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' FINAL REPLY BRIEF

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Appellants Tony Giovino, Carter Tackett, Richard Aquino, Bill West, and Shoreham Towners Homeowners Association (collectively, "Appellants") respectfully submit this Reply.

INTRODUCTION

The weaknesses of Respondent's legal theories have not been more evident than as set forth in his brief, which makes clear his position: he believes he is entitled to exclusive use of the rooftop area, while every other unit owner pays for—but cannot use—this common element. Upon examination of Respondent's arguments, they are at best specious, and at worst, seek to have this Court disregard established principles of South Carolina contract law and existing case law.

Although the issues in this case are numerous, the essential point is simple: "No jury—nor any judge—is permitted by law to rewrite a contract to impose liability based on some vague personal sense of what is fair." *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 25, 850 S.E.2d 1, 13 (2020). Here, Respondent would like nothing more than for this Court to confirm the jury's doing of just that: rewrite the express terms of the Master Deed. Indeed, Respondent asks the Court to do as much, ironically, in his discussion of the alleged ambiguity of the Master Deed by stating: "Merely looking at the property in question eradicates any belief that the terrace is intended to be a common element." (Resp.'s Br., p. 16.) However, Respondent's approach to rewriting terms of the Master Deed, in addition to his arguments concerning the other errors on appeal, are not the law, and the arguments of counsel are not evidence. *See RoTec Servs. Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471, 597 S.E.2d 881, 883 (Ct. App. 2004) ("Even when viewing the evidence in the light most favorable to Encompass, as we must, more is required than mere speculation.").

ARGUMENT

I. Respondent misapprehends the holding of *Allegro, Inc. v. Scully* and the meaning of "probative" in addition to ignoring portions of his counsel's own line of questioning.

Perhaps in an attempt to distract the Court from the prejudicial severity of his questioning and multitude of references to the Temporary Restraining Order ("the Order") before the jury, Respondent makes several misstatements regarding applicable case law, his causes of action, and the record.

A. The *Allegro* Court fully recognized the highly prejudicial nature of admitting evidence of a preliminary injunction into evidence before a jury.

To begin, Respondent insists that *Allegro, Inc. v. Scully* is entirely irrelevant because there exist factual distinctions between *Allegro* and this case. Specifically, Respondent notes the fact that in *Allegro*, a preliminary injunction itself was entered into evidence as an exhibit. 409 S.C. 392, 408, 762 S.E.2d 54, 63 (Ct. App. 2014), *rev'd on other grounds*, 418 S.C. 24, 791 S.E.2d 140 (2016). Certainly, Appellants noted this factual difference when reciting the facts of *Allegro* in their brief. (Appellants' Br., p. 14.) However, the Court's reasoning in *Allegro* squarely applies to the many references—in excess of thirty-five—to the Order Respondent made to the jury. While the jury in this case did not receive a written copy of the Temporary Restraining Order, the jury repeatedly heard from Respondent's counsel that a judge ordered Appellants to reverse their conduct by requiring them to return Respondent's personal property that they had removed.[1]

South Carolina law is well settled that the purpose of a temporary injunction is to preserve the status quo of an action, and "[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

[1] Moreover, contrary to Respondent's representations, *Allegro* was not the sole authority Appellants cited to support that reference to a preliminary injunction at trial is improper. *See* Appellants' Br., p. 14.

determined *without reference* to the temporary injunction." *Allegro*, 409 S.C. at 409, 762 S.E.2d at 63 (citations omitted) (emphasis added); *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (citation omitted) (same); *Alston v. Limehouse*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) ("No fact decided upon [a temporary injunction] is concluded thereby, and when the other issues are brought to trial they are to be determined *without reference to said orders*.") (emphasis added). Where a jury is continuously bombarded with the fact that Respondent complained about Appellants' conduct to a court and a judge ruled that Appellants must undo the action they undertook, such facts undoubtedly convey that Appellants committed some kind of wrongdoing. Although Respondent may not have read the Order into the record, Respondent made clear that Appellants took action that had to be undone by a judge, the action that Respondent continued to complain of before the jury. The many references to the Order had the same effect on the jury as entry of the order in *Allegro*: the province of the jury was invaded by learning that a judge had ruled a particular way in the very case before them and as to the issues before them. Accordingly, the same rationale that concerned the *Allegro* Court applies here, and such references to the Order had a high possibility of prejudicing the jury.

B. References to the Temporary Restraining Order were not probative, relevant, or necessary for Respondent's claims.

Respondent contends the Order was needed, but he misunderstands what it means for evidence to be "probative" and/or "relevant." "Probative" is an adjective meaning "[t]ending to prove or disprove." Probative, Black's Law Dictionary (11th ed. 2019). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Simply because the Order and Respondent's claims concern the same

topic—furniture and turtle tile—does not mean the entry of the Order makes any fact relevant or probative for proving Respondent's conversion claim.[2]

For example, Respondent insists the "effect" of the Order was essential to proving his conversion claim, but conversion requires a showing of the "unauthorized assumption and exercise of the right of ownership over good 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). There is nothing—and Respondent cites to no law supporting the notion—that requires a claimant must prove what happens to his property after it has been allegedly converted.

Similarly, the issuance and "effect" of the Order have no bearing on proving any element of a claim for civil conspiracy, which requires a showing of: (1) combination of two or more people; (2) to commit an unlawful act or a lawful act by unlawful means; (3) together with the commission of an overt act in furtherance of the agreement; and (4) damages proximately resulting to the plaintiff. *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574-75 n.4, 861 S.E.2d 774, 780 n.4 (2021). Respondent offers no reasoning as to what element the many questions and the testimony in response to these questions of the Order tended to make more or less probable, and thus, the Order cannot be probative or relevant.

Nonetheless, Respondent contends Appellants would not have returned his personal property had the circuit court not issued an order requiring Appellants to do so. (Resp.'s Br., p.

[2] Indeed, in so arguing, Respondent actually concedes the true reason for referencing the Order was to improperly use the Order as evidence of Appellants' alleged wrongdoing—which certainly flies in the face of this State's precedent to not invade the province of the jury and its ability to make determinations of fact and whether to find defendants liable for the claims against them.

10.) However, although not relevant or probative to Respondent's claims, Appellants' alleged intent to not return Respondent's personal property did not support any claim since it was without dispute that the Association asked the Respondent many times to take possession of the turtle tile and furniture.[3]

Evidence of the Order was not "highly probative" as Respondent claims; it was not probative at all, and the circuit court abused its discretion in permitting any reference to it.

C. Respondent's counsel's questioning extended beyond the "effect" of the Temporary Restraining Order.

Respondent states that his counsel "questioned Appellants only as to the impact the Order had upon their actions," which conveniently requires the Court to ignore portions of his counsel's examination and the witnesses' answers. (Resp.'s Br., p. 11.) Specifically, Respondent's counsel created and then 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?

[3] *See* R. pp. 1229—1231; R. p. 848, lines 14-17; R. p. 861, lines 16-23.

(R. p. 682, lines 13-15; R. p. 707, lines 23-25; R. p. 798, lines 7-9; R. p. 845, lines 4-6; R. p. 849, lines 2-5.)

This line of questioning did not, as Respondent suggests, *only* show the "effect" of the Order, but rather, stressed the severity of a judge ordering parties to reverse their behavior—which only enhances the prejudice to Appellants by continuous references and questioning related to the Order.

II. The Master Deed is not ambiguous, the Court did not make a finding of ambiguity, and even so, the only reasonable interpretation of the evidence supports a finding that the Roof Terrace, tenth floor elevator lobby, and planters are common elements.

Without fully explaining why the Master Deed is ambiguous, Respondent contends the Master Deed is both patently and latently ambiguous.[4] Respondent makes this assertion without considering the entire Master Deed. *See Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person *who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade of business*.") (quoting 17A. AM. JUR. 2D *Contracts* § 338, at 345 (1991)) (emphasis added); *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975) ("Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract.") (citation omitted).

Respondent first asserts that the Roof Terrace is not a common element since the Master Deed refers to "balconies" in Exhibit A. Respondent contends the word "balcony" is synonymous with "terrace," and because a terrace does not fall under South Carolina Code Section 27-31-20(f)(2)-(3)'s definitions of common elements, therefore the terrace is "not a roof, but rather a

[4] 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.

terrace with raised planters surrounding a unit." (Resp.'s Br., p. 14.) Respondent, disregarding his own testimony that the Rooftop Terrace is a roof for the entire building, asserts these facts create a "patent ambiguity." (R. p. 359, lines 6-17.) However, Respondent's assertion fails for numerous reasons.

First and foremost, Respondent does not at all address the plain language in Exhibit A of the Master Deed that provides:

> 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.

(R. p. 1120.) Specifically, the Master Deed does recognize the terrace, which includes a reference to planters within the "rooftop area." This language, "rooftop area," encompasses the entirety of the roof, including the terrace, elevator lobby, and planters, and thus, to the extent Respondent contends the Master Deed did not specifically set forth the Rooftop Terrace as common, such an interpretation ignores the remainder of the Master Deed, such as the definitions of "DWELLING" and "COMMON ELEMENT" in Article III, the depiction of balconies for every unit except for the Rooftop Penthouse in the accompanying building plans which are fully incorporated as being a part of the Master Deed, the square footage of the penthouse unit in Exhibit A to the Master Deed, and the definitions set forth and incorporated into the Master Deed within the Horizontal Property Act.

Moreover, there is no logic to Respondent's position. According to Respondent, because the word "terrace" is not within Exhibit A, the Rooftop Terrace is not common. Apparently not willing to provide this same lens of reading to his own theory, Respondent insists that because Exhibit A also references dwellings' "balconies" as part of the unit, the terrace must be a balcony

because the words are synonymous.[5] However, Respondent fails to explain why the word "terrace" must explicitly appear in Exhibit A to be a common element while "balcony" does not in order to be considered part of Respondent's unit. In essence, Respondent wants this Court to disregard 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) ("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.") (citation and internal quotation marks omitted). This Court must recognize that the drafters of the Master Deed incorporated both the Horizontal Property Act and

[5] Respondent, throughout trial and now on appeal, places great weight on the fact that Merriam-Webster notes "balcony" is a synonym for "terrace"; however, Respondent makes no mention of Merriam-Webster's definition of "terrace," which is "a flat roof or open platform." *Terrace, Merriam-Webster Dictionary* (July 28, 2023), https://www.merriam-webster.com/dictionary/terrace; *see* S.C. Code Ann. § 27-31-20-(f)(2)-(3) (defining "general common elements" as "roofs" and "flat roofs, yards, and gardens").

the building plans. When read together, the rooftop is a common area. Only Respondent refers to the rooftop as his balcony.[6]

Respondent has not demonstrated there is any ambiguity within the entirety of the Master Deed—either patent or latent—and thus, any reference to extrinsic evidence is improper. *See Bellamy v. Bellamy*, 292 S.C. 107, 111, 355 S.E.2d 1, 3 (Ct. App. 1987) ("It is fundamental law in this state that if a deed description is unambiguous, extrinsic evidence cannot add to, subtract from, vary or explain its terms . . . . Extrinsic evidence is admissible to resolve ambiguities, not to create them where none exists.") (citation omitted); *Herrington*, 435 S.C. at 248, 866 S.E.2d at 581 ("[P]recedent explains that when construing a contract, 'all of its provisions should be considered, and one may not, but pointing out a single sentence or clause, create an ambiguity.'") (citation omitted). Nonetheless, even if the jury could have considered the issue of the Master Deed's interpretation and extrinsic evidence related thereto, such evidence would lead to only one reasonable interpretation: that the Rooftop Terrace, tenth floor elevator lobby, and planters are common.

The only similarity between the terrace and the balconies for the units on floors two to nine, is that a railing exists around the terrace and balconies; however, no balcony has common planters, common HVAC units, serves as a flat roof for the remainder of the building, or has common stairwells that lead directly to its area. The survey, introduced at trial, confirms that the balconies' square footage—as denoted on the building plans for floors two through nine—are included within the square footage of each dwelling as set forth in Exhibit A of the Master Deed, while the rooftop area is not included within the Rooftop Penthouse's square footage. (R. p. 778,

[6] And, notably, Respondent's counsel did not refer to this area as a "balcony," but rather, the "rooftop area" and "rooftop terrace" prior to initiating litigation. *See* R. p. 1197.

lines 21-24; R. p. 1220; R. p. 1120.) Respondent has never paid assessments for the rooftop area square footage; Respondent has never paid property taxes for the rooftop area square footage; Respondent never maintained insurance on the rooftop area—although the Association did; Respondent never paid for roof or railing repairs—although the Association did; and other individuals did access the rooftop area over the years as evidenced by Mr. Aquino's testimony and Association meeting minutes. (R. p. 359, lines 3-5; R. p. 387, lines 9-14; R. p. 672, lines 2-16; R. p. 388, lines 16-21; R. p. 584, lines 8-17; R. p. 473, line 11—p. 474, line 6; R. p. 1149.) The facts that Respondent paid for the rooftop area to be periodically cleaned after *his* tenants used the area, for the vegetation in the planters,[7] and for electricity, which the Association would subsume, do not rebut the only reasonable interpretation of the Master Deed.

III. Respondent misunderstands the implied covenant of good faith and fair dealing as applied to the facts in this case, and Respondent fails to reference several key facts.

Respondent next erroneously represents several portions of testimony at trial and misunderstands what constitutes a breach of the implied covenant of good faith and fair dealing—which he references for the first time in his appellate brief. *Cf. Crenshaw*, 432 S.C. at 30-31, 850 S.E.2d at 16 (noting Respondent "did not argue to the jury that [Appellant] breach the implied covenant. The trial court did not explain the implied covenant in its jury charge. The first time [Respondent] made this argument was in his brief to the court of appeals."). "[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Crenshaw*, 432 S.C. at 31, 850 S.E.2d at 17 (quoting *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995)) (internal quotation

[7] Respondent did not, however, pay for the lining of the planters, and the planters for which he did pay was the result of a settlement reached after Respondent sued the Association in 1997 when the Association determined that cementing over the planters would cause less issues for the building. (R. p. 269, lines 18-23; R. p. 274, line 13—p. 276, line 1; R. p. 817, line 23—p. 818, line 5; R. pp. 1187—1194; R. pp. 1148—1149.)

marks omitted). Pursuant to the Master Deed, the Association has the right to create rules and regulations regarding the usage of common elements and to enforce those rules and regulations, which is the alleged breach of which Respondent complains. (R. p. 1098.) All evidence supported that the Association acted in accordance with the terms of the Master Deed, as confirmed by its counsel and per the recommendations of a safety consultant and roofing contractors. Thus, there can be no breach of an implied covenant of good faith and fair dealing because the Association acted as it permitted under the provisions of the Master Deed.

Moreover, Respondent wildly overstates his maintenance of the property and the Association's "allowance" of Respondent to maintain the rooftop area: "Appellants continued to have Respondent maintain the area and pay out of his own pocket for said maintenance." (Resp.'s Br., p. 20.) Respondent fails to mention that while he paid for the plants, electricity, and cleanup of the rooftop area utilized by his renters, he never paid for the rooftop area's coating or sealant, and the Association paid for repairs to the railing, all in contradiction to Section XX of the Master Deed, which provides: "The balcony floor, walls facing the balcony, and balcony railings attached to his DWELLING shall be maintained by the owner at his expense." (R. pp. 1100—1101; R. p. 388, lines 16-21; R. p. 84, lines 8-17.)

Further, Mr. Tackett explained on cross-examination that many members of the Shoreham Towers Community voluntarily provided services to upkeep various common areas, so for Respondent to do the same, to the extent he did, was not an issue until such alterations were safety concerns and once it became known to the Association that the rooftop area was a common element. (R. p. 812, lines 7-19.) Accordingly, there was no evidence that the Association breached an implied covenant of good faith and fair dealing.

IV. Respondent misapprehends what constitutes a "fraudulent act."

At the outset, Respondent asserts "the Association acted fraudulently by breaching the Master Deed." (Resp.'s Br., p. 21.) This statement reveals Respondent's confusion as to what he asserts constitutes the breach versus fraudulent acts according to him. A fraudulent act may be an act "characterized by dishonesty in fact, unfair dealing, or the unlawful appropriate of another's property by design." *Coker's Mobile Home Plaza, Inc. v. ITT Com. Fin. Corp.*, 900 F.2d 250, 5 (4th Cir. 1990) (citing *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986)) (internal quotation marks omitted). Although a fraudulent act may result for a misrepresentation, "a plaintiff must prove reliance on the misrepresentation" when he asserts that was the fraudulent act. *Coker's*, 900 F.2d at 5 (citing *Rutledge v. St. Paul Fire & Marine Ins. Co.*, 286 S.C. 360, 365, 334 S.E.2d 131, 135 (Ct. App. 1985)). Significantly, the Supreme Court of South Carolina and the Fourth Circuit Court of Appeals have held that where a party does not know of and accepts another party's interpretation of a contract's terms, but rather, simply attempts to enforce the contract according to its understanding of the contract, albeit disputed, such acts do not constitute fraud. *Coker's*, 900 F.2d at 6; *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980). Further, when the fraudulent acts alleged are merely repetitious of a plaintiff's breach of contract claim, a cause of action for breach of contract accompanied by a fraudulent act will fail. *Coker's*, 900 F.2d at 6.

Here, Respondent claims the fraudulent acts included the Association's reliance on "material misrepresentations" and "false accusations" by Mr. Aquino, upon which the Association acted "without first verifying [the information's] accuracy." (Resp.'s Br., p. 21.) Frist, Appellants' testimony[8] confirmed the Association did investigate the concerns raised by Mr. Aquino—who

[8] *See, e.g.*, R. p. 646, line 17—p. 648, line 10; R. p. 685, lines 3-14; R. p. 686, line 8—p. 688, line 7.

later corrected some of his misstatements to the Board—by conducting its own investigation and seeking the advice of an attorney. Notwithstanding that Respondent is attempting to impute the allegedly fraudulent accusations of an individual to the Association, Respondent has not presented evidence of, or even asserted, that he relied on these alleged misrepresentations. Moreover, Respondent's other claims of fraudulent acts—including "unfair dealing" by passing rules and regulations, treating the Rooftop Terrace as a common element, and "misappropriating Respondent's property" by removing Respondent's turtle tile and furniture from the Rooftop Terrace—also fail because these acts are merely repetitious of Respondent's breach of contract claim. Accordingly, Respondent's theories of the Association's "fraudulent acts" should not have been submitted to the jury.

V. Respondent made no demand for the return of his furniture or turtle tile, and Appellants did not exercise ownership over Respondent's property.

Referencing his repossession of his furniture and the issuance of the Order, Respondent asserts he made a demand for the return of his furniture and turtle tile. (Resp.'s Br., p. 23.) However, the ownership of the furniture or the turtle tile was never denied to Respondent. The Association relocated these due to the fact that the rooftop area was a common element. Respondent received multiple notices asking him to retrieve his furniture and turtle tile but he communicated nothing in response. According to Respondent, the only evidence of damages—which Appellants contest—was for the price of his over-twenty-year-old turtle tile for $20,000.00. Respondent did not submit any evidence of damages related to his furniture, nor could he, as the furniture was returned.

Moreover, there is no evidence, and Respondent points to none, that Appellants attempted to exercise ownership over his turtle tile or furniture. To the contrary, the Association repeatedly asked that Respondent retrieve his furniture, and Respondent received numerous notices over the

course of several years to retrieve his tile. The fact that the Association informed Respondent that he could not place his personal property within a common area does not equate to an exercise of ownership. Thus, Respondent did not allege or prove any plausible theory of conversion.

VI. Respondent's assertions relating to the law of conspiracy and alleged facts are without any support.

In addressing the issue related to the error of not granting Appellants' directed verdict or judgment notwithstanding the verdict as to his civil conspiracy claim, Respondent failed to articulate any "personal stake" the individual board members would have to the rooftop area being common.[9]

Respondent also makes several assertions that are entirely unsupported by the law or record, such as the impropriety of the Board meeting without Respondent: "Since Respondent was a board member as well, these meetings were inherently outside the scope of the board since the full board was not assembled." (Resp.'s Brief, p. 25.) Respondent cites to no law or the governing documents for this supposed requirement of all members of the board to be present during a

[9] Respondent also failed to address any evidence of an intent to harm him by the Board members, especially any board member aside from Mr. Aquino. *See Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574-75 n.4, 861 S.E.2d 774, 780 n.4 (2021) (holding intent to harm is an "inherent part of the [civil conspiracy] analysis"). When arguing immunity does not apply to protect the individual board members, Respondent contends that "acting under the influence of and for the benefit of one property owner—to the detriment of another—is outside of the scope of their duties as Association board members." (Resp.'s Br., p. 29.) Yet again, Respondent cites to no evidence that supports the Board responded to Mr. Aquino's concerns any differently than they would had any other unit owner expressed the same concerns—although evidence to the contrary is replete in the record. (R. p. 685, lines 3-14; R. p. 860, lines 12-19.) *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted) ("Arguments made by counsel are not evidence."); *cf. Roland v. Heritage Litchfield, Inc.*, 372 S.C. 161, 165, 641 S.E.2d 465, 467 (Ct. App. 2007) (holding the circuit court's granting of summary judgment was proper where mere allegations by developer and builder of condominiums that mold discovered in the firewall area of the condominiums could have been caused by condominium owners' negligence in failing to properly maintain their air conditioning systems were not sufficient to raise an issue of material fact on the issue of causation).

meeting. *See* R. pp. 1128—1129 ("A quorum at a Director's meeting shall consist of the Directors entitled to cast a majority of the votes of the entire Board. The acts of the Board approved by a majority of the votes present at a meeting at which a quorum is present shall constitute the acts of the Board of Directors . . . ."). Moreover, Respondent's contention that the exclusion of him during a meeting regarding the rooftop area with the Association's attorney was somehow an unlawful act entirely ignores South Carolina law entitling the Association to rely on experts' advice. *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. . . ."). Respondent further absurdly argues that "Appellants have not stated what advice they were given or whether they chose to follow it." (Resp.'s Br., p. 25.) This assertion is not only untrue,[10] but also inconsistent with Respondent's objection to the Association's legal counsel, Roger Roy's, testimony concerning advice he provided to the Board. (R. p. 196, line 9—p. 198, line 25.)

Moreover, Mr. Roy never "admitted" that the Board acted outside of his advice, but rather, simply confirmed he made no recommendation to remove Respondent's furniture—not that the Board sought such advice from Mr. Roy and proceeded against his advice. Similarly, Mr. Roy's testimony concerning his clients' openness to certain meetings with Respondent is not indicative of the Board's failure to follow his advice, and the notion that the Board provided Mr. Roy "selective"—and irrelevant—information is inapposite as Mr. Roy never testified such information would have any bearing on his advice to the Board. Furthermore, Respondent's counsel did share this information with Mr. Roy during their numerous conversations. *See* R. p.

[10] *See* R. p. 648, lines 2-10; R. p. 651, line 18—p. 652, line 10; R. p. 655, line 5—p. 657, line 15; R. p. 661, lines 12-25; r. p. 664, line 15—p. 665, line 2; R. p. 689, line 22—p. 690, line 4; R. pp. 1195—1196.

1197. Indeed, what Respondent is essentially asking this Court to do is to hold that "obtaining an attorney" and following his advice constitutes an "overt act[] in furtherance of [] conspiracy." (Resp.'s Br., p. 27.)

Moreover, none of the issues about which Respondent complains is related to the alleged unlawful acts of the individual Appellants, which includes: hiring an attorney; passing rules and regulations as to a common element; removing personal property at the suggestion of experts; and hiring a safety inspector. (Resp.'s Br., p. 27.)

VII. South Carolina's Horizontal Property Act, specifically, Section 27-31-70, bars any claim of acquiescence and adverse possession of common elements.

Respondent references only a portion of Section 27-31-70 and asserts "that statute applies to partition or division, not to claims of adverse possession or acquiescence." (Resp.'s Br., p. 29.) He fails to review the entirety of Section 27-31-70, which 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." (Emphasis added.) Common elements must remain undivided, and accordingly, any action that attempts to convert such property to the ownership of one individual as opposed to all unit owners—including an action for partition or division, or adverse possession or acquiescence—is barred by the statute. To hold otherwise would be to render the statute meaningless. *See In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . .") (quoting 82 C.J.S. *Statutes* § 346) (internal quotation marks omitted).

Respondent insists that its counsel made no admission that the terrace is a common element when describing the doctrine of acquiescence to the jury in closing arguments, but the doctrine as asserted requires the taking of property that once belonged to one and making it the property of another because of the behavior of the parties, which is what Respondent's counsel understood

and explained to the jury. (R. p. 945, lines 13-22.) Notwithstanding, the trial court permitting an amendment of the complaint a few days before trial was prejudicial, especially in light of the fact that Respondent was seeking to take away rights of Shoreham unit owners to common elements.

VIII. Respondent's testimony regarding damages was nothing beyond pure conjecture.

Respondent contends he testified to "the renters that never returned after filing complaints," but Respondent did not present any evidence that any renters cancelled their reservations, demanded a refund of the rent they paid, or otherwise actually withheld money from Respondent. Indeed, Respondent's own witness, Sue Peck, testified she *might* not return in the future if she could not have the same accommodations she previously enjoyed. (R. p. 548, lines 9-20.) As to Respondent's alleged damages related to his turtle tile and furniture, Respondent presented no explanation as to why he did not retrieve his turtle tile—which was damaging the roof—even after years of being asked to retrieve it, and Respondent offered absolutely no evidence as to damages related to the removal of his furniture, which the Association returned to him, undamaged. Thus, these alleged damages of lost rental income and property value are nothing beyond "bald allegations." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 561, 671 S.E.2d 79, 86 (Ct. App. 2008) ("Bald allegations of diminution in property value are insufficient to create a genuine issue of fact regarding damages absent any competent evidence showing the existence, amount, or causation of damages.") (quoting *Clark v. Greenville Cnty.*, 313 S.C. 205, 208, 437 S.E.2d 117, 118 (1993)) (internal quotation marks omitted).

Respondent attempts to salvage the relevancy of the testimony of its expert appraiser, Henry Beckham, by asserting his testimony "not only provided an evaluation of the damages Respondent suffered by Appellants wrongfully determining it to be a common element, but it also provided the jury with an understanding of the property value at stake to both parties." (Resp.'s Br., pp. 32-33.) First, Mr. Beckham offered no testimony as to the value of every other unit owner's

property value if the rooftop area were considered common, and furthermore, Respondent essentially concedes the purpose of this testimony regarding the difference in valuation was to establish damages suffered by Respondent. As set forth fully in Appellants' brief, this valuation testimony was entirely irrelevant to the issue of damages because if the area is common, Respondent is not entitled to recover any damages as to the alleged value of his property, and if the area belongs to Respondent, he has not suffered any diminution in property value. This testimony was irrelevant and prejudicial and should never have been heard by the jury.

IX. The cases Respondent cites with respect to joinder of the individual unit owners are inapposite.

In support of Respondent's argument that the individual unit owners should not have been named, Respondent cites to two cases. (Resp.'s Br., p. 32.) In the first, *Marshall v. Winter*, the Supreme Court of South Carolina held that adjoining landowners, lessees, and the county were not necessary parties to an action regarding a property dispute. 250 S.C. 308, 313, 157 S.E.2d 595, 597 (1967). However, the issue in that case involved a dispute between two property owners with respect to an easement between the plaintiff and defendant, and notably, neither the adjoining landowners, lessees, nor the county claimed an ownership interest in the property. *Id*. at 311-13, 157 S.E.2d at 596-97. Similarly, in the case of *Baron v. Knohl*, the Supreme Court of South Carolina held lot owners within a subdivision were not necessary parties because the action was brought to "solely [] determine the reasonableness of the actions of [a] committee. . . ." 282 S.C. 21, 24, 316 S.E.2d 674, 676 (1984). Unlike those cases, the unit owners here have been affected in that a common element—in which each unit owner has an undivided ownership interest—has been determined to be owned by a single unit owner. The terms of the Master Deed have in fact changed in that neither the description of this area nor the square footage of Respondent's unit

comports with the terms of the Master Deed. Accordingly, the individual unit owners are necessary parties.[11]

X. Respondent's brief demonstrates the legal fallacies created by the jury verdict form.

The jury's finding against both the Association and the individual Appellants is problematic in that both cannot exist, particularly where the jury verdict form did not list which causes of action the jury found against the Association. The circuit court ruled and Respondent conceded that the only cause of action against the individual Appellants was civil conspiracy. Yet, as demonstrated through Respondent's own brief, the instances wherein the Appellants' behavior was on behalf of the Association—and therefore, would protect the individual Appellants from personal liability—versus actions taken on behalf of the individuals allegedly acting outside the scope of their authority as board members, are entirely jumbled.

To name a few examples, Respondent referenced the removal of his personal property as alleged evidence of civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, and conversion. Similarly, Respondent contended the act of passing rules and regulations for the rooftop area was evidence of civil conspiracy and breach of contract. According to Respondent, "excluding" him from a meeting also constituted civil conspiracy and a breach of contract. These same actions cannot be instances where the Association *and* the individual Appellants are liable because such logic requires this Court to find that the individual members

[11] To the extent Respondent contends the Association represents the interests of the unit owners so that they need not be named individually, an amendment of the Master Deed can occur only through the consensus of all unit owners (R. p. 1113), and ultimately, the individual unit owners are the property owners of common elements—not the Association. *See, e.g.*, *Roland*, 372 S.C. at 167, 641 S.E.2d at 468 (holding the homeowners' association was not granted an ownership interest in the common elements but rather, the unit owners owned the common elements); *BancOhio Nat'l Bank v. Neville*, 310 S.C. 323, 328-29, 426 S.E.2d 773, 776-77 (1993) (holding 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 in the road subject to an action to close and abandon the road).

were acting simultaneously—in the exact same behavior—as a board *and* outside of their purview as board members; both cannot be, and the circuit court's determination to not clarify the jury verdict form was error. *See, e.g.*, *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 419, 734 S.E.2d 641, 645 (2012) (holding a special jury verdict form's "overall structure [was] both confusing and prejudicial, since it strongly suggest[ed] that [the defendant entity] was necessarily more culpable than the individual defendants despite the fact that Respondents' theory at trial was based on [the defendant entity's] vicarious rather than direct liability").

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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September 18, 2023
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SC Court of Appeals

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.

CERTIFICATE OF COUNSEL

I certify that APPELLANTS' FINAL REPLY BRIEF complies with Rule 211(b), SCACR.

Taylor K. Voegel