconstruing the individual provisions immediately before the court (reserving to Ephesian the sole option as to additional amenities or recreational facilities), but by extending its opinion beyond the issues before it in order to reframe and limit Ephesian's claim to other reserved or retained rights still at issue.

### I. The Master-in-Equity erroneously held that the plain language of the agreement unambiguously entitles Respondent to construct any facilities or improvements without Appellant's prior authorization or option.

The Master-in-Equity was charged with interpreting the terms and provisions of the Master Deed that created the Edgewater Regime, and in particular the effect of certain provisions reserving a sole option over additional amenities. Deeds and any easements therein are interpreted in accordance with the law governing construction of written instruments and contracts generally. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). "The construction of a clear and unambiguous deed is a question of law for the court." Gardner v. Mozingo, 293 S.C. 23, 358 S.E.2d 390 (1987). However, "if the court identifies an ambiguity on the face of

the [deed], external evidence is admissible and the determination of the intent of the parties becomes a question of fact." Penza v. Pendleton Station, LLC, 404 S.C. 198, 205, 743 S.E.2d 850, 853 (Ct. App. 2013). Both the court's construction of a clear and unambiguous deed and its determination that no facial ambiguity exists are subject to *de novo* review, with no deference given to the conclusions below. See Lee v. Univ. of S.C., 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014); Proctor v. Steedley, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012).

The Master erred in concluding as a matter of law that the expressly reserved rights, restrictions, and easements held by Ephesian unambiguously authorize Edgewater to construct any and all amenities and recreational facilities on the Phase 1 property without Ephesian's review or approval. To the contrary, the terms of Section 6(b)(9) plainly reserve to the Declarant the sole option as to any additional amenities or recreational facilities which "may be" in the contemplated potential additional phases, or "may not" be in them—leaving no reasonable place for their location but Phase 1. At a minimum, the effect of the various rights, options, and easements reserved or retained by the Declarant are ambiguous and susceptible to more than one reasonable interpretation, and the Master erred by awarding summary judgment where there exists a material dispute of fact as to the intent of the parties and the extent of the Declarant's rights.

**A. The plain, unambiguous language of the Master Deed as a whole grants Appellant the sole option over recreational facilities and amenities proposed for the Phase I property.**

As an initial matter, the Master found—and the parties appear to agree—that as the successor in interest, Appellant Ephesian now holds at any rights that would have been held or reserved by Broad Creek. (See R. p. 9; see also Singletary v. Aetna Cas. & Sur. Co., 316

S.C. 199, 202, 447 S.E.2d 869, 870 (Ct. App. 1994) ("An assignee . . . can claim no higher rights than his assignor had at the time of the assignment.")). At issue, therefore, is whether the language of the Master Deed and other documents of conveyance expressly reserve to the Declarant the right to advanced notice or approval of certain improvements proposed by Edgewater, and in particular the swimming pool and walkway submitted to the Town of Hilton Head. (R. pp. 14–15). The Master held that no such right was reserved, instead finding that Ephesian possesses only the ordinary rights of any easement holder to seek redress for encroachments or express violations after the injury has already occurred. (R. p. 16). Because this finding is an erroneous construction of the unambiguous language of the agreement, it should be reversed.

The court's primary object in constructing a deed is to "ascertain and give effect to the intention of the parties." Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). "The intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." K & A Acquisition Grp., LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 262 (2009) (quoting Wayburn v. Smith, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977)). The court's first duty is to review the language of the deed itself and determine whether the language is ambiguous on its face or subject to more than one reasonable interpretation. Lee, 407 S.C. at 517–18, 757 S.E.2d at 397. "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the [deed]'s language determines the instrument's force and effect" Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). When the language is clear, the court must apply its plain meaning without regard for the parties' "secret intentions," their "wisdom or folly" in

accepting the clearly stated terms, or their "apparent unreasonableness, or the parties' failure to guard their rights carefully." See Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2 767, 769 (1976); Lee, 407 S.C. at 517–18, 757 S.E.2d at 397; S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, 379 S.C. 645, 655, 687 S.E.2d 7, 13 (Ct. App. 2008).

Interpreting the Master Deed, the Master-in-Equity held that "[t]here is no restrictive covenant that is controlling to, conflicts with, or prohibits [Respondent] from making improvements on the property of the Regime," and authorized Respondent to "construct a swimming pool and/or other common or recreational amenities on the common elements of the Regime" without Ephesian's prior approval. Entirely disregarding the express "sole option" language, the Master instead determined that any rights were "not exclusive" and that, consistently with the principles governing easements generally, Ephesian could object only after its rights had already been violated. (R. p. 16). This result contradicts the clear language of the Deed.

Per Section 6(b)(9) of the Master Deed, "[a]ny additional amenities or recreational facilities, which may or may not be in the additional Phases, are solely at the option of Declarant." Broken down, the proposed swimming pool and walkway are unquestionably "additional amenities or recreational facilities." Likewise, the "sole option" language clearly reserves to Ephesian the exclusive and final decision over any such additional facilities. But when interpreting the remaining phrase, the Master concluded that applying that right to improvements or amenities that "may or may not be" in additional Phases was intended to limit the scope of the right to only the Additional Land, whether or not it was ever added to the Regime as an additional phase. (R. p. 18). In so holding, the Master concludes that because this section refers only to the "additional Phases," it necessarily excludes any

construction or development on the Phase I property. (R. p. 18). This reading ignores the deliberate inclusion of both those prospective amenities that "may be" in any additional Phases (which were merely speculative and did not exist at the time of the Deed's execution), or "may not" be in them—that is, that may be located elsewhere, with the only reasonable alternative location being the other property described in the Deed, or Phase I. The Master erred by concluding that this language unambiguously applies only to contemplated future Phases that did not exist at the time of the Master Deed.

This interpretation is supported by the numerous additional rights and powers over the Phase I property reserved by the Declarant—including exclusive ownership of any then-existing or later constructed water or sewer lines, the right to improve the property, clear landscaping, or construct common facilities relating to the Association, and the right to install any additional drainage or utility facilities on the property. Taken as a whole, the Master Deed clearly contemplates that the Declarant would retain additional rights and powers over the Association property, well beyond the rights typical of an ordinary easement "no different than anyone else holding an easement over someone else's property," as argued by Respondent's counsel. (R. p. 542, lines 21–25). The typical easement appurtenant does not carry with it the right to improve, maintain, or construct facilities on the subservient property. Clearly, the parties envisioned that the Declarant would retain considerably more interest in and involvement with the Phase I property than a simple, non-exclusive easement for ingress and egress or an ordinary restrictive covenant. A plain language reading of Section 6(b)(9) that provides the Declarant with a sole option over the development of additional common or recreational facilities—facilities that it has also reserved the right to

construct—is consistent with this clearly articulated intent, and the Master-in-Equity erred by mischaracterizing the Appellant's reserved rights within the context of the Deed as a whole.

Equally without foundation is the implication that all or most of Appellant's rights, including its sole option over additional amenities, somehow "expired" on December 31, 2010. Admittedly, certain of the Declarant's rights were extinguished on that date: namely, the right to add additional land to the Regime. But other express easements and rights are not expressly terminated by the expiration of the December 31, 2010 "opt in" period, nor are they otherwise limited by the language of the Master Deed. The Master-in-Equity cannot now reform the Deed by creating and imposing its own expiration dates.

**B. At a minimum, the language of the Master Deed is ambiguous, and the Master erred by making findings as to the intent of the parties and relying on an affidavit not based on personal knowledge.**

At a minimum, the language of the Master Deed is ambiguous on its face, and the Master's ruling was premature in light of the remaining issues of material fact. A court's first task in reviewing a deed is to examine the four corners of the document and determine whether any ambiguities exist on the face of the document. See Penza v. Pendleton Station, LLC, 404 S.C. 198, 205, 743 S.E.2d 850, 853 (Ct. App. 2013). Whether the deed is ambiguous is a question of law. Id. If the court identifies an ambiguity on the face of the deed and finds that it is reasonably susceptible to more than one reasonable interpretation, additional evidence is admissible to establish the intent of the parties. See id.; Proctor, 398 S.C. at 573 n.8, 730 S.E.2d at 363 n.8; Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). The court must review this extrinsic evidence, consider the circumstances surrounding the deed's execution, and make a determination of fact as to the intent of the parties. See Penza, 404 S.C. at 205, 743 S.E.2d at 853 (citing

Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976)). "Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). The Master-in-Equity erroneously failed to identify that the four corners of the Master Deed are, at a minimum, ambiguous as to Ephesian's rights, and further erred by awarding summary judgment despite a material dispute of fact as to the parties' intent.

**1. The Master Deed is, at minimum, ambiguous as to the parties' intent.**

Even if the language of the Master Deed does not clearly grant Ephesian the sole option as to the proposed amenities, the document as a whole is at least ambiguous and plainly does not foreclose such a reading. "A [deed] is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." SC Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (citing Hawkins, 328 S.C. at 592, 493 S.E.2d at 878 (Ct. App. 1997)). "The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." Pee Dee Stores, Inc., 381 S.C. at 241, 672 S.E.2d at 802 (citing Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969)). When an instrument contains ambiguities, or can reasonably be given two or more interpretations, an award of summary judgment is reversible error. See HK New Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007) ("[S]ummary judgment is improper where the motion presents a question as to the construction of a written contract, and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the written instrument.").

An ambiguity can arise when the parties have different interpretations or definitions of individual phrases or clauses or their significance. For example, in HK New Plan Exchange Property Owner I, LLC v. Coker, the court reversed the lower court because the contested terms of a lease amendment were unclear, making summary judgment improper. HK New Plan, 375 S.C. at 24, 649 S.E.2d at 184. The amendment at issue identified a single tenant as the "successor in interest" to the original, two-tenant lease, with a lease term "commencing" on March 1, 2004 and the amendment to be "effective upon execution." Id. at 21, 649 S.E.2d at 182–83. The amendment also purported to supersede any inconsistent terms within the original lease. Id. After the remaining tenant fell behind in rent, the landlord filed suit against both tenants under the original lease and moved for summary judgment. Id. The trial court found that nothing in the amendment expressly released the former tenant, and held him liable for rent obligations until the expiration of the original lease term on February 29, 2004. This Court reversed, concluding that summary judgment was improper because although no express release had been incorporated into the amendment, the document as a whole was ambiguous as to the original tenant's continuing obligations, and because "the parties [had] differing interpretation of the import of the 'effective' and 'commencement' dates." Id. at 24, 649 S.E.2d at 184.

This Court applied similar reasoning in Wallace v. Day, reversing the trial court for awarding summary judgment on an ambiguous default provision in a contract for the sale of real property. Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010). In the event of a default by either party, the contract authorized the other to "elect to seek any remedy provided by law . . . or terminate this Agreement with a five day written notice." Id. at 76, 700 S.E.2d at 450. After the buyers were unable to finalize their loan package on the

designated closing date, the seller authorized a return of their earnest money the following day. Id. at 72, 700 S.E.2d at 448. The day after that, the buyers were prepared to close, but the seller signed a different contract with another purchaser. Id. The buyers ultimately filed suit for breach of contract, and the seller counterclaimed. Id. The seller argued that the buyers had elected to terminate the agreement pursuant to the second option under the default provision, and were therefore required to provide her with five days written notice. Id. at 76, 700 S.E.2d at 450. The Master awarded summary judgment to the buyers, and the seller appealed, arguing that the Master had incorrectly interpreted the default provision. Id. at 74, 770 S.E.2d at 449. This court agreed, disregarding counsel's assertion below that the parties were not arguing that the contract contained an ambiguity in light of their opposing positions on the meaning and effect of the default clause. Id. at 75, 770 S.E.2d at 449. Instead, this Court determined that the default provision was reasonably susceptible to more than one construction, creating a question of fact that should not have been decided on summary judgment. Id. at 76–77, 700 S.E.2d at 450. In doing so, this Court forcefully reaffirmed its duties on review of summary judgment, noting that it has "not only the authority but also the responsibility to recognize an ambiguity in a contract in determining whether the trial court appropriately relied on the contract's language in granting summary judgment." Id. at 75, 770 S.E.2d at 450.

To the extent that the Master Deed now before this Court does not unambiguously grant Ephesian any prior right or exclusive option over the Regime's proposed development, it is at minimum reasonably susceptible to multiple interpretations. As in HK New Plan and Wallace, the parties dispute the legal effect of a specific provision of the Deed, and in particular the intent of the parties in extending the Declarant's rights to amenities that "may

or may not" be in any additional Phases. The Master's interpretation is further undermined by the other provisions of the Deed, which clearly illustrate an intent that the Declarant retain and reserve more than *de minimis* rights over the development and improvement of the Phase I property. The Declarant owns not only all existing water lines and sewers, but also any additional lines installed after the execution of the Master Deed, along with an access easement to maintain or replace them. The Declarant also reserved the right to install any utility or drainage related equipment or facilities, and to create and grant easements for their installation. The Declarant expressly retained the right to improve the property by clearing, landscaping, or "constructing additional parking and common facilities" including "recreational facilities . . . and the like" pertaining to the Association. Undoubtedly, the parties to the Master Deed contemplated that the Declarant would retain at least some authority and control over the Phase I property and its development, including both existing and future facilities, whether or not any additional Phases were ever constructed or added to the Regime. The Master erred by holding as a matter of law that those rights do not extend to the option Ephesian now claims. At a minimum, the terms of the Master Deed are ambiguous, creating a question of fact as to the intent of the parties. Our courts have repeatedly held that it is improper and a reversible error to grant summary judgment under these circumstances.

**2. The materials offered by Respondent are not sufficient evidence to establish the absence of a genuine issue of material fact.**

An ambiguity created by the language of Section 6(b)(9) and the additional reserved rights expressed within the Master Deed creates a question of fact. Penza, 404 S.C. at 205, 743 S.E.2d at 853. To the extent that it was appropriate for the Master to make a finding of fact to resolve the ambiguity, the Order correctly acknowledges the court's obligation to

resolve all facts and inferences in the light most favorable to the non-moving party. (R. p. 13). Somewhat overlooked in the Order, however, is the threshold requirement that a movant who bears the burden of proof on an issue put forward evidence clearly demonstrating the absence of a genuine dispute of material fact.[2] See Rule 56(c), SCRCP; Griffin Plumbing & Heating, 351 S.C. at 470, 570 S.E.2d at 197. The Order does not clearly state whether or not the Deed contains an ambiguity, instead making a conclusory finding that whatever rights Appellant may have are not exclusive, and that "nothing in the referenced provision provides the Declarant . . . the exclusive right to construct, approve, authorize, interfere with, supervise or veto amenities in Phase I," apparently in reliance on the Master Deed's "plain meaning." (R. p. 18). However, other passages of the Order appear to make findings of fact as to the parties' intent, rely heavily on Appellant's alleged "failure to rebut," and offer a determination as to the purported "unconscionability" of the right asserted. (R. p. 13, 16). To the extent that these apparent conclusions rely on findings of fact, those findings are without support in the record and do not resolve the ambiguity.

The court's primary object in resolving a facial ambiguity is to determine the intent of the parties by considering external evidence beyond the four corners of the document. S.C. Dep't of Natural Res., 345 S.C. at 623, 550 S.E.2d at 302. At the summary judgment stage, any external evidence submitted cannot be considered by the court unless those materials would be admissible into evidence. See Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). Any affidavit submitted in support of a motion for summary judgment must be relevant and germane to the disputed issue so as to create a genuine issue for trial, must be based on the affiant's personal knowledge, and must show that the affiant is

[2] Appellant disputes the Master's finding that it "submitted no evidence to avoid summary judgment," as the Master Deed itself is the best evidence of the issue before the court.

"competent to testify to the matters stated therein." See Rule 56(e), SCRCP; Rule 401, SCRE. "[U]ltimate or conclusory facts and conclusions of law . . . cannot be utilized on a summary judgment motion." 10B Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 2738 (3d ed. 1998) (quoted with approval in Dawkins v. Fields, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) and H & H of Johnston, LLC v. Old Republic Nat'l Title Ins. Co., 405 S.C. 469, 477, 748 S.E.2d 72, 76 (Ct. App. 2013)). "Allegations made upon information and belief do not meet the 'personal knowledge' requirements of Rule 56(e)." Dawkins v. Fields, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003). Summary judgment cannot be granted on evidence that falls short of these minimal requirements.

In support of its motion for partial summary judgment, Respondent submitted the affidavit of William J. Eisenman, who attests that he has served as the President of Edgewater on Broad Creek Owners Association, Inc., since approximately March of 2011. (R. p. 520). Few, if any, of Mr. Eisenman's statements are relevant to the intent of the parties, and those that arguably could be are not based on personal knowledge. Instead, Mr. Eisenman avers that "Declarant Edgewater Broad Creek, L.P. initially described the Regime as a multi-phase project in which additional land parcel(s) were intended to be subjected to the existing horizontal property regime." (R. p. 520). There is no further explanation as to how or why Mr. Eisenman, as the President of the Association, holds personal knowledge as to what Broad Creek "intended" or is competent to testify on the overarching scheme of development or contemplated relationship or reservation of rights as between the Declarant and the Phase I property. Nothing in Mr. Eisenman's affidavit lends any support to the Master's findings regarding the intentions of either party in effectuating the Master Deed.

Instead, the Master concluded—without any evidence at all—that by including Section 6(9)(b), "[t]he Declarant essentially left itself a way out of any amenity shown in any sales or promotional literature, by disclaiming any obligation to so construct such an amenity." (R. p. 18). This presumption is unsupported by the record and appears to have been based largely on mere speculation by Respondent's counsel.[3] In carrying out its paramount duty to determine the intent of the parties, the court made findings on nonexistent or incompetent evidence and conclusory statements inadequate to support an award of summary judgment.

The Master's Order touches on number of other issues, none of which resolve any ambiguity in the Deed language or establish the absence of an issue of fact. Considerable time is expended in detailing the chain of events surrounding the Town of Hilton Head's temporary refusal to issue a permit for the proposed amenities pending resolution of this dispute. None of these proceedings have any bearing on the issue at hand—the interpretation of the Master Deed or the intent of the parties—and in any event are not independent sustaining grounds for affirming the Master's Order. The Master also describes the unit owners of the Association as "comparatively passive observers to the events that caused their neighbor to be [Appellant], and bear little if any responsibility for the basic circumstances." The Association was represented by counsel throughout the bankruptcy proceedings, and in any event it's unclear what import was or could have been attributed to this circumstance. The Master's purported findings relating to unconscionability or the Horizontal Property Act are likewise without support in the record, and premature at the summary judgment stage.

[3] At argument, counsel for Respondent described Section 6(9)(b) as follows: "I mean quite honestly that is a CYA language that the Declarant reserved in itself discretion as to what if any additional amenities might be built by it. They left themselves a way out of any amenity that they may have put out in promotional literature by disclaiming an obligation to construct further amenities." (R. p. 555, lines 10–19). Counsel's argument as to the intent and effect of Section 6(9)(b) is not competent evidence.

Respondent and the Master-in-Equity also rely on Butler v. Sea Pines Plantation Co., 282 S.C. 113, 317 S.E.2d 464 (Ct. App. 1984), for the proposition that "restrictive covenants" must be construed narrowly. (R. p. 560, line 24–p. 562, line 9). In Sea Pines, the plaintiff sought to enforce an "implied easement . . . created by representations and unrecorded documents" to preclude any development of a two-square-mile tract. Sea Pines, 282 S.C. at 120–122, 317 S.E.2d at 468–69. To the extent that Sea Pines even applies, the court ultimately issued its decision as to the existence and scope of the claimed easement in light of its jurisdiction "to find facts in accordance with its view of the preponderance of evidence." Id. In relying on Sea Pines, the Master's Order acknowledges that the construction of a restrictive covenant is premised on findings of fact—facts that are both material and disputed in this case and therefore not suitable for summary judgment.

The material facts are plainly in dispute, and the Master committed a reversible error by neglecting to effectuate the intent of the parties, improperly weighing evidence, and adjudicating the import and effect of the Deed's provisions without competent support in the record.

## II. The Master's Order is overbroad and improperly restricts Appellant's rights by addressing matters not before the Court.

The language of the Order extends well beyond the issues raised by the Motion and touches on other matters that are not material to resolving Respondent's motion, but potentially limit or restrict Ephesian's other rights and jeopardize the viability of other claims and counterclaims that are still pending. Specifically, the Master's Order mischaracterizes Appellant's position as an attempt to "turn back the clock" and claim "separate and distinct developer rights . . . despite the fact that no such reservation of rights existed." The Order goes so far as to reference Appellant's Answer and Counterclaim—pleadings that plainly

contain additional matters unrelated to the discrete issues before the Master on Respondent's Motion for Partial Summary judgment—and offers conclusory findings that other powers and rights claimed by the Appellant may not exist. These issues were not before the Master and are not material to the relief actually sought. This gratuitous language hints at key questions central to disputes that were not purported to be resolved by this Order, and should be vacated to prevent prejudice to the Appellant on the remaining claims.

A reviewing court may vacate dicta[4] that resolves issues beyond the scope of relief requested or is likely to have unintended consequences. See Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 428, 746 S.E.2d 35, 39 (2013) (Pleicones, J., dissenting). In Advance International, Inc. v. North Carolina National Bank of South Carolina, the reviewing court considered whether the claims of a mortgage-holder against another, senior mortgagee should be dismissed because they were not raised as mandatory counterclaims during the preceding foreclosure action on the mortgaged property. Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266, 446 S.E.2d 580 (Ct. App. 1994). As part of the order, the court addressed the senior lender's argument that the claims being brought against it—fraud, negligence, and unfair trade practices—effectively constituted the equitable defenses of unclean hands and equitable subordination. Id. at 270, 466 S.E.2d 582–83. Ultimately holding that the pending claims were not barred, the court evaluated whether and how the equitable defenses would have affected the outcome of the foreclosure proceedings. Id. The South Carolina Supreme Court, in an especially succinct opinion, vacated the opinion "to the extent it decides in dicta

[4] While the language of a trial court order may not technically qualify as "dicta," in this case the Master's Order has a binding precedential effect comparable to that of an appellate court opinion. See First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("[An] unchallenged ruling, right or wrong, is the law of the case.").

issues related to the doctrine of unclean hands and equitable subordination." Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 320 S.C. 532, 533, 466 S.E.2d 367, 367 (1996).

Respondent Edgewater initiated this litigation with a declaratory judgment action, requesting that the court issue an Order making no fewer than twelve discrete findings as to the rights of the parties over the Phase I property and requesting additional relief related to a structure located on Ephesian's property. (R. pp. 37–39). In response, Appellant Ephesian brought a number of counterclaims, including its own declaratory judgment action asking the court to make four additional findings relating to the parties' rights and powers as to the property, including density rights previously held by the developer. (R. p. 149). Of the sixteen enumerated, individual requests for declaratory relief as to the myriad rights, duties, and powers of the parties, Respondent's Motion for Partial Summary Judgment requests the determination as to only five: (a) Edgewater's right to "construct a swimming pool and other common or recreational facilities on its land . . . free from interference, supervision or veto by [Ephesian]; (b) the right to improve, sell, or encumber its remaining common elements "free from interference, supervision or veto by [Ephesian]; (c) a finding that Ephesian's right to use Edgewater's clubhouse as a sales office has extinguished; (d) a finding that Ephesian's right to relocate Edgewater's ingress and egress has likewise extinguished; and (e) a finding that Ephesian's right of ingress and egress is extinguished "except to the extent that the Court determines that no other ingress and egress exists."[5] (R. pp. 188–89).

Although the Motion for Partial Summary judgment requests resolution of only a handful of the numerous discrete declaratory rights and other various related claims at stake in this action, the Master's Order extends well beyond this limited review and touches on

[5] The Order makes no specific finding on this issue, except that any such easement, to the extent that it exists, is non-exclusive. (R. p. 7).

issues with no bearing on the specific questions before it. The determination of the specific rights raised in the motion hinges on the interpretation of the Master Deed and individual provisions therein. The key issues before the Master were limited only to Ephesian's asserted claim to certain individual, specified powers and rights as expressly reserved in the Deed: the right to authorize construction of amenities and recreational facilities; the right to use the Edgewater clubhouse as a sales office; and the right to relocate the Edgewater ingress and egress. The parties argued the existence and scope of these specific rights as reserved solely in the language of the Master Deed.

Respondent Edgewater's counsel acknowledged that the arguments and issues then before the Master were "with regard to the interpretation of the language, whether it actually does or does not do what the [Appellants] suggest that the language does." (R. p. 543, lines 13–21). Counsel for Ephesian affirmed that the existence and scope of any rights not expressly reserved by the Declarant in the Master Deed were not before the court because they did not affect the issues set forth in Edgewater's Motion:

> MR. COOKE: And now as I glance through the Plaintiff's Memorandum they are suggesting that we are arguing that we acquired more rights than the Declarant had, and for the purposes of this motion today, no, we are not. We are asking for the preservation of the same rights that the Declarant possessed in this property.
>
> (R. p. 547, lines 7–15).

Appellant's arguments as to the specific rights at issue arose entirely out of the language of the Master Deed, relying only on various written provisions within the document itself. (R. p. 547, line 16–p. 551, line 10). Respondent's counsel also admitted that any claimed rights

arising from any other source than those expressly reserved by the Declarant in the Master Deed were not at issue:

> MR. NEWTON: Thank you, Judge. I mean based on Mr. Cooke's summary, perhaps we can focus on a couple of points. For purposes of this discussion I understand that we are not talking about more expansive rights than that which the Declarant had at the time or that he had that Ephesian now claims to have.
>
> (R. p. 551, line 22–p. 552, line 5).

Clearly, the only issue before the Master was the interpretation and construction of the written instruments before him. However, even though both parties acknowledged that the inquiry was limited to the terms of the Deed itself, the Master's expansive Order touches on other issues that are, by all accounts, gratuitous and irrelevant to the resolution of Respondent's Motion. For example, Paragraph 4 of the Master's Order draws sweeping conclusions regarding the existence of any and all rights not expressly reserved by the Deed, examines case law involving the assignment of development rights, mischaracterizes Ephesian's position in matters not actually at issue as an attempt to "turn back the clock" having "no basis," and otherwise purports to broadly limit other rights claimed by Ephesian not under review. (R. pp. 14–15). In Paragraph 5, the Master explains that the Bankruptcy Court Order conveyed all reservations, rights and easements, and developer rights of Broad Creek, but identifies the "reservations, rights, and easements" conveyed as limited to five individual rights expressed in the Master Deed. (R. pp. 16–17).

In addition to tacitly restricting Appellant's rights—either by narrowly defining those rights or by broadly concluding that they do not exist, the Order contains lengthy and gratuitous deliberations on matters that are conceded to be unripe and not presently at issue. After making a specific finding that "some provisions of the Master Deed could be deemed

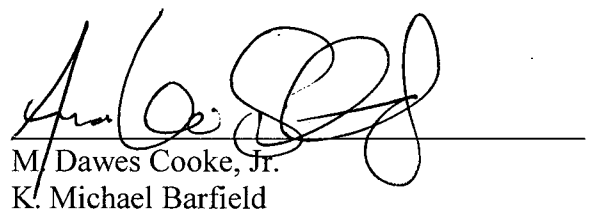
to conflict with public policy" and that "Defendant's assertion of rights contravenes the Horizontal Property Act," the Master admits that "these issues are not ripe for determination." (R. pp. 12, 19–20). Elsewhere, the Master makes a conclusory statement that "there was no notice to purchasers of units" of the rights reserved in the Master Deed and speculates that this "could form a basis for finding some reservations of rights of the Master Deed unconscionable and unenforceable," before once again acknowledging that the issue is "not ripe for determination." (R. p. 21). The Master's halfhearted attempt to cushion these unfounded and irrelevant statements by stopping just short of a final ruling does not unwind the potential prejudice to Appellant if an Order gratuitously and speculatively asserting that the Master Deed violates the Horizontal Property Act, or that purchasers of the units had no notice of Appellant's rights, is allowed to stand.

This Order does not conclude this case. Well over half of the issues raised between the parties remain pending. Both Appellant and Respondent acknowledged that the scope of the Master's duty on partial summary judgment was to determine whether the language of the Master Deed grants Ephesian certain enumerated rights, or restricts Edgewater's authority to construct certain amenities and facilities without prior review or approval. But this Order's language reaches well beyond that limited inquiry, narrowly defining Ephesian's rights, offering gratuitous findings and conclusions that may impact the remaining claims, and making bold and unfounded conclusory assertions as to issues that, admittedly, were not before the Master and are not ripe for review. Appellant claims certain development rights, including density rights, that could be significantly compromised by the Master's overreaching language. To reduce the risk of prejudice to Appellant and in the interest of

justice, this Court can and should vacate those portions of the Order that are not part of the doctrine of the decision.

## CONCLUSION

For the foregoing reasons, Appellant Ephesian Ventures, LLC, respectfully requests that this Court reverse the Master-in-Equity's Orders granting partial summary judgment and denying Appellant's Rule 59(e) Motion to Alter or Amend, or in the alternative for an order vacating those portions of the Master's Order that are not material to the doctrine of the case.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

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Appellate Case No. 2016-001789

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The Edgewater on Broad Creek Owners Association, Inc. and the Council of Co-Owners of the Edgewater on Broad Creek Horizontal Property Regine Phase I, .....Plaintiffs

Of which The Edgewater on Broad Creek Owners Association, Inc. is the .....Respondent

v.

Ephesian Ventures, LLC.....Appellant.

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RULE 211 CERTIFICATE

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I hereby certify that this Appellant's Final Brief complies with Rule 211(b), S.C.A.C.R.

11/7/2018
Date

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