

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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.

APPENDIX – VOLUME IV

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Marshall Griffin, ...Respondent,

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STATEMENT OF ISSUES ON APPEAL

- I. It was an error of law and unduly prejudicial to permit Respondent to introduce any evidence or make any reference regarding the Temporary Restraining Order.
- II. The question of the roof terrace, tenth-floor elevator lobby, and planters as common elements was a question of law that should not have been submitted to the jury, for the Master Deed identifies those areas as common.
- III. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract claim for no evidence existed that any term in the Master Deed was breached.
- IV. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract Accompanied by Fraudulent Act claim for there was no breach of contract, fraudulent act, or fraudulent intent.
- V. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Conversion claim for the Appellants did not deprive the Respondent of owning any property.
- VI. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Civil Conspiracy claim for all Appellants' actions were consistent with the Master Deed, done as directors, and followed advice of professionals.
- VII. The circuit court abused its discretion by granting Respondent's Motion to Amend to include a cause of action for Acquiescence and erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Acquiescence claim for this is not the proper case for such a claim, Respondent cannot use estoppel as a claim, and such a claim, if applied to these facts, would be barred by South Carolina Code Section 27-31-70.
- VIII. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to the individual Appellants' immunity for each acted within their scope as directors.
- IX. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to evidence of actual damages for the Respondent did not suffer any actual damages.
- X. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to evidence of

punitive damages in that punitive damages should not have been submitted to the jury.

- XI. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to not requiring all dwelling unit owners to have been made defendants for common elements are owned by all Shoreham Tower unit owners.
- XII. The circuit court erred as a matter of law in denying Appellants' Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to permitting the testimony of Henry Beckham in that he improperly testified as to the value of property not owned by Respondent.
- XIII. The circuit court erred as a matter of law by not listing in its verdict form each cause of action to be submitted to the jury.
- XIV. The circuit court abused its discretion by permitting Respondent and his counsel to refer to the roof terrace as a balcony.

INTRODUCTION

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

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

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

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

STATEMENT OF THE CASE

Shoreham Towers is a horizontal property regime (“Shoreham”) consisting of forty condominium units with ten levels and is located on Ocean Boulevard in North Myrtle Beach, South Carolina. (R. pp. 1091—1146; R. p. 628, lines 9-10.) The Shoreham Towers Association (“the Association”) is a South Carolina non-profit corporation organized for the purpose of administering and governing Shoreham. Shoreham Towers was constructed in 1982, and the Master Deed (“Master Deed”) was recorded on June 22, 1983. (R. pp. 1091—1146.) The Master Deed has never been amended. (R. p. 343, lines 13-15.) The highest unit, known as the Rooftop Penthouse, is located on the roof of the building. (R. pp. 1091—1146.)

Respondent Marshall Griffin (“Respondent”), along with his wife, are the owners of the Rooftop Penthouse. (R. pp. 1184—1186; R. p. 335, lines 2-6.) However, Respondent’s wife was not a party to the action. (R. pp. 35—41.) On January 21, 1994, Respondent purchased the Penthouse from his uncle’s trust for \$233,500.00. (R. pp. 1184—1186; R. p. 334, lines 3-13.) In his Deed, the property conveyed to the Respondent is classified as a “dwelling.” (R. pp. 1184—1186; R. p. 334, line 22—p. 335, line 6.) The Rooftop Penthouse is surrounded by an area of approximately 2,000 square feet, which is depicted on Shoreham’s building plans as the “Roof Terrace.” (R. pp. 1170—1183; R. p. 778, line 25—p. 779, line 4.) Access to the Shoreham roof is by two stairwells—which Respondent conceded are common elements. (R. p. 378, lines 13-18.) Located in the middle of the roof is Respondent’s unit, and on the sides of the roof are HVAC units for all dwellings. (R. pp. 1170—1183; R. p. 1220; R. p. 256, lines 2-5; R. p. 776, lines 14-19.) Planters are also located around the edge of the roof, which have been the subject of controversy for many years. (R. p. 255, lines 8-16; R. p. 785, line 4—p. 786, line 3.) For instance,

in 1997, the Association's Board of Directors ("the Board") voted to cement over the planters because the membranes were leaking and causing leaks in the building. (R. p. 274, lines 13-24; R. p. 669, line 13—p. 670, line 5.) In response, Respondent initiated a lawsuit against the Association, asserting the planters were common and were required to have plants per the Building Plans; as a result of that litigation, the Association reached an agreement with Respondent that the planters would not be cemented over, but Respondent would be responsible for the plants and the Association for the planters. (R. p. 274, line 25—p. 275, line 23; R. pp. 1187—1194.)

Since the construction of Shoreham, the Association has maintained the roof with the last major repair being in the spring 2019 when a new roof coating was installed at a cost in excess of \$100,000.00. (R. p. 359, lines 18-21; R. p. 360, lines 14-19; R. p. 634, lines 10-12.) In the Board's January 19, 2019 meeting, each Board member, including Respondent, voted to approve Thompson Roofing, Inc.'s revised proposal for repairing the roof membrane. (R. p. 653, 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 partial funding the roof project. (R. p. 652, line 11—p. 654, line 23.) During this roof repair, the roofing contractor removed turtle tile, which, years before, the Respondent had installed on top of the roof membrane, which he installed without approval from the Board. (R. p. 361, lines 19-21; R. p. 362, lines 3-5.) The roofing contractor advised that the turtle tile not be placed back on the roof due to the fact that it gathered debris, clogged drains, and could negate the roof membrane warranty. (R. p. 730, line 6—p. 731, line 6; R. p. 732, line 18—p. 733, line 10; R. p. 735, lines 10-18; R. p. 740, lines 15-22; R. p. 1201.) Based on the advice of the roofing contractor, the turtle tile was not returned to the roof; rather it was delivered to the roofing contractor's business location where it remained for over four years. (R. p. 735, lines 10-18; R. p. 738, line 24—p. 739, line 8.) Many times, Respondent was asked to

pick up the turtle tile. (R. p. 739, lines 7-11; R. p. 741, lines 2-7.) Respondent never picked up the turtle tile but instead sued, seeking approximately \$20,000.00 for the loss of the tile. (R. p. 739, lines 7-8; R. p. 268, lines 8-10.)

While president of the Board, Respondent converted the tenth-floor elevator lobby area, designated in the Master Deed as a common element, to his private foyer to make it more “aesthetically pleasing” to Respondent’s renters. (R. p. 349, line 11—p. 350, line 1; R. p. 350, lines 18-21.) Respondent never obtained permission for this construction. (R. p. 350, lines 7-17.) Respondent posted signs within the stairwells restricting access to the tenth floor, which he also did without the permission of the Board. (R. p. 257, lines 16-22; R. p. 258, lines 8-10; R. p. 378, line 19—p. 379, line 2.)

Respondent’s primary use of his Penthouse is for vacation rental. (R. p. 250, lines 7-9.) Prior to 2018, Respondent placed outside furniture, similar to pool-type lounge furniture, on the roof. (R. p. 377, 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. (R. p. 377, lines 10-12, 22-24; R. p. 378, lines 4-6.) Subsequently, his renters often positioned the high-back chairs and table next to the roof’s edge, and renters occasionally sat on the roof parapet. (R. p. 377, line 25—p. 378, line 12; R. pp. 1211—1219.)

On October 1, 2018, Appellant Richard Aquino expressed concerns regarding Respondent’s exclusive use of the roof.¹ (R. pp. 1150—1155.) In response to Mr. Aquino’s

¹ At the time Mr. Aquino sent this initial email, he was not a member of the Board. (R. p. 385, lines 9-10.) The individual Appellants, Tony Giovino, Bill West, Richard Aquino, and Carter Tackett, along with Respondent, served as board members of the Association’s Board of Directors in 2019. Respondent testified he served as a Board member for approximately fifteen or sixteen years. (R. p. 270, lines 15-17.) During that time, he served as the President from approximately 2004 to 2016. (R. p. 350, lines 22-24.)

inquiries that the roof terrace was a common element, the Board subsequently asked Respondent to respond to the items set forth in Mr. Aquino's email, which Respondent never did. (R. p. 385, line 25—p. 386, line 10; R. p. 649, line 18—p. 650, line 2.) Sometime in early 2019, the Board, at Respondent's request, met with Respondent to view his unit while the Board attempted to determine whether the roof terrace was common. (R. p. 818, line 19—p. 819, line 11.) Following that tour, the Board concluded the area was likely a common element, and Respondent told the Board he was "going to lawyer up." (R. p. 819, lines 12-21.)

The Board, during a meeting at which Respondent was present, also passed a motion for Mr. Tackett, a Board member, to retain legal counsel. (R. p. 651, lines 3-25.) The Board hired Roger Roy, a real estate attorney practicing in Myrtle Beach, to provide legal guidance. (R. p. 647, line 13—p. 648, line 6.) Significantly, both Mr. Aquino and Respondent abstained from the Board discussion regarding the legal advice it received as well as the voting on matters relating to the roof terrace. (R. p. 651, lines 17-25.)

Mr. Roy provided his legal opinion as to whether the roof terrace was a common element in the spring of 2019. (R. p. 655, line 20—p. 656, line 9.) Specifically, by letter dated March 19, 2019 to the Mr. Tackett, Mr. Roy expressed concern about the roof terrace becoming a liability to the Association, and Mr. Roy encouraged the Board to create rules and regulations for that area. (R. pp. 1195—1196.) Sometime thereafter, the Board held a telephone conference with Mr. Roy to discuss proposed rules and regulations for the roof terrace, and upon conferring with Mr. Roy, the Board asked Respondent to not join the call. (R. p. 294, lines 3-14.) Then in May 2019, the Board met to discuss rules and regulations for the roof terrace. (R. p. 655, lines 5-10.) Specifically, Bill West, Carter Tackett, and Tony Giovino met, without the participation of Mr. Aquino or Respondent, to draft rules with the "guidance and okay of Roger Roy." (R. p. 655, lines 13-17; R.

p. 665, lines 9-22.) These board members asked Mr. Roy to approve the draft rules, and upon receiving approval, the Board implemented rules and regulations (“the Rules”) for the roof terrace. (R. p. 657, lines 9-15; R. pp. 1223—1228.)² Initially, Respondent, through his attorney by letter dated May 31, 2019, proposed alternative rules that stated the roof terrace was to be exclusively used by Respondent or his guests. (R. pp. 1198—1200.) The Association did not accept those proposed rules. (R. p. 1223—1228.) As a result of the Rules’ passage, Respondent filed suit against the Association and his other fellow board members on October 14, 2019, alleging causes of action for breach of contract, breach of contract accompanied by fraudulent act, unjust enrichment/quantum meruit, conversion, and civil conspiracy. (R. pp. 35—41.)

Due to the Board’s concerns about liability in a common area, in December 2019, the Board hired a safety consultant. (R. p. 671, line 24—p. 672, line 16; R. pp. 1158—1160.) The consultant issued an opinion that the high-back chairs were a hazard and all roof furnishing should be kept away from the rooftop edges. (R. p. 672, line 17—p. 673, line 7; R. pp. 1158—1160.) As a result, the Board asked Respondent to move the high-back chairs more than once, but Respondent did not do so. (R. p. 674, lines 11-16; R. p. 675, lines 3-7.) Subsequently, the Board replaced the Respondent’s high-back furnishings on the roof with furnishings similar to those used for the ground floor pool. (R. p. 380, lines 7-16.) In January 2020, Respondent filed a motion for a temporary restraining order, which the circuit court subsequently denied due to Respondent’s failure to support the motion by affidavit or verified complaint. (R. pp. 45—60; R. pp. 7—9.) In June 2020, Respondent again filed a motion for a temporary restraining order seeking the same

² The Master Deed provides that the “ASSOCIATION shall have . . . the authority and power to enforce the provisions of this Master Deed . . . and to adopt, promulgate and enforce such rules and regulations governing the use of the DWELLINGS and COMMON ELEMENTS, as the Board of Directors of the ASSOCIATION may deem to be in the best interests of the CONDOMINIUM.” (R. p. 1098.)

relief. (R. pp. 61—137.) The circuit court issued a temporary injunction, requiring the Appellants to return the Respondent’s high-back furnishings to the roof and providing Respondent exclusive use of the roof terrace during the litigation. (R. pp. 13—19.)

THE MASTER DEED

The Shoreham Master Deed sets out that there are two components to the regime: Dwellings and Common Elements. (R. p. 1095.) It provides that Common Elements are all of the real property, improvements and facilities, other than the Dwellings, and it further incorporates, by direct reference, the definitions set forth in South Carolina’s Horizontal Property Act. (R. pp. 1095, 1117.) The Master Deed states that common elements are subject to a “perpetual non-exclusive easement in favor of all the owners of dwellings in the condominium for their use and the use of their immediate families, guests, and invitees...” (R. p. 1096.) In other words, all forty unit owners of Shoreham Towers possess an undivided ownership interest in all of the common areas within the regime. (R. p. 353, lines 15-22.) As Respondent conceded, the Master Deed does not create any right of privacy in common elements. (R. p. 353, lines 4-14.) Respondent’s Deed to his Shoreham unit states that Respondent and his wife were deeded a “Dwelling” and that they own an undivided interest in the common elements. (R. pp. 1184—1186.) Specifically, Respondent’s “Dwelling” consists of 2,630 square feet. (R. p. 355, lines 2-5; R. pp. 1184—1186.)

The property description in the Master Deed, identified as Exhibit A, states that the forty dwellings are all located in a single building consisting of nine habitable floors, with floor two being the first habitable floor. (R. pp. 1120—1121.) Exhibit A further states that one dwelling having a designation as “rooftop penthouse” is on the tenth floor. (R. p. 1120.) As to the unit’s size, the Master Deed, in Exhibit A, provides, “[T]he ‘Rooftop Penthouse’ dwelling on the 10th floor contains approximately 2,630 sq. feet.” (R. p. 1120.)

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

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

(R. p. 1120 (emphasis added).) At trial, Respondent took the position that the roof terrace is a balcony. (R. p. 339, lines 9-14.) He relied on this interpretation by pointing to the language in the second to last paragraph in Exhibit A to the Master Deed, which states that “all balconies adjacent to each dwelling, including the railing attached thereto, are part of that dwelling and not common areas” (R. p. 1121.) However, the recorded building plans (“Building Plans”), which are incorporated by reference in Exhibit A of the Master Deed, identifies thirty-nine dwellings as having balconies. (R. p. 1120; R. pp. 1170—1183.) There is nothing in the Master Deed, including Exhibit A, that states the rooftop terrace is a balcony nor is there anything that designates the rooftop unit as having a balcony. Moreover, the Master Deed does not provide that the roof terrace or tenth-floor elevator lobby may be used solely by occupants of the Rooftop Penthouse. (R. p. 374, lines 9-19.)

As to the tenth-floor elevator lobby, a common element which Respondent converted for his own use, the language in the Master Deed identifies the elevator lobby as a common area, as do the recorded Building Plans. (R. pp. 1170—1183; R. p. 1120.) 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. (R. p. 346, lines 3-19; R. pp. 1170—1183.) 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. (R. p. 319 lines 5-8; R.

p. 349, line 11—p. 350, line 6.) However, Respondent later testified on direct and cross-examination that the following areas are common or are otherwise not exclusively owned by him:

- The roof (R. p. 359, lines 10-12; R. p. 371, lines 13-17);
- The portion of the roof where the HVAC units are located (R. p. 367, lines 7-14);
- The planters (R. p. 275, line 24—p. 276, line 1; R. p. 329, lines 12-14; R. p. 368, lines 12-17; R. p. 371, lines 10-12);
- The roof and planter walls (R. p. 376, lines 15-17); and
- The two stairwells that lead to the tenth floor (R. p. 378, lines 13-18).

TRIAL

The trial started on January 30, 2023 and concluded February 3, 2023. Before the actual trial started, the circuit court heard Appellants' Motions in Limine, Respondent's Motion in Limine, and Respondent's Motion to Amend. (R. pp. 195—228.) On January 24, 2023, less than a week prior to the start of trial, Respondent filed a motion to amend his complaint to add causes of action for adverse possession, declaratory judgment, and acquiescence. (R. pp. 145—153.) Over the objection of Appellants, the circuit court permitted Respondent to add a claim of acquiescence. (R. p. 200, line 13—p. 204, line 10; R. p. 619, line 15—p. 623, line 7.) Respondent dismissed his claim for unjust enrichment/quantum meruit. (R. p. 606, line 24—p. 607, line 6.) Subsequently, the circuit court ruled the only cause of action that applied to the individual Appellants was the civil conspiracy claim. (R. p. 874, line 10—p. 875, line 10.) Over the objection of Appellants, the causes of action for breach of contract, breach of contract accompanied by fraudulent act, conversion, civil conspiracy, and acquiescence were submitted to the jury. (R. p. 862, line 19—p. 880, line 24.)

The jury returned a verdict finding the roof terrace, elevator lobby, and planters were not common, found against the Association, found against the individual Appellants for civil conspiracy, found the individual Appellants acted willfully and wantonly, and awarded \$20,000.00 in actual damages and \$200,000.00 in punitive damages. (R. pp. 22—25.) The jury then completed

a special verdict form, dividing the punitive damages among the individual Appellants in the following way: 67% against Richard Aquino; 11% against Tony Giovino; 11% against Bill West; and 11% against Carter Tackett. (R. p. 26.) After evaluating the *Gamble* factors, the circuit court reduced the punitive damage award to \$160,000.00. (R. p. 978, line 5—p. 980, line 25.)

At the close of Respondent’s case and at the close of all evidence, Appellants made motions for directed verdict. (R. p. 594, line 20—p. 624, line 4; R. p. 862, line 19—p. 880, line 24.) Following the trial, on February 13, 2023, Appellants filed a motion for judgment notwithstanding the verdict, motion for a new trial remittitur, motion for new trial absolute, and motion for new trial. (R. pp. 163—176.) Appellants supplemented these post-trial motions with an additional ground the same day. (R. pp. 177—179.) On March 9, 2023, the circuit court entered an order denying Appellants’ motions. (R. pp. 27—30.) On March 13, 2023, the circuit court amended its order to correct a typographical error regarding the filing date of Appellants’ supplemental post-trial motions. (R. pp. 31—34.) Appellants filed and served their Notice of Appeal on March 16, 2023. (R. pp. 1237—1261.)

STANDARD OF REVIEW

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

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

II. Interpretation of the Master Deed

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

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

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

IV. Motion to Amend Complaint

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

ARGUMENT

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

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

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

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

Id. Here, although Respondent did not introduce the Temporary Restraining Order (“the Order”) into evidence as an exhibit, Respondent repeatedly mentioned and questioned witnesses about a judge ordering Appellants to put Respondent’s furniture back on the terrace. Despite his acknowledgement during Appellants’ Motion in Limine that he could not “beat [the Appellants] over the head” with reference to the Temporary Restraining Order, Respondent’s counsel

referenced the Order over thirty-five times³ in front of the jury. (R. p. 208, lines 5-7.) For example, during Respondent's cross-examination of Appellant Bill West, Respondent's counsel asked the following:

Q: We had to go to court to make you put [the keylock] back; you remember that?

A: Yes.

Q: And the only reason why it is back now is because we had to get a restraining order to put it back; is that correct?

A: Correct.

Q: Have you ever had to deal with restraining orders before?

A: This is my first time.

Q: The only reason there is a keylock in that elevator is because a judge here in Horry County made your board put it back the way it has been?

A: Correct.

(R. p. 682, lines 6-19.) Not only were the references to the Order irrelevant as they did not support any element of damages or cause of action alleged, but the repeated references were unfairly and inherently prejudicial. Respondent's counsel made it clear that a judge issuing an order—a *restraining* order, which a jury of lay persons associates with something criminal in nature—requiring the Appellants to reverse their conduct. Furthermore, Respondent mentioned and questioned witnesses about the Order in excess of thirty-five times before the jury, which certainly had a high possibility of influencing the jury's decisions to find fault against the Appellants and otherwise award punitive damages at ten times the rate of actual damages. Because of its highly

³ The following citations to the transcript include Respondent's references to the Temporary Restraining Order, which were mentioned in opening statements and closing arguments, and were otherwise elicited or referenced during the examination of Respondent, Richard Aquino, Bill West, Tony Giovino, and Carter Tackett: R. p. 240, lines 13-20; R. p. 320, lines 15-16; R. p. 326, line 16—p. 327, line 5; R. p. 375, lines 18-21; R. p. 396, lines 5-11; R. p. 500, lines 7-19; R. p. 501, lines 11-21; R. p. 512, line 22—p. 513, line 8; R. p. 513, line 17—p. 514, line 13; R. p. 682, lines 6-19; R. p. 707, line 9—p. 708, line 3; R. p. 708, line 21—p. 709, line 3; R. p. 797, line 24—p. 798, line 9; R. p. 844, line 24—p. 845, line 6; R. p. 848, line 20—p. 849, line 7; R. p. 861, line 9—p. 862, line 7; R. p. 914, lines 1-12; R. p. 916, lines 9-14.

prejudicial nature and minimally probative value, it was an error of law for the circuit court to permit any evidence of the Order.

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

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

For example, in *Heritage Federal Savings and Loan Association v. Eagle Lake and Golf Condominiums*, the Court of Appeals of South Carolina held a clubhouse was a common element after considering the master deed and definition provisions of the Horizontal Property Act. 318 S.C. 535, 542-43, 458 S.E.2d 561, 566 (Ct. App. 1995). In that case, a builder attempted to foreclose on a clubhouse, which the Homeowners Association contested. *Id.* at 538, 458 S.E.2d at 563. According to the Homeowners Association, the clubhouse was a common element that could not be sold as separate property of the mortgagor in foreclosure. *Id.* at 542, 458 S.E.2d at 566. The Court of Appeals reviewed the master deed’s definition of common elements, which was set forth in Section III of the master deed, entitled “Dwellings and Common Elements” as well as Section XXXV, entitled “Definitions.” *Id.* at 542-43, 458 S.E.2d at 566. The Court noted that Section XXXV defined a “dwelling” as being synonymous with the term “apartment,” in accordance with the Horizontal Property Act. *Id.* at 543, 458 S.E.2d at 566. The Court further noted that Section

XXXV defined “common elements” as including elements described in the Horizontal Property Act and the master deed, and Section III defined common elements as “all of the real property, improvements and facilities of the condominium other than the dwelling” *Id.*

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

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

A. Shoreham Towers Master Deed

The Master Deed has nearly identical language when defining two categories of property within the Shoreham Towers Regime: Dwellings and Common Elements. To begin, Section III of the Master Deed defines “DWELLINGS” in part as “the forty (40) separate and numbered DWELLING Units which are designated in Exhibit A. . . .” (R. p. 1095.) Section III proceeds to define “COMMON ELEMENTS” in part as “all of the real property, improvement and facilities of the CONDOMINIUM *other than the DWELLINGS*” (Emphasis added.) Stated differently, pursuant to these definitions, if a property is not defined as a dwelling—as set forth in detail in Exhibit A—then the property is a common element.

As Section XXXV of the *Heritage Federal* master deed provided, Section XXXVI of Shoreham’s Master Deed provides definitions. (R. pp. 1116—1117.) Subsection A defines “dwelling” as “synonymous with the term ‘Apartment’ or ‘Apartments’ as those terms are used under the Horizontal Property Act of the 1976 Code of Laws of South Carolina, as amended.” Subsection I similarly defines “common elements” as “the elements described in the Horizontal Property Act, and in the Master Deed (including Exhibits), as ‘general common elements’ and [various easements, installations, and personal property required for maintenance of the Regime].”

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

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

(R. p. 1116).

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

Exhibit A of the Master Deed incorporates by reference a recorded plat and a set of the Building Plans. (R. pp. 1120—1121.) Exhibit A further sets forth the square footage of each dwelling. Specifically, the dwellings located on floor two through eight, with the designations B, C, and D, include approximately 1,253 square feet; dwellings located on floors two through eight with the designations of A and E contain approximately 1,610 square feet; dwellings on the ninth floor with number designations two and three contain approximately 1,701 square feet; dwellings on the ninth floor with number designations one and four contain approximately 1,936 square feet; and the “‘Rooftop Penthouse’ dwelling” on the tenth floor contains approximately 2,630 square feet. (R. pp. 1120—1121.)

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

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

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

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

C. Horizontal Property Act

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

(2) The foundations, main walls, *roofs*, halls, *lobbies*, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed;

(3) The basements, *flat roofs*, *yards*, and *gardens*, in existence or to be constructed or installed, except as otherwise provided or stipulated;

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

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

Further, the first part of the first sentence refers to the elevator lobby located on the tenth floor as being common. Respondent asserted the lobby referenced is the elevator lobby on the first floor. However, such an interpretation is a strained and nonsensical one. First, the language of preceding the terms “elevator lobby” expressly addresses access to the Penthouse dwelling on the tenth floor; second, the very next paragraph in Exhibit A addresses first floor elevator lobbies as being common, and therefore, Respondent’s reading would make the references redundant. Further, if Respondent’s interpretation were correct that the elevator lobby referenced was that on

the first floor, then Exhibit A should state that that elevator lobby provides access to *all* floors—not just the “Rooftop Penthouse” dwelling.

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

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

Thus, the language of the Master Deed and those documents incorporated by reference, including Exhibit A, the Building Plans, and applicable provisions of the South Carolina Horizontal Property Act, are unambiguous that the roof terrace, tenth floor elevator lobby, and

planters are common elements. Accordingly, directed verdict should have been granted, and submission of these issues to the jury was error.

Notwithstanding, even if the circuit court made a finding that the Master Deed was ambiguous—which it did not and which Appellants do not concede to be the case—the facts only support an interpretation that the roof terrace, planters, and tenth floor elevator lobby are common elements. The following facts are without dispute: Respondent never paid Horry County taxes on the areas he claims are not common; Respondent never paid assessments to the Association for the square footage he claims are not common; Respondent’s insurance policy did not cover the area he claims are not common, although the Association has always provided insurance for the roof area; and, a survey confirmed that the square footage listed in Exhibit A of the Master Deed for all dwellings on floors two through nine included each dwelling’s balcony, while the square footage listed in Exhibit A for the Rooftop Penthouse did not include the roof terrace, tenth floor elevator lobby, or planters. (R. p. 359, lines 3-5; R. p. 387, lines 9-14; R. p. 672, lines 2-16; R. p. 778, lines 21-24; R. p. 1220.) The overwhelming evidence weighed in favor of Appellants’ interpretation of the Master Deed. Other than portions of Respondent’s testimony, there is no evidence that any part of the roof terrace is not a common element. For the foregoing reasons, the circuit court erred when it did not declare the areas in dispute were common as a matter of law and when it denied all of Appellants’ respective motions as to that finding.

Furthermore, there should be a reversal of all of Respondent’s causes of action as a matter of law because of the absence in this action of all dwelling owners. The dwelling owners have an undivided interest in the common elements. (R. p. 1036.) South Carolina Code Section 27-31-70 provides, “The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the

contrary shall be void.” The Master Deed further supports this provision by providing that “the percentage of the undivided interest in the COMMON ELEMENTS appurtenant to each DWELLING shall remain undivided and no owner of any DWELLING shall bring or have any right to bring any action for partition or division.” (R. p. 1036.) Therefore, Respondent had no right to bring any claim whatsoever related to the division of this common area, and judgment should be reversed.

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

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

Here, the cause of action for breach of contract should have never gone to the jury because the Master Deed is unambiguous as to the areas in dispute being common elements, and there is no evidence Appellants breached the Master Deed. The only provision Respondent pointed to when asked as to what language he believed was “important” in the lawsuit was the second-to-last paragraph in Exhibit A, which provides in part that “All balconies adjacent to each dwelling,

including the railing attached thereto, are a part of that dwelling and not common areas” (R. p. 263, line 10—p. 264, line 3.) When specifically asked which provision of the Master Deed Respondent claimed the Appellants breached, Respondent responded, “They never were able to add what they wanted to add to the master deed It’s not in there. It never made it into the master deed, what they wanted to do.” (R. p. 381, lines 8-16.) Respondent’s position is that the Association’s passage of rules and regulations as they relate to the roof terrace breached the Master Deed because, according to him, the roof area was for his exclusive use alone.

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

Perhaps the best evidence of the fact that Respondent’s dwelling does not include the roof terrace is from the unrebutted survey of Shoreham Towers presented at trial. As noted, the surveyor found that the square footage for all dwellings in the units located on level two through nine

included their respective balconies as set forth in Exhibit A of the Master Deed; the Rooftop Penthouse square footage—approximately 2,630 square feet—did *not* include the roof terrace—or what Respondent would call his “balcony.” Indeed, the surveyor testified that the roof terrace square footage would equal approximately 2,000 square feet, meaning Respondent’s “dwelling” would nearly double if that area were a balcony for the Respondent’s unit. That would, in turn, mean Respondent should be paying nearly double in assessments to the Association considering each unit owner’s square footage determines the amount he pays in assessments. (R. p. 345, lines 1-8; R. p. 1061.) Respondent did not establish any breach because his interpretation of the Master Deed is erroneous as a matter of law.

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

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

Per the circuit court’s ruling, this cause of action was against only the Association and not the individual Appellants. (R. p. 874, line 10—p. 875, line 10.) The only fraudulent intent and/or act Respondent testified to, without citing to any document or specific conversation, was the Appellants allegedly saying Respondent “didn’t pay enough” and that Respondent’s “furniture and [] outdoor space had become a nuisance.” (R. p. 330, lines 8-22.) Respondent’s counsel pointed to the email sent by Richard Aquino to the Board in October 2018, which listed several ways in which Mr. Aquino believed the rooftop area was a common element and not part of Respondent’s

dwelling.⁴ However, on cross-examination, Respondent acknowledged that Mr. Aquino and every other Appellant possessed the right to ask questions, to communicate his concerns about Shoreham Towers to the Board, and to have an opinion about Shoreham Towers or about “anything.” (R. p. 381, line 21—p. 382, line 8.) The alleged breach according to Respondent’s theory was the Association’s passage of rules and regulations after the Association determined the area was a common element. Although there was no breach of the Master Deed as set forth in detail above, there was also no evidence that the Association acted with a fraudulent intent or committed a fraudulent act. Respondent, requesting that the circuit court perform legal gymnastics, insisted that the Association was influenced by Mr. Aquino’s email, but Mr. Aquino was not acting on behalf of the Association as he was not a board member at the time he sent his allegedly “fraudulent” email; in other words, Respondent provided no evidence of a fraudulent act committed *by the Association* that would fulfill the last element of this cause of action. Therefore, it was an error of law to allow this question to go to the jury.

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

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

⁴ Indeed, Mr. Aquino ultimately withdrew some of the issues he originally brought to the Board’s attention upon discovering he had been mistaken, such as Respondent’s alleged alteration of the elevator key and Respondent’s use of a private atrium. (R. p. 646, line 22—p. 647, line 4; R. pp. 1221—1222.) Such retractions by Mr. Aquino undeniably evidence his good faith belief in reporting these concerns to the Board, not fraudulent acts or intention.

for all guests. . . .” (R. pp. 39—40.) Upon Appellants’ Motion for Directed Verdict, the circuit court agreed Respondent’s claim for conversion could not apply to real property, but rather, could only apply to personal property, and the circuit court permitted Respondent to amend his cause of action for conversion to seek damages for only his furniture and turtle tile. (R. p. 607, line 8—p. 608, 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 owner’s rights.” *Jenkins v. Few*, 391 S.C. 209, 217-18, 705 S.E.2d 457, 461 (Ct. App. 2010) (quoting *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975)) (internal quotation marks omitted). Where there is no evidence that a party wrongfully assumed and exercised the right of ownership over the personal property, there can be no claim for conversion. *Id.* at 218, 705 S.E.2d at 462.

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

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

As for his turtle tile, Appellants presented uncontradicted testimony that this was removed based on Thompson Roofing, Inc.'s recommendation to not place the turtle tile back on the roof membrane. According to Thompson Roofing, the turtle tile was capturing debris, which prevented water from draining off the flat roof, making the containment of water a serious issue for the building's roof. By letter dated May 13, 2019, Thompson Roofing specified that it did not recommend placing the turtle tile back on the roof membrane. (R. p. 1201.) Following the recommendation of the roofing contractor, the Association collected the turtle tile and asked the contractor to store it at his place of business until Respondent could retrieve it. Respondent did not object to the removal of his turtle tile. Jason Thompson of Thompson Roofing testified his

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

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

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

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

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

Even if there were any evidence—which Appellants do not concede—that Mr. Aquino’s email was motivated by some ill-will toward Respondent, that alone is not sufficient to establish that there was any agreement with any other individual Appellant to commit a lawful act by unlawful means or an unlawful act, coupled with an overt act in furtherance of such agreement to cause Respondent damages. Indeed, the jury apparently did not believe any of the other individual Appellants made such an agreement as evidenced by its third question to the circuit court during deliberations: “For civil conspiracy, do you have to have at least two people conspiring against a person, or does the person conspiring and the person being conspired upon count as the combination of two people[?]” (R. p. 1233.)

At the close of Respondent’s case, the only evidence Respondent provided as to his theory was that Mr. Aquino, who lived in the unit directly below the Rooftop Penthouse, previously sent an email to the Board questioning whether the rooftop area was a common element. Respondent presented no evidence that any individual Appellant acted on his own behalf or conspired with Mr. Aquino to unlawfully harm Respondent. All the evidence supported the contrary conclusion: at each step, the individual Appellants sought and followed the advice of counsel, a safety consultant, and a roofing contractor. Mr. Tackett testified that if any other unit owner aside from Mr. Aquino had submitted a concern regarding whether the rooftop area was a common element, the Board would have responded in the same way by hiring an attorney to receive legal advice as to whether that area was a common element. (R. p. 860, lines 12-19.)

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

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

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

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

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

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

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

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

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

B. Respondent cannot use estoppel as a claim.

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

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

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

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

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

(R. p. 945, lines 13-22.) Thus, Respondent's theory of acquiescence in this case admits the property was, at some time, a common element, and through time, he converted the property to his own. However, any cause of action that concedes the property was ever a common element and seeks to convert it to one's own ownership is barred by Section 27-31-70, which expressly prohibits any such actions that seek to divide the unit owners' co-ownership of the common elements. Accordingly, the circuit court should have granted Appellants' motions for directed verdict and motion for judgment notwithstanding the verdict as a matter of law.⁶

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

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

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

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

At the close of Respondent’s case, Appellants made a motion for directed verdict because Respondent presented no evidence that Appellants acted willfully, wantonly, or grossly negligently. (R. p. 617, line 18—p. 618, line 7.) In response, the circuit court stated, “I’ll let that jury determine if Richard did that or not.” (R. p. 618, lines 8-9.) Appellants’ counsel requested that the circuit court grant immunity as to the other three individual Appellants, and the circuit court responded that, “They went along with what Richard was up to maybe. I don’t know, but it is a question of fact.” (R. p. 618, lines 10-16.) The following exchange between the circuit court and Appellants’ counsel then occurred:

Ms. Golding: Your Honor, you said you don’t know. There has to be evidence.

The Court: I’m not going to make that decision. They’re going to make that decision.

Ms. Golding: No, but some evidence must exist at this stage.

The Court: Were they acting as a board?

Ms. Golding: Yes, sir, they acted as a board.

The Court: Were they directed by Richard Aquino?

Ms. Golding: No, sir. There is no evidence that they were directed.

The Court: It sure sounds like he was working with them to accomplish something that benefited him, possibly.

Ms. Golding: Yes, sir.

The Court: I just think it is a question of fact.

Ms. Golding: I respectfully disagree, but I understand.

The Court: He talked to us for half a day.

(R. p. 618, line 17—p. 619, line 11.) In the above exchange, the only apparent conclusion the circuit court drew in order to keep the three individual Appellants in the lawsuit was the potential inference that the individuals—although acting in their capacities as board members—were working to “accomplish something that benefited” Mr. Aquino. As Appellants’ counsel noted, there must be some evidence that each individual acted willfully, wantonly, or grossly negligently, meaning the individuals were not acting in their capacities as board members. “Arguments made by counsel are not evidence.” *S.C. Dep’t of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted). The circuit court’s ruling essentially inverted Respondent’s burden and placed it on Appellants. *Cf. Dockside Ass’n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 875 (1987) (“[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct. . . . [T]he burden of providing good faith is not on the governing board; the burden of proving a lack of good faith is borne, rather, by those challenging the board’s actions.”); *Goddard v. Fairways Dev. Gen. P’ship*, 310 S.C. 408, 414 426 S.E.2d 828, 832 (Ct. App. 1993) (“In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the ‘business judgment rule’ and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.”). Thus, it was legal error for the circuit court to deny Appellants’ motion for a directed verdict as to the individual Appellants, particularly Bill West, Tony Giovino, and Carter Tackett.

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

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

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

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

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

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

No reasonable jury could have found Plaintiff suffered actual damages. There was no evidence to permit the jury to determine the existence of damages, let alone the amount, with reasonable certainty or accuracy. “As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy ‘Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.’” *Gauld v. O’Shaughnessy 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. (R. p. 320, 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.” (R. p. 310, 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. (R. p. 310, lines 18-24.) In reality, Respondent suffered no losses, and it was legal error to submit the question of actual damages to the jury.

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

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

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

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

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

There is no supportable basis for the award of punitive damages. The jury’s punitive damage award was based only on its erroneous belief that Respondent should recover attorneys’ fees, as evidenced by its fifth question to the circuit court during deliberation: “For damages, do we have to put an actual number, or can it be a phrase such as: ‘attorney fees and costs’[?]” (R. p. 1236.) The fact that the disproportionate \$200,000 award was based on a belief that Respondent should recover its attorneys’ fees and costs is clearly supported by the jury’s question asking if it could award damages by writing that Respondent is to recover “attorneys’ fees and costs,” or whether the jury must award an actual number. This blatant error must be reversed.

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

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

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

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

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

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

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

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

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

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

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

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

Prior to closing arguments, Appellants’ counsel requested that the circuit court edit the jury verdict form in order to clarify to which cause of action the jury may find against the Appellants. (R. p. 891, lines 7-18.) The circuit court’s denial of Appellants’ request to specify the jury verdict form as to each cause of action created confusion as to what the jury’s findings were and whether those findings could logically coexist.

To illustrate, the circuit court ruled that all causes of action except civil conspiracy were against the Association. (R. p. 874, line 10—p. 875, line 10.) The same reason Respondent’s breach of contract, breach of contract accompanied by fraudulent intent, and conversion fail by pointing to the behavior of an individual as attributable to the Association illustrates a flaw in the jury verdict; the jury found the individual Appellants acted willfully and wantonly, meaning the statutory immunity did not apply, and they could be personally liable—a finding with which Appellants vehemently disagree as set forth above. However, the jury also found against the Association, notwithstanding that the actions Respondent complained of made no distinction between when the Appellants were acting within their duties as board members or willfully or wantonly as individuals. Therefore, the jury’s findings are a legal fallacy; either the board members were acting in their individual capacities—in which case, they could be liable only for civil conspiracy—or the board members were acting within their authority as board members, i.e. as the Association. Such denial constituted legal error.

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

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

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

CONCLUSION

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

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September 18, 2023
Myrtle Beach, South Carolina

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 BRIEF complies with Rule 211(b), SCACR.


Taylor K. Voegel

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SC Court of Appeals

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Whether allowing reference to the effects of the Temporary Restraining Order was an abuse of discretion.
- II. Whether interpretation of the Master Deed was properly submitted to the jury.
- III. Whether the Circuit Court erred in denying Appellants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract claim.
- IV. Whether the Circuit Court erred in denying Appellants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract Accompanied by a Fraudulent Act claim.
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- VI. Whether the Circuit Court erred in denying Appellants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Civil Conspiracy claim.
- VII. Whether the Circuit Court abused its discretion by permitting Respondent to amend the Complaint to include a claim for Acquiescence.
- VIII. Whether the Circuit Court erred in denying Appellants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to the individual Defendants' immunity.
- IX. Whether the Circuit Court erred in finding evidence of damages.
- X. Whether the Circuit Court erred in submitting the issue of punitive damages to the jury.
- XI. Whether the individual dwelling unit owners were necessary and indispensable parties to the action.
- XII. Whether the Circuit Court erred by permitting the testimony of Henry Beckham.
- XIII. Whether the Verdict Form was properly submitted to the jury.
- XIV. Whether allowing reference to the roof terrace as a balcony was an abuse of discretion.

STATEMENT OF THE CASE

This case arises out of Appellants' attempts to convert Respondent's private property into a common element. Respondent Marshall Griffin is the owner of the "Rooftop Penthouse" on the top of Shoreham Towers, which is a Horizontal Property Regime governed by Appellant Shoreham Towers Association ("the Association"). Surrounding the Rooftop Penthouse is a "roof terrace" which has been treated as part of the Rooftop Penthouse dwelling for over three decades. In 2019, Appellants made a wrongful determination that the terrace was a common element. Subsequently, Appellants committed numerous acts, including the taking of Respondent's personal property, based on that wrongful determination.

After a trial with multiple witnesses testifying for each side, the jury entered a verdict in favor of Respondent, finding that the terrace and surrounding areas were not common, as well as finding the Appellants liable on each cause of action. The Circuit Court denied Appellants' post-trial motions. Appellants now challenge several evidentiary rulings and the Circuit Court's denial of their motions for directed verdict and judgment notwithstanding the verdict.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Marshall Griffin is the owner of the Rooftop Penthouse on the top of Shoreham Towers. (R. pp. 1184-1186). Surrounding the Rooftop Penthouse is a "Roof Terrace", which is at issue in this case. (R. pp. 1170-1183). The Rooftop Penthouse is covered in either solid glass walls or sliding glass doors, including the bedroom walls, which overlook the terrace. (R. p. 298, line 25-p. 299, line 3). The terrace itself has a railing on one of its edges, made to overlook the ocean. (R. p. 264, lines 6-7).

Shoreham Towers was constructed in 1982, and the Master Deed for the property was recorded on June 22, 1983. (R. p. 1091). Robert Griffin, Respondent's uncle, was one of the primary developers of the property, signing the Master Deed as a developer. (R. p. 251, lines 4-9;

R. p. 1091; R. p. 263, lines 8-9). For five years after its construction, Robert Griffin used the Rooftop Penthouse as his residence. (R. p. 265, lines 18-23). While Robert Griffin—the original developer—lived in the Rooftop Penthouse, the Roof Terrace was treated as a private area and not common. (R. p. 266, lines 11-16). Board Meeting minutes from 1992 state that the Roof Terrace was to be treated as a balcony. (R. p. 1147).

After Robert Griffin's death, Respondent inherited a majority interest in the Penthouse and purchased the remaining shares from a trust on January 21, 1994. (R. pp. 1184-1186; R. p. 267, lines 11-14). Since that time, Respondent and his wife have owned the Rooftop Penthouse and use it primarily as a rental. (R. p. 250, lines 7-9; R. p. 267, lines 15-16). After acquiring the Rooftop Penthouse, Respondent also treated the Roof Terrace as a private area. (R. p. 273, lines 10-13). Respondent paid for improvements, such as installing turtle tile on the space, with no objections. (R. p. 267, line 19-p. 268 line 7). Respondent also paid for the maintenance, cleaning, electricity, and landscaping on the terrace. (R. p. 269, line 2-p. 270, line 14). During this time, Respondent also frequently served on the board of Shoreham Towers Association ("the Association"), with no objections from other members to him using the terrace as a private area. (R. p. 270, lines 15-17).

After thirty-six years of the terrace being understood to be a private area, Appellant Aquino sent an email to the Board of the Association on October 1, 2018, suggesting that the terrace was a common area and accusing Respondent of violating the Master Deed. (R. pp. 1150-51). In this email, Mr. Aquino also argued that Respondent created a nuisance. *Id.* Multiple complaints in the email were later shown to be false. (R. p. 472, lines 13-24).

Nevertheless, in December of 2018 the Association proceeded forward with retaining legal counsel to advise on the issue of the terrace. (R. p. 814, lines 2-22). The Association removed both Mr. Aquino and Respondent from all communications with said legal counsel, despite Respondent

being on the Board at the time. (R. p. 814, line 23-p. 815, line 7). Thereafter, on January 29, 2023, the Association held a meeting in the Rooftop Penthouse in order to inspect the property at issue and discuss Mr. Aquino's email. (R. p. 815, lines 8-24). Sometime after, the Association held a conference call with legal counsel to discuss proposed rules and regulations. (R. p. 294, lines 3-14.) Respondent was told that he could not participate in the call to discuss rules and regulations for the area directly outside of his dwelling. *Id.* The Association then held further meetings where Respondent—a board member—was excluded. (R. p. 295, lines 13-15.)

During one of these meetings without Respondent, the Association drafted rules and regulations (“the Rules”) for the terrace. (R. p. 655, lines 8-17). The Rules stated that the Association had accepted a legal interpretation that the terrace, tenth floor elevator lobby, and the planters were all common. (R. pp. 1156-57). Additionally, the Rules put various restrictions on Respondent and the area. *Id.* For instance, the terrace was to be closed to everyone, including Respondent and his occupants, from the hours of 10 PM to 8 AM. *Id.* Respondent, in an effort to compromise, proposed alternative rules and regulations for the space, which were rejected by the Association. (R. pp. 1198-1200; R. pp. 1223-28).

Also in 2019, the Association approved a repair to the roof of Shoreham Towers. (R. p. 360, lines 14-22; R. p. 634, lines 10-12). While the center roof over the penthouse required repairs, only a coating was applied to the terrace. *Id.* When this coating was applied, Respondent removed the turtle tile from the terrace and stacked it to the side, so that it could be set back down later. (R. p. 300, lines 19-24). The Association—without the consent of Respondent—instead had the roofing contractor remove the turtle tile from the terrace and take it away. (R. p. 301, lines 2-3). This turtle tile originally cost Respondent \$20,000 to install on the terrace. (R. p. 301, lines 4-6). Respondent then filed suit against the Association on October 14, 2019. (R. pp. 35-41).

Following the filing of the lawsuit, the Association hired a safety inspector to come and give a report on the terrace (R. p. 302, lines 7-15). The safety inspector visited no other areas or units of Shoreham Towers, and Respondent's unit was the sole place of inspection. *Id.* Following the inspection, Respondent received a letter from the Association stating that he needed to remove all of his furniture from the area, or it would be removed and disposed of at his expense. (R. pp. 1158-60). Respondent was also told to remove his shrubs from the planters. *Id.* Respondent was then given a deadline of May 29, 2020, to remove his furniture, directly before the summer season. (R. p. 307, lines 13-22). Respondent was told there was to be a six-foot setback from his railing, despite it being the same height as the railings for every other balcony at Shoreham Towers. (R. p. 306, lines 19-21; R. p. 307, lines 13-22). Respondent's furniture was then removed by the Association, which caused numerous complaints from renters. (R. p. 308, lines 3-4).

Due to the actions of the Appellants, Respondent filed a motion for a temporary restraining order in January of 2020, which the circuit court denied due to the lack of an affidavit or verified complaint. (R. pp. 45-52; R. pp. 7-9). Subsequently, Respondent filed another motion for a temporary restraining order in June 2020. (R. pp. 61-69). The circuit court then issued a temporary injunction, which required Appellants to return Respondent's furniture and gave Respondent exclusive use of the roof terrace. (R. pp. 16-19). Respondent's turtle tile was never returned. (R. p. 326, lines 16-24).

Prior to trial, Respondent filed a Motion to Amend his Complaint to conform to the evidence, seeking to add causes of action for adverse possession, declaratory judgement, and acquiescence. (R. pp. 145-46; R. pp. 147-53). Trial in this case began on January 30, 2023, and concluded February 3, 2023. Before the trial began, the Circuit Court heard motions in limine and Respondent's Motion to Amend. The Circuit Court waited to see what the evidence held before

ruling on Respondent's Motion to Amend. (R. p. 204, lines 9-10). Ultimately, Respondent dismissed his unjust enrichment claim. The causes of action for breach of contract, breach of contract accompanied by a fraudulent act, conversion, civil conspiracy, and acquiescence were submitted to the jury. (R. p. 862, line 19-p. 880, line 24). Respondent's civil conspiracy claim was the only cause of action ruled to apply to the individual Appellants, with all other causes of action applying to the Association.

The jury returned a verdict finding that the roof terrace, tenth floor elevator lobby, and planters were all not common. (R. pp. 968-70). The jury also found against the Association and against the individual Appellants for civil conspiracy, finding that the individual Appellants acted willfully and wantonly. *Id.* The jury awarded Respondent \$20,000.00 in actual damages and \$200,000.00 in punitive damages. *Id.* The Circuit Court ultimately reduced the punitive damages award to \$160,000.00 after a review of the *Gamble* factors. (R. p. 978, line 5 –p.980, line 25). The jury also completed a special verdict form, assigning a percentage of the punitive damages award to each individual Appellant. (R. pp. 976-77).

Following the trial, on February 13, 2023, Appellants filed a Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial Remittitur, Motion for New Trial Absolute, and Motion for New Trial. On March 9, 2023, the Circuit Court denied Appellants' motions. (R. pp. 27-30). The Circuit Court amended its Order on March 13, 2023, solely to correct a typographical error. (R. pp. 31-34). On March 16, 2023, Appellants filed a Notice of Appeal. (R. pp. 1237-38).

STANDARD OF REVIEW

I. Reference to the Effects of the Temporary Restraining Order

“The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011) (quoting *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). “The court’s ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law.... The trial court’s decision will not be reversed on appeal unless it appears the trial court clearly abused its discretion, and the objecting party was prejudiced by the decision.” *Proctor v. Dep’t of Health & Envtl. Control*, 368 S.C. 279, 313, 628 S.E.2d 496, 514 (Ct. App. 2006).

II. Interpretation of the Master Deed

“When the terms of a contract are ambiguous, the question of the parties’ intent must be submitted to the jury.” *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). “Construction of an ambiguous contract is a question of fact to be decided by the trier of fact.” *Matsell v. Crowfield Plantation Cmty. Servs. Ass’n, Inc.*, 393 S.C. 65, 71, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)).

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

An appellate court should reverse the circuit court’s ruling on a directed verdict motion or a judgment notwithstanding the verdict motion only when there is no evidence to support the ruling or the ruling is controlled by an error of law. *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022) (citation omitted). “When reviewing the trial court’s ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” *Id.* (quoting *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171

(2012)). “The motions should be denied when either the evidence yields more than one inference or its inference is in doubt.” *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007). “Neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

IV. Motion to Amend Complaint

An amendment to conform to proof provides the opposing party with no just cause to complain if the opposing party “is afforded full opportunity to introduce testimony bearing on the subject of the amendment.” *Soil & Material Engineers, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987) (citing 61A Am.Jur.2d *Pleading* § 329 at 322 (1981)). The question of allowing an amendment of pleadings to conform to proof, however, is addressed to the sound discretion of the trial judge whose decision will not be disturbed absent an abuse of discretion. *Id.* (citation omitted).

ARGUMENT

I. Allowing Reference to the Effects of the Temporary Restraining Order was not an Abuse of Discretion.

“All relevant evidence is admissible.” Rule 402, SCRE. Relevant evidence may only be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Rule 403, SCRE. “Prejudice is a reasonable probability that the jury’s verdict was influenced by the challenged evidence or lack thereof.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008).

A. Reference to the Temporary Restraining Order was not Prejudicial.

Appellants assert that the Circuit Court should not have allowed references made to the Temporary Restraining Order (“the Order”) in the presence of the jury. The only support

Appellants provided for this argument is a sole case. *Allegro, Inc. v. Scully*, 409 S.C. 392, 762 S.E.2d 54 (Ct. App. 2014). In *Allegro*, a preliminary injunction order was admitted directly into evidence for review by the jury. The order contained approximately four and a half pages of “Findings of Fact” by the trial court, as well as this statement by the trial court:

“The Court carefully considered the pleadings, documents, and argument of counsel at a hearing ... and finds that despite Appellants' denials of wrongdoing, there is sufficient evidence to indicate that the Appellants were engaged in the activities alleged by the Respondent.

Id. at 409 S.C. at 409, 762 S.E.2d at 63. The Court of Appeals held that the admission of the entirety of the preliminary injunction into evidence during a jury trial was inherently prejudicial *given the nature of the contents of the order. Id.* The Court reasoned that the direct admission was prejudicial only “due to its numerous findings of fact and statements concluding Defendants’ liability for the alleged charges.” *Id.*

Neither findings of fact nor statements concluding the Appellants’ liability were admitted into evidence in this case. Appellant argues the holding of *Allegro* while ignoring the reasoning and facts underlying such holding. First, the actual Order issued against Appellants herein was never admitted in any portion to the jury. Essential to the Court’s holding on the issue of admissibility in *Allegro* is that the jury was given the entirety of the preliminary injunction to review. *Id.* In this case, at no point during the trial was the jury ever shown or provided any part of the Order. The jury was also never made aware of any specific language contained within the Order. Consequently, the risk of prejudice in *Allegro* was not present here. Nothing beyond general references to the effects of the Order were ever made before the jury.

B. Reference to the Temporary Restraining Order was Highly Probative.

In addition to there being no risk of prejudice, reference to the Order was highly probative and necessary for Respondent to present his case to the jury. Respondent brought actions for

Breach of Contract, Breach of Contract accompanied by a Fraudulent Act, Civil Conspiracy, and Conversion. The fact that Appellants would have kept Respondent's personal property and continued to interfere with his use of his real property without being forced to return to status quo is directly relevant to each cause of action, especially Respondent's claim for conversion. It would be impossible to show that Appellants did not plan on returning Respondent's personal property without referencing the *effects* of the Order. Without such evidence, the Respondent would have been unable to fully present his conversion claim.

As demonstrated by the trial transcript, the references made to the Order at trial were for the purpose of showing the effect of that order. They were not made to present a judge's findings of fact or conclusions of liability. For instance, Appellants admitted to removing Respondent's keylock, and stated that they would not have returned it without the Order:

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.

(R. p. 682, lines 6-12).

Mentions of the Order during trial focused only on the immediate effects the preliminary injunction had on the Appellants' actions, such as stopping them from removing Respondent's plants or keeping his furniture:

Q: But Marshall had to go to court to get you to stop from removing his plants?

A: He got a temporary restraining order for status quo.

Q: My question is: To stop you from removing the plants?

A: The temporary restraining order was removing plants.

Q: And he – the restraining order also required you to bring back his furniture?

A: Which we did.

(R. p. 501, lines 11-21).

Q: How did you get your furniture back?

A: Yeah. You had to file a temporary restraining order.

Q: Okay. And when was the restraining order heard?

A: Probably in October of 2020.

Q: Okay. And what were the results of the restraining order?

A: My furniture came back. My plants remained where they were. Only thing that didn't come back was the Turtle tile.

(R. p. 326, lines 16-22).

Appellants' testimony as to the impact of the restraining order on their actions was highly probative to supporting all of Respondent's causes of actions. Appellants admit numerous times in their testimony that, but for the enforcement mechanisms of the Order, they would have continued to cause damages to Respondent:

Q: You weren't going to reconnect it [the elevator key] until you got the court order telling you to, right?

A: We could not limit access to a common element.

Q: My question is: You were not going to reconnect it until you got a court order telling you to; is that correct?

A: That's correct.

(R. p. 514, lines 5-11). These admissions were also probative as to Respondent's civil conspiracy claim. They showed that but for the Order, Appellants would have continued in their concerted efforts to harm Mr. Griffin. They also showed that Appellants did not voluntarily discontinue their harmful course of conduct.

Respondent's counsel never directly mentioned any liability findings made within the Order. Rather, he questioned Appellants only as to the impact the Order had upon their actions. Beyond alleging, without any evidence to support this claim, that a jury of lay persons associates "restraining order" with criminal acts, Appellants' brief fails to address anyway in which mention of the Order would create unfair prejudice. Therefore, the probative value of references to the Order was not "substantially outweighed" by the danger of unfair prejudice. See Rule 403, SCRE. Therefore, the Circuit Court's admission was not an abuse of discretion.

II. Interpretation of the Master Deed was Properly Submitted to the Jury Because the Deed is Ambiguous.

“A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.” *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). “The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe.” *Hann v. Carolina Cas. Inc. Co.*, 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969). According to the South Carolina Supreme Court, there are two types of ambiguities:

Ambiguities, however, are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the will, deed, or other instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the will, deed, or other instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe.

Id. Moreover, under South Carolina Law, it is well settled that the meaning of ambiguous contracts is determined by a jury. *See S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012) (“When the terms of a contract are ambiguous, the question of the parties’ intent must be submitted to the jury”); *Matsell v. Crowfield Plantation Cmty. Servs. Ass’n, Inc.*, 393 S.C. 65, 71, 710 S.E.2d 90, 93 (Ct. App. 2011) (“Construction of an ambiguous contract is a question of fact to be decided by the trier of fact.”)

Furthermore, South Carolina courts have also specifically applied this rule to deeds. *See Snow v. Smith*, 416 S.C. 72, 85, 784 S.E.2d 242, 248 (Ct. App. 2016) (“If this court decides the language in a deed is ambiguous, the determination of the grantor’s intent then becomes a question of fact.”); *Santoro v. Schulthess*, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009).

A. Patent Ambiguity

Appellants attempt to use the holding of *Heritage Fed. Sav. & Loan v. Eagle Lake & Golf Condominiums* as proper precedent for asserting that the Master Deed is facially unambiguous. 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995). In *Heritage*, a lengthy period of litigation over the development and sale of a condominium project resulted in an attempt by a builder to foreclose on the condominium's clubhouse. *Id.*, at 538, S.E.2d at 563. The Homeowners Association contested, arguing that the clubhouse was in fact a common element and therefore could not be foreclosed upon. *Id.* After review of the condominium's master deed along with comparisons of the deed to provisions of the Horizontal Property Act, the Court of Appeals held that the clubhouse was a common element.

However, *Heritage* is distinct from the case at hand. The clubhouse at issue in *Heritage* appeared specifically in the legal description of the land submitted to the regime in the master deed. *Id.*, at 543, 458 S.E.2d at 566. One of the plats attached to the master deed further explicitly illustrated the clubhouse as an improvement, which indicated it was a common area. *Id.*

Such facts and language do not exist in the Master Deed at issue herein. In the Master Deed, other areas are specifically delineated as common areas, but the terrace is not. As the fourth paragraph in Exhibit A states:

“Access to all floors is provided by both stairways and elevators. . . . [A]ccess to the single ‘Rooftop Penthouse’ dwelling on the 10th floor is provided from an elevator lobby which is a common area and stairways to the rooftop area, which is also common. The rooftop area contains planters which are common.”

(R. p. 1120). In their brief, Appellants make no attempt to explain why the terrace surrounding the Rooftop Penthouse would be excluded from the property description of common areas when all other common areas of the building are so clearly defined.

Not only is the terrace excluded from any description of common elements, but balconies are expressly designated as part of the dwelling and not common. The last paragraph in Exhibit A to the Master Deed indicates:

“all balconies adjacent to each dwelling, including the railing attached thereto, are part of that dwelling and not common areas”

Id. Appellant’s contend that because the area surrounding the Rooftop Penthouse is not referred to as a “balcony” that it implies the area must be common. However, Appellants dismiss the fact that balcony and terrace are synonyms. *Terrace*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/terrace>. Appellants offer no explanation for why synonyms in the same document should not be read to be exactly that, synonymous. At the very least, such usage of synonyms for areas that are substantially similar—with one of them *expressly* designated as not common—gives rise to a patent ambiguity.

To avoid the patent ambiguities in the Master Deed itself, Appellants argue that the inclusion of the South Carolina Horizontal Property Act indicates that the area is common. However, definitions provided in the South Carolina Horizontal Property Act do not support the interpretation that the terrace functions as a general common element. Section 27-31-20(f)(2)-(3) of the Act defines “general common elements as”:

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

S.C. Code Ann. § 27-31-20(f)(2)-(3). Appellants fixate on the use of the word “roof” under the Act to assert that the rooftop terrace unambiguously functions as a common element. They fail to address that the area is not a roof, but rather a terrace with raised planters surrounding a unit. In fact, Shoreham Towers does have a roof, on top of Respondent’s unit, not surrounding it.

Appellants make the claim that a terrace with planters, access to a unit, railings, and a space for guests to view the ocean is a “flat roof” that would fall under the definition in the Act, even though a roof exists elsewhere.

Appellants tout certain provisions of the Horizontal Property Regime Act to support their argument but fail to address other provisions that defeat it. Appellants fail to address in their brief Section 27-31-100(c), which requires the master deeds of a horizontal property regime to feature:

(c) The description of the general common elements of the property, and, in proper cases, of the limited common elements restricted to a given number of apartments, expressing which are those apartments;

S.C. Code Ann. § 27-31-100(c) (emphasis added). As noted above, the Master Deed does not include any description of the terrace as a general common element. Notably, the Master Deed does include numerous descriptions of other common elements on the property. Appellants do not attempt to explain why the rooftop terrace was excluded from this list of common elements. Appellants’ argument leads to the conclusion that in the drafting of the Master Deed, the drafter meticulously made explicit provisions for all common areas of the building but neglected to include a massive and valuable common element—a terrace with a seating area and views overlooking the ocean. If the terrace was intended to be common, such a description would exist, but it does not. Therefore, the Master Deed is patently ambiguous.

B. Latent Ambiguity

Upon applying the Master Deed to the facts at hand, the ambiguity becomes even more apparent. Our courts have held that latent ambiguities exist when a defect arises when attempting to put the words of a document into effect. *Jennings v. Talbert*, 77 S.C. 454, 58 S.E.2d 420 (1907). Parole testimony and extrinsic evidence are admissible for latent ambiguities, which are for the jury to decide. *Beaufort County Sch. Dist., v. United Nat’l Ins. Co.*, 392 S.C. at 525-526, 709

S.E.2d at 95-96 (Ct. App. 2011). If a latent ambiguity exists, the court may look to other evidence to help determine the intent of the drafter. *In Re Estate of Larry Mitchell Nimmons*, 344 S.C. 244, 230, 545 S.E.2d 251 (Ct. App. 2001).

The rooftop terrace is adjacent to the Rooftop Penthouse, serves the same purpose for the penthouse as any other balcony in the building, and has been used as such since the building's completion four decades ago. The building was constructed by Respondent's uncle, who originally used the Rooftop Penthouse as his own dwelling. After applying the Master Deed to the facts at hand, it is apparent that no rational developer would construct an entirely glass walled Rooftop Penthouse as his residence and surround it with a common area accessible to all residents and guests of the building. Merely looking at the property in question eradicates any belief that the terrace is intended to be a common element. Appellants essentially contend that the building's developer and drafter of the Master Deed intended to have a common element surrounding his entire dwelling with only a sliding glass door to separate the spaces.

Additionally, after the original construction and drafting, the rooftop terrace has been treated as a private dwelling since the opening of the building. Respondent has held, maintained, and improved the terrace for over 25 years while prohibiting access to any other potential owners. All evidence shows that when Respondent acquired the Rooftop Penthouse, he also believed that he acquired the terrace. Since then, Respondent has treated the terrace as his own private balcony—as has each and every member of the Regime—until this dispute arose. Respondent has furnished the terrace for a period of decades, installed tiling on the terrace, and placed signage along areas of the rooftop to indicate the terrace as a private dwelling. Respondent has also paid thousands of dollars out of his own pocket for improvements and maintenance to the area.

Notably, Appellants offer no explanation why a latent ambiguity does not exist. Appellants do not raise a single argument against the Master Deed containing a latent ambiguity in their Initial Brief. This is a telling omission when Appellants, other members of the Regime, and Respondent all treated the terrace as private for over 25 years. Appellants readily admitted at trial that the area had been treated as Respondent's private property for the entirety of his time there. (R. p. 829, lines 15-18). In fact, Appellants admitted that until 2019 the possibility was never even *considered*:

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. 836, lines 1-4). It is evident, based on the multi-year conduct of both Respondent and Appellants, that an ambiguity exists in the Master Deed as to the ownership of the terrace. By way of action, inaction, and assent, the intent of the drafters was for the terrace to be treated as a part of the Rooftop dwelling. Because the Master Deed is ambiguous, its interpretation is a question of fact, and the issue was properly submitted to the jury.

III. The Circuit Court Properly Denied Appellant's Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Breach of Contract Claim.

A. Breach of Express Provisions

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012). "The general rule is that for a breach of contract the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* at 492, 732 S.E.2d at 209 (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)).

The rooftop terrace is for the exclusive use of Respondent, and Appellants breached the Master Deed when they sought to unlawfully take ownership and control over Respondent's balcony. The Master Deed provides in pertinent part:

“an individual property capable of independent use and fee simple ownership, and the owner or owners of each dwelling shall own, as an appurtenance of the common elements, the undivided interest appurtenant to each dwelling...”

(R. p. 1095).

“all balconies adjacent to each dwelling, including the railing attached thereto, are part of that dwelling and not common areas”

(R. p. 1121). Appellants' attempts to convert Respondent's property into a general common element are a clear breach of contract. By seeking to redesignate the terrace as a common element, Appellants have violated the fair and equitable rights Respondent enjoys over his own property. The Master Deed is clear and concise in defining the rights and possessory interests afforded to each unit owner over their dwelling and adjacent balconies.

Again, Appellants attempt to negate their breach of contract by arguing that nothing exists to support the obvious assertion that the words “balcony” and “terrace” are synonymous. Ignoring that the terrace meets all the physical characteristics of a balcony and is adjacent to a dwelling with *less* privacy than any other unit in the building, Appellants argue that there exists no evidence to conclude the drafters clearly intended the terrace to function as a balcony for Respondent. In addition to the express language of the Master Deed, Appellants blatantly ignore the decades-long conduct of the Regime and Respondent treating the terrace as a balcony.

As Appellants correctly point out, when interpreting a contract, the court must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein. (App. Br. 22) (citing *Bluffton Towne Ctr., LLC*, 412 S.C. at 569, 772 S.E.2d at 890 (Ct. App. 2015)). Viewing the contract in its entirety, as well as the conduct of the parties for the better part

of forty years, Respondent's dwelling includes the roof terrace as a private element. Consequently, Appellants' conversion of Respondent's property is a breach of the Master Deed.

B. Breach of the Covenant of Good Faith and Fair Dealing

Every contract has an implied covenant of good faith and fair dealing. *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E. 2d 481, 484 (1996). In addition to breaching the express provisions of the Master Deed, Appellants breached the implied covenant of good faith and fair dealing. Appellants did not deal fairly with Respondent and acted in bad faith.

As shown above, Appellants were well aware that the terrace had been treated as Respondent's personal balcony for over twenty years and had been treated as his uncle's personal balcony before him. Despite being aware of that fact, Appellants proceeded to attempt to strip Respondent of his privacy and use of his terrace. Appellants improperly excluded Respondent from the Association Board meetings. They then passed rules and regulations to prevent Respondent from being allowed on his own balcony at certain times. They opened up the area—a terrace surrounding a penthouse with entirely glass walls—to all residents of the tower. They threatened to install cameras to monitor him at all times. They removed his personal property and even failed to return some of it despite a court order requiring them to do so. All of these actions were taken without the Respondent's consent. They were decided on by a board that improperly excluded him from discussions and meetings. Respondent was treated unfairly not only at the outset of the controversy, but throughout the process. These actions, and Appellants' disregard of Respondent's rights, constitute a breach of the covenant of good faith and fair dealing.

Appellants claim that they were entitled to engage in these actions because of their improper interpretation of the Master Deed to include the terrace as a common element. Appellants

offer no explanation why, if that is the case, they allowed Respondent to continue shouldering the burden of maintaining this alleged “common element.” During this entire time period, Appellants continued to have Respondent maintain the area and pay out of his own pocket for said maintenance. Remarkably, Appellants *admit that this is inconsistent*. They attempt to justify stripping Respondent of his private property rights while having him pay the bill as being at “his own discretion”:

Q: Now, you agree -- that it is inconsistent for you, as a board, to say he pays the electricity for something we say is a common area?

A: Yes.

Q: And he's been paying it since '95?

A: Yes. But the other two big numbers you threw out there that you want to give him credit for, for taking and maintaining them, that is his own discretion. The board didn't ask him to do it. He did that on his own freewill.

Q: The board didn't tell him to stop?

A: Amen. We didn't tell him to stop, because he said he wanted to control it. He wanted to do it. So knock yourself out, go ahead and do it.

(R. p. 841, lines 6-19). It is inherently unfair to have Respondent to pay for an area while claiming it is common, regulating the area, and taking his personal property located on the area. Appellants wanted the benefits of declaring the area common with none of the burdens. They also breached the covenant of good faith and fair dealing in this regard.

IV. The Circuit Court Properly Denied Appellant’s Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent’s Breach of Contract Accompanied by a Fraudulent Act Claim.

For a breach of contract accompanied by a fraudulent act claim, Respondent only needed to demonstrate: (1) a contract was breached, (2) the breach occurred with fraudulent intent, and (3) was accompanied by a fraudulent act. *Minter v. GOCT, Inc.*, 322 S.C. 525, 530, 473 S.E.2d 67, 70 (Ct. App. 1996). A party can establish an act was fraudulent if it is “characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another’s property by design.” *Perry v. Green*, 313 S.C. 250, 254, 437 S.E.2d 150, 152 (Ct. App. 1993) (citing *Harper v. Ethridge*, 290

S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986)). Fraudulent intent is not normally demonstrated by direct evidence but proven through the circumstances surrounding the breach. *See Sutton v. Continental Casualty Co.*, 168 S.C. 372, 167 S.E. 647, 651 (1933). “Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.” *Sullivan v. Calhoun*, 117 S.C. 137, 137, 108 S.E. 189, 189 (1921).

Relying on the standard laid out in *Harper* and solidified in *Perry*, Respondent demonstrated that the Association acted fraudulently by breaching the Master Deed. As shown above, Appellants breached both express provisions of the Master Deed and the implied covenant of good faith and fair dealing. This breach was accompanied by numerous fraudulent acts, which fell under each category of fraud outlined in *Perry*—despite Respondent only needing to show one.

First, Appellants made material misrepresentations and false accusations regarding Respondent and actions undertaken by him. Specifically, Appellants accused Respondent of not paying his fair share, changing access to the elevator, and creating a nuisance through his furniture. (R. p. 331, lines 19-22). The association relied on statements made by Mr. Aquino which were proven to be false and dishonest in fact. Notably, Mr. Aquino and Respondent had a personal history prior to this incident, which should have served to warn Appellants that caution was necessary in taking his statements as truth. (R. p. 283, line 22-p. 284, line 11). Instead, they acted upon the false information provided—without first verifying its accuracy.

The Association was aware that Respondent had endeavored to maintain the rooftop and had even covered the cost of electricity and other necessities. He had paid his assessment using the same formula that had been in place since Shoreham towers was created. To claim that

Respondent was not paying his fair share when he simply wanted to enjoy his balcony in the same way every other owner in the building did was dishonest in fact. Respondent undertook substantial cost to maintain and improve the terrace.

Second, the Association engaged in unfair dealing. Along with the actions described above, they brought in a safety inspector who only looked at the top floor of the building. (R. pp. 1158-60). No other balcony was examined. Appellants only brought in the safety inspector in an attempt to gain leverage over Respondent to strip him of his rights over the terrace. Mr. Aquino personally harassed and interfered with Respondent's renters on the terrace. (R. p. 316, line 6-p. 317, line 11.). Appellants placed caution tape around the railing, which they notably did for no other balcony in the building. Appellants even admitted that Respondent was a "target." (R. p. 831, lines 7-13). Appellants singled Respondent out and targeted him with rules, regulations, inspections, threats, and removal of his property.

Finally, Appellants sought to misappropriate Respondent's property. In *Perry*, the fraudulent act was the party acting "covertly" to prevent ownership of the horse which was the premise of the sale. *Perry*, at 254, 437 S.E.2d at 152. Similarly, Appellants operated covertly either without Respondent's knowledge or explicitly excluding him to deprive Griffin of his property, both personal and real. They also created rules to deprive him of his rights. They removed his furniture while he wasn't present and refused to return it. Consequently, Appellants endeavored to exclude Respondent both from claiming his property rights regarding the terrace and preventing him from being able to fully access and enjoy the area. As shown by the evidence at trial, Appellants breached the Master Deed and coupled their breach with several fraudulent acts. The evidence supported the finding the jury reached as to this cause of action.

V. The Circuit Court Properly Denied Appellant's Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Conversion Claim.

A cause of action for conversion requires either a wrongful taking or detention. *Regions Bank v. Schmauch*, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003). Conversion can occur through an “illegal use or misuse, or by illegal detention of another’s personal property.” *Id.* (citing *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975); *Castell v. Stephenson Fin. Co.*, 244 S.C. 45, 50-51, 135 S.E.2d 311, 313 (1964)).

Respondent’s property was converted both through a wrongful taking and a wrongful detention. Throughout the trial, Respondent presented ample evidence demonstrating that his turtle tile and furniture were improperly detained by Appellants. Contrary to the statements made by Appellants, they did seek to charge Respondent for the cost of storage. (R. p. 1165). After improperly taking his property and moving it to a storage facility, Appellants then threatened to forfeit his property to the storage facility if Respondent did not pay fees to the HOA. Prior case law of this State clearly demonstrates that property that has been improperly taken must be returned when a demand is made or that taking will constitute conversion. *Oxford Finance Companies, Inc. v. Burgess*, 303 S.C. 534, 539, 402 S.E.2d 480, 482 (1991) (citing *Castell v. Stephenson Fin. Co.*, 244 S.C. 45, 50-51, 135 S.E.2d 311, 313 (1964)). Here, Respondent took back his furniture after Appellants took it, but was unable to retrieve his turtle tile. This action is a clear demand for the return of his property. When Appellants again removed Griffin’s property, he was forced to obtain a Temporary Restraining Order to have his property restored. If the taking back of his furniture was not enough to inform the Appellants that he demanded the return of his property, the TRO left no room for doubt. Therefore, Respondent’s property was unlawfully detained, and it was not an abuse of discretion to uphold the jury verdict as to this claim.

Furthermore, Appellants converted Respondent’s property through a wrongful taking. To establish that a wrongful taking occurred, it must be demonstrated that the converting party

exercised some right of ownership over the property. *Owens*, at 496, 220 S.E.2d at 119. Appellants argue they exercised no rights of ownership over Respondent's personal property; however, the facts indicate otherwise. Appellants went onto the terrace multiple times to obtain Respondent's furniture and turtle tile. These actions alone are enough to support a cause of action for conversion. By going back and taking his property a second time, Appellants' actions cement the fact that they exercised control over Respondent's property, sufficient to warrant a finding of conversion.

VI. The Circuit Court Properly Denied Appellant's Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to Respondent's Civil Conspiracy Claim.

A plaintiff seeking to demonstrate a cause of action for civil conspiracy must show: "(1) the combination or agreement of two or more persons, (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 County School District*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021) (citing *Charles v. Texas Co.*, 199 S.C. 156, 176, 18 S.E.2d 719, 727 (1942)). Civil conspiracy is usually demonstrated through circumstantial evidence as the nature of civil conspiracy tends to be more secretive. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348-499, 565 S.E.2d 309, 314 (Ct. App. 2002). A corporation can be a party to a conspiracy where the individuals are acting in regard to their own personal interests. *McMillan v. Oconee Memorial Hospital, Inc.*, 367 S.C. 559, 564-65, 626 S.E.2d 884, 887 (2006) (overruled by *Paradis* on other grounds). A conspiracy may exist when employees are acting outside the scope of their employment. *Id.* at 565, 626 S.E.2d at 887. When parties have a personal stake in the matter they are conspiring about, the intracorporate conspiracy doctrine is inapplicable. *Cricket Cove Ventures, LLC. V. Gilland*, 390 S.C. 312, 326, 701 S.E.2d 39, 47 (Ct. App. 2010).

Appellants conspired together to deprive Respondent of property and took overt steps to do so. Appellants contend that the individuals were acting within the scope of their duties as board members. However, the board members each had a personal interest in having the terrace converted to common property. Moreover, these individuals met behind Respondent's back, engaged in unfair dealing, and acted willfully and wantonly. 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. Further, each individual had a personal stake in the matter as they all lived in the building and would enjoy being able to use Griffin's terrace as a common element. Respondent's loss would be their gain. Appellants' convenient and recent discovery of the terrace as a common area allowed them access to a highly appealing area for their own personal benefit and stopped Respondent from using the area in the way that he had previously. Additionally, Mr. Aquino admitted to believing Respondent's use of his Penthouse to be a nuisance, and a personal history existed between the two. Thus, they had a personal interest in the matter, and the intercorporate conspiracy doctrine does not apply to the facts at hand.

Appellants actively sought to exclude Respondent from discussions as a means to deprive him of his property. There were phone calls and meetings that occurred without Respondent present even though he was an active member of the board. Appellants claim that they consulted an attorney prior to these decisions; however, Appellants have not stated what advice they were given or whether they chose to follow it. Additionally, Appellants' own witness, Roger Roy—who provided the legal advice they use as a shield—admitted that they acted outside the scope of his advice:

Q: But you didn't tell them to remove the furniture?

A: No.

Q: The board did that on their own?

A: Correct.

(R. p. 769, lines 17-20). Appellants' own witness further admitted that Appellants were difficult to deal with and that he pushed them to meet with Respondent to no avail:

Q: And do you recall me asking you more than once if Marshall can meet with the board to resolve our issues?

A: Yes.

Q: And the board never wanted to meet with Marshall?

A: That's correct.

Q: Even after the board came up with rules and regulations, and Marshall wanted to meet, they did not want to talk to Marshall, did they?

A: That's correct.

Q: And you and I didn't meet, did we?

A: Just phone conversations and e-mail.

Q: You even said there was one board member who was hard to deal with on this matter, didn't you?

A: Correct.

Q: Who was that?

A: Mr. Aquino.

Q: You also said you couldn't get them to budge about having a meeting?

A: That's correct.

(R. p. 765, lines 7-25).

Furthermore, Appellants argue they were merely following legal advice, while the facts indicate that they selectively decided what information to provide to the attorney to their advantage:

Q: Did the board tell you that he was paying maintenance on the terrace for the last 20 years?

A: No.

Q: Were you aware he was paying landscaping cost for the planters for over 20 years?

A: No.

Q: The board didn't tell you that either?

A: No.

(R. p. 768, lines 4-11). Appellants created new rules for the rooftop terrace without Respondents consent and claim that it was based on legal advice. Even if that were true, that legal advice was shown to have been obtained through selective and unfair representations made to Appellants'

attorney. The rules were unduly restrictive on Respondent and anyone he may have allowed to rent the rooftop penthouse. Therefore, the individuals of the Board, excluding Respondent, acted together to bring about the deprivation of Respondent's property. They made material misrepresentations regarding his actions and the rights he possessed regarding the rooftop. They passed new rules and restrictions which breached the Master Deed that all parties were bound by. Appellants took numerous overt acts in furtherance of the conspiracy such as obtaining an attorney but only providing him selective information, passing rules to control the use of Griffin's property, removing his property, hiring a safety inspector for only the terrace, and treating the terrace as a "common element."

Even if Appellants were meeting lawfully, civil conspiracy can occur through a lawful act, but unlawful means. The record shows Appellants singled out Respondent to deprive him both of his real and personal property. Regardless of the legality of their meetings, the means through which they acted were unlawful, thereby satisfying the second element required for civil conspiracy.

Finally, the Respondent was damaged by the conspiracy. Respondent's only current job is to rent out his rooftop penthouse. This means that the revenue he receives, and the perceived value of the penthouse, is integral to his well-being. By treating the terrace as a common element, Appellants greatly diminished the value of the rooftop penthouse. The rooftop terrace was a major selling point for the penthouse as it was uniquely its own in this area. Guests had already begun to send him messages that they would not or would be less inclined to stay in the future because of the lack of privacy and inability to fully use the terrace. (R. pp. 1161-64). Respondent stated in trial that if the rules and regulations were to remain in effect, his rentals "would be non-existent" and he would "go out of business." (R. p. 331, lines 12-14). Hence, Respondent suffered both a

loss in value and a loss in future earnings, both of which are sufficient for the damages claim. In summation, Respondent presented sufficient evidence of each element of his civil conspiracy claim.

VII. The Circuit Court did not Abuse its Discretion by Permitting Respondent's Amendment of the Complaint.

Appellants repeatedly claim that it was improper for Plaintiff to amend his Complaint near trial. However, this is explicitly provided for in the South Carolina Rules of Civil Procedure. Rule 15(b) allows for the amendment of pleadings to conform to the evidence and provides:

Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party **at any time, even after judgment**; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Rule 15(b), SCRPC (emphasis added). This amendment falls directly under this rule. The evidence presented during the discovery process and at trial raised the issue of acquiescence. Appellants argue that the doctrine of acquiescence is *typically* applied to boundary disputes but present no law that prevents the doctrine from being applied in any property dispute. Appellants also admit that the doctrine is substantially similar to the doctrine of adverse possession, which is not solely limited to boundary disputes.

As shown above, Appellants, Respondent, and all members of the boards that came before them treated the terrace as belonging to Respondent. Minutes from board meetings expressly state that the area should be treated as a balcony. These facts give rise to an acquiescence claim, and the Court properly allowed Respondent to assert such a claim.

Appellants argue that an acquiescence claim would be barred by South Carolina Code § 27-31-70. However, that statute applies to partition or division, not to claims of adverse possession or acquiescence. Moreover, Appellants base their argument on a hypothetical admission that the terrace is a common element; however, Respondent's position has always been that the area was not common, and the jury found the same. Therefore, this argument is moot.

VIII. The Circuit Court Properly Denied Appellant's Motion for Directed Verdict and Judgment Notwithstanding the Verdict as to the Individual Defendants' Immunity.

Respondent presented specific evidence that each board member took willful and wanton actions against Respondent. As shown above, Appellants took several actions that were outside of their scope as board members and were for the direct benefit of themselves. According to Appellants, an exchange with the Circuit Court indicates that the only reason the individual Appellants (aside from Mr. Aquino) remained in the cause of action is because they were acting to the benefit of Mr. Aquino. Even assuming that was true, which Respondent does not admit, 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. Therefore, the Circuit Court did not abuse its discretion by refusing to dismiss them.

Appellants argue that each act taken by the individual Appellants was “blessed” by legal counsel. (App. Br. 36). As illustrated above, their legal counsel's numerous admissions at trial indicate that this statement is untrue. Additionally, even if it were, Appellants were selective and unfair in what information they provided to their counsel. By acting outside of the scope of their duties, acting outside of the advice of their legal counsel, and procuring such advice through selective and unfair means, the individual Appellants acted willfully and wantonly. Consequently, the Circuit Court properly found them not immune from individual liability.

IX. The Circuit Court Properly Found Evidence of Damages.

Appellants contend “there was no evidence to permit the jury to determine the existence of damages.” (App. Br. 37). However, Respondent presented evidence of multiple instances where he suffered damages. First, Respondent presented evidence of the loss of rental income that was suffered due to the Association’s interference with his property. Though Respondent could not present an exact measurable amount, his testimony rose well beyond the level of “conjecture.” *Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008); *White v. Whitney Mfg. Co.*, 60 S.C. 254, 38 S.E. 456, 461 (1901). Respondent testified to the renters that never returned after filing complaints, the amount that he normally charged for rental, and the periods in which he was unable to rent due to the actions of Appellants. In fact, Respondent specifically gave the number “\$20,000,” when asked about his loss of rental income. (R. p. 320, line 24).

Second, Respondent presented evidence of the loss of his personal property, including his turtle tile. Respondent testified to the value of the property and the costs of the installation. (R. p. 268, lines 8-10). The jury was also shown pictures of the personal property that was taken and presented evidence regarding Respondent’s inability to retrieve his personal property. Appellants argue that there was no evidence to support an award of damages. However, Respondent presented direct evidence of the value of personal property that was wrongfully taken and never returned. Beyond the exact amount of the personal property that was never returned, Respondent also testified to the loss of use and ownership of personal property that was eventually returned—against the wishes of the Appellants.

X. The Circuit Court Properly Submitted the Issue of Punitive Damages to the Jury.

The jury properly found that Plaintiff was entitled to punitive damages based on the malicious nature of Appellants' actions. Appellants first argue that for punitive damages to be considered there must be a finding of actual damages. As shown above, actual damages were both established at trial and awarded by the jury. Additionally, the actual damages awarded allowed for punitive damages to be awarded in an amount that was both "reasonable and proportionate." *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164-66, 604 S.E.2d 385, 389-90 (2004) (citations omitted).

Appellants argue that the jury's punitive damage award was "based only on its erroneous belief that Plaintiff should recover attorney's fees." (App. Br. 39). The only support Appellants provide for this argument is the fact that the jury asked a question about whether they must write down a number for actual damages. From this question, Appellants make the illogical leap that the jury awarded punitive damages solely as a substitute for attorney's fees.

The jury was properly charged on the nature of punitive damages and given extensive instruction on what could and could not be considered. Appellants assert that the jury wholly disregarded this instruction and instead used punitive damages as a roundabout method of awarding attorney's fees. This assertion is without merit or support from the trial record. The jury properly found the actions of Defendants reprehensible enough to warrant a punitive damage award, and Appellants have not shown otherwise.

XI. The Individual Dwelling Unit Owners were not Necessary and Indispensable Parties to the Action.

The individual dwelling unit owners were not indispensable parties to the action. Rule 19 of the South Carolina Rules of Civil Procedure governs the joinder of parties. The Note to the Rule states that parties must be joined if they are "needed for just adjudication." Note to Rule 19, SCRPC. The Note to the Rule further states: "The number of cases in which there is truly an

‘indispensable party’ in whose absence the court should not proceed are **very rare.**” Note to Rule 19(a), SCRCP (emphasis added).

In *Marshall v. Winter*, 250 S.C. 308, 313, 157 S.E.2d 595, 597 (1967), the Supreme Court determined that both adjoining landowners and lessees of the plaintiff were not necessary parties in a property dispute action. In another case, the Court also held that all lot owners in a subdivision were not necessary parties to determine the reasonableness of committee actions concerning the subdivision. *Baron v. Knohl*, 282 S.C. 21, 24, 316 S.E.2d 674, 676 (1984). Furthermore, the Shoreham Towers Homeowners Association was a party to the suit and would have represented the interests of the individual unit owners if the individual unit owners had any interest.

Appellants contend that the unit owners were necessary because they had an interest in the property. However, in order to show they had any interest in the property, Appellants would first have to show that the verdict that the terrace was private property was in error. They have not and cannot. Consequently, the unit owners had no interest in the property. Appellants further argue that the Master Deed has been changed, but that is incorrect. The jury interpreted the Master Deed to mean that the areas in question were not common elements. Therefore, the individual unit owners had no interest in the proceedings, let alone an interest that would be sufficient to make them an indispensable party. In interpreting the ambiguous provisions, the jury did not alter or amend the Master Deed.

XII. The Circuit Court Properly Allowed the Testimony of Henry Beckham.

Appellants argue that Mr. Beckham should not have been allowed to testify despite Mr. Beckham being a licensed and qualified appraiser capable of speaking as an expert regarding property value. Appellants argue that Mr. Beckham solely gave an evaluation of “damages” Plaintiff suffered. However, that is not the case. Rather, Mr. Beckham testified to the difference in

property value if the Rooftop Penthouse Terrace was considered a common element. This testimony not only provided an evaluation of the damage 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.

Appellants argue that the jury was confused by the dollar amount of the valuation and felt compelled to “afford Respondent some relief.” (App. Br. 41). This argument is not supported by the jury’s award. The jury was quite capable of understanding the distinction between the valuation and the damages suffered. This is evident because the jury only awarded \$20,000 in actual damage, not the \$200,000 potential value difference testified to by Mr. Beckham. As is evident by their award, the jury understood that Griffin did not suffer this \$200,000 value difference because the terrace was ultimately determined to be his. Moreover, the jury award demonstrates that Appellants were not prejudiced by this admission.

XIII. The Verdict Form was Properly Submitted to the Jury.

It is “the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it was his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the courts of the trial.” *Howard v. Kirton*, 144 S.C. 89, 101, 142 S.E.2d 39, 43 (1928). Further, “it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.” *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003). “The trial judge has the discretion to determine how a case is submitted to a jury.” *S.C. Dep’t of Transp. V. First Carolina Corp. of S.C.*, 372 S.C. 295, 300, 641 S.E.2d 903, 906 (2007).

The decision of how a case will be presented to a jury is well within the discretion provided to the Court. The Circuit Court gave the jury a verdict form that was comprehensible and allowed

for a decision to be communicated. Appellant argues that the verdict form created confusion around the findings. However, the verdict reached by the jury decided the issues involved in the case and found each of the Appellants liable. The jury made their decision, and the Circuit Court accurately interpreted and applied their findings.

Appellants argue that this decision created a legal fallacy. Of note, Appellants provide no law or precedent that supports this argument. The jury found the Association and the individual board members liable on separate causes of action. Therefore, no contradiction in the verdict arose. The Association breached the contract based on a fraudulent act. Additionally, the board members acted outside of their capacity as board members when committing civil conspiracy. Appellants provide no South Carolina law to support their argument that the verdict form or the verdict reached was improper.

XIV. The Circuit Court Allowing Reference to the Roof Terrace as a Balcony was not an Abuse of Discretion.

Appellants argue that Respondent should not have been able to refer to the Rooftop Terrace as his balcony. This argument goes against foundational rules of evidence, and the Court properly permitted Respondent to reference the rooftop terrace as a balcony. As a witness, Respondent was free to testify to his personal knowledge and experience. Respondent has referred to the area as his balcony for decades and understands the area to be his balcony.

Appellants argue that Respondent was not free to testify as to his knowledge and experience because the Master Deed does not list a balcony on the Rooftop Penthouse. Even if the Master Deed had the ability to restrict Respondent's testimony in this manner, the argument would still be without merit. Though the Master Deed does not refer to a balcony on the Rooftop Penthouse, the area is frequently referred to as a terrace. Terrace and Balcony are synonyms. *Terrace*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/terrace>. This is a fact

Appellants admit. (R. p. 691, lines 22-24). To prevent witnesses from being allowed to use synonyms to describe their personal knowledge and experiences would be patently problematic. Therefore, the Circuit Court properly permitted Plaintiff to reference the area as a balcony and no abuse of discretion occurred.

CONCLUSION

The Circuit Court did not abuse its discretion in ruling on evidentiary matters, in denying the Motions, or in submitting the verdict form and question of punitive damages to the jury. As shown above, Respondent presented sufficient evidence to support each of his claims. Appellants committed numerous egregious acts in an attempt to convert his property into common property for their benefit. For the foregoing reasons, the Respondent respectfully requests that this Court affirm the Circuit Court's denial of Appellants' motions and uphold the jury's verdict.

Respectfully submitted,

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September 13, 2023

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Sep 13 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Appellate Case No. 2023-000451
Circuit Court 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

I, Crawford A. Krebs, Esquire, attorney for Respondent, certify that the Respondent's Brief complies with the South Carolina Supreme Court Order of August 13, 2007, and Rule 211(b) of the South Carolina Court Rules.

s/Crawford A. Krebs

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APP 001371

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APP 001372

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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’ testimony⁸ 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'Shaughnessy 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.

s/Taylor K. Voegel
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September 18, 2023
Myrtle Beach, South Carolina

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

RECEIVED

Sep 18 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marshall Griffin, Respondent,

v.

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

Appellate Case No. 2023-000451

Appeal From Horry County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 6117
Heard December 3, 2024 – Filed July 16, 2025

AFFIRMED

Henrietta U. Golding, of Burr & Forman LLP, of Myrtle Beach, for Appellants.

John Martin Grantland and Crawford Alan Krebs, of Murphy & Grantland, PA, of Columbia; and Thomas Casey Brittain, of The Brittain Law Firm, P.A., of Myrtle Beach for Respondent.

KONDUROS, J.: In this property dispute, respondent, Marshall Griffin, sued Tony Giovino, Carter Tackett, Richard Aquino, Bill West, and Shoreham Towers Homeowners Association (the Association; collectively, Appellants) for several causes of action related to Appellants' efforts to restrict Griffin's exclusive use of Shoreham Tower's (Shoreham) "roof terrace." On appeal, Appellants argue the

circuit court erred by: (1) allowing Griffin to reference a temporary restraining order (TRO) against Appellants; (2) submitting the issue of whether the roof terrace, tenth floor elevator lobby, and planters were common elements to the jury; (3) allowing Griffin to amend his complaint to include a cause of action for acquiescence; (4) finding evidence of damages; (5) submitting punitive damages to the jury; (6) not joining all dwelling owners as defendants; (7) permitting the testimony of Henry Beckham; (8) not listing each cause of action in the verdict form; (9) permitting Griffin to refer to the roof terrace as a balcony; and (10) denying Appellants' motion for directed verdict and judgment notwithstanding the verdict (JNOV) on the following claims: a) breach of contract, b) breach of contract accompanied by fraudulent act claim, c) conversion, d) civil conspiracy, e) acquiescence, and f) failing to find the individual defendants immune from these claims. We affirm.

FACTS/PROCEDURAL HISTORY

Shoreham is a horizontal property regime governed by the Association. Members of the Association are periodically elected to serve on its governing body (the Board), of which Griffin was a member when the events giving rise to this case occurred.

Shoreham consists of ten floors, and the tenth floor, "the rooftop penthouse" (the Unit) is surrounded by a roof terrace. Griffin and his wife, who is not a party, are the owners of the Unit, which has been either owned or occupied by Griffin or his uncle since 1983. Griffin acquired the Unit from his uncle, one of Shoreham's primary developers, in 1995. The Unit's exterior walls are either solid glass walls or sliding glass doors, including the bedroom walls, which overlook the terrace. The roof terrace has a railing on one of its edges, made to overlook the ocean. Griffin installed Turtle Tile¹ on the roof terrace, furnished the terrace, and planted shrubs in the roof terrace's planters. Griffin testified the Turtle Tile was worth \$20,000 at the time of installation.

Appellant Aquino sent an email to the Board regarding concerns over Griffin's exclusive use of the roof terrace and that it may be a common element. In response, the Board requested that Griffin address the concerns raised in Aquino's email. When Griffin did not, the Board proceeded to make its determination as to

¹ Turtle Tile is a brand of interlocking, cushion-style floor tiles and ramps made from recycled plastic.

whether the terrace was a common element and therefore open to all the residents and their guests.

After touring the roof terrace, the Board enlisted legal counsel (Counsel) to provide an opinion on whether the roof terrace was a common element. Counsel advised the Board that the roof terrace was a common element and recommended the Board establish rules and regulations. The Board held a telephone conference with Counsel to discuss proposed rules and regulations for the roof terrace. Griffin was excluded from the call. Thereafter, the Board held a meeting to discuss the proposed rules and regulations for the roof terrace. Specifically, West, Tackett, and Giovino met with Counsel. The parties dispute whether Griffin was excluded from this meeting or failed to participate, but Appellants admit Griffin was not included on any correspondence with Counsel.

Once Counsel approved the rules and regulations (the Rules), the Board began implementing the Rules for the roof terrace.² By this time Griffin had obtained his own legal counsel and proposed alternative rules to the Board stating the roof terrace was to be exclusively used by Griffin or his guests. Griffin's rules were rejected by the Board and he filed suit against the Association and his fellow board members alleging breach of contract, breach of contract accompanied by fraudulent act, unjust enrichment/quantum meruit, conversion, and civil conspiracy.

Following the filing of the lawsuit, the Association hired a safety inspector to come and give a report on the roof terrace. The safety inspector visited no other areas or units of Shoreham, and the Unit was the sole place of inspection. Following the inspection, Griffin received a letter from the Association stating that he needed to remove all of his furniture from the roof terrace and his shrubs from the planters before the end of May or they would be removed, stored, and eventually disposed of at his expense. Griffin was informed the Rules required a six-foot setback from his railing, despite it being the same height as the railings for every other balcony at Shoreham. The Association removed Griffin's furniture when he failed to do so by the May deadline.³ During this same period, the Board approved repairs for Shoreham's roof. Griffin removed his Turtle Tile and stacked it to the side so that

² In addition to regulating the roof terrace regarding usage and improvements, the Rules included a limitation on the number of occupants the Unit could have at one time – something it did not do for any other unit within Shoreham.

³ As the end of May coincided with the start of peak rental season according to Griffin, he alleges this resulted in numerous complaints from renters.

it could be re-laid after completion of the repairs. However, the Board instructed the roofing contractors to remove the Turtle Tile. The tile was stored at the roofing contractor's facility. The Board instructed Griffin that he could pick up the tile, but he was not allowed to reinstall it.

In response to the removal of his furniture and the Turtle Tile, Griffin filed a motion for a TRO, which the circuit court denied due to the lack of an affidavit or verified complaint. Griffin filed a subsequent motion for a TRO and the court issued a temporary injunction. The injunction required Appellants to return Griffin's furniture and gave Griffin exclusive use of the roof terrace; however, Griffin's Turtle Tile was never returned.

Six days prior to the start of trial, Griffin filed a motion to amend his complaint to add causes of action for adverse possession, declaratory judgment, and acquiescence. Before the trial began, the circuit court heard motions in limine and Griffin's motion to amend. The circuit court waited to see the evidence before ruling on Griffin's motion to amend. Ultimately, Griffin dismissed his unjust enrichment claim, and his claims for adverse possession and declaratory judgment were not accepted by the circuit court. Accordingly, the causes of action for breach of contract, breach of contract accompanied by a fraudulent act, conversion, civil conspiracy, and acquiescence were submitted to the jury. Griffin's civil conspiracy claim was the only cause of action found applicable to the individual appellants, with all other causes of action applying to the Association.

The jury returned a verdict finding that the roof terrace, tenth-floor elevator lobby, and planters were not common elements. The jury also found against both the Association and the individual appellants for civil conspiracy, finding that the individual appellants acted willfully and wantonly. The jury awarded Griffin \$20,000.00 in actual damages and \$200,000.00 in punitive damages.

The jury then completed a special verdict form, dividing the punitive damages among the individual Appellants as follows: 67% against Aquino; 11% against Giovino; 11% against West; and 11% against Tackett. After evaluating the *Gamble*⁴ factors, the circuit court reduced the punitive damage award to \$160,000.00. At the close of Griffin's case and at the close of all evidence, Appellants made motions for directed verdict, which the circuit court denied. Following the trial, Appellants filed a motion for JNOV, motion for a new trial nisi

⁴ *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

remittitur, and motion for new trial absolute. The circuit court denied the motions and this appeal followed.

LAW/ANALYSIS

I. TRO Reference

Appellants argue the thirty-five references to the TRO before the jury were irrelevant and inherently prejudicial. They maintain permitting references to the TRO was an error of law because the references were minimally probative and highly prejudicial. We disagree.

"The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion." *Davis v. Traylor*, 340 S.C. 150, 157, 530 S.E.2d 385, 388 (Ct. App. 2000). "The trial court's ruling on the admission of evidence will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 108, 498 S.E.2d 395, 404 (Ct. App. 1998). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005), *overruled on other grounds by State v. Wallace*, 440 S.C. 537, 892 S.E.2d 310 (2023). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

As a general rule, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "'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." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014) (quoting Rule 401, SCRE). "Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." *Hoeffner v. The Citadel*, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010)

(quoting *State v. Owens*, 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)). "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Id.* (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

"The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009). 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) (emphasis added).

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.

Allegro, Inc. v. Scully, 409 S.C. 392, 409, 762 S.E.2d 54, 63 (Ct. App. 2014), *reversed on other grounds by Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016), *abrogated by Hall v. UBS Fin. Servs. Inc.*, 435 S.C. 75, 866 S.E.2d 337 (2021).

However, we conclude "without *reference* to the temporary injunction," does not mean that the TRO may not be referenced, but that the decision on the merits may not be based on the fact a TRO was issued or any specific findings in the TRO itself. *See Alstonse v. Limehouse*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) (recognizing the findings in an order for temporary injunction addressed the requirements for issuing such an order and not the ultimate merits of the matter). We distinguish *Allegro* from the present case. In *Allegro* the TRO itself was admitted into the record as an exhibit. *See Allegro*, 409 S.C. at 408-09, 762 S.E.2d at 63 (explaining the language that was used in the TRO that was admitted into evidence). The court found that 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. *See id.* at 409, 762 S.E.2d at 63.

Here, the TRO was never admitted or shown to the jury; it was only referenced in the context of the status of Griffin's property, namely the patio furniture, Turtle Tiles, and plants within the planter boxes. We find each reference to the TRO was relevant and its probative value was not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Nor do any of the references include findings of fact or conclusions about liability. Rather, the references to the TRO were to help establish the timeline, inform the jury on the current state of the property, or support the elements of Griffin's claims.

Specific to Griffin's conversion claim, Appellants argue "[t]here is nothing—and [Griffin] cites to no law supporting the notion—that requires a claimant must prove what happens to his property after it has been allegedly converted." They contend this argument supports that Griffin only referenced the TRO 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." We disagree. Though establishing what happened to the property after it was converted is not an element of conversion, it does not mean that it is not relevant. The TRO was factually relevant to the current state of the allegedly converted property. Further, the fact Griffin pursued a TRO supports his conversion claim because he argues the TRO was necessary to protect his property and his use of the Unit, which included providing chairs to his guests who rented the Unit. Therefore, we conclude the circuit court did not err.

II. Submitting the Common Elements Issue to the Jury

Appellants contend the master deed, Exhibit A⁵, the building plans, and the definitions in the Horizontal Property Act⁶ unambiguously define the roof terrace, the tenth-floor elevator lobby, and the rooftop planters as common elements. They assert Griffin did not contest that the rooftop planters were common elements at trial but that the circuit court still submitted the question to the jury who erroneously found the planters were not common elements. Appellants maintain because it is unambiguous that the roof terrace, tenth-floor elevator lobby, and

⁵ Exhibit A was a letter to Griffin from the Board regarding a safety inspection report it received.

⁶ S.C. Code Ann. §§ 27-31-10 to -440 (2007 & Supp. 2024).

rooftop planters are common elements, it was an error to submit these issues to the jury and a directed verdict should have been granted. We disagree.

Deeds are construed to determine the intent of the parties. To construe a deed, a court looks first at the language of the instrument because the court presumes it declares the intent of the parties. When, and only when, the meaning of a deed is not clear, or is ambiguous or uncertain, will a court resort to established rules of construction to aid in the ascertainment of the grantor's intention by artificial means where such intention cannot otherwise be ascertained.

Hunt v. Forestry Com'm, 358 S.C. 564, 569, 595 S.E.2d 846, 848 (Ct. App. 2004) (quoting 23 Am. Jur. 2d *Deeds* § 192 (2002)).

"[I]f the language of the deed is unambiguous, then its interpretation is a question of law to be resolved by the reviewing court without resort to extrinsic evidence." *Id.* (alteration in original) (quoting 23 Am. Jur. 2d *Deeds* § 192 (2002)). "If . . . the language in a deed is ambiguous, the determination of the grantor's intent then becomes a question of fact." *Santoro v. Schulthess*, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009). "In recent years, . . . our supreme court has seemingly discarded the distinction between patent and latent ambiguities in determining whether the interpretation of a document is for the court or the jury." *Harbin v. Williams*, 429 S.C. 1, 8, 837 S.E.2d 491, 495 (Ct. App. 2019). "When the terms of a [deed] are ambiguous, the question of the parties' intent must be submitted to the jury." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d.205, 206 (Ct. App. 2012).

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings.

Wright v. Craft, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

Notably, we need not weigh the merits of the party's claims on appeal but only determine whether an ambiguity existed in the deed and if there was *any evidence*

to support the jury's finding that the roof terrace, tenth-floor elevator lobby, and planters were common elements.⁷ Shoreham's master deed establishes two classifications within the regime: "Dwellings and Common Elements." It provides that common elements are all of the real property, improvements, and facilities, other than the dwellings, and it further incorporates, by direct reference, the definitions outlined in the Horizontal Property Act.⁸ The master deed states that common elements are subject to a "perpetual nonexclusive easement in favor of all the owners of dwellings in the condominium for their use and the use of their immediate families, guests, and invitees" Griffin's deed to the Unit states that Griffin and his wife were deeded a "Dwelling" consisting of 2,630 feet squared and an undivided interest in the common elements.

However, the master deed also provides "an individual property capable of independent use and fee simple ownership, and the owner or owners of each dwelling shall own, as an appurtenance of the common elements, the undivided interest appurtenant to each dwelling" Further, "all balconies adjacent to each dwelling, including the railing attached thereto, are part of that dwelling and not common areas".

Exhibit A, also taken from the master deed, states: "Access to all floors is provided by both stairways and elevators. . . . [A]ccess to the single 'Rooftop Penthouse' dwelling on the 10th floor is provided from an elevator lobby which is a common area and stairways to the rooftop area, which is also common. The rooftop area contains planters which are common." The parties dispute the meaning of this passage. According to Appellants, this passage indicates that the roof terrace and tenth floor elevator lobby are both common elements. Griffin concedes this passage supports the lobby being a common element, but contends the statement "which is also common" refers exclusively to the stairwell and not the rooftop terrace. Further, Griffin argues that this exclusion was intentional and evidences

⁷ We address this issue exclusively in terms of the rooftop terrace. If the roof terrace is not a common element then the planters and tenth floor elevator lobby certainly are not common elements as no other dwelling owner would have reason for accessing either the planters or lobby.

⁸ The HPA provides little guidance because it defines "common elements" as "[t]he foundations, main walls, roofs, halls, lobbies, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed." See § 27-31-20(f)(2). Shoreham does not have a "roof" in the traditional sense and the HPA does not designate "balconies" or "terraces" as common elements. See § 27-31-20.

that the rooftop terrace is not a common element. We find either interpretation is reasonable and accordingly that there was an ambiguity in the master deed.

We agree with the circuit court's finding that there existed ambiguities given the very nature of the property. It is almost inconceivable that the roof terrace was intended to be common. Again, the entirety of the Unit's exterior walls are glass, allowing anyone using the roof terrace a direct view into the Unit. This would leave any occupant of the Unit completely exposed should any other dwelling users access and use the roof terrace. Accordingly, the extrinsic evidence was properly admitted.

Furthermore, the extrinsic evidence submitted supports the jury's finding the roof terrace was not a common element. Though the terrace was accessible to other tenants via the stairwell, to access the rooftop via the elevator required a key belonging to Griffin. Griffin testified he maintained and made improvements to the roof terrace at his own expense including installation of the Turtle Tile and adding shrubs to the planters. Meeting minutes from a 1992 board meeting also indicated that the terrace was intended to be treated as a balcony, which per the master deed, would make it not common. The minutes included the statement "Jim Pike, the attorney responsible for the master deed, stated that the area around the top penthouse would be handled the same as other balconies."

Finally, and we believe most compelling, the roof terrace was, for thirty-six consecutive years (1982-2018), treated as part of the Unit. Griffin and his uncle exclusively used the rooftop terrace. By Aquino's own admission, he nor any member of the Association had *ever* questioned whether or not the roof terrace was a common element prior to 2019. Based on the foregoing, we conclude the circuit court did not err in submitting the common element question to the jury.

III. Amended Complaint

Appellants assert the circuit court abused its discretion in allowing Griffin to amend his complaint to include an acquiescence cause of action just before trial was to begin. They argue acquiescence was an inappropriate claim and they would have conducted additional discovery to refute the claim if given the time. Appellants assert the acquiescence cause of action is an attempt to claim estoppel, which can only be used as a defense. We disagree.⁹

⁹ We recognize Griffin's *pretrial* motion to amend was filed under Rule 15(b) of the South Carolina Rules of Civil Procedure, which was procedurally unusual;

Rule 15(b) allows for the amendment of pleadings to conform to the evidence and provides:

Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Rule 15(b), SCRCPP.

"It is well established that a motion to amend is addressed to the discretion of the trial [court], and the party opposing the motion has the burden of establishing prejudice." *Collins Ent., Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005). "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.*

Complaints should be allowed to be amended so long as the opposing party "is afforded full opportunity to introduce testimony bearing on the subject of the amendment." *Soil & Material Engineers, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987) (quoting 61A Am. Jur. 2d *Pleading* § 329 (1981)). "The question of allowing an amendment of pleadings to conform to proof, however, is addressed to the sound discretion of the trial judge whose decision will not be disturbed absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Menne*, 368 S.C. at 568, 629 S.E.2d at 696.

however, the circuit court refrained from ruling until evidence to support the acquiescence cause of action was presented at trial.

We find the circuit court did not abuse its discretion. The acquiescence claim is substantially related to Griffin's other claims. Appellants were given six days to prepare and "afforded full opportunity to introduce testimony" to refute the claim. Accordingly, we believe Appellants failed to prove prejudice.

IV. Finding Evidence of Damages

Appellants argue Griffin presented no evidence to enable a jury to determine the existence of damages or a reasonably certain or accurate amount. They asserted no evidence was presented to show Griffin suffered any losses, and it was an error of law to submit the question to the jury. We disagree.

"As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy." *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008). "Neither the existence, causation[,] nor amount of damages can be left to conjecture, guess[,] or speculation." *Id.* (quoting *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991)). *See also White v. Whitney Mfg. Co.*, 60 S.C. 254, 267-68, 38 S.E. 456, 461 (1901) (noting speculative damages would not constitute the element of damages).

The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy.

Beck v. Clarkson, 300 S.C. 293, 298-99, 387 S.E.2d 681, 684 (Ct. App. 1989) (quoting *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 122-23, 113 S.E.2d 329, 336 (1960)).

Griffin presented evidence of the loss of rental income that was suffered due to the Association's interference with his property. He testified to the renters that never returned after filing complaints, the amount that he normally charged renters, and the periods in which he was unable to rent due to the actions of Appellants. Griffin provided \$20,000 as an estimate for total lost in rental value. Griffin also presented evidence of the loss of his personal property, including his Turtle Tile, which he testified was worth \$20,000 at the time of installation. We believe these

estimations were based on more than speculation and conjecture. Therefore, we affirm the circuit court.

V. Submitting Punitive Damages to the Jury

Appellants argue punitive damages should not have been submitted to the jury because no reasonable jury could have found punitive damages were warranted. They assert the punitive damages award was excessive and unconstitutional, and the jury incorrectly applied the law when awarding punitive damages. We disagree.

"Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004).

"There is no formula or standard to be used as a measure for assessing punitive damages." *See Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). However, the relevant factors in consideration of punitive damages are:

- (1) the character of the defendant's acts; (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay.

Id., at 290, 659 S.E.2d at 251-52. "Under *Gamble* [*v. Stevenson*, 305 S.C. 104, 406 S.E.2d 408 (Ct. App. 2000)], the trial court is not required to make findings of fact for each factor to uphold a punitive damage award." *Welch v. Epstein*, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct. App. 2000)

"[P]unitive damages may be awarded only upon a finding of actual damages." *Gamble*, 305 S.C. at 111, 406 S.E.2d at 354. "The policy behind awarding punitive damages must also remain consistent with the principle of penal theory that the 'punishment should fit the crime.'" *Atkinson v. Orkin Exterminating Co.*,

361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (quoting *Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P.*, 347 F.3d 672, 676 (7th Cir. 2003)). "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003)).

As stated above, actual damages were awarded. Further, Appellants' actions were in willful disregard of Griffin's rights: Aquino made several false claims in his email; his direct examination revealed that much of his motivation for sending the email was a result of animus towards Griffin's renters; the individual appellants intentionally excluded Griffin from Board meetings during the creation of the Rules; in addition to regulating the use of the roof terrace, the Rules also placed limitations on the Unit without including similar limitations for the other units of Shoreham; and when Griffin filed suit after the Rules were imposed, the individual appellants removed Griffin's property without his permission and imposed prejudicial requirements to restrict Griffin's use of the terrace. Appellants argue that punitive damages were only awarded because the jury came to believe that Griffin was entitled to attorney's fees. They base this on one of the questions the court received from the jury during deliberations: "For damages, do we have to put an actual number, or can it be a phrase such as: 'attorney fees and costs'['?']" We believe there are a number of reasons this question could have been asked. Further, the jury was provided an instruction on punitive damages. We do not believe these instructions were wholly ignored as roundabout way to award Griffin attorney's fees. Rather, the record contains clear and convincing evidence to support the jury's determination that Appellants willfully disregarded Griffin's rights and arrived at a figure they believed to be reasonable and proportional to the damages recovered. Further, as to Appellants' argument that the punitive damages verdict was excessive, the circuit court reduced the jury's award by \$40,000. Therefore, we find the circuit court did not err in submitting the issue of punitive damages to the jury.

VI. Not Joining All Dwelling Owners

Appellants argue Griffin had no right to bring any claim related to the division of the common area because the dwelling owners had an undivided interest in the common areas, and thus the judgment should be reversed. They maintain the remaining Shoreham unit owners should have been added to the action pursuant to Rule 19(a) of the South Carolina Rules of Civil Procedure. We disagree.

A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Rule 19(a), SCRCP.

Appellants cite *BancOhio National Bank v. Neville*, 310 S.C. 323, 426 S.E.2d 773 (1993), in support of their contention that the other dwelling owners were necessary parties. We distinguish *BancOhio National Bank* from the present case. In that case, our supreme court held that South Carolina Department of Highways and Public Transportation and the Town of West Union were necessary parties when an action was filed to close and abandon a public road. *Id.* at 324, 426 S.E.2d at 774-75. However, this case dealt specifically with State owned property.

We recently held in *Coburg, Inc. v. Lesser*, 309 S.C. 252, 422 S.E.2d 96 [(1992)], that "where the State is the presumed owner of property . . . [it] must be joined as a party defendant, either by motion of one of the parties or, if necessary, by the [c]ourt." This same rule also applies to any property interest, such as a right of way or easement, where the State has a proprietary interest. The inescapable conclusion is that the South Carolina Department of Highways and Public Transportation and the Town of West Union are indispensable parties well within the meaning of Rule 19(a). Here, under the procedural posture of the case, only the trial court or the respondents were the proper parties to join the State and West Union.

Id. at 329, 426 S.E.2d at 777 (second and third alterations in original).

As our supreme court explained, the state is afforded additional rights beyond those outlined in Rule 19. Though *BancOhio National Bank* was Appellants' most

heavily cited case on this issue, we find the facts are not particularly on point. As *BancOhio National Bank* dealt with the rights of the Town and the Department to a road that was going to be closed, it is not relevant precedent. Moreover, Appellants' argument is predicated on a finding that the roof terrace is a common element. This was not the jury's finding. Because the other dwelling owners had no property interest in the roof terrace, they could not have been necessary parties.

VII. Beckham Testimony

Appellants argue they were unduly prejudiced by real estate appraiser Henry Beckham's testimony. They maintain his testimony created a confusion of the issues and misled the jury. We disagree.

"Evidence which is not relevant is not admissible." Rule 402, SCRE. Rule 403 of the South Carolina Rules of Evidence states, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"

Appellants argue Beckham's testimony included a damages evaluation that confused and misled the jury causing them to conflate differences in property values with actual damages. We disagree. Although Beckham's testimony may not have been relevant, the jury did not base their decision on it, as the amount the jury awarded was consistent with the figures Griffin testified to related to damages, and not Beckham's figures for change in property value. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Therefore, we conclude Beckham's testimony was not prejudicial to Appellants.

VIII. Verdict Form

Appellants assert the circuit court's denial of their request to edit the verdict form created confusion as to what the jury's findings were and whether the findings could coexist logically. We disagree.

"The trial [court] has the discretion to determine how a case is submitted to the jury." *S.C. Dep't of Transp. v. First Carolina Corp.* of S.C., 372 S.C. 295, 300, 641 S.E.2d 903, 906 (2007). It is "the duty of the trial [court] to decide what the verdict meant, and, in reaching his conclusion thereabout, it was his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial." *Howard v. Kirton*, 144 S.C. 89, 101, 142

S.E.2d 39, 43 (1928). Further, "it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003).

The verdict form was four pages in total, and numbered one through thirteen. Items three through eleven stated specific parties and causes of action and were as follows:

3. Do you find for the Plaintiff Marshall Griffin against the Defendant Shoreham Towers Homeowners Association?
4. Do you find the Defendant Richard Aquino acted willfully or wantonly?
5. In regard to the civil conspiracy claim do you find for the Plaintiff Marshall Griffin against the Defendant Richard Aquino?
6. Do you find the Defendant Bill West acted willfully or wantonly?
7. In regard to the civil conspiracy claim, do you find for the Plaintiff Marshall Griffin against the Defendant Bill West?
8. Do you find the Defendant Tony Giovino acted willfully or wantonly?
9. In regard to the civil conspiracy claim, do you find for the Plaintiff Marshall Griffin against the Defendant Tony Giovino?
10. Do you find Defendant Carter Tackett acted willfully or wantonly?
11. In regard to the civil conspiracy claim, do you find for the Plaintiff Marshall Griffin against the Defendant Carter Tackett?

Following each item were the words "yes or no." For each item the jury checked "yes." The jury found the Association and the individual Board members liable on separate causes of action. Therefore, we find no contradiction in the verdict form as Appellants claim. The Association breached the contract based on a fraudulent act. Additionally, the Board members acted outside of their capacity as board members when committing civil conspiracy. Accordingly, we find the presentation of the verdict form was proper.

IX. Terrace Reference

Appellants argue nothing supported Griffin's claim that "balcony" and "terrace" were synonymous or that because there was a railing on the roof area, that made

the area part of Griffin's dwelling. They assert Griffin mislead the jury by referring to the tenth-floor terrace space as a "balcony," confused the issues, mislead the jury, and unfairly prejudiced Appellants pursuant to Rule 403 of the South Carolina Rules of Evidence. Appellants maintain the circuit court's allowance of "balcony" to describe the tenth-floor terrace space was an abuse of discretion. We disagree.

"The trial court's ruling on the admission of evidence will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *Hawkins*, 330 S.C. at 108, 498 S.E.2d at 404. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields*, 363 S.C. at 26, 609 S.E.2d at 509. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

State v. Mitchell, 399 S.C. 410, 416, 731 S.E.2d 889, 893 (Ct. App. 2012) (quoting Rule 701, SCORE).

The circuit court denied the motion in limine on this issue because it determined it to be a fact issue for the jury. The court stated during pretrial motions, "[i]f [Griffin] wants to call it a balcony, he can. . . . You can cross-examine in that regard, but that is the whole issue of this case, basically. [The] jury will figure it out." We agree.

As stated above, the master deed is ambiguous. Accordingly, the issue of whether the roof terrace is a balcony and therefore not a common element per the master deed was a fact issue properly before the jury. As both patent and latent ambiguities existed, extrinsic evidence was allowable. Griffin testified he believed the roof terrace was his private balcony and he referred to and treated the roof

terrace as such since acquiring the Unit.¹⁰ Additionally, the 1992 meeting minutes support that the roof terrace was not common. As the circuit court found, Griffin's entire argument of the case hinged on the fact that he had an exclusive right to the roof terrace because it was intended to be treated the same as the other dwellings' balconies. Evidence supporting his assertion that the terrace was his "balcony" and Griffin's use of word was not just relevant but essential to his theory of the case. Accordingly, we find no error in the circuit court's denial of Appellants' motion in limine on this issue and affirm.

X. Directed Verdict and JNOV

Appellants contend Griffin did not establish any breach of contract because his interpretation of the Master Deed was erroneous as a matter of law. They maintain Griffin also presented no evidence that the Association acted with a fraudulent intent or committed a fraudulent act; therefore, it was an error of law to allow the jury to determine the breach of contract accompanied by fraudulent act cause of action. Appellants also assert Griffin did not present any evidence of Appellants attempting to exercise ownership or the right of ownership over Griffin's personal property. They contend Griffin failed to present evidence of the individual Appellants acting outside the scope of their duties as board members as needed for a civil conspiracy claim.

Appellants further assert acquiescence was not an appropriate claim because its application typically applies to physical boundary disputes, not the nature of property, nor is it applicable to horizontal property regimes. They further argue Griffin's acquiescence theory is barred by section 27-31-70 of the South Carolina Code because Griffin concedes the property was once a common element, which cannot be divided under the statute. Appellants assert it was an error of law to deny Appellants' motion for a directed verdict as to West, Giovino, and Tackett. We disagree.

"When reviewing the trial court's ruling on a motion for a directed verdict . . . , this [c]ourt must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). "[T]he appellate court must determine whether it would have been reasonably possible for the jury to return a verdict for the party opposing the

¹⁰ Griffin also alleges the previous owner, his uncle, treated and referred to the terrace as his "balcony."

motion." *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 35, 737 S.E.2d 857, 860 (Ct. App. 2013). "If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied." *Howard v. Roberson*, 376 S.C. 143, 149, 654 S.E.2d 877, 880 (Ct. App. 2007). The issue must be submitted to the jury if material evidence tends to establish the issue in a reasonable juror's mind. *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). The appellate court will reverse the trial court's ruling only when no evidence supports the ruling or when an error of law controls the ruling. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). "[N]either the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." *Wright*, 372 S.C. at 22, 640 S.E.2d at 498.

"A trial court should grant JNOV when the evidence is insufficient to support the verdict." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 338, 611 S.E.2d 485, 487 (2005).

In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt.

Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003) (quoting *Strange v. S.C. Dept. of Hwys. and Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994)).

"A motion for a [JNOV] is merely a renewal of the directed verdict motion." *Jamison v. Hilton*, 413 S.C. 133, 139, 775 S.E.2d 58, 61 (Ct. App. 2015). "When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Id.* "This [c]ourt can only reverse the trial court when there is no evidence to support the ruling below." *Moore v. Moore*, 360 S.C. 241, 260, 599 S.E.2d 467, 477 (Ct. App. 2004). "We must affirm a trial [court's] denial of a directed verdict motion when there is evidence to support the court's ruling." *Hurd v. Williamsburg*

County, 353 S.C. 596, 609, 579 S.E.2d 136, 143 (Ct. App. 2003), *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (2005).

Again, under the applicable standard of review, this court need only determine that there was *some* evidence to support the circuit court's finding.

a) Breach of Contract

"The merger by deed doctrine provides that 'a deed made in in full execution of a contract of sale of [property] merges the provisions of the contract therein.'" *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013) (quoting *Charleston & W. C. Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957)). "The elements for a breach of contract are the existence of a contract, its breach, and the damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012).

The existence of the master deed is undisputed, which through the merger of deed doctrine, became Griffin's "contract" when he acquired the Unit from his uncle. Further, Griffin presented evidence to support the finding that his rights under the deed were breached by Appellants' actions and he suffered damages as a result.

b) Breach of Contract Accompanied by Fraudulent Act Claim

A breach of contract accompanied by fraudulent act claim requires the claimant demonstrate: "(1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention[;] and (3) that the breach was accompanied by a fraudulent act." *Minter v. GOCT, Inc.*, 322 S.C. 525, 530, 473 S.E.2d 67, 70 (Ct. App. 1996). "'Fraudulent act' is broadly defined as 'any act characterized by dishonesty in fact or unfair dealing.'" *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 470, 597 S.E.2d 881, 883 (Ct. App. 2004) (quoting *Conner v. City of Forest Acres*, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002)).

Evidence of the deed and its breach were presented. Further, Griffin presented evidence that breach occurred not for Appellant's belief the terrace was common, but as a means of antagonizing Griffin over conflicts between Griffin and other dwelling owners related to his renters. Further, despite his status as a Board member at the time, when the Board sought to create rules and regulations for the terrace, Griffin was wholly excluded from that process. Accordingly, we find evidence was presented of fraudulent intent accompanied by a fraudulent act.

c) Conversion

"'Conversion' is defined as the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." *Mullis v. Trident Emergency Physicians*, 351 S.C. 503, 506-07, 570 S.E.2d 549, 550 (Ct. App. 2002).

It is undisputed that Griffin's Turtle Tile and chairs were removed from the roof terrace without his permission. Therefore, Appellants' motion for directed verdict and JNOV on this issue is predicated on a finding that the roof terrace was a common element and they had the requisite authority to regulate the space including the removal of Griffin's Turtle Tile and chairs. As there was evidence supporting the jury's finding that the roof terrace is not a common element, there was also evidence to support the jury's finding on this issue.

d) Civil Conspiracy

A claim for civil conspiracy requires, "(1) the combination or agreement of two or more persons, (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, 861 S.E.2d 774, 780 (2021). "[A]lthough a corporation cannot conspire with itself, 'the agents of a corporation are legally capable, as individuals, of conspiracy among themselves or with third parties.'" *Pridgen v. Ward*, 391 S.C. 238, 244, 705 S.E.2d 58, 62 (Ct. App. 2010) (quoting *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 14, 344 S.E.2d 379, 383 (Ct. App. 1986), *overruled on other grounds by Paradis*, 433 S.C. 562, 861 S.E.2d 774).

We believe the same facts outlined above to support Griffin's claim for breach of contract accompanied by fraudulent act also support his claim for civil conspiracy. Further, as Griffin was a Board member himself, Appellants cannot say they were acting within the scope of their duties as Board members when they intentionally and without reason excluded Griffin from these meetings.

e) Acquiescence

"[A]cquiescence is a question of fact determined by the intent of the parties." *Kirkland v. Gross*, 286 S.C. 193, 198, 332 S.E.2d 546, 549 (Ct. App. 1985),

receded from on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988).

[I]f a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interest[s] are affected. His silence is acquiescence and it estops him.

Jordan v. Judy, 413 S.C. 341, 348-49, 776 S.E.2d 96, 100 (Ct. App. 2015) (alteration in original) (quoting *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955)).

While Appellants are correct that acquiescence usually arises in terms of boundary disputes and as an alternative to adverse possession when the hostility element is lacking, we find no case law to suggest that the claim can only be brought exclusively under those circumstances. Accordingly, we find the evidence that Griffin and his uncle were allowed to exclusively use the roof terrace for thirty-six years supports a claim for acquiescence.¹¹

f) Individual Appellants' Immunity

"All directors, trustees, or members of the governing bodies of not-for-profit . . . associations . . . are immune from suit arising from the conduct of the affairs of these . . . associations. This immunity from suit is removed when the conduct amounts to willful, wanton, or gross negligence." S.C. Code Ann. § 33-31-834 (2006).

We find there was evidence that Appellants acted willfully in depriving Griffin of his rights. Accordingly, we affirm.

CONCLUSION

¹¹ We do not believe that acquiescence is barred by section 27-31-70 of the South Carolina Code, nor do we believe Griffin's claim is actually a veiled allegation of estoppel as Appellants assert.

Based on the foregoing, the circuit court did not abuse its discretion in admitting references to the TRO, in permitting Griffin to amend his complaint to include a cause of action for acquiescence, in allowing Beckham to testify, in how it submitted the verdict form to the jury, or in allowing Griffin to refer to the terrace space as a balcony. Additionally, the circuit court did not err in submitting the common elements issue, the question of actual damages, or the question of punitive damages to the jury. Further, the circuit court did not err in not requiring other dwelling owners be added as necessary parties. Lastly, viewing the evidence and all reasonable inferences in the light most favorable to Appellants, the circuit court did not err in denying Appellants' motions for a directed verdict or JNOV for the breach of contract, breach of contract accompanied by a fraudulent act, conversion, civil conspiracy, acquiescence, or individual appellants' immunity defenses. Accordingly, the circuit court's determinations are

AFFIRMED.

HEWITT, J., concurs.

GEATHERS, J., concurring in part and dissenting in part: I concur in the majority's conclusion that the disputed language in the master deed was capable of more than one reasonable interpretation. However, I respectfully depart from those parts of the majority's decision concerning the intent of the directors as well as the majority's conclusions concerning the TRO references.

First, I cannot agree that there was clear and convincing evidence of conduct that could be characterized as willful, wanton, or reckless in order to justify a punitive damages award. *See* S.C. Code Ann. § 15-33-135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."); *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996) ("A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights."). Rather, the evidence shows that the directors were acting under the advice of counsel and other consultants. Therefore, there was no clear and convincing evidence to support the punitive damages verdict. *See id.* ("A conscious failure to exercise due care constitutes willfulness."); *Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986) ("It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the tortfeasor.")

Neither can I agree that there was evidence of a fraudulent intent, dishonesty, or unfair dealing for purposes of breach of contract accompanied by a fraudulent act. *See Conner v. City of Forest Acres*, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002) ("The fraudulent act is any act characterized by dishonesty in fact or unfair dealing."). Additionally, I cannot infer any gross negligence from the evidence for purposes of removing the individual directors' immunity or infer Appellants' intent to harm Griffin from the evidence for purposes of civil conspiracy. *See* S.C. Code Ann. § 33-31-834 (2006) (providing directors of non-profit organizations with immunity from lawsuits "arising from the conduct of the affairs of" the organization but removing this immunity "when the conduct amounts to willful, wanton, or gross negligence"); *Hamilton v. Charleston Cnty. Sheriff's Dep't*, 399 S.C. 252, 255, 731 S.E.2d 727, 728 (Ct. App. 2012) ("A defendant is guilty of gross negligence if he is *so indifferent to the consequences of his conduct as not to give slight care to what he is doing.*" (emphasis added) (quoting *Jackson v. S.C. Dep't of Corrs.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989))); *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574 n.9, 861 S.E.2d 774, 780 n.9 (2021) ("Since civil conspiracy is an intentional tort, an intent to harm . . . remains an inherent part of the analysis."). Therefore, the circuit court should have set aside the punitive damages award and granted a JNOV as to civil conspiracy and breach of contract accompanied by a fraudulent act.

Finally, the TRO references had little to no probative value. Yet, the danger of unfair prejudice from their admission into evidence was high due to the probability that the jurors would view the mere existence of such an order as an imprimatur on the merits of Griffin's claims. Therefore, the circuit court should have excluded them. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"); *In re Campbell*, 427 S.C. 183, 193, 830 S.E.2d 14, 19 (2019) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis" (quoting *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001))). However, the circuit court cured its error in allowing this testimony by instructing the jury that the TRO had no effect on the merits of the case and the jurors were not to consider the order.

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Jul 30 2025

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

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

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

v.

Marshall Griffin, ...Respondent,

APPELLANTS' PETITION FOR REHEARING

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Myrtle Beach, South Carolina

July 30, 2025

APP 001422

PETITION FOR REHEARING & MEMORANDUM IN SUPPORT

I. Standard Of Review.

Per Rule 221(a), Appellants respectfully asks the Court for a rehearing. Rule 221(a), SCACR. A Petition for Rehearing shall be in accordance with Rule 240. Id. Therefore, a Petition for Rehearing shall be written, state the grounds for the petition, and comply with Rule 267. See Rule 240(c), SCACR. The purpose of a Petition for Rehearing is to state with particularity the points that have been overlooked or misapprehended by the Court. Rule 221(a), SCACR.

II. The Court Overlooked And Misapprehended That Its Ruling On The TRO Essentially Overturned The South Carolina Supreme Court *Helsel* Decision and Blessed The Sledgehammer Effect Created By Respondent's Counsel By The Constant References Of The TRO To The Jury.

All issues in a trial must be 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). The Court's Opinion essentially gutted this crystal clear principal of law. The TRO was a topic in the Respondent's opening statement, in Respondent's counsel's examination of five separate witnesses, and in his closing statement. The first TRO "...reference..." was in Respondent's counsel's opening statement to the jury; thereafter, the TRO reference just picked up steam, being used to shame the Appellants and guide the jury to the finding of liability. To not recognize the prejudice overlooks the undisputed reality that the TRO permeated the entire trial from beginning to end.

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. (R. 01120, 00368, and 00371), and the Respondent, in his testimony, agreed the planters are common. (R. 00368 and 00371). But yet, it

was the closing argument by Respondent's counsel in which he told the jury the TRO saved the plants. (R. 00914).

In other words, there was no evidence the planters were not common elements – even Respondent testified they were common; but yet, the jury found otherwise – only because of the use of the TRO by Respondent's counsel.

III. The Court's Opinion Overlooked And Misapprehended The Undisputed Evidence That Respondent's Deed To His Shoreham Unit Conveyed 2,630 Square Feet Whereas This Court Opinion Significantly Enlarged Respondent's Unit Without Any Accompanying Responsibility For The Area Outside His Dwelling Unit.

The Shoreham Towers Master Deed, without any contradiction from Respondent at trial, established the square footage of Respondent's Unit as being approximately 2,630 square feet. This is in Exhibit A to the Master Deed, third paragraph in Exhibit A. (R. 01120). Respondent admitted the size of his Unit is 2,630 square feet and admitted his Unit size never changed; it is the same size today as the day he bought the Unit. (R. 00345). But this Court's Opinion enlarged the size of his Dwelling Unit by affirming that the planters, roof terrace, and elevator lobby were not common elements. This Opinion even overlooked the fact that in Respondent's Complaint, he alleged in Paragraph 7, the planters and elevator lobby were common elements, therefore, not part of his Dwelling Unit. (R. 00037).

The Shoreham Towers Master Deed, unambiguously stated the size of Respondent's Dwelling Unit. The Court's Opinion overlooked this significant contractual term in the Master Deed. The result is that all other unit owners at Shoreham Towers are disproportionately assessed for the care and maintenance of the planters, roof top terrace, and the elevator lobby, even though these components are no longer classified as common elements.

The fact that all the other 43 unit owners bear the costs of these components was overlooked. Per the Master Deed, all the 44 unit owners share the costs of common elements. But with the Opinion, 43 unit owners now financially contribute to Respondent's Dwelling Unit.

IV. The Court Overlooked And Misapprehended The Fact That The South Carolina Horizontal Property Regime Act Is Part Of The Shoreham Towers Master Deed And As A Result Of The Court's Error, The Court's Opinion Reads As Holding That The South Carolina Horizontal Property Regime Act Is Ambiguous.

In its Opinion, the Court states, in footnote 8 that "...HPA provides little guidance...". It further stated that it "...is almost inconceivable that the roof terrace was intended to be common." This misapprehension that a roof cannot be a terrace is without any support. If the roof terrace is not the roof of the building, the Shoreham Towers building has no roof. This egregious error cannot stand.

The Shoreham Towers Master Deed states the roof is a common element, as does the South Carolina Horizontal Property Regime Act, which Act is specifically incorporated into the Master Deed in Article XXXIV. (R. 01055). Simply because the roof is used as a terrace does not mean it is not a common element.

The Court's Opinion, to its logical conclusion, reads as holding that the term "roof", as stated in the South Carolina Horizontal Property Regime Act, is ambiguous.

V. The Court Overlooked And Misapprehended The Fact That Respondent Voted As A Board Member To Repair The Roof, And That The Turtle Tile Was Removed By The Roofing Contractor With Respondent's Consent.

The Court's Opinion states that it "...is undisputed that Griffin's Turtle Tile and chairs were removed from the roof terrace without his permission." This statement is incorrect; Griffin approved both removal of the furniture and Turtle Tile. At a Board meeting on January 19, 2019, the Board, including Respondent, voted unanimously to accept the roofing contractor's roof repair proposal. (R. 00652-00643). At a second meeting on March 25, 2019, the Board, including Griffin,

approved a special assessment for the needed roof repairs. (R. 00653-00654). For the roofing job, the contractor testified that "...we had to take up the tile called Turtle tile and remove that...". (R. 00730). It was after the conclusion of the roofing repair when the roofing contractor informed the Board that the Turtle Tile should not be re-installed nor should the heavy wooden furniture be returned. (Defendants' Exhibit 30, R. 01201).

VI. The Court Overlook And Misapprehended The Undisputed Facts That Respondent, And Before Him, His Uncle Who Was The Developer, Controlled The Shoreham Board Of Directors For Over 30 Years And That Respondent, In Paying Assessments And Taxes, Never Considered The Roof Terrace As Being A "...Part Of The Unit."

In the Court's Opinion, it is stated that "...we believe most compelling, the roof terrace was, for thirty-six consecutive years (1982-2018), treated as part of the Unit." The Respondent's uncle was a member of the developer, which for a number of years controlled the Board, and then when the Respondent and his wife became the Unit owners, they served as Board members. In fact, Respondent was the Board President for many of those years. These facts were completely overlooked by the Court.

In addition, the unit owners were kept completely in the dark about the changes Respondent made to the Shoreham Towers common elements. Respondent testified that he never obtained approval for the installation of the Turtle Tile on the roof, as required by the Master Deed. (R. 00362). Nor did Respondent obtain approval for any remodeling to the elevator lobby, even though this is a common element, nor did he inform the Board. (R. 00350).

Never did the Respondent consider the roof terrace "...part of his Unit." This Court overlooked the undisputed facts that Respondent never paid any Association assessments on the roof terrace – the assessments he paid were based only on the size of his Unit, being 2,630 square feet. He never paid property taxes on the roof terrace since he never considered this being part of his Unit. Respondent never personally paid for any roof top repairs; and Respondent testified that

the railings around the roof terrace are maintained by the Association. (R. 00388). As testified by the Respondent, his Unit size never changed and it continues to be 2,630 square feet. (R. 00345).

VII. The Court Overlooked And Misapprehended The Fact That The Designation Of The Roof As Roof Terrace Means That It Is Not A Common Element.

In the Court's Opinion, it states that "It is almost inconceivable that the roof terrace was intended to be common...". The Court overlooked that a component of the building, the roof, can be named a roof terrace. The Master Deed unequivocally states that Shoreham Towers Horizontal Property Regime contains two components: Dwelling Units and Common Elements. (R. 01095). The survey (R. 01220), along with testimony of the surveyor (R. 00775-00779), shows that the roof top terrace area footage far exceeds the Respondent's square footage of his Dwelling Unit – no dispute. Finally, because it has always been a common element, this roof top terrace was never subject to association assessments nor local property taxes. (R. 00387 and 00693).

Shoreham Towers has a roof and the Court's affirmation that its roof is not a common element is directly contrary to the Master Deed. No dispute that in the Master Deed, Exhibit A, Respondent's Unit being approximately 2,630 square feet, is not part of the roof terrace. (R. 01120). No dispute that Respondent testified that the roof is a common element. (R. 00359). The Building Plans do not create the fiction that the roof is separate from the roof terrace. (R. 01170-01183). Therefore, the roof terrace is the roof and this Court's Opinion that it is not, wrecks extreme havoc and uncertainty with respect to the maintenance and repair of this roof.

VIII. The Court Overlooked And Misapprehended The Evidence That The Shoreham Towers Directors, Having Been Guided By The Advice Of Legal Counsel, The Roofing Contractor, And The Safety Experts, Should Be Subject To A Finding of Intentional Wrongdoing And Punitive Damages; Instead These Directors Are Protected by The Immunity Granted By The South Carolina General Assembly.

This Court overlooked the fact that at all times, the Board members were guided by experts, with one being an independent South Carolina attorney, with significant legal experience regarding

horizontal property regimes. In its Opinion, the Court stated that the Board members “...intentionally and without reason, excluded Griffin from these meetings.” This is incorrect. Any exclusion was due to advice of legal counsel. The evidence was without dispute that the Shoreham Towers directors retained competent, qualified independent legal advice after Respondent, in January 2019, told the Board that he was “going to lawyer up.” (R. 00819). As Roger Roy, Shoreham Towers’ attorney testified, the Board came to him looking for guidance. (R. 00758). Respondent testified that the Association’s lawyer, Roger Roy, instructed the Board that he should not participate in Board calls in April 2019, which calls were to discuss the rules and regulations. Then he testified that he believes they met two times, without him, to discuss the rules. (R. 00294-00295).

The Appellant Board member, Bill West, testified that the reason Respondent was not present was due to legal counsel’s advice. (R. 00689-00690). Respondent testified that it was legal counsel’s instruction that he not participate. Additionally, this Court overlooked the fact that the Respondent did attend and vote on the rules and regulations. (R. 00365-00366). Finally, through his attorney, Respondent presented his version of rules and regulations.

This Court’s affirmation of breach of contract accompanied by fraud, conversion, and the punitive damages sends a message to all non-profit board of directors that legal, expert advice means nothing.

IX. The Court Overlooked And Misapprehended The Master Deed As Being Ambiguous When It Points To The Roof Terrace As Being A Balcony.

The Court overlooked the Building Plans. The Master Deed, which incorporates the Building Plans, clearly shows that there is no balcony on the tenth floor of the Shoreham Towers building. As testified by the Respondent, the Building Plans have balconies on the first through ninth floors, but the Plans show no balcony on the rooftop. (R. 00342; 0355; and 00359). The

provision in the Master Deed, Exhibit A, which states that “[a]ll balconies adjacent to each dwelling, including the railing attached thereto, are part of that dwelling and not common areas...”, does not create any ambiguity. This provision is not applicable to the tenth floor, for there is no balcony on this floor. The Court’s interpretation of ambiguity is simply unfounded.

CONCLUSIONS

Appellants respectfully petitions the Court to rehear the argument.

Respectfully submitted,

s/Henrietta U. Golding

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Myrtle Beach, South Carolina

July 30, 2025

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-_____

Case No. 2019-CP-26-06550

Marshall Griffin, ...Respondent,

v.

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

PROOF OF SERVICE

I, Henrietta U. Golding, attorney for Appellants, hereby certify that **Appellants' Petition for Rehearing** was served on Respondent on July 30, 2025, via email (*see attached*) to counsel of record for Respondent, addressed as follows:

John M. Grantland, Esquire Crawford A. Krebs, Esquire Post Office Box 6648 Columbia, South Carolina 29260 Email: jgrantland@murphygrantland.com ckrebs@murphygrantland.com	Thomas C. Brittain, Esquire Brittan Law Firm 4614 Oleander Drive Myrtle Beach, South Carolina 29577 Email: tommyb@brittainlawfirm.com
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Respectfully submitted,

BURR & FORMAN LLP

By: s/Henrietta U. Golding
Henrietta U. Golding, SC Bar #2173

Attorneys for the Appellants

Subject: Marshall Griffin v. Tony Giovino 2023-000451

Date: 7/30/2025 11:54 AM

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Good Morning Counselors,

Attached please find Appellant's Petition for Rehearing and Proof of Service, which I will be filing with the Court momentarily.

Sheila



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APP 001431

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Aug 25 2025

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

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

Marshall Griffin, ...Respondent,

v.

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

RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR REHEARING

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.

APP 001432

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.

s/Crawford A. Krebs

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Columbia, South Carolina
August 25, 2025

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

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

RECEIVED

Aug 25 2025

SC Court of Appeals

Marshall Griffin, ...Respondent,

v.

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

PROOF OF SERVICE

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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s/Crawford A. Krebs
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APP 001441

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RECEIVED

Sep 02 2025

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

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

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

v.

Marshall Griffin, ...Respondent,

**APPELLANTS' REPLY TO RESPONDENT'S RETURN TO
APPELLANTS' PETITION FOR REHEARING**

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Myrtle Beach, South Carolina

September 2, 2025

APP 001443

INTRODUCTION

Pursuant to Rule 240(f), SCACR, Appellants respectfully submits this Reply to Respondent's Return to Appellants' Petition for Rehearing.

ARGUMENTS

I. The TRO Was Used As A Hammer At Trial In Complete Disregard Of The Legal Principle That A Temporary Injunction Is Without Prejudice To The Rights Of Either Party-Respondent's Own Return Used The TRO As A Weapon.

Incredibly, Respondent's Return states that there was no risk of prejudice, even though the jury repeatedly, over 35 times, heard from Respondent's counsel that a judge issued a TRO against the Appellants. How can there be "...no risk of prejudice..." when the Board members, under cross examination, had to repeatedly testify that actions they took, as Board members, had to be redone, reversed, or halted because a state court judge issued an order. Even in this Appeal, the prejudice continues for Respondent, in his Return to this Petition, uses the TRO to the prejudice of Appellants when he wrote "*...although the Appellants returned some of the converted property, they did not do so voluntarily.*" *Emphasis added.* (Respondent's Return, page 3).

Also in his argument, Respondent argues that the TRO did not influence the finding that the planters are not common elements. However, the Master Deed clearly identified the planters as common elements and Respondent testified, two (2) different times, that the planters were common elements:

Q. And you agree that the planters are common elements?

A. That's correct. (R. p. 00368, lines 15-17).

Q. I think you told the jury on direct that you agree that the planters are common elements?

A. That's correct. (R. p. 00371, lines 10-11).

It is a fact that Respondent's counsel, in his cross examination and his closing statement, referred to the TRO being applicable to the planters. The only plausible explanation for the jury finding that the planters are common elements is that the TRO dealt with the planters-certainly not the Master Deed nor the unequivocal testimony of Respondent that the planters were common elements.

II. The Court Of Appeals Penalized Appellants For Following Legal Advice When They Treated The Roof Terrace As A Common Element.

Respondent, in his return, ignores the salient testimony of the Appellants' legal counsel, Roger Roy. Mr. Roy did not testify, nor even insinuate, that the Shoreham Board acted outside of his legal guidance that the roof terrace was a common elements. Instead, he testified that he provided legal guidance that the roof terrace was a common element and encouraged the Board to devise rules and regulations as to the roof terrace. In a March 19, 2019 letter to the Appellant, Carter Taggart, a Board member, Mr. Roy wrote the following about the rooftop area: "I'm very concerned that this area could be a great liable (sp) to the Association due to the unsafe areas that would be accessible by the owners, immediate families, guests and invitees. I would encourage the Board to devise rules and regulations concerning this area as to when and how it may be used. These rules should limit the activity on the rooftop". (Defendants' Exhibit 23, R. p. 01195).

The Appellants accepted the legal guidance from Roger Roy that the roof was a common element. (R. p. 00647, line 13 to R. p. 00648, line 10). As Appellant Bill West testified, the Board sought legal counsel to give advice and guidance. (R. p. 00657, lines 9-15). The Board prepared rooftop rules and regulations, which were reviewed by Roger Roy and he testified that they "...were well thought out and very appropriate". (R. p. 00766, lines 9-16).

The statutory protections afforded to the Board members by South Carolina Subsections 33-31-832(a) and 33-31-830(b)(2), were ignored and now there exists a South Carolina published

appellate decision which dissuades persons from serving as a director on a non-profit association board of directors.

III. It Is Not The Providence Of The Court Of Appeals To Create Fictitious Ambiguities, By Ignoring The Plain Meaning Of Words.

In Respondent's Return, he argues that the Shoreham Towers Master Deed is ambiguous with respect to the words "roof terrace". The decision of the Court of Appeals that a roof terrace is not a roof "...in the traditional sense..." does not make sense and appears to be an excuse to manufacture a non-existent ambiguity. In a South Carolina horizontal property regime, of which Shoreham Towers is, the roof is a common element. Code of Laws of the State of South Carolina, Section 27-31-20(f)(2) & (3). The Shoreham Towers roof terrace is the roof. The Appellant Association repaired this roof terrace, a common element, in 2019, which roof repair was done by a professional roofing contractor (R. p. 00728, line 23 to R. p. 00735, line 18; and R. p. 00636, line 4 to R. p. 00637, line 4). As discussed in the Petition for Rehearing, the Respondent voted, as a Shoreham director, for the Association to this repair.

In addition, in his Return, Respondent argues that an ambiguity exists with respect to the size of his Unit. Apparently, his Unit is now larger in square footage than the 2,630 square feet he was deeded. However, at trial Respondent testified that his Unit is 2,630 square feet, as stated in the Master Deed and that his Unit size did not change over the years. (R. p. 00345, lines 13-24). This testimony is consistent with the fact that since the purchase of his Unit, Respondent only paid property taxes and his Shoreham annual, and special, assessments based on his Unit size being 2,630 square feet.

CONCLUSION

Based on the foregoing, and the matters set forth in Appellants' Petition for Rehearing, Appellants pray that this Court grant a rehearing of this matter and amend its Decision by reversing

the jury verdict in its totality and finding that the roof, planters, and elevator lobby are common elements as plainly stated in the Master Deed.

Respectfully submitted,

s/Henrietta U. Golding

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Myrtle Beach, South Carolina

September 2, 2025

Sep 02 2025

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-_____

Case No. 2019-CP-26-06550

Marshall Griffin, ...Respondent,

v.

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

PROOF OF SERVICE

I, Henrietta U. Golding, attorney for Appellants, hereby certify that **Appellants' Reply to Respondent's Return to Appellants' Petition for Rehearing** was served on Respondent on September 2, 2025, via email (*see attached*) to counsel of record for Respondent, addressed as follows:

John M. Grantland, Esquire Crawford A. Krebs, Esquire Post Office Box 6648 Columbia, South Carolina 29260 Email: jgrantland@murphygrantland.com ckrebs@murphygrantland.com	Thomas C. Brittain, Esquire Brittan Law Firm 4614 Oleander Drive Myrtle Beach, South Carolina 29577 Email: tommyb@brittainlawfirm.com
---	---

Respectfully submitted,

BURR & FORMAN LLP

By: s/Henrietta U. Golding
Henrietta U. Golding, SC Bar #2173

Attorneys for the Appellants

Subject: Marshall Griffin v. Tony Giovino 2023-000451

Date: 9/2/2025 11:20 AM

From: "Evans, Sheila" <SEvans@burr.com>

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Good Morning Counselors,

Attached please find Appellants' Reply to Respondent's Return to Appellants' Petition for Rehearing and Proof of Service, which I will be filing with the Court momentarily.

Sheila



Sheila Evans

Paralegal

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APP 001449

The South Carolina Court of Appeals

Marshall Griffin, Respondent,

v.

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

Appellate Case No. 2023-000451

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.

In keeping with the dissent, I would vote to grant the petition.



J.

Columbia, South Carolina

cc:

APP 001450

Henrietta U. Golding, Esquire
Thomas Casey Brittain, Esquire
John Martin Grantland, Esquire
Crawford Alan Krebs, Esquire
The Honorable William H. Seals, Jr.

FILED
Sep 05 2025
