THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2023-000451

Case No. 2019-CP-26-06550

Marshall Griffin, ...Respondent,

v.

Tony Giovino, Carter Tackett, Richard Aquino,
Bill West, and Shoreham Towers Homeowners Association, ... Appellants.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. It was an error of law and unduly prejudicial to permit Respondent to introduce any evidence or make any reference regarding the Temporary Restraining Order.

II. The question of the roof terrace, tenth-floor elevator lobby, and planters as common elements was a question of law that should not have been submitted to the jury, for the Master Deed identifies those areas as common.

III. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract claim for no evidence existed that any term in the Master Deed was breached.

IV. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract Accompanied by Fraudulent Act claim for there was no breach of contract, fraudulent act, or fraudulent intent.

V. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Conversion claim for the Appellants did not deprive the Respondent of owning any property.

VI. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Civil Conspiracy claim for all Appellants' actions were consistent with the Master Deed, done as directors, and followed advice of professionals.

VII. The circuit court abused its discretion by granting Respondent's Motion to Amend to include a cause of action for Acquiescence and erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Acquiescence claim for this is not the proper case for such a claim, Respondent cannot use estoppel as a claim, and such a claim, if applied to these facts, would be barred by South Carolina Code Section 27-31-70.

VIII. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to the individual Appellants' immunity for each acted within their scope as directors.

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XIV. The circuit court abused its discretion by permitting Respondent and his counsel to refer to the roof terrace as a balcony.

INTRODUCTION

Can a jury, without the approval of all condominium unit owners, limit the use of a common element to only the owner of one condominium unit? That is what happened in this case, and if this jury verdict is permitted to stand, it will mean that juries, instead of the South Carolina Horizontal Property Act and Master Deeds consistent with the Act, will dictate what are common elements.

This case centers around a single unit owner, who, having served as the Appellant Association president for over a decade, and fully knowing the duties and responsibilities of an association's board, disagreed with the Board's conclusion that the roof was a common element. The point of contention is the roof area, identified in the building plans as the "roof terrace" which surrounds Respondent's unit. When advised that this roof area was being used exclusively by Respondent, not as a common element, the Board set out to perform its duties. When the concern was brought, the Board hired and followed the advice of legal counsel; the Board reviewed the Association's governing documents; the Board hired and followed the advice of a safety consultant; the Board hired a surveyor to determine whether this rooftop area was included within the square footage specified in the Master Deed for the rooftop unit; and the Board hired and followed the advice of the roofing contractor.

The Respondent, who never paid assessments to the Association for this rooftop area, who never paid Horry County taxes for this rooftop area, and who never insured this rooftop area, disagreed that the rooftop area was common and sued not only the Association, but also every individual board member in his personal capacity. The verdict was based on the arguments of Respondent's counsel, who, in excess of thirty-five times, referenced and elicited highly prejudicial testimony regarding the Temporary Restraining Order, which improperly influenced

the jury in its findings against Appellants, including its award of punitive damages. For the reasons set forth below, this verdict cannot stand.

STATEMENT OF THE CASE

Shoreham Towers is a horizontal property regime ("Shoreham") consisting of forty condominium units with ten levels and is located on Ocean Boulevard in North Myrtle Beach, South Carolina. (Pl.'s Ex. 5; Tr. 449:9-10.) The Shoreham Towers Association ("the Association") is a South Carolina non-profit corporation organized for the purpose of administering and governing Shoreham. Shoreham Towers was constructed in 1982, and the Master Deed ("Master Deed") was recorded on June 22, 1983. (Pl.'s Ex. 5.) The Master Deed has never been amended. (Tr. 164:13-15.) The highest unit, known as the Rooftop Penthouse, is located on the roof of the building. (Pl.'s Ex. 5.)

Respondent Marshall Griffin ("Respondent"), along with his wife, are the owners of the Rooftop Penthouse. (Defs.' Ex. 2; Tr. 156:2-6.) However, Respondent's wife was not a party to the action. (Compl., Oct. 14, 2019.) On January 21, 1994, Respondent purchased the Penthouse from his uncle's trust for $233,500.00. (Defs.' Ex. 2; Tr. 155:3-13.) In his Deed, the property conveyed to the Respondent is classified as a "dwelling." (Defs.' Ex. 2; Tr. 155:22—156:6.) The Rooftop Penthouse is surrounded by an area of approximately 2,000 square feet, which is depicted on Shoreham's building plans as the "Roof Terrace." (Defs.' Ex. 1; Tr. 599:25—600:4.) Access to the Shoreham roof is by two stairwells—which Respondent conceded are common elements. (Tr. 199:13-18.) Located in the middle of the roof is Respondent's unit, and on the sides of the roof are HVAC units for all dwellings. (Defs.' Ex. 1; Defs.' Ex. 39; Tr. 77:2-5; Tr. 597:14-19.) Planters are also located around the edge of the roof, which have been the subject of controversy for many years. (Tr. 76:8-16; 606:4—607:3.) For instance, in 1997, the Association's Board of Directors ("the Board") voted to cement over the planters because the membranes were leaking and causing

leaks in the building. (Tr. 95:13-24; 490:13—491:5.) In response, Respondent initiated a lawsuit against the Association, asserting the planters were common and were required to have plants per the Building Plans; as a result of that litigation, the Association reached an agreement with Respondent that the planters would not be cemented over, but Respondent would be responsible for the plants and the Association for the planters. (Tr. 95:25—96:23; Defs.' Ex. 13.)

Since the construction of Shoreham, the Association has maintained the roof with the last major repair being in the spring 2019 when a new roof coating was installed at a cost in excess of $100,000.00. (Tr. 180:18-21; 181:14-19; 455:10-12.) In the Board's January 19, 2019 meeting, each Board member, including Respondent, voted to approve Thompson Roofing, Inc.'s revised proposal for repairing the roof membrane. (Tr. 474:10-15.) At the same meeting, the Board also unanimously voted to approve a special assessment to the unit owners to obtain $75,000.00 for partial funding the roof project. (Tr. 473:11—475:23.) During this roof repair, the roofing contractor removed turtle tile, which, years before, the Respondent had installed on top of the roof membrane, which he installed without approval from the Board. (Tr. 182:19-21; 183:3-5.) The roofing contractor advised that the turtle tile not be placed back on the roof due to the fact that it gathered debris, clogged drains, and could negate the roof membrane warranty. (Tr. 551:6—552:6; 553:18—554:10; 556:14-18; 561:15-22; Defs.' Ex. 30.) Based on the advice of the roofing contractor, turtle tile was not returned to the roof; rather it was delivered to the roofing contractor's business location where it remained for over four years. (Tr. 556:10-18; 559:24—560:8.) Many times, Respondent was asked to pick up the turtle tile. (Tr. 560:7-11; 562:2-7.) Respondent never picked up the turtle tile but instead sued, seeking approximately $20,000.00 for the loss of the tile. (Tr. 560:7-8.)

While president of the Board, Respondent converted the tenth-floor elevator lobby area, designated in the Master Deed as a common element, to his private foyer to make it more "aesthetically pleasing" to Respondent's renters. (Tr. 170:11—171:1; 171:18-21.) Respondent never obtained permission for this construction. (Tr. 171:7-17.) Respondent posted signs within the stairwells restricting access to the tenth floor, which he also did without the permission of the Board. (Tr. 78:16-22; 79:8-10; 199:19—200:2.)

Respondent's primary use of his Penthouse is for vacation rental. (Tr. 71:7-9.) Prior to 2018, Respondent placed outside furniture, similar to pool-type lounge furniture, on the roof. (Tr. 198:1-9.) In 2018, Respondent replaced the low-back chairs with high-back chairs and a high-top table without the approval of the Board. (Tr. 198:10-12, 22-24; 199:4-6.) Subsequently, his renters often positioned the high-back chairs and table next to the roof's edge, and renters occasionally sat on the roof parapet. (Tr. 198:25—199:12.)

On October 1, 2018, Appellant Richard Aquino expressed concerns regarding Respondent's exclusive use of the roof.1 (Pl.'s Ex. 12.) In response to Mr. Aquino's inquiries that the roof terrace was a common element, the Board subsequently asked Respondent to respond to the items set forth in Mr. Aquino's email, which Respondent never did. (Tr. 206:25—207:10; 470:18—471:2.) Sometime in early 2019, the Board, at Respondent's request, met with Respondent to view his unit while the Board attempted to determine whether the roof terrace was

[1] At the time Mr. Aquino sent this initial email, he was not a member of the Board. (Tr. 206:9-10.) The individual Appellants, Tony Giovino, Bill West, Richard Aquino, and Carter Tackett, along with Respondent, served as board members of the Association's Board of Directors in 2019. Respondent testified he served as a Board member for approximately fifteen or sixteen years. (Tr. 91:15-17.) During that time, he served as the President from approximately 2004 to 2016. (Tr. 171:22-24.)

common. (Tr. 639:19—640:11.) Following that tour, the Board concluded the area was likely a common element, and Respondent told the Board he was "going to lawyer up." (Tr. 640:12-21.)

The Board, during at a meeting at which Respondent was present, also passed a motion for Mr. Tackett, a Board member, to retain legal counsel. (Tr. 472:3-25.) The Board hired Roger Roy, a real estate attorney practicing in Myrtle Beach, to provide legal guidance. (Tr. 468:13—469:6.) Significantly, both Mr. Aquino and Respondent abstained from the Board discussion regarding the legal advice it received as well as the voting on matters relating to the roof terrace. (Tr. 472:17-25.)

Mr. Roy provided his legal opinion as to whether the roof terrace was a common element in the spring of 2019. (Tr. 476:20—477:9.) Specifically, by letter date March 19, 2019 to the Mr. Tackett, Mr. Roy expressed concern about the roof terrace becoming a liability to the Association, and Mr. Roy encouraged the Board to create rules and regulations for that area. (Defs.' Ex. 23.) Sometime thereafter, the Board held a telephone conference with Mr. Roy to discuss proposed rules and regulations for the roof terrace, and upon conferring with Mr. Roy, the Board asked Respondent to not join the call. (Tr. 115:3-14.) Then in May 2019, the Board met to discuss rules and regulations for the roof terrace. (Tr. 476:5-10.) Specifically, Bill West, Carter Tackett, and Tony Giovino met, without the participation of Mr. Aquino or Respondent, to draft rules with the "guidance and okay of Roger Roy." (Tr. 476:13-17; 486:9-22.) These board members asked Mr. Roy to approve the draft rules, and upon receiving approval, the Board implemented rules and regulations ("the Rules") for the roof terrace. (Tr. 478:9-15.)[2] Initially, Respondent, through his

[2] The Master Deed provides that the "ASSOCIATION shall have . . . the authority and power to enforce the provisions of this Master Deed . . . and to adopt, promulgate and enforce such rules and regulations governing the use of the DWELLINGS and COMMON ELEMENTS, as the Board of Directors of the ASSOCIATION may deem to be in the best interests of the CONDOMINIUM." (Pl.'s Ex. 5.)

attorney by letter dated May 31, 2019, proposed alternative rules that stated the roof terrace was to be exclusively used by Respondent or his guests. (Defs.' Ex. 27.) The Association did not accept those proposed rules. (Defs.' Ex. 52.) As a result of the Rules' passage, Respondent filed suit against the Association and his other fellow board members on October 14, 2019, alleging causes of action for breach of contract, breach of contract accompanied by fraudulent act, unjust enrichment/quantum meruit, conversion, and civil conspiracy. (Compl., Oct. 14, 2019.)

Due to the Board's concerns about liability in a common area, in December 2019, the Board hired a safety consultant. (Tr. 491:24—492:16; Pl.'s Ex. 19.) The consultant issued an opinion that the high-back chairs were a hazard and all roof furnishing should be kept away from the rooftop edges. (Tr. 492:17—493:7; Pl.'s Ex. 19.) As a result, the Board asked Respondent to move the high-back chairs more than once, but Respondent did not do so. (Tr. 495:11-16; 496:3-7.) Subsequently, the Board replaced the Respondent's high-back furnishings on the roof with furnishings similar to those used for the ground floor pool. (Tr. 201:7-16.) In January 2020, Respondent filed a motion for a temporary restraining order, which the circuit court subsequently denied due to Respondent's failure to support the motion by affidavit or verified complaint. (Pl.'s Mot. for TRO; Ct. Order Den. Pl.'s Mot.) In June 2020, Respondent again filed a motion for a temporary restraining order seeking the same relief. (Pl.'s Mot. for TRO.) The circuit court issued a temporary injunction, requiring the Appellants to return the Respondent's high-back furnishings to the roof and providing Respondent exclusive use of the roof terrace during the litigation. (Ct. Order Grant. Pl.'s Mot. for TRO.)

THE MASTER DEED

The Shoreham Master Deed sets out that there are two components to the regime: Dwellings and Common Elements. It provides that Common Elements are all of the real property,

improvements and facilities, other than the Dwellings, and it further incorporates, by direct reference, the definitions set forth in South Carolina's Horizontal Property Act. (Pl.'s Ex. 5.) The Master Deed states that common elements are subject to a "perpetual non-exclusive easement in favor of all the owners of dwellings in the condominium for their use and the use of their immediate families, guests, and invitees…" (Pl.'s Ex. 5.) In other words, all forty unit owners of Shoreham Towers possess an undivided ownership interest in all of the common areas within the regime. (Tr. 174:15-22.) As Respondent conceded, the Master Deed does not create any right of privacy in common elements. (Tr. 174:4-17.) Respondent's Deed to his Shoreham unit states that Respondent and his wife were deeded a "Dwelling" and that they own an undivided interest in the common elements. Specifically, Respondent's "Dwelling" consists of 2,630 square feet. (Tr. 176:2-5.)

The property description in the Master Deed, identified as Exhibit A, states that the forty dwellings are all located in a single building consisting of nine habitable floors, with floor two being the first habitable floor. Exhibit A further states that "one dwelling having a designation as 'rooftop penthouse' is on the tenth floor. As to the unit's size, the Master Deed, in Exhibit A, provides, "[T]he 'Rooftop Penthouse dwelling' on the 10th floor contains approximately 2,630 sq. feet."

In the fourth paragraph in Exhibit A, the first sentence states:

> Access to all floors is provided by both stairways and elevators. . . . [A]ccess to the single 'rooftop penthouse' dwelling on the 10th floor is provided from an elevator lobby *which is a common area* and stairways to the rooftop area, *which is also common*. The rooftop area contains planters which are common.

(Pl.'s Ex. 5 (Emphasis added.).) At trial, Respondent took the position that the roof terrace is a balcony. (Tr. 160:9-14.) He relied on this interpretation by pointing to the language in the second to last paragraph in Exhibit A to the Master Deed, which states that "all balconies adjacent to each dwelling, including the railing attached thereto, are part of that dwelling and not common areas . .

. .” (Pl.’s Ex. 5.) However, the recorded building plans (“Building Plans”), which are incorporated by reference in Exhibit A of the Master Deed, identifies thirty-nine dwellings as having balconies. (Defs.’ Ex. 1.) There is nothing in the Master Deed, including Exhibit A, that states the rooftop terrace is a balcony nor is there anything that designates the rooftop unit as having a balcony. Moreover, the Master Deed does not provide that the roof terrace or tenth-floor elevator lobby may be used solely by occupants of the Rooftop Penthouse. (Tr. 195:9-19.)

As to the tenth-floor elevator lobby, a common element which Respondent converted for his own use, the language in the Master Deed identifies the elevator lobby as a common area, as do the recorded Building Plans. (Defs.’ Exs. 1, 5.) Respondent testified that he was unsure whether the elevator lobby he converted into a private foyer was included in his 2,630 square feet of his dwelling, although the Building Plans show the lobby as not being part of the Penthouse foyer. (Tr. 167:3-25; Defs.’ Ex. 1.) In addition to converting the elevator lobby to his private use, Respondent also had a privacy key to this elevator so that only the occupants of the tenth floor can use this elevator to access the tenth floor. (Tr. 140:5-8; 170:11—171:6.) However, Respondent later testified on direct and cross-examination that the following areas are common or are otherwise not exclusively owned by him:

- The roof (Tr. 180:10-12; 192:13-17);
- The portion of the roof where the HVAC units are located (188:7-14);
- The planters (Tr. 96:24—97:1; 150:12-14; 189:12-17; 192:10-15);
- The roof and planter walls (Tr. 97:15-17); and
- The two stairwells that lead to the tenth floor (Tr. 199:13-18).

TRIAL

The trial started on January 30, 2023 and concluded February 3, 2023. Before the actual trial started, the circuit court heard Appellants’ Motions in Limine, Respondent’s Motion in Limine, and Respondent’s Motion to Amend. On January 24, 2023, less than a week prior to the

start of trial, Respondent filed a motion to amend his complaint to add causes of action for adverse possession, declaratory judgment, and acquiescence. (Pl.'s Mot. to Amend; Pl.'s Am. Compl.) Over the objection of Appellants, the circuit court permitted Respondent to add a claim of acquiescence. (Tr. 440:15—444:7.) Respondent dismissed his claim for unjust enrichment/quantum meruit. (Tr. 427:24—428:6.) Subsequently, the circuit court ruled the only cause of action that applied to the individual Appellants was the civil conspiracy claim. Over the objection of Appellants, the causes of action for breach of contract, breach of contract accompanied by fraudulent act, conversion, civil conspiracy, and acquiescence were submitted to the jury. (Tr. 683:19—701:24.)

The jury returned a verdict finding the roof terrace, elevator lobby, and planters were not common, found against the Association, found against the individual Appellants for civil conspiracy, found the individual Appellants acted willfully and wantonly, and awarded $20,000.00 in actual damages and $200,000.00 in punitive damages. (Jury Verdict.) The jury then completed a special verdict form, dividing the punitive damages among the individual Appellants in the following way: 67% against Richard Aquino; 11% against Tony Giovino; 11% against Bill West; and 11% against Carter Tackett. (Special Verdict Form.) After evaluating the *Gamble* factors, the circuit court reduced the punitive damage award to $160,000.00. (Tr. 799:5—801:25.)

At the close of Respondent's case and at the close of all evidence, Appellants made motions for directed verdict. (Tr. 415:20—445:4; 683:19—701:24.) Following the trial, on February 13, 2023, Appellants filed a motion for judgment notwithstanding the verdict, motion for a new trial remittitur, motion for new trial absolute, and motion for new trial. Appellants supplemented these post-trial motions with an additional ground the same day. On March 9, 2023, the circuit court entered an order denying Appellants' motions. (Mar. 9, 2023 Order.) On March

13, 2023, the circuit court amended its order to correct a typographical error regarding the filing date of Appellants' supplemental post-trial motions. (Mar. 13, 2023 Am. Order.) Appellants filed and served their Notice of Appeal on March 16, 2023.

STANDARD OF REVIEW

I. Evidence of the Temporary Restraining Order and Reference to the Roof Terrace as a "Balcony"

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reserved on appeal absent an abuse of discretion." *Allegro, Inc. v. Scully*, 409 S.C. 392, 407, 762 S.E.2d 54, 62 (Ct. App. 2014) (citations and internal quotation marks omitted), *rev'd on other grounds*, 418 S.C. 24, 791 S.E.2d 140 (2016). A court's abuse of discretion occurs when a ruling is based on an error of law. *Id*. When both an error of the ruling and prejudice—which is the "reasonable probability that the jury's verdict was influenced by the challenged evidence"—exist, reversal is warranted. *Id*.

II. Interpretation of the Master Deed

When the disposition of a case depends largely on the interpretation of a deed, the matter is an equitable one. *Heritage Fed. Sav. & Loan v. Eagle Lake & Golf Condos.*, 318 S.C. 535, 539, 458 S.E.2d 561, 564 (Ct. App. 1995) (citations omitted). The construction of a clear and unambiguous deed is a question or law for the court. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987) (citation omitted).

III. Denial of Motions for Directed Verdict and Judgment Notwithstanding the Verdict

An appellate court should reverse the denial of a motion for directed verdict where there is no evidence to support the rulings, where the jury could not reasonably find in favor of the party opposing the motion, or where the rulings are controlled by an error of law. *Broyhill v. Resol. Mgmt. Consultants, Inc.*, 401 S.C. 466, 472, 736 S.E.2d 867, 870 (Ct. App. 2012).

IV. Motion to Amend Complaint

The denial of a motion to amend under Rule 15, SCRCP is within the sound discretion of the circuit court. *Oulla v. Velazques*, 427 S.C. 428, 435, 831 S.E.2d 450, 453 (Ct. App. 2019). A ruling on a motion to amend will be overturned when there exists an abuse of discretion or when manifest injustice has occurred. *Id.* at 435, 831 S.E.2d at 453 (citation omitted). "An abuse of discretion occurs when the [circuit court]'s ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Id*. at 435, 831 S.E.2d at 453 (quoting *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)) (internal quotation marks omitted).

ARGUMENT

I. Repeated references to the temporary restraining order in the presence of the jury was inherently prejudicial and constituted an error of law.

The purpose of a temporary injunction is to preserve the status quo of an action and prevent irreparable harm pending a hearing or trial on the merits. *Allegro*, 409 S.C. at 409, 762 S.E.2d at 63 (citations omitted). It is well settled in South Carolina that "[a] temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without *reference* to the temporary injunction." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (citing *Alston v. Limehouse*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901)) (emphasis added).

In *Allegro, Inc. v. Scully*, the Court of Appeals of South Carolina held the admission of a preliminary injunction order into evidence during a jury trial was inherently prejudicial and constituted an abuse of discretion. 409 S.C. at 409, 762 S.E.2d at 63. Specifically, the Court provided:

> It is hard for this court to determine an instance where admission of a preliminary injunction order into the trial record would not be highly

> prejudicial. . . . We believe admitting this order had a high possibility of influencing the jury due to its numerous findings of fact and statements concluding defendants' liability for the alleged charges.

Id. Here, although Respondent did not introduce the Temporary Restraining Order ("the Order") into evidence as an exhibit, Respondent repeatedly mentioned and questioned witnesses about a judge ordering Appellants to put Respondent's furniture back on the terrace. Despite his acknowledgement during Appellants' Motion in Limine that he could not "beat [the Appellants] over the head" with reference to the Temporary Restraining Order, Respondent's counsel referenced the Order over thirty-five times[3] in front of the jury. For example, during Respondent's cross-examination of Appellant Bill West, Respondent's counsel asked the following:

> Q: We had to go to court to make you put [the keylock] back; you remember that?
> A: Yes.
> Q: And the only reason why it is back now is because we had to get a restraining order to put it back; is that correct?
> A: Correct.
> Q: Have you ever had to deal with restraining orders before?
> A: This is my first time.
> Q: The only reason there is a keylock in that elevator is because a judge here in Horry County made your board put it back the way it has been?
> A: Correct.

(Tr. 503:6-19.) Not only were the references to the Order irrelevant as they did not support any element of damages or cause of action alleged, but the repeated references were unfairly and inherently prejudicial. Respondent's counsel made it clear that a judge issuing an order—a *restraining* order, which a jury of lay persons associates with something criminal in nature—requiring the Appellants to reverse their conduct. Furthermore, Respondent mentioned and

[3] The following citations to the transcript include Respondent's references to the Temporary Restraining Order, which were mentioned in opening statements and closing arguments, and were otherwise elicited or referenced during the examination of Respondent, Richard Aquino, Bill West, Tony Giovino, and Carter Tackett: Tr. 61:13-20; 141:15-16; 147:16—148:5; 196:18-21; 217:5-11; 321:7-19; 322:11-21; 333:22—334:8; 334:17—335:13; 503:6-19; 528:9—529:3; 529:21—530:3; 618:24—619:9; 665:24—666:6; 669:20—670:7; 682:9—683:7; 735:1-11; and 737:9-14.

questioned witnesses about the Order in excess of thirty-five times before the jury, which certainly had a high possibility of influencing the jury's decisions to find fault against the Appellants and otherwise award punitive damages at ten times the rate of actual damages. Because of its highly prejudicial nature and minimally probative value, it was an error of law for the circuit court to permit any evidence of the Order.

II. Whether the Roof Terrace, tenth floor elevator lobby, and planters are common elements was a question of law for the circuit court because the Master Deed is unambiguous, and this issue should never have been submitted to the jury.

"The rights and authority of [a horizontal property regime] must be gleaned from the Horizontal Property Act and from the master deed." *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 421, 321 S.E.2d 46, 49 (1984). "The terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987) (citation omitted). "In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy . . . . The intention of the grantor must be found within the four corners of the deed." *Id*.

For example, in *Heritage Federal Savings and Loan Association v. Eagle Lake and Golf Condominiums*, the Court of Appeals of South Carolina held a clubhouse was a common element after considering the master deed and definition provisions of the Horizontal Property Act. 318 S.C. 535, 542-43, 458 S.E.2d 566 (Ct. App. 1995). In that case, a builder attempted to foreclose on a clubhouse, which the Homeowners Association contested. *Id*. at 538, 458 S.E.2d at 563. According to the Homeowners Association, the clubhouse was a common element that could not be sold as separate property of the mortgagor in foreclosure. *Id*. at 542, 458 S.E.2d at 566. The Court of Appeals reviewed the master deed's definition of common elements, which was set forth in Section III of the master deed, entitled "Dwellings and Common Elements" as well as Section

XXXV, entitled "Definitions." *Id*. at 542-43, 458 S.E.2d at 566. The Court noted that Section XXXV defined a "dwelling" as being synonymous with the term "apartment," in accordance with the Horizontal Property Act. *Id*. at 543, 458 S.E.2d at 566. The Court further noted that Section XXXV defined "common elements" as including elements described in the Horizontal Property Act and the master deed, and Section III defined common elements as "all of the real property, improvements and facilities of the condominium other than the dwelling . . . ." *Id*.

The Court then examined Section 27-31-20 of the Horizontal Property Act, which defined common elements as the land on which apartments stand, foundations, main walls, roofs, basements, yards, gardens, lobbies, halls, walkways, etc. *Id*. The Court then noted the master deed's description of the real property and associated plats. *Id*. Specifically, one plat depicted certain areas as common elements, but did not include the clubhouse. *Id*. However, another plat referred to in the legal description acknowledged the clubhouse as an improvement. *Id*. Moreover, the first amendment to the master deed referenced the submission of "improvements." *Id*. Taken together the provisions of the master deed and provisions of the Horizontal Property Act, the Court of Appeals ruled that the clubhouse was an improvement and therefore, a common element. *Id*.

As did the Court of Appeals in *Heritage Federal*, the Court of Appeals here should examine the definitions and descriptions within Shoreham Towers' Master Deed, including exhibits, as well as the provisions of the Horizontal Property Act.

A. Shoreham Towers Master Deed

The Master Deed has nearly identical language when defining two categories of property within the Shoreham Towers Regime: Dwellings and Common Elements. To begin, Section III of the Master Deed defines "DWELLINGS" in part as "the forty (40) separate and numbered DWELLING Units which are designated in Exhibit A. . . ." Section III proceeds to define "COMMON ELEMENTS" in part as "all of the real property, improvement and facilities of the

CONDOMINIUM *other than the DWELLINGS . . . .*" (Emphasis added.) Stated differently, pursuant to these definitions, if a property is not defined as a dwelling—as set forth in detail in Exhibit A—then the property is a common element.

As Section XXXV of the *Heritage Federal* master deed provided, Section XXVI of Shoreham's Master Deed provides definitions. Subsection A defines "dwelling" as "synonymous with the term 'Apartment' or 'Apartments' as those terms are used under the Horizontal Property Act of the 1976 Code of Laws of South Carolina, as amended." Subsection I similarly defines "common elements" as "the elements described in the Horizontal Property Act, and in the Master Deed (including Exhibits), as 'general common elements' and [various easements, installations, and personal property required for maintenance of the Regime]."

Section XXXIV of the Master Deed goes even further to provide great deference to the Horizontal Property Act:

> The South Carolina Horizontal Property Act, 1976 Code of Laws, as the same may be amended from time to time thereafter is hereby adopted and expressly made a part hereof. In the event of any conflict between the provisions of this Master Deed and the said South Carolina Horizontal Property Act of South Carolina, as the same may be amended, said Act shall take the place of the provisions in conflict with the Master Deed.

(Section XXXIV).

B. Exhibit A and Building Plans of the Shoreham Towers Master Deed

Exhibit A of the Master Deed incorporates by reference a recorded plat and a set of the Building Plans. (Ex. A.) Exhibit A further sets forth the square footage of each dwelling. Specifically, the dwellings located on floor two through eight, with the designations B, C, and D, include approximately 1,253 square feet; dwellings located on floors two through eight with the designations of A and E contain approximately 1,610 square feet; dwellings on the ninth floor with number designations two and three contain approximately 1,701 square feet; dwellings on the ninth

floor with number designations one and four contain approximately 1,936 square feet; and the "'Rooftop Penthouse' dwelling" on the tenth floor contains approximately 2,630 square feet. (Ex. A.)

The next paragraph of Exhibit A describes common elements, including those areas at issue in this case:

> Access to all floors is provided by both stairways and elevators. Access to each dwelling on floors 2 through 9 inclusive is provided by a corridor which runs along the Northwestern side of each building in a generally Southwest-Northeast direction. Each dwelling contains a door which fronts on a branch of the corridor and such branch is a common area. *Access to the 'Rooftop Penthouse' dwelling on the tenth floor is provided from an elevator lobby which is a common area and stairways to the rooftop area, which is also common. The rooftop area contains planters which are common*. On the first floor, on which no dwellings are located, all areas and facilities are common.

(Emphasis added). Respondent points to a sentence in Exhibit A that provides, "All balconies adjacent to each dwelling, including the railing attached thereto, are a part of that dwelling and not common areas although such may be subject to other restrictions on use as set out elsewhere in this Master Deed, including but not limited to a restriction in favor of a common design, painting and color scheme for the building." Notably, the Building Plans incorporated by reference in Exhibit A depict "balconies" for levels two through nine; there is no denotation of a "balcony" adjacent to the Rooftop Penthouse. Rather, the area outside of the Rooftop Penthouse is noted as a "roof terrace."

Finally, Exhibit A ends with the provisions that reference to areas as common elements "shall be in addition to and be read in conjunction with further designation of common elements and areas set out in other portions of this Master Deed or Exhibits hereto."

C. Horizontal Property Act

South Carolina Code Section 27-31-20(f)(2)—(3) of the Horizontal Property Act defines "general common elements" as:

> (2) The foundations, main walls, *roofs*, halls, *lobbies*, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed;
>
> (3) The basements, *flat roofs*, *yards*, and *gardens*, in existence or to be constructed or installed, except as otherwise provided or stipulated;

(Emphasis added.) The Master Deed, Exhibit A, the Building Plans, and the definitions provided by the Horizontal Property Act unambiguously define the roof terrace, tenth floor elevator lobby, and planters as common elements.

The Master Deed defines property at the regime as falling into one of two categories: dwelling or common element. If property is not considered a dwelling, it is considered a common element. The Master Deed further defines each dwelling as set forth in Exhibit A, which provides the square footage of each dwelling. Exhibit A also expressly states that the roof terrace, elevator lobby, and planters are common: "Access to the 'Rooftop Penthouse' dwelling on the tenth floor is provided from an elevator lobby which is a common area and stairways to the rooftop area, which is also common. The rooftop area contains planters which are common." Perhaps the most explicit reference is the last sentence, which expressly provides the planters located on the rooftop area are common. Indeed, Respondent did not contest that the planters were common at trial, but the circuit court submitted that question to the jury—who erroneously found the planters were not common—nonetheless.

Further, the first part of the first sentence refers to the elevator lobby located on the tenth floor as being common. Respondent asserted the lobby referenced is the elevator lobby on the first floor. However, such an interpretation is a strained and nonsensical one. First, the language of

preceding the terms "elevator lobby" expressly address access to the Penthouse dwelling on the tenth floor; second, the very next paragraph in Exhibit A addresses first floor elevator lobbies as being common, and therefore, Respondent's reading would make the references redundant. Further, if Respondent's interpretation were correct that the elevator lobby referenced was that on the first floor, then Exhibit A should state that that elevator lobby provides access to *all* floors—not just the "Rooftop Penthouse" dwelling.

Moreover, the first sentence describes the roof terrace as common. Although Respondent did not address this language at trial, the sentence is specifically related to access to the entirety of the roof area, including both the dwelling and roof terrace: "Access to the 'Rooftop Penthouse' dwelling on the tenth floor is provided from an elevator lobby which is a common area and ***stairways to the rooftop area, which is also common***." (Emphasis added.) Respondent has previously asserted that the phrase "which is also common" refers to the "stairways" as opposed to the "rooftop area." However, that reading ignores the grammar used. The descriptive phrase, "which *is* also common," uses the singular verb, which corresponds with the singular noun, "area." If the descriptive phrase were intended to correspond with the plural noun, "stairways," the phrase would have been written, "which *are* also common." And moreover, as with the elevator lobby, the remainder of that paragraph explains that all "stairs affording access to the upper floors and the beachfront equipment and mechanical rooms" are common, and if the descriptive phrase applied only to the stairways leading to the rooftop area, the remainder of the paragraph would be redundant.

The definitions provided in the South Carolina Horizontal Property Act further support the interpretation that these areas are common elements, as Subsections 27-31-20(f)(2) & (3) list roofs, lobbies, flat roofs, yards, and gardens as general common elements.

Thus, the language of the Master Deed and those documents incorporated by reference, including Exhibit A, the Building Plans, and applicable provisions of the South Carolina Horizontal Property Act, are unambiguous that the roof terrace, tenth floor elevator lobby, and planters are common elements. Accordingly, directed verdict should have been granted, submission of these issues to the jury was error.

Notwithstanding, even if the circuit court made a finding that the Master Deed was ambiguous—which it did not and which Appellants do not concede to be the case—the facts only support an interpretation that the roof terrace, planters, and tenth floor elevator lobby are common elements. The following facts are without dispute: Respondent never paid Horry County taxes on the areas he claims are not common; Respondent never paid assessments to the Association for the square footage he claims are not common; Respondent's insurance policy did not cover the area he claims are not common, although the Association has always provided insurance for the roof area; and, a survey confirmed that the square footage listed in Exhibit A of the Master Deed for all dwellings on floors two through nine included each dwelling's balcony, while the square footage listed in Exhibit A for the Rooftop Penthouse did not include the roof terrace, tenth floor elevator lobby, or planters. (Tr. 180:3-5; 208:9-14; 493:2-16; 599:21-24; Defs.' Ex. 39.) The overwhelming evidence weighed in favor of Appellants' interpretation of the Master Deed. Other than portions of Respondent's testimony, there is no evidence that any part of the roof terrace is not a common element. For the foregoing reasons, the circuit court erred when it did not declare the areas in dispute were common as a matter of law and when it denied all of Appellants' respective motions as to that finding.

Furthermore, there should be a reversal of all of Respondent's causes of action as a matter of law because of the absence in this action of all dwelling owners. The dwelling owners have an

undivided interest in the common elements. (Section IX.) South Carolina Code Section 27-31-70 provides, "The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the contrary shall be void." The Master Deed further supports this provision by providing that "the percentage of the undivided interest in the COMMON ELEMENTS appurtenant to each DWELLING shall remain undivided and no owner of any DWELLING shall bring or have any right to bring any action for partition or division." (Section IX.) Therefore, Respondent had no right to bring any claim whatsoever related to the division of this common area, and judgment should be reversed.

III. The circuit court erred in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract claim because no provision of the Master Deed was breached.

The elements for a claim of breach of contract include the existence of a contract, its breach, and damages caused by such breach. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009) (citations omitted). South Carolina courts should construe contracts "liberally" so as to give contracts the effect of carrying out the parties' intention. *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) (citation omitted). When interpreting a contract, the court "must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein." *Id*. "If practical, a court should interpret the agreement so as to give effect to all of its provisions." *Id*. "It is fundamental that[,] in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." *Id*. (internal quotation marks omitted).

Here, the cause of action for breach of contract should have never gone to the jury because the Master Deed is unambiguous as to the areas in dispute being common elements, and there is

no evidence Appellants breached the Master Deed. The only provision Respondent pointed to when asked as to what language he believed was "important" in the lawsuit was the second-to-last paragraph in Exhibit A, which provides in part that "All balconies adjacent to each dwelling, including the railing attached thereto, are a part of that dwelling and not common areas . . . ." (Tr. 84:10—85:3.) When specifically asked which provision of the Master Deed Respondent claimed the Appellants breached, Respondent responded, "They never were able to add what they wanted to add to the master deed . . . . It's not in there. It never made it into the master deed, what they wanted to do." (Tr. 202:8-16.) Respondent's counsel's position is that the Association's passage of rules and regulations as they relate to the roof terrace breached the Master Deed because, according to h, the roof area was for his exclusive use alone.

Yet again, Respondent's interpretation ignores the purposeful language used throughout the Master Deed. The Building Plans, which denote every dwelling's outdoor space on levels two through nine as a "balcony," do not make any reference to a "balcony" adjacent to the Rooftop Penthouse; rather, the area surrounding the Penthouse is noted as the "Roof Terrace." At trial, Respondent argued that the words "balcony" and "terrace" were synonymous, and because the roof area contained a railing, that area was part of Respondent's "dwelling." Nothing exists to support this interpretation. First, the Master Deed, including Exhibit A and the Building Plans, uses specific language, and the roof terrace is not identified anywhere as a balcony. Respondent's focus on single sentence in the entire Master Deed is contrary to South Carolina law that requires an entire contract to be given meaning rather than focusing on one isolated clause. *See Towne Ctr., LLC*, 412 S.C. at 569, 772 S.E.2d at 890 (when interpreting a contract, the court "must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein").

Perhaps the best evidence of the fact that Respondent's dwelling does not include the roof terrace is from the unrebutted survey of Shoreham Towers presented at trial. As noted, the surveyor found that the square footage for all dwellings in the units located on level two through nine *included* their respective balconies as set forth in Exhibit A of the Master Deed; the Rooftop Penthouse square footage—approximately 2,630 square feet—did *not* include the roof terrace—or what Respondent would call his "balcony." Indeed, the surveyor testified that the roof terrace square footage would equal approximately 2,000 square feet, meaning Respondent's "dwelling" would nearly double if that area were a balcony for the Respondent's unit. That would, in turn, mean Respondent should be paying nearly double in assessments to the Association considering each unit owner's square footage determines the amount he pays in assessments. (Tr. 166:1-8.) Respondent did not establish any breach because his interpretation of the Master Deed is erroneous as a matter of law.

IV. The circuit court erred in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract Accompanied by Fraudulent Act claim.

To establish a claim for breach of contract accompanied by a fraudulent act, Respondent was required to prove: a breach of contract; fraudulent intent relating to the breaching of the contract, not merely in its making; and, by a standard of clear and convincing evidence, a fraudulent act accompanying the breach. *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 654, 780 S.E.2d 263, 273-74 (Ct. App. 2015) (citations omitted).

Per the circuit court's ruling, this cause of action was against only the Association and not the individual Appellants. (Tr. 695:10—696:6.) The only fraudulent intent and/or act Respondent testified to, without citing to any document or specific conversation, was the Appellants allegedly saying Respondent "didn't pay enough" and that Respondent's "furniture and [] outdoor space had become a nuisance." (Tr. 151:8-22.) Respondent's counsel pointed to the email sent by Richard

Aquino to the Board in October 2018, which listed several ways in which Mr. Aquino believed the rooftop area was a common element and not part of Respondent's dwelling.[4] However, on cross-examination, Respondent acknowledged that Mr. Aquino and every other Appellant possessed the right to ask questions, to communicate his concerns about Shoreham Towers to the Board, and to have an opinion about Shoreham Towers or about "anything." (Tr. 202:21—203:8.) The alleged breach according to Respondent's theory was the Association's passage of rules and regulations after the Association determined the area was a common element. Although there was no breach of the Master Deed as set forth in detail above, there was also no evidence that the Association acted with a fraudulent intent or committed a fraudulent act. Respondent, requesting that the circuit court perform legal gymnastics, insisted that the Association was influenced by Mr. Aquino's email, but Mr. Aquino was not acting on behalf of the Association as he was not a board member at the time he sent his allegedly "fraudulent" email; in other words, Respondent provided no evidence of a fraudulent act committed *by the Association* that would fulfill the last element of this cause of action. Therefore, it was an error of law to allow this question to go to the jury.

V. The circuit court erred in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Conversion claim.

A claim for conversion does not apply to real property. *Hawkins v. City of Greenville*, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) ("It is well settled that a conversion action does not lie when alleging the exercise of dominion or control over real property."). Respondent's complaint alleged the Appellants "exercised unauthorized possession, control, and/or ownership

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Indeed, Mr. Aquino ultimately withdrew some of the issues he originally brought to the Board's attention upon discovering he had been mistaken, such as Respondent's alleged alteration of the elevator key and Respondent's use of a private atrium. (Tr. 467:22—468:4; Defs. Ex. 43.) Such retractions by Mr. Aquino undeniably evidence his good faith belief in reporting these concerns to the Board, not fraudulent acts or intention.

of the area adjacent to the Rooftop Penthouse when they converted the area into a common area for all guests. . . ." (Compl. ¶¶ 24—28.) Upon Appellants' Motion for Directed Verdict, the circuit court agreed Respondent's claim for conversion could not apply to real property, but rather, could only apply to personal property, and the circuit court permitted Respondent to amend his cause of action for conversion to seek damages for only his furniture and turtle tile. (Tr. 428:8—429:13.)

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights." *Jenkins v. Few*, 391 S.C. 209, 217-18, 705 S.E.2d 457, 461 (Ct. App. 2010) (quoting *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975)) (internal quotation marks omitted). Where there is no evidence that a party wrongfully assumed and exercised the right of ownership over the personal property, there can be no claim for conversion. *Id.* at 218, 705 S.E.2d at 462.

Respondent presented no evidence that any Appellant attempted to exercise the right of ownership over Respondent's furniture or turtle tile; rather, the evidence is unrefuted that Appellants and others, namely, Thompson Roofing, contacted Respondent numerous times asking that Respondent retrieve his property. *Cf. Jenkins*, 391 S.C. at 217-18, 705 S.E.2d at 461-62 (holding that where a defendant poured sugar in the plaintiff's gas tank and thereby prevented the plaintiff from using the truck, the plaintiff set forth no evidence that the defendant wrongfully assumed and exercised the right of ownership over the truck, and therefore, the circuit court should have granted the defendant's motion for a directed verdict); *see, e.g., Spates v. Dameron Hosp. Ass'n*, 7 Cal. Rptr. 3d 597, 609 (Cal. Ct. App. 2003) ("The act of removing personal property from one place to another, without an assertion of ownership or preventing the owner from exercising all rights of ownership in such personal property, is not enough to constitute conversion.") (internal quotation marks and citations omitted).

Moreover, Respondent did not present any evidence as to damages to his furniture. Instead, Respondent simply argued the Appellants removed his furniture after the start of litigation, because, as Appellants testified, they believed the area wherein the furniture was located to be a common element, and personal furniture could not be located on common elements. The Appellants further testified they hired a safety consultant who warned of the dangers of the high-back furniture, and given the Respondent's refusal to remove this furniture after repeated requests to do so, the Appellants removed the furniture and had it stacked and placed, with a secure chain around the furniture, in a parking space. The Appellants replaced Respondent's furniture with pieces that were similar to what was located at the pool. After discovery the furniture had been retrieved and returned to the rooftop area, the Appellants once again had the furniture removed and placed in a storage facility wherein the Association paid for the monthly storage fee. Respondent repeatedly made known that the furniture was returned upon entry of the Temporary Restraining Order, and Respondent never paid money toward the monthly storage fee or suffered any damage related to his furniture, which was returned in an undamaged condition.

As for his turtle tile, Appellants presented uncontradicted testimony that this was removed based on Thompson Roofing, Inc.'s recommendation to not place the turtle tile back on the roof membrane. According to Thompson Roofing, the turtle tile was capturing debris, which prevented water from draining off the flat roof, making the containment of water a serious issue for the building's roof. By letter dated May 13, 2019, Thompson Roofing specified that it did not recommend placing the turtle tile back on the roof membrane. (Defs.' Ex. 30.) Following the recommendation of the roofing contractor, the Association collected the turtle tile and asked the contractor to store it at his place of business until Respondent could retrieve it. Respondent did not object to the removal of his turtle tile. Jason Thompson of Thompson Roofing testified his

company sent numerous requests to Respondent to retrieve the turtle tile over the course of four years, but Respondent never so much as made contact with Thompson Roofing. For the foregoing reasons, there was no evidence of conversion, and it was legal error to deny Appellants' motions for direct verdict and judgment notwithstanding the verdict.

VI. The circuit court erred in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Civil Conspiracy claim because the Appellants acted solely as directors.

To succeed on a claim of civil conspiracy, Respondent had to have provided evidence that there was: a combination or agreement of two or more persons; to commit an unlawful act or a lawful act by unlawful means; together with the commission of an overt act in furtherance of the agreement; and damages proximately resulting to the Respondent. *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574-75 n.4, 861 S.E.2d 774, 780 n.4 (2021). Intent to harm is an "inherent part of the analysis." *Id*. However, under the intracorporate conspiracy doctrine, "it is well settled that a corporation cannot conspire with itself . . . . [N]o conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." *McMillan v. Oconee Mem'l Hosp.*, 367 S.C. 559, 564-65, 626 S.E.2d 884, 887 (2006), *overruled on other grounds by Paradis*, 433 S.C. 562, 861 S.E.2d 774.

Here, Respondent presented no evidence that the individual Appellants acted outside the scope of their duties as board members in their dealings with the rooftop area. Although Respondent relies heavily on Mr. Aquino's September 2018 email wherein Mr. Aquino expressed concern that the rooftop area was actually a common element, nothing about that email is an unlawful act or unlawful means, particularly where there is no evidence Mr. Aquino knew such statements to be false at the time he made them. Further, Respondent made much of the fact that the individual Appellants had a phone conference wherein Respondent was not permitted to

participate; in so doing, Respondent conveniently disregarded the unrebutted testimony that the individual Appellants were instructed *by their counsel* to not permit Respondent to join the conference, particularly in light of the fact that Respondent represented he was going to "lawyer up" over that issue.

Even if there were any evidence—which Appellants do not concede—that Mr. Aquino's email was motivated by some ill-will toward Respondent, that alone is not sufficient to establish that there was any agreement with any other individual Appellant to commit a lawful act by unlawful means or an unlawful act, coupled with an overt act in furtherance of such agreement to cause Respondent damages. Indeed, the jury apparently did not believe any of the other individual Appellants made such an agreement as evidenced by its third question to the circuit court during deliberations: "For civil conspiracy, do you have to have at least two people conspiring against a person, or does the person conspiring and the person being conspired upon count as the combination of two people[?]" (Ct. Ex. 6.)

At the close of Respondent's case, the only evidence Respondent provided as to his theory was that Mr. Aquino, who lived in the unit directly below the Rooftop Penthouse, previously sent an email to the Board questioning whether the rooftop area was a common element. Respondent presented no evidence that any individual Appellant acted on his own behalf or conspired with Mr. Aquino to unlawfully harm Respondent. All the evidence supported the contrary conclusion: at each step, the individual Appellants sought and followed the advice of counsel, a safety consultant, and a roofing contractor. Mr. Tackett testified that if any other unit owner aside from Mr. Aquino had submitted a concern regarding whether the rooftop area was a common element, the Board would have responded in the same way by hiring an attorney to receive legal advice as to whether that area was a common element. (Tr. 681:12-19.)

Lastly, Respondent provided no evidence that any individual Appellant had an intent to harm Respondent. Accordingly, the circuit court should have granted Appellants' motion for directed verdict as to this cause of action. *See Broyhill v. Resol. Mgmt. Consultants, Inc.*, 401S.C. 466, 477, 736 S.E.2d 867, 872 (Ct. App. 2012) (affirming the trial court's granting of directed verdict to the defendants as to the plaintiff's civil conspiracy claim because "[Plaintiff] presented no evidence that [the individual defendants] acted outside their official capacities as officers of [the corporation], [and] neither they nor [the corporation] can be liable for civil conspiracy").

VII. The circuit court abused its discretion in permitting Respondent to amend his complaint to add a claim of Acquiescence, and the circuit court further erred in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Acquiescence claim.

"It is well established that a motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice." *Collins Ent., Inc. v. White*, 363 S.C. 46, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) (citation omitted). "The prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." *Id.*

Respondent filed a motion to amend his complaint to add three causes of action, only one of which the circuit court permitted, on January 24, 2023, over three years after initially filing his complaint and less than a week before trial was set to begin. Appellants were prejudiced by the lack of notice of the trial of this issue, the lack of opportunity to refute it, and to determine the need to add all Shoreham unit owners.[5] Furthermore, as discussed below, acquiescence was an inappropriate claim under these facts, and per Respondent's interpretation of the claim, Appellants would have conducted additional discovery to refute Respondent's claim that he had used the

[5] The acquiescence claim is the only one that could be used and was used to determine the status of the property. The remaining claims sought monetary damage.

property at issue uninterrupted for a period of ten years or more. For those reasons, the circuit court abused its discretion by allowing Respondent to add a claim of acquiescence on the eve of trial. *See Collin Enter., Inc.*, 363 S.C. at 561-63, 611 S.E.2d at 270, *cert. denied*, Aug. 15, 2006 (holding the trial court did not err in denying defendants' motion to amend their answer to allege estoppel even though the same "comments and assurances" formed the basis of the estoppel claim, when the issues were not tried by the consent of the parties and plaintiff prepared to defend a counterclaim of breach of contract accompanied by fraudulent act rather than estoppel and therefore, and plaintiff "sufficiently demonstrated the prejudice envisioned by Rule 15, requiring the court to deny a motion to amend") (citations omitted).

A. This is not the proper case for an acquiescence claim.

The circuit court further erred in denying Appellants' motion for directed verdict and judgment notwithstanding the verdict as to Respondent's claim of acquiescence. The doctrine of acquiescence appears to be a vehicle courts have used to "rescue" an adverse possession claim wherein the element of hostility could *not* be met because there is a mistaken belief as to an encroachment onto another's land. *See* 8 S.C. Jur. *Adverse Possession*, § 27. Factually, the application of acquiescence in South Carolina case law typically occurs in the context of physical boundary dispute cases where the location of a boundary line is in dispute—not the nature of property, and it does not appear South Carolina has applied the doctrine of acquiescence to horizontal property regimes. *Coker v. Cummings*, 381 S.C. 45, 53, 671 S.E.2d 383, 387 (Ct. App. 2008) ("A disputed *boundary line* can be established by acquiescence of the parties.") (quoting *Kirkland v. Gross*, 286 S.C. 193, 197, 332 S.E.2d 546, 48-49 (Ct. App. 1985), *receded from on other grounds by Boyd v. Hyatt*, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)) (internal quotation marks omitted) (emphasis added); *Knox v. Bogan*, 322 S.C. 64, 71-72, 472 S.E.2d 43, 48 (Ct. App. 1996) ("[I]f adjoining landowners occupy their respective premises up to a certain line which they

mutually recognize and acquiesce in for a long period of time—usually the time prescribed by the statute of limitations—they are precluded from claiming that the *boundary line* thus recognized and acquiesced in is not the true one.") (emphasis added); *S. Ry. Co. v. Day*, 140 S.C. 388, 138 S.E.2d 870, 875 (1926) ("[I]n such case [where boundary lines are disputed] the possession is knowingly hostile to the railroad company, and the principle of equitable estoppel is not applicable. 'The estoppel may arise, even though the period of acquiescence is very short.'") (citations omitted). The application of the doctrine of acquiescence to facts such as these is inappropriate.

B. Respondent cannot use estoppel as a claim.

Furthermore, Respondent's claim of acquiescence is truly a thinly veiled attempt to claim estoppel despite the basic legal principle that estoppel cannot be used as a claim, but rather, only a defense. *See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992) ("While the doctrine of waiver or equitable estoppel may be invoked as affirmative defense to counterclaim, they may not be asserted in a complaint as offensive weapons."). Moreover, at no time prior to the eve of trial did Respondent claim ownership of the planters, elevator lobby, or roof terrace—but this all changed by permitting the additional claim of acquiescence to this legal action. The complaint and amended complaint seek only monetary damages and not any property ownership.

C. Even if acquiescence could apply to these facts, such a claim is barred by South Carolina Code Section 27-31-70.

Most significantly, even if the Court should find the doctrine of acquiescence is a separate claim that was correctly applied to the facts of this case, such a cause of action is barred by South Carolina Code Section 27-31-70: "The common elements, both general and limited, shall remain undivided and *shall not* be the object of any action for partition or division of the co-ownership. Any covenant to the contrary shall be void." (Emphasis added.) In order to apply the theory of

acquiescence as Respondent would do, Respondent must concede the premise that the property in dispute was at some point in time a common element; Respondent's counsel even acknowledged as much in his reply closing argument:

> I'll end with this. Henri mentioned acquiescence. Even if my friend, Ms. Golding, was right—and we don't think she is, and with all due respect, I don't think she is right—but even if she is, the Judge will charge you on acquiescence. That is when there is a property dispute between property owners and one person has taken control of the property and acted like that property is theirs for a number of years. The other property owner can't come back and say, oh, never mind, you can't do it. . . .

(Tr. 766:13-22.) Thus, Respondent's theory of acquiescence in this case admits the property was, at some time, a common element, and through time, he converted the property to his own. However, any cause of action that concedes the property was ever a common element and seeks to convert it to one's own ownership is barred by Section 27-31-70, which expressly prohibits any such actions that seek to divide the unit owners' co-ownership of the common elements. Accordingly, the circuit court should have granted Appellants' motions for directed verdict and motion for judgment notwithstanding the verdict as a matter of law.[6]

VIII. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to the individual defendants' immunity.

The circuit court should have dismissed the individual Appellants, or, at the very least, Appellants Bill West, Carter Tackett, and Tony Giovino because Respondent presented no evidence that they acted willfully or wantonly. South Carolina Code Subsection 33-31-834(a) states, "All directors, trustees, or members of the governing bodies of not-for-profit . . . associations . . . are immune from suit arising from the conduct of the affairs of these . . . corporations. This immunity from suit is removed when the conduct amounts to wilful, wanton, or

[6] For the same reasoning, a claim of adverse possession would also be barred by Section 27-31-70.

gross negligence." South Carolina Code Subsection 33-31-830(b)(2) further provides directors are entitled to rely on expert opinions: "In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements . . . if prepared or presented by: . . . (2) legal counsel . . . or other persons as to matters the director reasonably believes are within the person's professional or expert competence[.]" Moreover, Subsection 33-31-830(d) states, "A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section."

At the close of Respondent's case, Appellants made a motion for directed verdict because Respondent presented no evidence that Appellants acted willfully, wantonly, or grossly negligently. (Tr. 438:18—439:7.) In response, the circuit court stated, "I'll let that jury determine if Richard did that or not." (Tr. 439:8-9.) Appellants' counsel requested that the circuit court grant immunity as to the other three individual Appellants, and the circuit court responded that, "They went along with what Richard was up to maybe. I don't know, but it is a question of fact." (Tr. 439:10-16.) The following exchange between the circuit court and Appellants' counsel then occurred:

> Ms. Golding: Your Honor, you said you don't know. There has to be evidence.
> The Court: I'm not going to make that decision. They're going to make that decision.
> Ms. Golding: No, but some evidence must exist at this stage.
> The Court: Were they acting as a board?
> Ms. Golding: Yes, sir, they acted as a board.
> The Court: Were they directed by Richard Aquino?
> Ms. Golding: No, sir. There is no evidence that they were directed.
> The Court: It sure sounds like he was working with them to accomplish something that benefited him, possibly.
> Ms. Golding: Yes, sir.
> The Court: I just think it is a question of fact.
> Ms. Golding: I respectfully disagree, but I understand.
> The Court: He talked to us for half a day.

(Tr. 439:17—440:11.) In the above exchange, the only apparent conclusion the circuit court drew in order to keep the three individual Appellants in the lawsuit was the potential inference that the individuals—although acting in their capacities as board members—were working to "accomplish something that benefited" Mr. Aquino. As Appellants' counsel noted, there must be some evidence that each individual acted willfully, wantonly, or grossly negligently, meaning the individuals were not acting in their capacities as board members. "Arguments made by counsel are not evidence." *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted). The circuit court's ruling essentially inverted Respondent's burden and placed it on Appellants. *Cf. Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 875 (1987) ("[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct. . . . [T]he burden of providing good faith is not on the governing board; the burden of proving a lack of good faith is borne, rather, by those challenging the board's actions."); *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414 426 S.E.2d 828, 832 (Ct. App. 1993) ("In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action."). Thus, it was legal error for the circuit court to deny Appellants' motion for a directed verdict as to the individual Appellants, particularly Bill West, Tony Giovino, and Carter Tackett.

Evidence in the Appellants' case only supported a finding that the individual Appellants acted within their capacities as board members and were entitled to immunity. Every act of the Appellants was done in order to comply with the Master Deed, and if the Appellants had not

conducted such inquiries, they could have been personally liable to other unit owners for failure to fulfill their duties.[7] *Cf. Queen's Grant Villas Horizontal Prop. Regimes I-V v. Daniel Int'l Corp.*, 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985) ("In this case, the master deeds and the by-laws incorporated therein show that the Regime has the obligation to maintain the common elements. Should the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains, it may be liable to the homeowners for its omissions."); *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 409 S.C. 164, 178, 760 S.E.2d 121, 129 (Ct. App. 2014) ("When master deeds and bylaws show a homeowner's association has the obligation to maintain the common elements, the association has a duty to pursue a recovery for any alleged construction defects in the common elements.") (citation omitted).

Moreover, the Appellants and the Association's attorney testified that each act the Board took was blessed by legal counsel. As the Appellants testified, if any other unit owner expressed the same concerns as Mr. Aquino did regarding whether the property was common, the Board would have responded in the same manner: by hiring an attorney for the legal interpretation of the Master Deed, relying on a safety inspector—who was hired by recommendation to the Board—concerning the safety of the rooftop area, and following the advice of a roofing contractor. *Cf. Smith v. Dockside Ass'n, Inc.*, No. 2005-UP-139, 2005 WL 7083482, at *3-4 (S.C. Ct. App. Feb.

[7] *Cf.* S.C. Code Ann. § 33-31-830, cmt. 2 ("[The ordinary prudent person concept] is intended to protect directors who innovate and take informed risks to carry out the corporate goals and objections. *The directors need not be right,* but they must act with common sense and informed judgment. . . . In appropriate circumstances[,] the duty of care requires reasonable inquiry. *Where a problem exists or report on its face does not make sense, a director has a duty to inquire into the surrounding facts and circumstances.* The inquiry required is the inquiry an ordinarily prudent person in a like position would make under the circumstances. . . . A court should not be harsh in second-guessing directors who in good faith make a judgment that proves incorrect. 'Although some decisions turn out to be unwise or the result of a mistake of judgment, it is unreasonable to reexamine these decisions with the benefit of hindsight.'") (emphasis added).

28, 2005) ("In the present case, the undisputed evidence shows the individual directors consulted with various professionals when confronted with financial or construction issues relating to the Association. The types of experts consulted corresponded with the issues the Board sought to resolve. For example, the directors sought advice from attorney for legal questions, accountants and CPAs for financial questions, and architects for construction issues. Because there was undisputed evidence that the directors sought outside advice in order to make informed maintenance and financial decisions for the Association, the individual directors were protected from liability. . . . By relying upon the advice of various individuals with particular professional competence and expertise *as a matter of law, the individual directors discharged their duties in good faith, with the care of an ordinarily prudent person and in the best interest of Dockside.*") (emphasis added). Therefore, Appellants were entitled to this immunity as a matter of law.

IX. The circuit court erred in finding evidence of damages.

No reasonable jury could have found Plaintiff suffered actual damages. There was no evidence to permit the jury to determine the existence of damages, let alone the amount, with reasonable certainty or accuracy. ("As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy . . . . 'Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.'" *White v. Whitney Mfg. Co.*, 60 S.C. 254, 38 S.E. 456, 461 (1901) (noting speculative damages would not constitute the element of damages); *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (citations omitted).

Respondent testified he "just noticed probably" six renters who did not return, "but could be more," and that could be "probable close to $20,000.00" in rental income he lost, but not one document showed that Respondent suffered any losses. (Tr. 141:21-24.) There was not even any foundation provided as to Respondent's rental charges, loss of any rentals, or any time period

during which rentals were or could have been lost. Instead, Respondent testified that in May of 2020, he was "booked up solid." (Tr. 131:8-12.) As a result of the removal of Respondent's furniture and turtle tile, Respondent testified he received complaints—not actual losses in rental business. (Tr. 131:18-24.) In reality, Respondent suffered no losses, and it was legal error to submit the question of actual damages to the jury.

X. The circuit court erred in submitting punitive damages to the jury.

Punitive damages should not have been considered in connection with any of the Appellants. The punitive damages award against the individual Appellants can only be attributed to the jury frequently hearing on a daily basis the evidence of the Temporary Restraining Order. Additionally, the jury was improperly and repeatedly subject to Respondent's argument that the roof terrace, elevator lobby, and planters were part of a balcony attributable to his unit, even though Respondent had none, and the error of not directing that the Master Deed, including the Horizontal Property Act, required a finding that the three parts of Shoreham Towers are common elements.

No reasonable jury could have found punitive damages were warranted. Further, the punitive damages award was excessive and unconstitutional, and the jury incorrectly applied the law—if it applied any—by considering issues it should not have considered when awarding punitive damages.

First and foremost, punitive damages may only be awarded upon a finding of actual damages. "[P]unitive damages may be awarded only upon a finding of actual damages." *Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (citation omitted). "The policy behind awarding punitive damages must also remain consistent with the principle of penal theory that the 'punishment should fit the crime.' 'In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the general damages recovered.' Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections

of the Due Process Clause of the Fourteenth Amended of the United Sates Constitution." *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164-66, 604 S.E.2d 385, 389-90 (2004) (citations omitted). *See also Kennedy v. Richland Cnty. Sch. Dist. Two*, 428 S.C. 98, 123, 833 S.E.2d 414, 427-28 (Ct. App. 2019) (nothing three "guideposts" for determining whether an award of punitive damages was reasonable, including (1) "the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded to the jury and the civil penalties authorized or imposed in comparable cases.") (citation omitted).

There is no supportable basis for the award of punitive damages. The jury's punitive damage award was based only on its erroneous belief that Respondent should recover attorneys' fees, as evidenced by its fifth question to the circuit court during deliberation: "For damages, do we have to put an actual number, or can it be a phrase such as: 'attorney fees and costs'[?]" The fact that the disproportionate $200,000 award was based on a belief that Respondent should recover its attorneys' fees and costs is clearly supported by the jury's question asking if it could award damages by writing that Respondent is to recover "attorneys' fees and costs," or whether the jury must award an actual number. This blatant error must be reversed.

XI. All dwelling unit owners should have been made defendants, and failure to do so constituted reversible error.

Respondent failed to add indispensable parties, especially when the circuit court permitted the claim of acquiescence. Rule 12(h)(2), SCRCP states allows "a defense of failure to join a part indispensable under Rule 19 . . . may be made . . . at the trial on the merits." Rule 19(a), SCRCP provides:

> A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

For example, in *BancOhio National Bank v. Neville*, the Supreme Court of South Carolina held the South Carolina Department of Highways and Public Transportation and the Town of West Union were indispensable parties because those entities had a property interest—whether ownership, easement, right of ways, etc. in the property at issue—and should have been added to the action regarding an action to close and abandon a road. 310 S.C. 323, 328-29, 426 S.E.2d 773, 776-77 (1993)

Similarly, the Shoreham Towers unit owners were ultimately affected by the jury's verdict, and pursuant to Rule 19(a), SCRCP, they should have been added to the action. This is particularly true given that the claim of acquiescence necessarily requires an acknowledgement that the property was common at some time. The end result of the verdict is that the Master Deed has now been changed, which directly impacts all Shoreham Towers unit owners. At no time did Respondent seek any reformation of the Master Deed or any remedy that would result in a transfer of parts of the Shoreham Towers' property to Respondent. Only the Shoreham Towers unit owners have the right to amend or change the Master Deed, and therefore, the failure to add all Shoreham Towers unit owners constituted a significant legal error, requiring reversal.

XII. The circuit court erred by permitting the testimony of Henry Beckham.

It was an error of law to permit Henry Beckham, Respondent's expert appraiser, to testify. The Appellants were unduly prejudiced by this error, and this error created confusion of the issues and misled the jury. Rule 402, SCRE provides, "Evidence which is not relevant is not admissible." Rule 403, SCRE states, "Although relevant, evidence may be extended if it probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Mr. Beckham's testimony included an evaluation of "damages" to Respondent's property by comparing the value of Respondent's dwelling with exclusive use of the roof terrace compared to the value of the dwelling if the roof terrace were subject to the Rules and Regulations. This damages analysis was a legal fallacy. Because the jury found that the roof terrace was not a common element, respondent necessarily suffered no damage because he never lost his exclusive use of that area. If, on the other hand, Respondent had been unsuccessful and the roof terrace were held to be a common element—as set forth in the Master Deed—Respondent would not have suffered damages because he would not be entitled to recover the value of something he never had the exclusive right to use. *See* S.C. Code Ann. § 27-31-80 ("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). Mr. Beckham's testimony created confusion because it presumed damages due to the surface comparison of value with or without the roof terrace; it never considered whether Respondent could rightfully claim damages as a result. When the jury heard Mr. Beckham testify to $220,000.00 in loss in value, a large, albeit false, number of potential damages, the jury may have been wrongfully compelled to afford Respondent some relief, regardless of whether Respondent could actually establish an entitlement to that amount. Therefore, allowing Mr. Beckham's testimony regarding the "value" of the property with or without the terrace constituted legal error. *See White v. Whitney Mfg. Co.*, 60 S.C. 254, 38 S.E. 456, 461 (1901) (noting speculative damages would not constitute the element of damages); *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App.

2008) ("As a general rule the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy . . . . 'Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.") (citation omitted).

XIII. The circuit court erred as a matter of law by not listing in its verdict form each cause of action to be submitted to the jury.

Prior to closing arguments, Appellants' counsel requested that the circuit court edit the jury verdict form in order to clarify to which cause of action the jury may find against the Appellants. (Tr. 712:7-18.) The circuit court's denial of Appellants' request to specify the jury verdict form as to each cause of action created confusion as to what the jury's findings were and whether those findings could logically coexist.

To illustrate, the circuit court ruled that all causes of action except civil conspiracy were against the Association. (Tr. 695:-696:10.) The same reason Respondent's breach of contract, breach of contract accompanied by fraudulent intent, and conversion fail by pointing to the behavior of an individual as attributable to the Association illustrates a flaw in the jury verdict; the jury found the individual Appellants acted willfully and wantonly, meaning the statutory immunity did not apply, and they could be personally liable—a finding with which Appellants vehemently disagree as set forth above. However, the jury also found against the Association, notwithstanding that the actions Respondent complained of made no distinction between when the Appellants were acting within their duties as board members or willfully or wantonly as individuals. Therefore, the jury's findings are a legal fallacy; either the board members were acting in their individual capacities—in which case, they could be liable only for civil conspiracy—or the board members were acting within their authority as board members, i.e. as the Association. Such denial constituted legal error.

XIV. The circuit court abused its discretion by permitting Respondent to refer to the roof terrace as a balcony.

In their Motion in Limine, Appellants requested that no evidence be permitted to the effect that Respondent has a "balcony" on the rooftop. The Court denied Appellants' request even though nowhere in the Master Deed, including the recorded Building Plans which are part of the Master Deed, does it provide for a balcony on the rooftop of Shoreham Towers. *See Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 421, 321 S.E.2d 46, 49 (1984) ("the rights and authority of [a horizontal property regime] must be gleaned from the Horizontal Property Act and from the master deed."); S.C. Code Ann. § 27-31-20(f)(3) (defining "general common elements" as "[t]he basements, *flat roofs, yards, and gardens*") (emphasis added). Respondent misled the jury by referring to these three, separate parts of the Shoreham Towers regime as constituting the Rooftop Penthouse's "balcony." This was clear legal error because the Building Plans, being an integral part of the Master Deed, show balconies existing only on floors two through nine, and none for the tenth-floor Rooftop Penthouse.

As set forth above, although it is evidence from the Building Plans that the Rooftop Penthouse does not have a balcony, Respondent testified that he paid neither any regime fees nor any county property taxes on anything outside the walls of his dwelling—unlike dwelling owners on floors two through nine who pay assessments and property taxes on their respective balconies. Simply because the roof terrace was referred to as a "balcony" by someone does not create a question of fact that would permit referring to it as such, especially because a plain reading of the Master Deed establishes that there is no balcony on the rooftop of Shoreham Towers. This reference all throughout trial confused the issues, misled the jury, and unfairly prejudiced Appellants in violation of Rule 403, SCRE, and therefore, the circuit court abused its discretion.

CONCLUSION

For the foregoing reasons, the jury's verdict should be reversed, and this Court should render a decision that the roof terrace, elevator lobby, and planters are common elements.

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