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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable William H. Seals, Jr., Circuit Court Judge

S.C. Ct. App. Case No. 2023-000451
Case No. 2019-CP-26-06550

Opinion No. 6117 (S.C. Ct. App. filed July 16, 2025)

Marshall Griffin, ...Respondent,

v.

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

PETITION FOR A WRIT OF CERTIORARI

Henrietta U. Golding, SC Bar #2173
BURR & FORMAN LLP
2411 N. Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
Phone: (843) 444-1107
hgolding@burr.com

Attorneys for the Appellants Tony Giovino, Carter Tackett, Richard Aquino, Bill West, and Shoreham Towers Homeowners Association

Other Counsel of Record:

John M. Grantland, Esquire
Crawford A. Krebs, Esquire
Post Office Box 6648
Columbia, South Carolina 29260
Ph: 803.782.4100
Email: jgrantland@murphygrantland.com
ckrebs@murphygrantland.com

Thomas C. Brittain, Esquire
Brittan Law Firm
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
Ph: 843.448.8562
Email: tommyb@brittainlawfirm.com

Attorneys for the Respondent

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certify that the Petition for Hearing was timely made and finally ruled on by the Court of Appeals on September 5, 2025.

QUESTIONS PRESENTED

I. The Appellate Court erred in affirming the jury verdict for there did not exist any ambiguity in the Master Deed - the roof terrace, the planters, and the elevator lobby are common elements - they were never a dwelling unit.

II. The Court of Appeals decision, if permitted to stand, guts the long standing legal principle that a TRO is made without prejudice to the rights of either party and when the issues are brought to trial, they are determined without reference to the temporary injunction.

III. The Court of Appeals erred by not setting aside the verdicts for conversion, conspiracy, fraud, and punitive damages for, at all times, the Appellants acted under the advice of counsel and other independent consultants.

IV. The Court of Appeals erred when it did not set aside the verdict for conversion for at no time did the Appellants ever claim ownership over the turtle tile nor the high back chairs and table.

V. The Court of Appeals erred in not setting aside the verdict for conspiracy because the Appellants acted solely as directors.

VI. The Court of Appeals erred by not holding that the circuit court abused its discretion in permitting Respondent to amend his complaint to add a claim of Acquiescence, and denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Acquiescence claim.

INTRODUCTION

Special and important reasons exist for this Honorable Court to grant this Petition. Two of the reasons are the following:

- If the Court of Appeals' Decision ("Decision") is left standing, then the long standing legal principle that a temporary injunction should not be referenced when deciding the merits of a case, is gutted.
- The Decision contains a dramatic departure from existing South Carolina law in that it holds that a non-profit Board member, acting under advice of legal counsel, or other experts, has no protective value.

This Decision hits on all fours the need for review in that there is a dissent in the Decision, the Decision is in conflict with prior decisions of the State Supreme Court, and novel questions of law exist.

STATEMENT OF THE CASE

Shoreham Towers is a horizontal property regime ("Shoreham") consisting of two distinct components: dwelling units and common elements. (R. p. 01095, Article III of the Master Deed) Shoreham was constructed in 1982, and became a forty unit horizontal property regime by the recording of the Master Deed ("Master Deed") on June 22, 1983. (R. pp. 01091-01146) This Master Deed has never been amended. (R. p. 00343, lines 13-15)

The Appellant Shoreham Towers Association ("the Association") is a South Carolina non-profit corporation organized for the purpose of administering and governing Shoreham. Per the Association's Articles of Incorporation, the first Association president, and a board member, was Robert P. Griffin, Respondent's uncle. (R. pp. 01137-01146) He was also one of the three developers. The Respondent, Marshall Griffin ("Respondent"), after becoming a dwelling unit owner, became a director on the Association Board of Directors ("Board") and served for nearly 20 years, with his last year being 2019. He also was the Association President from approximately 2004 to 2016. (R. p. 00350, lines 22-24)

Of the Shoreham forty dwelling units, one dwelling unit is located on the roof of the building, the Rooftop Penthouse. (R. pp. 01120-01121) In 1994, Respondent purchased his dwelling unit. (R. pp. 01184-01186; R. p. 00334, lines 3-13) His deed provides that he was conveyed a "dwelling." (R. pp. 01184-01186; R. p. 00334, line 22 - p. 00335, line 6) Also, the deed states that ownership of his dwelling unit is "Subject to all of the provisions of the Master Deed…and All Exhibits and amendments thereto". Per Exhibit A to the Master Deed, Respondent's dwelling unit "…contains approximately 2,630 square feet." (R. p. 01120) Respondent testified that the square footage of his dwelling unit has never changed; it was the same square footage as when he purchased the unit. (R. p. 00345, lines 13-24) He also testified that he only pays county property taxes on the square footage of his dwelling unit, not on any portion of the roof terrace. (R. p. 00386, line 20 - p. 00387, line 11) And, his Association's assessments have always been based on his dwelling unit size, 2,630 square feet, never on any portion of the roof terrace.

The Rooftop Penthouse is surrounded by a "Roof Terrace", a roof area of approximately 2,000 square feet, which area is depicted on Shoreham's building plans as the "Roof Terrace." (R. pp. 01170-01183; R. p. 00778, line 25 - p. 00779, line 4[1]) Access to the Shoreham roof is by two stairwells-which Respondent testified are common elements. (R. p. 00378, lines 13-18) On the sides of the roof are HVAC units for all dwellings below the roof. (R. pp. 01170-01183; R. p. 01220; R. p. 00256, lines 2-5; R. p. 00776, lines 14-19) Planters are also located on the roof, which were the subject of a 1997 lawsuit. (R. p. 00255, lines 8-16; R. p. 00785, line 4 - p. 00786, line 3) In 1997, the Board voted to cement the planters because of leakage causing damage to the building. (R. p. 00274, lines 13-24; R. p. 00669, line 13 - p. 00670, line 5) In response, Respondent sued the

[1] Nowhere in the Building Plans is this area identified as a Rooftop Penthouse Terrace.

Association, asserting the planters were common elements, which had to be maintained as planters. This lawsuit was settled with the Association agreeing to maintain the planters and Respondent agreeing to be responsible for the plants inside the planters. (R. p. 00274, line 25 - p. 00275, line 23; R. pp 01187-01194)

The Association has, over the years, replaced the roof. (R. p. 00359, lines 18-21) The last significant repair was in 2019. At a January 19, 2019 Board meeting, the Board, including the Respondent, approved a new roof membrane coating to be installed at a cost in excess of $150,000.00. (R. p. 00652, line 11 – p. 00653, line 15; R. p. 00360, lines 14-19; R. p. 00634, lines 10-12) At this Board meeting, the Board approved Thompson Roofing, Inc.'s revised proposal for repairing the roof membrane. (R. p. 00653, lines 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 additional needed funding of the roof project. (R. p. 00652, line 11 - p. 00654, line 23) Respondent testified he never personally paid for this job. (R. p. 00361, lines 7-11)

In order to install the roof membrane coating, the roofing contractor removed the turtle tile located on the roof top. This turtle tile had been placed on the roof by the Respondent, without approval from the Board. (R. p. 00361, lines 19-21; R. p. 00362, lines 3-5) When Thompson Roofing completed the roofing job, the roofing contractor instructed the Board not to place the turtle tile back on the roof because it gathered debris, clogged drains, and could negate the roof membrane warranty. (R. p. 00730, line 6 - p. 00731, line 6; R. p. 00732, line 18 - p. 00733, line 10; R. p. 00735, lines 10-18; R. p. 00740, lines 15-22; R. p. 01201) Based on the advice of the roofing contractor, the turtle tile was not returned to the roof; rather it remained at the roofing contractor's business location where it stored for over four years. (R. p. 00735, lines 10-18; R. p. 00738, line 24 - p. 00739, line 8) Many times, Respondent was asked to pick up the turtle tile. (R.

p. 00739, lines 7-11; R. p. 00741, lines 2-7) Respondent never picked up the turtle tile. (R. p. 00739, lines 7-8; R. p. 00268, lines 8-10)

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. (R. p. 00349, line 11 - p. 00350, line 1; R. p. 00350, lines 18-21) Respondent never obtained permission for this construction. (R. p. 00350, lines 7-17) Also, Respondent posted signs within the stairwells restricting access to the roof, which also without the permission of the Board. (R. p. 00257, lines 16-22; R. p. 00258, lines 8-10; R. p. 00378, line 19 - p. 00379, line 2)

Respondent used his unit for vacation rental. (R. p. 00250, lines 7-9) Prior to 2018, Respondent placed outside furniture, similar to pool-type lounge furniture, on the roof. (R. p. 00377, lines 1-9) In 2018, Respondent replaced the low-back chairs with high-back chairs and a high-top table. (R. p. 00377, lines 10-12, 22-24; R. p. 00378, lines 4-6) Subsequently, his renters often positioned the high-back chairs and table next to the roof's edge. (R. p. 00377, line 25 - p. 00378, line 12; R. pp. 01211-01219)

On October 1, 2018, Petitioner Richard Aquino, a Shoreham unit owner, expressed concerns regarding Respondent's use of the roof. (R. pp. 01150-01155) The Board asked Respondent to respond to the items set forth in Mr. Aquino's email, but Respondent never did. (R. p. 00385, line 25 - p. 00386, line 10; R. p. 00649, line 18 - p. 00650, line 2) As a result of these roof issues, the Board, at a November 2018 meeting, at which Respondent was present, passed a motion to seek legal counsel. (R. p. 00651, lines 3-25) The Board hired Roger Roy, a real estate attorney practicing since 1994 in North Myrtle Beach, to provide legal guidance. (R. p. 00647, line 13 - p. 00648, line 6) Mr. Roy testified that his real estate legal practice consists of about 75% of

his law practice, and he drafted master deeds, and restrictive covenants, for probably 20 to 30 different developments. (R. p. 00746, line 3-16)

In the spring 2019, Mr. Roy provided his legal opinion as to whether the roof terrace was a common element. (R. p. 00655, line 20 - p. 00656, line 9) By letter dated March 19, 2019, Mr. Roy expressed concern about the roof terrace being a liability to the Association, and Mr. Roy encouraged the Board to create rules and regulations for that area. (R. pp. 01195-01196) Sometime thereafter, the Board held a telephone conference with Mr. Roy to discuss proposed rules and regulations for the roof terrace, and following the advice of Mr. Roy, the Board asked Respondent not to join this call. (R. p. 00294, lines 3-14) This was the only time Respondent was asked not to join in on a Board discussion. Then in May 2019, the Board met to discuss rules and regulations with guidance of legal counsel. (R. p. 00655, lines 5-23) Roger Roy approved the draft rules, and upon receiving approval, the Board implemented rules and regulations ("the Rules") for the roof terrace. (R. p. 00657, lines 9-15; R. pp. 01223-01228, Ex. 52) Respondent, through his attorney by letter dated May 31, 2019, proposed alternative rules, with the first rule stating that the roof top terrace is a "roof element" and any remodeling must be approved by the Board. (R. pp. 01198-01200[2]) The Association did not accept Respondent's proposed rules. (R. pp. 01223-01228)

Due to the Board's concerns about liability for injuries occurring on the roof, in December 2019, the Board hired a safety consultant. (R. p. 00671, line 24 - p. 00672, line 16; R. pp. 01158-01160) The consultant issued an opinion that Respondent's high-back chairs were a hazard and all roof furnishing should be kept away from the roof edges. (R. p. 00672, line 17 - p. 00673, line 7; R. pp. 01158-01160) As a result, the Board asked, a number of times over many months, for the Respondent to move the high-back chairs, but he refused. (R. p. 00674, lines 11-16; R. p. 00675,

[2] Respondent's proposed rules acknowledged the roof terrace as a common element.

lines 3-7) Subsequently, the Board replaced the Respondent's high-back furnishings with outdoor furniture similar to those used for the ground floor pool. (R. p. 00380, lines 7-16) In June 2020, Respondent filed a motion for a temporary restraining order. 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. (R. pp. 00016-00018)

ARGUMENT

I. The Appellate Court erred in affirming the jury verdict for there did not exist any ambiguity in the Master Deed - the roof terrace, the planters, and the elevator lobby are common elements - they were never a dwelling unit.

The cause of action for breach of contract and breach of contract accompanied by fraud should have never gone to the jury because the Master Deed is unambiguous. The Shoreham Master Deed sets out that there are only two components to the regime: Dwellings and Common Elements. (R. p. 01095) It provides that Dwelling "…shall mean and comprise the forty (40) separate and numbered Dwelling Units which are designated in Exhibit A to this Master Deed…". (R. p. 01095) In Exhibit A to the Master Deed, it provides that the Dwelling are located in a single building consisting on nine habitable floors and "One dwelling having a designation as 'Rooftop Penthouse' is on the tenth floor." Exhibit A identifies the size of the forty Dwelling with the Rooftop Penthouse containing approximately 2,630 square feet. (R. p. 01120) Respondent admitted that his dwelling unit has never increased in size from the 2,630 square feet he purchased. (R. p. 00345, lines 13-24)

Therefore, the only interpretation of the Master Deed is that if a part of this horizontal property regime is not a Dwelling, then it can only be a common element. Nothing ambiguous

about the statement in the Master Deed that there are 2 components to this regime[3]. The analysis as to the status of the roof top terrace should have ended at this point; but instead, the trial judge permitted the creation of a fictional ambiguity.

Respondent took the position that the roof terrace is a balcony for his penthouse. (R. p. 00339, lines 9-14) He pointed 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..." (R. p. 01121) However, the recorded building plans ("Building Plans"), which are incorporated by reference in Exhibit A of the Master Deed, identifies only thirty-nine dwellings as having balconies. (R. p. 01120; R. pp. 01170-01183) 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 dwelling as having a balcony. In fact, Respondent agreed, on cross-examination, that the Building Plans do not show any balcony for his dwelling unit. (R. p. 00342, line 22 – p. 00343, line 5 - p. 00355, lines 23-25) Further, Respondent testified that the roof terrace is, in fact, the roof of the building and the roof is a common element. (R. p. 00359, lines 3-21)

The unrebutted survey of Shoreham Towers was presented at trial. The surveyor found that the square footage for all dwellings in the units located on levels 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. 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

[3] Respondent did not allege ambiguity in his Complaint or Amended Complaint, and he did not move to conform the pleadings to any evidence of ambiguity.

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. (R. p. 00345, lines 1-8; R. p. 01061) At no time did Respondent pay any assessments, nor property taxes, on any portion of the roof terrace; he only paid on his 2,630 square feet in his dwelling unit.

As to the tenth floor elevator lobby, which Respondent converted for his own use, the Master Deed identifies the elevator lobby as a common area, as do the recorded Building Plans. (R. pp. 01170-01183; R. p. 01120) Also, Respondent testified that the following areas are common or are otherwise not exclusively owned by him: the roof (R. p. 00359, lines 10-12; R. p. 00371, lines 13-17); the portion of the roof where the HVAC units are located (R. p. 00367, lines 7-14); the planters (R. p. 00275, line 24 - p. 00276, line 1; R. p. 00329, lines 12-14; R. p. 00368, lines 12-17; R. p. 00371, lines 10-12); the roof and planter walls (R. p. 00376, lines 15-17); and the two stairwells that lead to the tenth floor (R. p. 00378, lines 13-18)

In essence, the Court of Appeals disregarded basic rules of contract interpretation. "Actions on a contract must be based on the terms of the contract." *Crenshaw*, 432 S.C. at 24, 850 S.E.2d at 13 (citation omitted). The whole of the contract, such as the Master Deed, must be taken together, and therefore, the Master Deed must be read as a whole. *Herrington v. SSC Seneca Operating Co., LLC*, 435 S.C. 243, 248, 866 S.E.2d 579, 581-82 (Ct. App. 2021) ("We are bound to interpret the agreement by looking at the entire agreement from beginning to end…We do this because '[p]resumably, all portions of a contract are inserted for a purpose and the contract must be read as a whole, giving appropriate weight to all provisions.'") (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)) (internal quotation marks

omitted); *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015)

II. The Court of Appeals decision, if permitted to stand, guts the long standing legal principle that a TRO is made without prejudice to the rights of either party and when the issues are brought to trial, they are determined without reference to the temporary injunction.

The Decision gutted this Court's holding 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)).

The Decision states that "without reference to the temporary injunction" does not mean "that the TRO may not be referenced". Following its conclusion that the words "without reference" do not really mean "without reference", it cites to *Alston v. Limehouse*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) even though *Alston* affirms that an injunction order cannot dispose of the issues on the merits. In fact, *Alston* only can be read as supporting the legal principle that a temporary order cannot be referenced in a trial on the merits. Instead, the Court of Appeals ignored the meaning of the two words "without reference". Then the Court of Appeals rationalized its disregard of the words "without reference" by stating that the TRO was never admitted or shown to the jury and minimized the multitude of references to the TRO by erroneously finding the many references to the TRO were probative and not substantially outweighed by the danger of unfair prejudice.

During the trial, witnesses were repeatedly examined about being personally subject to a TRO, about a judge ordering Appellants to put Respondent's high top furniture back on the roof terrace, to stop access to the roof terrace, and put the privacy keylock back for the use of the

elevator only by the tenth floor renters. One example of using the TRO as evidence of wrong conduct by the Appellants during Respondent's cross-examination of Petitioner 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.

(R. p. 00682, lines 6-19)

Also, Respondent's counsel emphasized the significance of this Order by asking three of the four Appellants if any court had previously issued a restraining order against them:

Q: Have you ever had to deal with restraining orders before?
A: This is my first time.

Q: Ever been ordered by a judge to bring back someone's furniture?
A: No. I've never been in anything like this.

Q: Have you ever been ordered by a judge to give someone else's furniture back to them?
A: No.
Q: Have you ever been ordered by a court to return someone's furniture, not mess with someone's plants?
A: No. No.

Q: Have you ever been ordered by a judge to return someone's furniture?
A: You asked that question, and I answered it, no.

Q: Were you disappointed in the judge's ruling?

See (R. pp. 01229-1231; R. p. 00848, lines 14-17; R. p. 00861, lines 16-23; R. p. 00682, lines 13-15; R. p. 00707, lines 23-25; R. p. 00798, lines 7-9; R. p. 00845, lines 4-6; R. p. 00849, lines 2-5)

In addition, the TRO was a topic in the Respondent's opening statement (R. p. 00240 line 13-20), and in his closing statement. (R. p. 00914 lines 1-11, and p. 00916, lines 9-14) The following is what Respondent's counsel told the jury in his closing statement:

> "But they are going to take out his plants and forfeit his furniture, and that is why we got the restraining order. You know, I assure you, if you all say this area is common, the plants are going to be gone, the furniture is going to be gone. It is their rules, no question about it. The only reason they are there is because we had to go to court to get a restraining order."

One example of the TRO's prejudicial effect on the jury, is the finding, by the jury, that the planters were not common elements, despite all evidence to the contrary. The Master Deed, Exhibit A, states the planters are common elements. (R. pp. 01120, 00368, and 00371), and the Respondent testified the planters are common. (R. pp. 00368 and 00371). But, it was the closing argument by Respondent's counsel in which he told the jury the TRO saved the plants. (R. p. 00914). In other words, there was no evidence the planters were not common elements – even Respondent testified they were common; but the jury found otherwise – only because of the use of the TRO by Respondent's counsel.

III. The Court of Appeals erred by not setting aside the verdicts for conversion, conspiracy, fraud, and punitive damages for, at all times, the Appellants acted under the advice of counsel and other independent consultants.

South Carolina has long recognized that board members of a non-profit corporation are protected when performing their duties and this protection applies to non-profit homeowners associations. *Lovering v. Seabrook*, 344 S.E.2d 862 (Ct. App. 1986). *See* S.C. Code Ann. § 33-31-830(b)(2) ("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."

The Appellants relied upon three different experts in guiding their decisions regarding the Shoreham roof. The experts are a South Carolina real estate attorney, a roofing contractor, and a safety consultant. The Respondent presented no experts to contradict that the Appellants' three experts were not competent nor that any guidance these experts gave was erroneous in any way.

In November 2018 (approximately one year before Respondent filed his Complaint), the Board voted to hire legal counsel to obtain guidance for the issues relating to the roof terrace. (R. p. 00651, lines 3-5) The Association retained Roger Roy, a real estate attorney practicing since 1994 in North Myrtle Beach, to provide legal guidance. (R. p. 00647, line 13 - p. 00648, line 6) Mr. Roy testified that his real estate legal practice consists of about 75% of his law practice, and he drafted master deeds, and restrictive covenants, for probably 20 to 30 different developments. (R. p. 00746, lines 3-16)

Mr. Roy provided his legal opinion as to whether the roof terrace was a common element. (R. p. 00655, line 20 - p. 00656, line 9) Then, by letter dated March 19, 2019, Mr. Roy expressed concern about the roof terrace becoming a liability to the Association, and Mr. Roy encouraged the Board, in a letter, to create rules and regulations for that area. (R. pp. 01195-01196) The Board placed a great deal of reliance on this letter from Mr. Roy. (R. p. 00661, lines 12-25) Sometime thereafter, the Board held a telephone conference with Mr. Roy to discuss proposed rules and regulations for the roof terrace, and based upon the advice of Mr. Roy, the Board asked Respondent not to join the call. (R. p. 00294, lines 3-14) This was the only time Respondent was asked not to

join in on a Board discussion. Then in May 2019, the Board met to discuss rules and regulations for the roof terrace with guidance of legal counsel. (R. p. 00655, lines 5-23) Roger Roy approved the rules, and upon receiving approval, the Board implemented rules and regulations for the roof terrace. (R. p. 00657, lines 9-15; R. pp. 01223-01228)

The second expert was the commercial roofing contractor, Jason Thompson with Thompson Roofing. Thompson Roofing was engaged to repair the roof by placing a silicone topping on the roof terrace, then painting the roof terrace. (R. p. 00733, line 17 - p. 00734, line 8) In order to replace and install a new roof membrane, it was necessary to remove the turtle tile which Respondent had placed on the rooftop. Mr. Thompson testified that the turtle tile sat on top of the roof drains and because there was grass growing in the tile, water could not drain off the roof. (R. p. 00730, lines 12-25, and R. p. 00732, line 13 - p. 00733, line 2) Once the silicone membrane was placed on the roof terrace, it was Mr. Thompson's advice not to permit the return of the turtle tile. (R. p. 00734, lines 20-25) This instruction was placed in a letter to the Board dated May 13, 2019. (R. p. 01201) The Respondent did not present any evidence to contradict this instruction and he testified that Thompson Roofing is a qualified roofing company. (R. p. 00364, lines 9-21) As a result of this instruction from the Roofing contractor, Respondent was informed that the turtle tile, located at Thompson Roofing facility, needs to picked up but it cannot be placed back on the roof terrace. At least four times, the Respondent was asked to take possession of the turtle tile, but he refused. (R. p. 00362, lines 18-25)

The third expert was a safety consultant hired due to the possible roof top liability concerns raised by legal counsel, Roger Roy. The safety consultant inspected the roof terrace and as a result, he recommended that the high back chairs be removed due to their location being near the roof

railings. (R. p. 00672, line 17 - p. 673, line 18) As with their legal counsel and roofing contractor, the Board placed a great deal of reliance on the opinions of the safety consultant.

These three experts/consultants were specifically engaged to provide guidance. It is without dispute that the Appellants followed the guidance of these three experts in their determination, and their subsequent actions, that the roof terrace has always been a common element. Appellants' conduct was in accordance with the guidance they received and the Court of Appeals should never have considered them as acting "willfully in depriving Griffin of his rights." The Appellants were entitled to the immunity as provided in S.C. Code Ann. 33-31-834 (2006).

IV. The Court of Appeals erred when it did not set aside the verdict for conversion for at no time did the Appellants ever claim ownership over the turtle tile nor the high back chairs and table.

For almost three and one-half years, the Respondent's conversion cause of action related to the control of the roof top terrace. Respondent's complaint alleged the Appellants "exercised unauthorized possession, control, and/or ownership of the area adjacent to the Rooftop Penthouse when they converted the area into a common area for all guests…". (R. pp. 00039-0040) During the trial, the Respondent's claim for conversion was held not to apply to real property, but rather, could only apply to personal property, and the trial judge permitted Respondent to amend his cause of action for conversion to seek damages for only his furniture and turtle tile. (R. p. 00607, line 8 - p. 00608, line 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 owners' 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 him to retrieve his personal property. S*ee, 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 high back furniture. Because Respondent refused to remove his high back chairs, the Association removed the furniture and had it stacked and placed, with a secure chain around the furniture, in a parking space. (R. p. 00674 lines 11-16; p. 00675, lines 3-7). After the Temporary Restraining Order, the high back furniture was returned in an undamaged condition.

As for his turtle tile, Respondent voted for the installation of a new roof membrane which necessitated the removal of the turtle tile. It was not returned to the roof based on Thompson Roofing, Inc.'s opinion. (R. p. 00735, lines 10-18; R. p. 00738, line 8) 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. (R. p. 00730, line 6; R. p. 00731, line 6) Jason Thompson testified his company sent numerous requests to Respondent to retrieve the turtle tile over the course of four years, but Respondent never did. For the foregoing reasons, there was no evidence of conversion, and it was legal error not to set aside the verdict finding of conversion.

V. The Court of Appeals erred in not setting aside the verdict for conspiracy because the Appellants acted solely as directors.

To succeed on a claim of civil conspiracy, Respondent must present 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*. In addition, 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, there was no evidence that the individual Appellants acted outside the scope of their duties as board members. Respondent relied heavily on Mr. Aquino's email wherein Mr. Aquino expressed concern that the rooftop area was a common element. (R. p. 01140) However, 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. While the Court of Appeals pointed out that the individual Appellants had a phone conference wherein Respondent was not permitted to participate; it ignored 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 there was not - 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. The only evidence Respondent provided as to his conspiracy theory was that Mr. Aquino, who lived in the unit directly below the Rooftop Penthouse, sent an email to the Board questioning whether the rooftop area was a common element. However, on cross-examination, Respondent admitted that a Shoreham unit owner had a right to question the use of the roof top. (R. p. 00381 line 21 – p. 00382, line 8)

At all times, 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. (R. p. 00860, lines 12-19)

Lastly, there is no evidence that any individual Appellant had an intent to harm Respondent. Accordingly, the circuit court should have granted Appellants' motion *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").

VI. The Court of Appeals erred by not holding that the circuit court abused its discretion in permitting Respondent to amend his complaint to add a claim of Acquiescence, and 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.*

Over three and one-half years after the Complaint was filed, and one week before trial, Respondent filed a motion to amend his complaint to add three causes of action with one being acquiescence. The trial judge permitted the claim of acquiescence on January 24, 2023. 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.[4] Furthermore, as discussed below, acquiescence was an improper claim under the facts.

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

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 occurs in the context of physical boundary dispute cases where the location of a boundary line is in dispute - not the nature of property. Further, South Carolina has not 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; *Boyd v. Hyatt*, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)) (internal quotation marks omitted) (emphasis added).

B. Respondent cannot use estoppel as a claim.

[4] 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.

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. Until a week before trial, the complaint did not seek any property ownership.

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

Most significantly, in a horizontal property regime, an acquiescence cause of action is barred. South Carolina Code § 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, the Court of Appeals must concede 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…"

(R. p. 00945, lines 13-22) Thus, Respondent's theory of acquiescence 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 bound by § 27-31-70, which expressly prohibits any such actions that seek to divide the unit owners' co-ownership of the common elements.

CONCLUSION

It is respectfully submitted that this Court grant this Petition for the Court of Appeals' Decision, if permitted to stand, has completely changed the legal standards applicable to the use of temporary injunctions, has eroded any protection for directors serving on non-profit boards, and has created uncertainty of the legal definition of common elements.

Respectfully submitted,

s/Henrietta U. Golding
Henrietta U. Golding, SC Bar #2173
BURR & FORMAN LLP
Post Office Box 336
Myrtle Beach, SC 29578-0336
Phone: (843) 444-1107
hgolding@burr.com

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

Myrtle Beach, South Carolina

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