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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

Appellate Case No. 2025-002042

Marshall Griffin, ...Respondent,

v.

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

BRIEF OF PETITONERS

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INTRODUCTION

This case presents clear and consequential legal errors. The Court of Appeals affirmed a jury verdict that conflicts with controlling settled South Carolina law governing both the interpretation of recorded instruments and the limited role of temporary injunctions in adjudicating the merits of a dispute.

At its core, this case presents a question of law: the proper interpretation of a condominium master deed. The dispute concerns whether the "roof terrace" surrounding Respondent's rooftop penthouse is part of his individual unit or instead a common element of the Shoreham Towers Horizontal Property Regime. After concerns were raised regarding Respondent's exclusive use of that area, the Association's Board sought, and followed, the advice of legal counsel, a commercial roofing contractor, and a safety consultant in concluding the roof terrace was a common element and in adopting rules governing its use.

The record further establishes, without dispute, that Respondent never paid Association assessments, property taxes, or insurance premiums for the rooftop area as part of his Dwelling Unit yet now claims exclusive ownership and control over that portion of the Shoreham Towers building.

The Court of Appeals' Decision cannot stand because it conflicts with settled South Carolina law in multiple independent respects. First, it permits repeated reference to a temporary injunction in a jury trial on the merits, despite the long-settled rule that a temporary injunction is entered without prejudice and that issues later tried on the merits are determined without reference to that injunction. *See Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 31, 413 S.E.2d 824, 825 (1992). Second, it leaves intact verdicts against nonprofit volunteer board members who acted in reliance on legal and other professional advice. Third, it permits a jury to determine what constitutes common elements in a horizontal property regime notwithstanding the governing

Master Deed and the South Carolina Horizontal Property Regime Act, thereby displacing controlling legal authority with fact-finding.

STATEMENT OF THE CASE

The Respondent, an owner of a Shoreham Towers condominium unit located in North Myrtle Beach, filed his Complaint on October 14, 2019, against the individual members of the Shoreham Towers Board of Directors and the Shoreham Towers Homeowners Association ("Association"). Respondent had been President of the Association over fifteen (15) years and was an HOA Board member when he filed his Complaint. His Complaint alleges five (5) causes of action: breach of contract, breach of contract accompanied by fraud, unjust enrichment, conversion, and civil conspiracy. The Petitioners timely answered and asserted five (5) defenses including no violations of the Master Deed on the part of the Petitioners, compliance with the Master Deed, immunity for directors and officers, and estoppel and waiver. Due to ongoing disputes as to use of common elements, Respondent sought a temporary injunction which was issued on October 26, 2020. (App. pp. 17-19).

On February 2, 2023, a jury trial was commenced, and the jury returned its verdict on February 7, 2023. (App. pp. 21-22) This verdict found that the rooftop terrace, the planters, and the elevator lobby on the tenth floor were not common elements (thereby being part of the Dwelling Unit owned by Respondent) and awarded actual and punitive damages against the Petitioners. Petitioners timely appealed and on July 16, 2025, the South Carolina Court of Appeals, in a 2 to 1 decision, affirmed the jury verdict. Following the 2 to 1 denial of a Petition for Rehearing, a Petition for Writ of Certiorari was filed, and this Petition was granted February 11, 2026.

STATEMENT OF THE FACTS

Shoreham Towers is a ten-story, forty (40) unit, horizontal property regime ("Shoreham") consisting of only two (2) distinct components: dwelling units and common elements. (App. p. 1110, Article III of the Master Deed). In other words, if a part of the Shoreham Towers regime is not designated a dwelling unit in the Master Deed, it must be a common element. Shoreham was constructed in 1982 and became a horizontal property regime by the recording of the Master Deed ("Master Deed") on June 22, 1983. (App. pp. 1106-1161). This Master Deed has never been amended. (App. p. 344, lines 13-15).

The Petitioner 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 was Robert P. Griffin, Respondent's uncle. (App. pp. 1152-1161). Robert Griffin was one of the three developers. The Respondent, Marshall Griffin, after becoming a dwelling unit owner, became a director on the Association Board of Directors ("Board") and served for nearly twenty (20) years, with his last year being 2019. He also was the Association President from approximately 2004 to 2016. (App. p. 351, lines 22-24). Respondent's wife also served on the Board for years.

Of the Shoreham forty (40) dwelling units, one dwelling unit is located on the roof of the building, the Rooftop Penthouse. (App. pp. 1135-1136). Respondent, along with his wife, are the owners of the Rooftop Penthouse. (App. pp. 1199-1201; App. p. 336, lines 2-6). In January 1994, Respondent purchased his Dwelling Unit from his uncle's trust for $233,500.00. (App. pp. 1199-1201; App. p. 335, lines 3-13). Respondent's deed provides that he was conveyed a "dwelling." (App. pp. 1199-1201; App. p. 335, line 22–p. 336, line 6). Also, his deed states that ownership of this dwelling unit is "Subject to all of the provisions of the Master Deed dated June 17, 1983, and recorded In Deed Book 802, at Pages 305 through 360, records of Horry County, and All Exhibits

and amendments thereto". Per Exhibit A to the Master Deed, Respondent's Dwelling Unit "contains approximately **2,630 square feet.**" (App. p. 1135) (emphasis added). At trial, Respondent testified that the square footage of his rooftop penthouse has never changed; he testified that it was the same square footage as when he purchased the unit. (App. p. 346, 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 nor the elevator lobby. (App. p. 387, line 20–p. 388, line 11). In addition, the Association's assessments, both special and annual, have always been calculated based on his Dwelling Unit size, 2,630 square feet, never on any portion of the roof terrace, the elevator lobby or the planters which sit on the roof.

The Shoreham roof consists of approximately 2,000 square feet, as testified by Robert Warner, a licensed surveyor. This roof area is depicted on Shoreham's building plans as the "Roof Terrace." (App. pp. 1185-1198; App. p. 786, line 25–p. 787, line 4[1]). Access to the Shoreham roof is by two stairwells—which Respondent testified are common elements. (App. p. 379, lines 13-18). On the sides of the roof are HVAC units for all dwellings units below the roof. (App. pp. 1185-1198; App. p. 1235; App. p. 000257, lines 2-5; App. p. 784, lines 14-19). Planters are also located on the roof, which were the subject of a lawsuit. (App. pp. 256, lines 8-16; App. p. 793, line 4–p. 794, line 3). In 1997, the Association Board voted to cement the planters because of leakage causing damage to the building. (App. p. 275, lines 13-24; App. p. 677, line 13–p. 678, line 5). In response, Respondent sued the Association, asserting the planters were common elements which had to be maintained as planters. This lawsuit was settled with the Association agreeing not to cement the planters and Respondent agreeing to be responsible for the plants inside

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

the planters and the Association being responsible for the planters. (App. p. 275, line 25–p. 276, line 23; App. pp 1202-1209).

Since the construction of Shoreham, the Association has, a number of times over the years, replaced the roof terrace. (App. p. 360, 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. (App. p. 660, line 11–p. 661, line 15; App. p. 361, lines 14-19; App. p. 00642, lines 10-12). At this Board meeting, each Board member, including Respondent, voted to approve Thompson Roofing, Inc.'s revised proposal for repairing the roof membrane. (App. p. 661, 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 funding needed for the roof project. (App. p. 660, line 11–p. 662, line 23). Respondent testified that this roofing repair job cost close to $150,000.00, and he never personally paid for this job:

> Q: And you never personally paid for this roofing repair job. You just paid the portion from your assessment, just as the other 39 units; isn't that right?
> A: That's correct.

(App. p. 362, lines 7-11).

In order to install the roof membrane coating, the roofing contractor removed the turtle tile located on the top of the roof. This turtle tile had been placed on top of the roof by the Respondent[2], which he admitted was done without approval from the Board. (App. p. 362, lines 19-21; App. p. 363, 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. (App. p. 738, line 6–p. 739, line 6; App. p.

[2] The turtle tile was installed while Respondent was President and controlled the Association.

740, line 18–p. 741, line 10; App. p. 743, lines 10-18; App. p. 748, lines 15-22; App. p. 1216). 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 was stored for over four (4) years. (App. p. 743, lines 10-18; App. p. 746, line 24–p. 747, line 8). Many times, Respondent was asked to pick up the turtle tile. (App. p. 747, lines 7-11; App. p. 749, lines 2-7). Respondent never picked up the turtle tile. (App. p. 747, lines 7-8; App. p. 269, lines 8-10).

While President of the Association, 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. (App. p. 350, line 11–p. 351, line 1; App. p. 351, lines 18-21). Respondent never obtained permission for this construction. (App. p. 351, lines 7-17). Also, Respondent posted signs within the stairwells restricting access to the roof, which he also did without the permission of the Board. (App. p. 258, lines 16-22; App. p. 259, lines 8-10; App. p. 379, line 19–p. 380, line 2).

Respondent's primary use of his unit is for vacation rental. (App. p. 251, lines 7-9). Prior to 2018, Respondent placed outside furniture, similar to pool-type lounge furniture, on the roof. (App. p. 378, lines 1-9). In 2018, Respondent replaced the low-back chairs with high-back chairs and a high-top table without the approval of the Board. (App. p. 378, lines 10-12, 22-24; App. p. 379, lines 4-6). His renters often positioned the high-back chairs and table next to the roof's edge, and renters would sit on the roof parapet. (App. p. 378, line 25–p. 379, line 12; App. pp. 1226-1234).

On October 1, 2018, Petitioner Richard Aquino[3], a Shoreham unit owner, expressed concerns regarding Respondent's use of the roof. (App. pp. 1165-1170). At the time Mr. Aquino

[3] Mr. Aquino is now deceased.

sent his initial email, he was not a member of the Board. (App. p. 386, lines 9-10). The individual Petitioners, Tony Giovino, Bill West, Richard Aquino, and Carter Tackett, along with Respondent, served as board members of the Association's Board of Directors in 2018. The Board asked Respondent to respond to the items set forth in Mr. Aquino's email, but Respondent never did. (App. p. 386, line 25–p. 387, line 10; App. p. 657, line 18–p. 658, line 2). As a result of issues being presented to the Board regarding the use of the roof, the Board, at a November 2018 meeting, at which Respondent was present, passed a motion to seek legal counsel. (App. p. 659, lines 3-25). The Board hired Roger Roy, a real estate attorney practicing since 1994 in North Myrtle Beach, to provide legal guidance. (App. p. 655, line 13–p. 656, 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. (App. p. 754, lines 3-16).

In the spring 2019, Mr. Roy provided his legal opinion that the roof terrace was a common element. (App. p. 663, line 20–p. 664, line 15). By letter dated March 19, 2019, to the Board, Mr. Roy expressed concern about the roof terrace being a "great liability to the Association . . . ." and Mr. Roy encouraged the Board to create rules and regulations for that area. (App. pp. 1210-1211). 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 the call. (App. p. 295, lines 3-14). This was the only time Respondent was asked not to join in on a Board discussion and no action matters were voted upon. Then in May 2019, the Board met to discuss rules and regulations with guidance of legal counsel. (App. p. 663, lines 5-23). Roger Roy approved the draft rules, and upon receiving approval, the Board voted to implement these rules and regulations ("the Rules") for the roof terrace. (App. p. 665, lines 9-15; App. pp. 1238-1243, Ex. 52.) Respondent, through his attorney by letter dated May 31, 2019,

proposed alternative rules, with his first rule stating that the rooftop terrace is a "roof element" and any remodeling must be approved by the Board. (App. pp. 1213-1215[4]). The Association did not accept Respondent's proposed rules. (App. pp. 1238-1243).

Due to the Board's concerns about liability for activities occurring on the roof, in December 2019, the Board hired a safety consultant. (App. p. 679, line 24–p. 680, line 16; App. pp. 1173-1175). The consultant issued an opinion that Respondent's high-back chairs were hazardous, and all roof furnishing should be kept away from the roof edges. (App. p. 680, line 17–p. 681, line 7; App. pp. 1173-1175). As a result, the Board asked, a number of times over many months, for the Respondent to replace the high-back chairs with lower chairs, but he refused. (App. p. 682, lines 11-16; App. p. 683, lines 3-7). As a result, the Board replaced the Respondent's high-back furnishings on the roof with outdoor furniture similar to furniture used for the ground floor pool. (App. p. 381, lines 7-16). In June 2020, Respondent filed a motion for a temporary restraining order. The circuit court issued a temporary injunction, requiring the Petitioners to return the Respondent's high-back furnishings to the roof and providing Respondent exclusive use of the roof terrace during the litigation. (App. pp. 16-18).

STANDARD OF REVIEW

This appeal presents questions of law, which this Court reviews de novo. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (holding statutory interpretation is a question of law reviewed de novo). The interpretation of the Shoreham Towers Master Deed, including whether its terms are ambiguous, likewise presents a question of law for the Court. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550

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

S.E.2d 299, 302 (2001). The construction of a clear and unambiguous deed is a question of law reviewed de novo. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987).

This appeal further requires the Court to determine the legal effect of a temporary injunction and whether the Court of Appeals' Decision is consistent with this Court's precedent governing such orders. A temporary injunction is entered without prejudice, and issues later tried on the merits must be determined without reference to that injunction. *See Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 31, 413 S.E.2d 824, 825 (1992). Whether the decision below is consistent with controlling precedent presents a pure question of law reviewed de novo, and a decision inconsistent with such precedent constitutes reversible legal error. *See Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41.

Moreover, because the issues on appeal turn on the interpretation of written instruments and the application of settled legal principles, this Court owes no deference to the lower courts' conclusions. *See S.C. Dep't of Nat. Res.*, 345 S.C. at 623, 550 S.E.2d at 302 (recognizing appellate courts determine questions of law independently).

To the extent this appeal implicates discretionary rulings, including evidentiary determinations, those rulings are reviewed for abuse of discretion. An evidentiary ruling is reviewed for abuse of discretion; however, a ruling based on an error of law constitutes an abuse of discretion and warrants reversal where prejudice results. *See State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011); *State v. Adams*, 354 S.C. 361, 366, 580 S.E.2d 785, 788 (Ct. App. 2003).

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 causes of action for breach of contract and breach of contract accompanied by fraud should have never gone to the jury because the Shoreham Towers Master Deed is unambiguous.

The Master Deed, in Article III, states that there are two (2) components to this property regime: dwelling units and common elements. (App. pp. 78, 1110). It provides that dwelling units "shall mean and comprise the forty (40) separate and numbered dwelling units which are designated in Exhibit A to this Master Deed . . . ." (App. pp. 78, 1110, Article III). In Exhibit A to the Master Deed, it provides that the dwelling units are located in a single building consisting of nine habitable floors and "[o]ne dwelling having a designation as 'Rooftop Penthouse' is on the tenth floor." The Master Deed, in Exhibit A, identifies the square footage of each of the forty (40) dwelling units with the Rooftop Penthouse containing approximately 2,630 square feet. (App. p. 1135). Respondent admitted that his Dwelling Unit has never increased in size from the 2,630 square feet he purchased. (App. p. 346, 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 unit, then it can only be a common element. Nothing ambiguous about the statement in the Master Deed that there are two (2) components to this regime[5]. The analysis as to the status of the rooftop terrace should have ended at this point; but instead, the trial judge permitted the creation of a fictional ambiguity.

A. The roof terrace has never been part of Respondent's Dwelling Unit.

Contrary to the Building Plans (being part of the Master Deed), Respondent took the position that the roof terrace is a balcony. (App. p. 340, 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 . . . ." (App. p. 1136). But there is no balcony on the roof. The recorded building plans ("Building Plans"), which are incorporated by reference in Exhibit A of the Master Deed,

[5] 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.

identifies thirty-nine (39) dwellings as having balconies. (App. p. 1135; App. pp. 1185-1198). There is nothing in the Master Deed, including Exhibit A, which states the rooftop terrace is a balcony nor is there anything that designates the rooftop dwelling unit as having a balcony. In fact, Respondent agreed, on cross-examination, that the Building Plans, being part of the Master Deed, do not show any balcony for his Dwelling Unit. (App. p. 343, line 22–p. 344, line 5; App p. 356, 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. (App. p. 360, lines 3-12).

Q: There is no doubt this roof terrace is the roof of the building?
A: It's two things: it is a roof, and it is a terrace.
Q: So if it is a roof, you'll agree it is a common element; is that right?
A: The roof portion, that is correct.

(App. p. 360, lines 6-12).

Not only does the Master Deed only identify the rooftop as a roof, not a balcony, none of the thirty-nine (39) balconies identified in the Building Plans have common planters, common HVAC units, common stairwells or an elevator for access, or serve as a roof for the building.

The Court of Appeals ignored the Master Deed's plain language that dwelling units and common elements are the only two (2) components to this regime. It completely overlooked or disregarded the unrebutted survey of Shoreham Towers presented at trial. The surveyor testified that the square footage for each dwellings unit located on levels two through nine *included* their respective balconies as set forth in Exhibit A of the Master Deed. (App. p. 778, lines 1-12). The surveyor testified that the square footage in the Respondent's Dwelling Unit is the same square footage identified in the Master Deed, being 2,630 square feet. (App. p. 778, line 21–p. 779, line 4). The Rooftop Penthouse square footage—approximately 2,072 square feet—did *not* include the roof terrace. Indeed, the surveyor testified that the roof terrace square footage is approximately 2,000 square feet, meaning Respondent's "dwelling" would nearly double if the roof area were a

balcony for the Respondent's unit. That would, in turn, mean Respondent should be paying nearly double in assessments to the Association considering each unit owner's square footage determines the amount he pays in assessments. (App. p. 346, lines 1-8; App. p. 1076). At no time did Respondent pay any assessments or property taxes on anything other than his 2,630 square feet in his Dwelling Unit.

B. The tenth-floor elevator lobby is a common element, not part of Respondent's Dwelling Unit.

As to the tenth-floor elevator lobby[6], a common element which Respondent converted for his own use, the language in the Master Deed, Exhibit A, identifies the elevator lobby as a common area:

> "Access to the "Rooftop Penthouse dwelling on the tenth floor is provided from an elevator lobby which is a common area and stairways to the rooftop area, which is also common."

(App. p. 1135).

Respondent testified that he was unsure whether the elevator lobby he converted into a private foyer was included in his 2,630 square feet of his dwelling, although the Building Plans show the lobby as not being part of the Penthouse foyer. (App. p. 347, lines 3-19; App. pp. 1185-1198). In addition to converting the elevator lobby to his private use, Respondent also had a privacy key to this elevator so that only the occupants of the tenth floor can use this elevator to access the tenth floor. (App. p. 320, lines 5-8; App. p. 350, line 11–p. 351, line 6).

C. The planters, located on the roof terrace, are common elements, not part of Respondent's Dwelling Unit.

At trial, Respondent testified, as follows:

Q: What does the Master Deed say about the planters?
A: They just say, in general terms, that they are common.

[6] In his Complaint, paragraph 7, it is stated that the elevator lobby is a common area. (App. p. 38).

. . .
Q: According to the Master Deed, what part of the roof is common?
A: The planters are common, not the area adjacent to the window walls and the railing; that specifically says its not common.

. . .
Q: Do you agree that the planters are common elements?
A: That's correct.

(App. p. 276, line 24–p. 277, line 1; App. p. 330, lines 12-16; App. p. 369, lines 15-17). In spite of this undisputed testimony of the Respondent, that the planters were common elements, the trial judge permitted the jury to find otherwise.

Despite the uncontroverted fact that the roof terrace is not a dwelling unit, the Court of Appeals' Decision incredulously states, "[i]t is almost inconceivable that the roof terrace was intended to be common." (App. p. 1406). Nothing in the Master Deed supports this statement. In essence, the Court of Appeals disregarded basic rules of contract interpretation. "The contract is read as a whole document." *Crenshaw v Erskine Coll.*, 432 S.C. 1, 24, 850 S.E.2d 1, 14 (2020). 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).

Respondent testified, on direct and cross-examination, that the following areas are common or are otherwise not owned by him: the roof (App. p. 360, lines 10-12; App. p. 372, lines 13-17); the portion of the roof where the HVAC units are located (App. p. 368, lines 7-14); the planters (App. p. 276, line 24–p. 277, line 1; App. p. 330, lines 12-14; App. p. 369, lines 12-17; App. p. 372, lines 10-12); the roof and planter walls (App. p. 377, lines 15-17); and the two stairwells that lead to the tenth floor (App. p. 379, lines 13-18). This testimony completely undercuts Respondent's fictional ambiguity even without referencing the Master Deed.

II. The Court of Appeals' Decision, if permitted to stand, guts the long-standing legal principles 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 TRO, granting Respondent exclusive use of the roof, was referenced more than thirty-five (35) times during the trial, all heard by the jury.

The purpose of a temporary injunction is to preserve the status quo and prevent irreparable harm pending a hearing or trial on the merits. *Allegro, Inc. v. Scully*, 409 S.C. 392, 762 S.E.2d 54 (Ct. App. 2014). It is well settled in South Carolina that "[a] temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (citing *Alston v. Limehouse*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901)). The Court of Appeals' Decision gutted this legal principle that a temporary injunction should not be referenced in a trial on the merits.

In *Allegro, Inc. v. Scully*, the Court of Appeals of South Carolina held the admission of a preliminary injunction order into evidence during a jury trial was inherently prejudicial and

constituted an abuse of discretion. 409 S.C. at 409, 762 S.E.2d at 63. Specifically, the Court provided:

> "It is hard for this court to determine an instance where admission of a preliminary injunction order into the trial record would not be highly prejudicial. . . . We believe admitting this order had a high possibility of influencing the jury due to its numerous findings of fact and statements concluding defendants' liability for the alleged charges."

Id. Here, although Respondent did not introduce the Temporary Restraining Order ("the Order") into evidence as an exhibit, Respondent repeatedly mentioned and questioned witnesses about the Order. Despite his acknowledgement during Petitioners' Motion in Limine that he could not "beat [the Appellants] over the head" with reference to the Temporary Restraining Order, Respondent's counsel referenced the Order over thirty-five (35) times[7] in front of the jury. (App. p. 209, lines 5-7)

The Court of Appeals' 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

[7] The following citations to the transcript include Respondent's references to the Temporary Restraining Order, which were mentioned in opening statements and closing arguments, and were otherwise elicited or referenced during the examination of Respondent, Richard Aquino, Bill West, Tony Giovino, and Carter Tackett: App. p. 241, lines 13-20; App. p. 321, lines 15-16; App. p. 327, line 16–p. 328, line 5; App. p. 376, lines 18-21; App. p. 397, lines 5-11; App. p. 508, lines 7-19; App. p. 509, lines 11-21; App. p. 520, line 22–p. 521, line 8; App. p. 521, line 17–p. 522, line 13; App. p. 690, lines 6-19; App. p. 715, line 9–p. 716, line 3; App. p. 716, line 21–p. 717, line 3; App. p. 805, line 24–p. 806, line 9; App. p. 852, line 24–p. 853, line 6; App. p. 856, line 20–p. 857, line 7; App. p. 869, line 9–p. 870, line 7; App. p. 929, lines 1-12; App. p. 931, lines 9-14.

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, four (4) witnesses were repeatedly examined about being personally subject to a TRO, about a judge ordering Petitioners 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 Respondent using the TRO as evidence of wrongful conduct by the Petitioners occurred during Respondent's cross-examination of Petitioner Bill West. Respondent's counsel asked Mr. West 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.

(App. p. 690, lines 6-19).

Also, Respondent's counsel emphasized the significance of this Order by asking three of the four Petitioners 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?

(App. pp. 1244-1246; App. p. 856, lines 14-17; App. p. 869, lines 16-23; App. p. 690, lines 13-15; App. p. 715, lines 23-25; App. p. 806, lines 7-9; App. p. 853, lines 4-6; App. p. 857, lines 2-5).

In addition to Respondent's counsel questioning five different witnesses about each complying with the TRO, the TRO was a topic in the Respondent's opening statement (App. p. 241, lines 13-20), and in his closing statement. (App. p. 929, lines 1-11; App. p. 931, 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."

(App. p. 735, lines 1-5).

The significance of the questioning of the witnesses was to paint the Petitioners as engaging in misconduct. The opening and closing statements by Respondent's counsel were to establish liability on the part of the Petitioners.

One example of the TRO's prejudicial effect on the jury, is the fact 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 (App. pp. 1135, 369, 372), and the Respondent, in his testimony, agreed the planters are common. (App. pp. 369, 372). But it was the closing

argument by Respondent's counsel in which he told the jury the TRO saved the plants. (App. p. 929). 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.

The cross examination on the TRO was to shame the Petitioners and guide the jury to the finding of liability. To not recognize the highly prejudicial effect completely ignores the reality that the TRO was used to establish liability, not to preserve the status quo.

If this Decision by the Court of Appeals is permitted to stand, the ramifications will be significant in that *Helsel* is no longer good law and temporary injunctions are weapons to use at a merit hearing.

III. The Court of Appeals erred by not setting aside the verdicts for conversion, conspiracy, fraud, and punitive damages for, at all times, the Petitioners acted under the advice of counsel and other independent consultants and therefore entitled to protection afforded by S.C. Code § 33-31-834(a).

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 Petitioners relied upon three (3) different experts in guiding their decisions regarding the Shoreham Towers roof. The experts they hired are a South Carolina real estate attorney, a

roofing contractor, and a safety consultant. The Respondent presented no experts to contradict in any way that the Petitioners' three (3) experts were not competent nor that the guidance these experts gave to the Petitioners 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. (App. p. 659, lines 3-5). The Petitioner Association retained Roger Roy, a South Carolina real estate attorney practicing since 1994 in North Myrtle Beach, to provide legal guidance. (App. p. 655, line 13–p. 656, 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. (App. p. 754, lines 3-16).

Mr. Roy provided his legal opinion that the roof terrace was a common element. (App. p. 663, line 20–p. 664, line 9). Then, by letter dated March 19, 2019, Mr. Roy expressed concern about the roof terrace becoming a "great" liability to the Association, and Mr. Roy encouraged the Board, in his letter, to create rules and regulations for that area. (App. pp. 1210-1211). The Board placed a great deal of reliance on this letter from Mr. Roy. (App. p. 669, 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. (App. p. 295, 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. (App. p. 663, lines 5-23). Roger Roy approved the draft rules, and upon receiving approval, the Board implemented rules and regulations for the roof terrace. (App. p. 665, lines 9-15; App. pp. 1238-1243). Respondent, through his attorney by letter dated May 31, 2019, proposed alternative rules that stated the roof terrace, while a

responsibility of the Association (therefore, a common element), was to be exclusively used by Respondent or his guests. (App. pp. 1213-1215). Relying on advice of legal counsel, the Association did not accept those proposed rules. (App. pp. 1238-1243).

The second expert hired by Petitioners was the commercial roofing contractor, Jason Thompson with Thompson Roofing. Mr. Thompson testified that Thompson Roofing was started by his father and now is owned and operated by him and his brother. (App. p. 737, lines 4-9). Thompson Roofing was engaged to repair the roof by placing a 100% silicone topping on the roof terrace, then painting the roof terrace. (App. p. 741, line 17–p. 742, 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. (App. p. 738, lines 12-25, and App. p. 740, line 13–p. 741, line 2). Once the silicone membrane was placed on the roof terrace, then the terrace was painted, it was Mr. Thompson's advice not to permit the return of the turtle tile on top of the roof membrane. (App. p. 742, lines 20-25). This instruction was placed in a letter to the Board dated May 13, 2019. (App. p. 001216) The Respondent did not present any evidence to contradict this instruction, and he testified that Thompson Roofing is a qualified roofing company. (App. p. 365, 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 be picked up but it cannot be placed back on the roof terrace. At least four (4) times, the Respondent was sent communications asking him to take possession of the turtle tile, but he refused. (App. p. 363, lines 18-25).

The third expert was a safety consultant who was 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. (App. p. 680, 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 (3) experts/consultants were specifically engaged to provide guidance. It is without dispute that the Petitioners followed the guidance of these three (3) experts in their determination, and their subsequent actions. Based on competent legal advice and past history of roof terrace repair and maintenance by the Association, the Petitioners believed that the roof terrace has always been a common element.

Every act of the Petitioners was done in order to comply with the Master Deed, and if the Petitioners had not conducted such inquiries, they could have been personally liable to other unit owners for failure to fulfill their duties[8]. *Queen's Grant Villas Horizontal Prop. Regimes I-V v. Daniel Int'l Corp.*, 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985) ("In this case, the master deeds and the by-laws incorporated therein show that the Regime has the obligation to maintain the common elements. Should the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains, it may be liable to the homeowners for its omissions."); *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 409 S.C. 164, 178, 760 S.E.2d 121, 129 (Ct. App. 2014) ("When master deeds and bylaws show a

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

homeowner's association has the obligation to maintain the common elements, the association has a duty to pursue a recovery for any alleged construction defects in the common elements.") (citation omitted). Petitioners' 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." *Cf. Smith v. Dockside Ass'n, Inc.*, No. 2005-UP-139, 2005 WL 7083482, at *3-4 (S.C. Ct. App. Feb. 28, 2005) ("In the present case, the undisputed evidence shows the individual directors consulted with various professionals when confronted with financial or construction issues relating to the Association. The types of experts consulted corresponded with the issues the Board sought to resolve. For example, the directors sought advice from attorney for legal questions, accountants and CPAs for financial questions, and architects for construction issues. Because there was undisputed evidence that the directors sought outside advice in order to make informed maintenance and financial decisions for the Association, the individual directors were protected from liability. . . . By relying upon the advice of various individuals with particular professional competence and expertise *as a matter of law, the individual directors discharged their duties in good faith, with the care of an ordinarily prudent person and in the best interest of Dockside*.") (emphasis added).

The actions of the Petitioners in determining that the roof terrace, the planters, and the elevator lobby were common elements were actions premised upon advice and guidance from experts. Petitioners were entitled to immunity as a matter of law.

IV. The Court of Appeals erred when it did not set aside the verdict for conversion for at no time did the Petitioners 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 rooftop terrace. Respondent's complaint alleged the Petitioners "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 . . . ." (App. pp. 40-41). During the trial, due to Petitioners' Motion for Directed Verdict, the Respondent's claim for conversion was held not to apply to real property, but rather, could only apply to personal property, and the circuit court permitted Respondent to amend his cause of action for conversion to seek damages for only his furniture and turtle tile. (App. p. 615, line 8–p. 616, 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 Petitioner attempted to exercise the right of ownership over Respondent's furniture or turtle tile; rather, the evidence is unrefuted that Petitioners and others, namely, Thompson Roofing, contacted Respondent numerous times asking that Respondent retrieve his personal property. *Cf. Jenkins*, 391 S.C. at 217-18, 705 S.E.2d at 461-62 (holding that where a defendant poured sugar in the plaintiff's gas tank and thereby prevented the plaintiff from using the truck, the plaintiff set forth no evidence that the defendant wrongfully assumed and exercised the right of ownership over the truck, and therefore, the circuit court should have granted the defendant's motion for a directed verdict); *see, e.g., Spates v. Dameron Hosp. Ass'n*, 7 Cal. Rptr. 3d 597, 609 (Cal. Ct. App. 2003) ("The act of removing personal property from one place to another, without an assertion of ownership or preventing the owner from exercising all rights of ownership in such personal property, is not enough to constitute conversion.") (internal quotation marks and citations omitted).

Moreover, Respondent did not present any evidence as to damages to his furniture. Instead, Respondent simply argued the Petitioners removed his high-back furniture after the start of litigation, because, as Petitioners testified, they believed the area wherein the furniture was located to be a common area, and high-back chairs and table were deemed dangerous. The Petitioners hired a safety consultant, who warned of the dangers of the high-back furniture being located on a rooftop, next to the roof's edge. As a result, the Respondent was asked to not use this type of outdoor furniture. Respondent refused to remove this furniture after repeated requests to do so, then the Association removed the furniture and had it stacked and placed, with a secure chain around the furniture, in a parking space. (App. p. 682, lines 11-16; App. p. 683, lines 3-7). The Respondent was requested to retrieve the high-back furniture, but he did not. The Association substituted Respondent's furniture with pieces that were similar to what was located at the pool. (App. p. 381, lines 7-16). 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—there is no evidence to the contrary. It was not returned to the roof based on Thompson Roofing's opinion. (App. p. 743, lines 10-18; App. p. 746, 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. (App. p. 738, line 6; App. p. 739, line 6). By letter dated May 13, 2019, Thompson Roofing specified that it did not recommend placing the turtle tile back on the roof membrane. (App. p. 1216). Jason Thompson of Thompson Roofing testified his company sent numerous requests to Respondent to retrieve the turtle tile over the course of four (4) years, but Respondent never so much as made contact with Thompson Roofing.

For the foregoing reasons, there was no evidence of conversion, and it was legal error 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 Petitioners acted in their capacity 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, 861 S.E.2d 774, 780 (2021). Intent to harm is an "inherent part of the analysis." *Id*. at n.9. 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, Respondent presented no evidence that the individual Petitioners acted outside the scope of their duties as board members. Although Respondent relies heavily on Mr. Aquino's September 2018 email wherein Mr. Aquino expressed concern that the rooftop area was actually a common element, nothing about that email is an unlawful act or unlawful means, particularly where there is no evidence Mr. Aquino knew such statements to be false at the time he made them. While the Court of Appeals pointed out that the individual Petitioners had a phone conference wherein Respondent was not permitted to participate; it ignored the unrebutted testimony that the individual Petitioners 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 Petitioner 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. Mr. Aquino, who lived in the unit directly below the Rooftop Penthouse, previously sent an email to the Board questioning whether the rooftop area was a common element; and on cross-examination, Respondent admitted that a Shoreham unit owner had a right to question the use of the rooftop. (App. p. 382, line 21–p. 383, line 8).

At all times, the individual Petitioners 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. (App. p. 868, lines 12-19). In other words, the Board responses to Mr. Aquino's concerns was not any different if these concerns had been raised by other unit owners.

Lastly, the record contains no evidence that any individual Petitioner had an intent to harm Respondent. Intent to harm is inherent, essential part of a civil conspiracy analysis. *Paradis* at 574-575 n.9, 861 S.E.2d at 780 n.9 (2021). Accordingly, the circuit court should have granted Petitioners' 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, at the eve of trial, to amend his complaint to add a claim of Acquiescence and denying Petitioners' 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. Petitioners 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.[9] Furthermore, as discussed below, acquiescence was an improper claim under the facts, and per Respondent's interpretation of the claim, Petitioners would have conducted additional discovery to refute Respondent's claim that he had used the property at issue uninterrupted for a period of ten (10) years or more. For those reasons, the circuit court abused its discretion by allowing Respondent to add a claim of acquiescence on the eve of trial. *Collins Ent., Inc.*, 363 S.C. at 561-63, 611 S.E.2d at 270, *cert. denied*, Aug. 15, 2006 (holding the trial court did not err in denying defendants' motion to amend their answer to allege estoppel even though the same "comments and assurances" formed the basis

[9] 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.

of the estoppel claim, when the issues were not tried by the consent of the parties and plaintiff prepared to defend a counterclaim of breach of contract accompanied by fraudulent act rather than estoppel and therefore, and plaintiff "sufficiently demonstrated the prejudice envisioned by Rule 15, requiring the court to deny a motion to amend") (citations omitted).

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

The doctrine of acquiescence appears to be a vehicle courts have used to "rescue" an adverse possession claim wherein the element of hostility could *not* be met because there is a mistaken belief as to an encroachment onto another's land. *See* 8 S.C. Jur. *Adverse Possession*, §27. Factually, the application of acquiescence in South Carolina case law typically occurs in the context of physical boundary dispute cases where the location of a boundary line is in dispute - not the nature of property. 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). *Knox v. Bogan*, 322 S.C. 64, 71-72, 472 S.E.2d 43, 48 (Ct. App. 1996) ("[I]f adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for a long period of time—usually the time prescribed by the statute of limitations—they are precluded from claiming that the *boundary line* thus recognized and acquiesced in is not the true one.") (emphasis added). *S. Ry. Co. v. Day*, 140 S.C. 388, 138 S.E.2d 870, 875 (1926) ("[I]n such case [where boundary lines are disputed] the possession is knowingly hostile to the railroad company, and the principle of equitable estoppel is not applicable. 'The estoppel may arise, even though the period of acquiescence is very short.'") (citations omitted). The application of the doctrine of acquiescence to this case is simply wrong.

B. Respondent cannot use estoppel as a claim.

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

(App. p. 960, 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.

VII. <u>There was no competent evidence supporting any damage award to the Respondent.</u>

During the jury deliberations, the jury asked the following questions:

> "For damages, do we have to put an actual number, or can it be a phrase such as : "attorneys fees and court costs?"
>
> The trial judge's answer "an actual number".

(App. p. 001251)

In essence, this jury question means that the actual damage award was to compensate for attorney's fees because there was no competent evidence of damages. There was no evidence to permit the jury to determine the existence of damages, let alone the amount, with reasonable certainty or accuracy. "As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy . . . . 'Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.'" *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (citations omitted); *White v. Whitney Mfg. Co.*, 60 S.C. 254, 38 S.E. 456, 461 (1901) (noting speculative damages would not constitute the element of damages).

Respondent testified he "just noticed probably" six renters who did not return, "but could be more," and that could be "probably close to $20,000.00" in rental income he lost, but not one document showed that Respondent suffered any losses. (App. p. 321, lines 21-24). There was not even any foundation provided as to Respondent's rental charges, loss of any rentals, or any time

period during which rentals were or could have been lost. Instead, Respondent testified that in May of 2020, he was "booked up solid." (App. p. 311, lines 8-12). As a result of the removal of Respondent's furniture and turtle tile, Respondent testified he received complaints—not actual losses in rental business. (App. p. 311, lines 18-24). In reality, Respondent suffered no losses, and it was legal error to submit the question of actual damages to the jury.

VIII. Punitive damages should not have been submitted to the jury.

Punitive damages should not have been considered in connection with any of the Petitioners. The punitive damages award against the individual Petitioners can only be attributed to the jury frequently hearing, on a daily basis, the evidence of the Temporary Restraining Order. Additionally, the jury was improperly and repeatedly subject to Respondent's argument that the roof terrace, elevator lobby, and planters were part of a balcony attributable to his unit, even though Respondent had no balcony, a fact that the Master Deed unambiguously showed since the Master Deed identified balconies for thirty-nine (39) dwelling units, not the Respondent's Dwelling Unit, and in the Master Deed, the square footage of his Dwelling Unit, 2,630, did not include the roof terrace.

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

First and foremost, punitive damages may only be awarded upon a finding of actual damages. "[P]unitive damages may be awarded only upon a finding of actual damages." *Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (citation omitted). "The policy behind awarding punitive damages must also remain consistent with the principle of penal theory that the 'punishment should fit the crime.' 'In sum, courts must ensure that the measure of punishment is

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

There is no supportable basis for the award of punitive damages. The jury's punitive damage award was based only on the erroneous belief that Respondent should recover attorney's fees, as evidenced by its fifth question to the circuit court during deliberation: "For damages, do we have to put an actual number, or can it be a phrase such as: 'attorney fees and costs'[?]" (App. p. 1251). The fact that the disproportionate $200,000.00 award was based on a belief that Respondent should recover its attorney's fees and costs is clearly supported by the jury's question asking if it could award damages by writing that Respondent is to recover "attorneys' fees and costs," or whether the jury must award an actual number. This blatant error must be reversed.

CONCLUSION

It is respectfully submitted that this Honorable Court reverse the Decision of the Court of Appeals, render a decision that the rooftop terrace, elevator lobby, and planters are common elements, and negate the damages awarded by the jury verdict.

Respectfully submitted,

s/Henrietta U. Golding

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