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**Aug 25 2025**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

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

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Appellate Case No. 2023-000451  
Trial Court Case No. 2019-CP-26-06550

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Marshall Griffin, .....Respondent,

v.

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

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**RESPONDENT’S RETURN TO APPELLANTS’ PETITION FOR REHEARING**

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Appellants filed a Petition for Rehearing asserting that the Court overlooked and misapprehended various issues in the case. Rehearing is not warranted because the Court properly considered the relevant law and facts when deciding the appeal. *See* Rule 221, SCACR. Accordingly, the Court should deny Appellants’ Petition for Rehearing.

## ARGUMENT

### **I. The Court properly applied relevant law on the effect of the temporary restraining order, and reference to the TRO was not prejudicial.**

Appellants argue that the Court's ruling "essentially gutted" a principle of law. (Pet. For Reh'g, p. 2 (quoting *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992)). However, Appellants misinterpret the principle of law at issue. The *Helsel* case states that "other issues" brought to trial are to be "determined without reference to the temporary injunction." *Helsel*, 307 S.C. at 32, 413 S.E.2d at 826. The Court correctly concluded that "without reference" does not mean that the TRO may not be mentioned at trial. Rather, it means that "other issues" should be decided on the merits and should not be decided based on the fact that a TRO was issued or any specific findings in the TRO itself. Here, the TRO was mentioned so that the jury could understand the status of Respondent's property, namely the patio furniture. It was not used to establish the Appellants' liability under the various causes of action asserted against them. Nothing beyond general references to the Order's *effects* was ever made before the jury.

Additionally, Appellants argue that these references were prejudicial. (Pet. For Reh'g, p. 2). As the Court acknowledged, "[a] trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed *only in exceptional circumstances*." *Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)) (emphasis added). Here, the jury was never made aware of any specific language contained within the Order, was never shown or provided any part of the Order, and was properly instructed on the nature of the Order. Accordingly, there was no risk of prejudice. Further, the references that were made to the Order were directly probative. As the Court properly concluded, such references were factually

relevant to the current state of the converted property. Although the Appellants returned some of the converted property, they did not do so voluntarily.

Appellants argue prejudicial effect based solely on supposed reasonings behind the jury's findings – despite not being present for deliberations. Specifically, Appellants argue that the jury could not have found that the planters were common elements without the references to the TRO. (Pet. For Reh'g, pp. 2-3). However, there was ample evidence in the record to support the jury's findings that the planters were not common elements. Respondent testified that he paid landscaping costs on the planters for over 20 years and frequently referred to them as his planters. (R. p. 768, lines 4-11; R. p. 326, lines 16-22). Additionally, as was noted by the Court, if the roof terrace is not a common element, then the planters are certainly not common elements as no other dwelling owner would have access to them. Appellants' prejudicial effect arguments are based upon unwarranted assumptions that are not supported by the evidence. Consequently, this is not a proper ground for reversal.

## **II. The Court properly considered relevant evidence regarding the Master Deed.**

Appellants argue that the rooftop terrace cannot be a common element because the Shoreham Towers Master Deed established the square footage of Respondent's Unit as being approximately 2,630 square feet. (Pet. For Reh'g, p. 3 (citing R. 01120)). However, as the Court properly found, the Master Deed is ambiguous. When interpreting a contract, the Court must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein, which the Court properly did in this case. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015). The Master Deed, in the same section, states that all balconies adjacent to each dwelling are private and not common. (R. 01121). There was extensive evidence indicating that the terrace was treated as a balcony. Appellants'

argument about the square footage merely highlights the ambiguities in the Master Deed. Moreover, whether the Master Deed was ambiguous was an issue briefed by the parties and considered by the Court.

Appellants also argue that Paragraph 7 of Respondent's Complaint "alleged" that certain parts of the property are common elements. (Pet. For Reh'g, p. 3 (citing R. 00037)). However, that paragraph does not "allege" that any area is a common element. Rather, this paragraph merely references the Master Deed, which this Court considered and found to be ambiguous. Appellants' Petition mischaracterizes Respondent's allegations and ignores substantial evidence supporting the Court's finding that the Master Deed contained latent ambiguities and patent ambiguities when applied to the area at issue.

In addition, Appellants argue that the Court's opinion would lead to the other unit owners being disproportionately assessed for the care and maintenance of the planters, roof top terrace, and the elevator lobby. (Pet. For Reh'g, pp. 3-4). This is directly contradicted by the testimony in the record, which shows that Respondent had been responsible for the costs for these areas for over twenty years. (R. p. 00276, lines 4-11). Appellants' argument that unit owners would now be responsible for the Respondent's dwelling unit is disingenuous at best.

### **III. The Court properly considered the application of the South Carolina Horizontal Property Regime Act.**

Appellants Petition for Rehearing makes the odd argument that the Court's ruling would require the Court to hold that the term "roof" in the South Carolina Horizontal Property Regime Act is ambiguous. (Pet. For Reh'g, p. 4). Appellants underpin this argument with the conclusion that if the rooftop terrace is not the "roof" of the building, then Shoreham Towers has no roof. (*Id.*). First, there is a roof *on top of* the Rooftop Penthouse. This is the "roof" governed by the Act.

Additionally, Appellants' argument mischaracterizes the Court's opinion and the roof terrace at issue in this case. As the Court correctly noted, the roof terrace is not a "roof" in the traditional sense, as it wraps around the Rooftop Penthouse and serves as the Penthouse's balcony. The Horizontal Property Regime Act does not designate "balconies" or "terraces" as common elements. *See* S.C. Code § 27-31-20.

Although the Horizontal Property Regime Act is not ambiguous, its application and inclusion in the Master Deed does not resolve the patent and latent ambiguities within the Master Deed with regards to the terrace. As argued at length and addressed by the Court, the Master Deed is ambiguous both in its language and as applied to the property at issue. As the Court correctly held: "It is almost inconceivable that the roof terrace was intended to be common."

#### **IV. The Court properly considered the removal of the Turtle Tile.**

Appellants' argument that the Turtle Tile was removed with Respondent's consent contradicts all evidence in the record. Appellants cite to testimony that merely indicates that Respondent consented to the center roof *above* his Penthouse being repaired. There is nothing in the record to indicate that Respondent consented to the Turtle Tile being removed from the terrace. The original vote that Appellants reference for roof repairs was for the center roof above the dwelling, not the terrace, and did not include removal of the Turtle Tile in the scope of work. (R. p. 00391, lines 9-14).

Respondent's testimony clearly indicates that when he was *told* that the Turtle Tile would be taken up, he had it stacked and set aside on the terrace so that it could be reinstalled. (R. p. 00300, lines 17-24). He further testified that it was supposed to be put back down within three days. *Id.* Rather than putting it back down, the Board removed it from his property without his

consent or input. (R. p. 00300, lines 17-24). In fact, that removal was what prompted Respondent to file suit. (R. p. 00301, lines 12-16).

Appellants make this argument despite their own testimony admitting that they did not have Marshall's consent to remove the turtle tile. John Carter Tackett testified:

Q: Marshall did not consent to Turtle tile being removed, did he?

A: **No**. He did consent to us replacing the roof.

Q: He did not consent to you taking his Turtle tile away?

A: **We didn't have to ask Marshall** because it was in our way and unauthorized.

(R. p. 00663, lines 15-21). Appellants' argument disregards the evidence and mischaracterizes the evidence that is referenced. Respondent did not consent to the removal of the Turtle Tile from the terrace and certainly did not consent to it being completely removed from the property and never returned.

**V. The Court properly considered the history of the treatment of the roof terrace.**

Appellants argue that Respondent never considered the roof terrace "part of his unit", despite overwhelming evidence to the contrary. Robert Griffin, Respondent's uncle and the original developer, treated the area as private. (R. p. 00265, lines 18-23). When Respondent acquired the property in 1995, he treated the terrace as his private space and his balcony. (R. p. 00273-274, lines 3-3). Minutes from Board meetings also show that in 1992 it was explicitly stated that the terrace would be handled the same as other balconies. (R. p. 01147). Respondent treated it the same throughout his time on the Board, as his uncle did before him. Ever since he acquired the property in 1995, Respondent treated the terrace as his private outdoor space, maintained the planters, and paid for the terrace's maintenance and cleaning. (R. p. 00395, lines 5-18).

The entire Board treated the terrace as Respondent's private balcony prior to the actions of Appellants in 2019. (R. p. 00329, lines 19-21). The property manager of Shoreham Towers also confirmed that the Board treated the terrace as a balcony during his time working for the Board

from 2005 to 2018. (R. p. 00423, lines 8-13). Again, Appellants’ arguments are also directly contradicted by their own testimony in the case. John Carter Tackett further testified:

Q: And you wrote that because up until January of 2019, you and your board never thought about the terrace being a common element?

A: That’s correct.

(R. p. 00836, lines 1-4).

**VI. The Court properly considered the designation of the roof terrace.**

Appellants’ argument that the roof terrace should have been considered simply a roof fails to consider the evidence in this case and the nature of the property at issue. There is a separate center roof directly over the Rooftop Penthouse, which is the “roof” of Shoreham Towers. The fact that the roof terrace also serves to cover the areas below it does not indicate that it is a “roof” that would fall under the common elements outlined in the Master Deed. None of the other balconies on the property qualify as “roofs”—despite the fact that they also cover the areas below them. Appellants again fixate on the use of the word “roof” and fail to address that the area is not a roof, but rather a terrace with raised planters surrounding a unit. Appellants make no reference to the center roof above the Respondent’s unit, which is the roof. Appellants argue that treating the terrace as a common element will wreck “extreme havoc and uncertainty” with respect to the terrace’s maintenance and repairs. However, there has been no such havoc and uncertainty for the past thirty years in which the terrace has existed as Respondent’s private space. The Court properly concluded that the terrace is not a “roof” in the traditional sense.

**VII. The Court properly considered the finding of intentional wrongdoing and punitive damages.**

Appellants argue that they at all times were following the guidance of legal counsel and should be immune from individual liability. However, that legal counsel admitted that the Board acted outside the scope of his advice in their actions against the Respondent. (R. p. 769, lines 17-

20). That legal counsel further admitted that the Appellants were difficult to deal with and did not listen to his recommendations. (R. p. 765, lines 7-25). Appellants also failed to provide that legal counsel with relevant information and made unfair representations. (R. p. 768, lines 4-11).

Appellants claim that they were following legal advice when excluding Respondent from meetings; however, their attorney's testimony was that they were the ones that did not want to meet with Respondent and that he could not "get them to budge" on having a meeting with Respondent. (R. p. 765, lines 7-25). Appellants argue that the Court's opinion "sends a message to all non-profit board of directors that legal, expert advice means nothing." (Appellants' Pet. For Reh'g at p. 7). The Appellants are correct that the Court's opinion sends a message, but they are incorrect about the message itself. The message is that hiring an attorney cannot be used as a shield for willful and wanton misconduct when legal advice is disregarded, actions are taken outside of recommendations, and untrue representations are made to counsel.

#### **VIII. The Court properly determined that the Master Deed is ambiguous.**

Appellants argue that the Master Deed shows that there is no balcony on the tenth floor of the Shoreham Towers. The Master Deed designates that there is a roof terrace surrounding the Rooftop Penthouse. As has been consistently argued and considered by the Court, balcony and terrace are synonymous. Moreover, there is ample evidence in the record showing that this area has been treated as a balcony for over thirty years. Board meeting minutes from 1992 *explicitly* reference the area as being treated as a balcony. (R. p. 1147). The Court's finding that the Master Deed is ambiguous is well-founded based on the evidence in the case. Both patent and latent ambiguities are abundant when attempting to apply the Master Deed to the area in question.

**CONCLUSION**

The Court did not misapprehend or overlook relevant facts or legal standards. The Court previously considered both parties' arguments and properly applied the law to the facts. Therefore, the Court should deny Appellants' Petition for Rehearing.

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**PROOF OF SERVICE**

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I certify that I have served the Respondent’s Return to Appellant’s Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on August 25, 2025, addressed to their attorney of record:

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