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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2019-CP-40-01231
Appellate Case No. 2021-000465

Kevin O'Hara, Rebekah H. O'Hara and Krebone Enterprises, LLC, ...Respondents,

v.

Middleborough Horizontal Property Regime, ...Appellant.

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STATEMENT OF ISSUES ON APPEAL

I. **Did the circuit court err in failing to find that Appellant's Master Deed and Bylaws prohibit Respondents' use of their apartments as short-term rentals?**

STATEMENT OF THE CASE

This appeal arises from a circuit court order declaring that Appellant's Master Deed and Bylaws do not prohibit Respondents from using their apartment units for short-term rentals, and a subsequent order denying Appellant's Motion to Alter or Amend.

On February 28, 2019, Respondents Kevin and Rebekah H. O'Hara filed a summons and complaint in the circuit court seeking a declaratory judgment and an order restraining and enjoining Appellant from prohibiting them from renting their units in Middleborough on a short-term basis, interfering with the renters' right to use common areas, and "otherwise violating the Master Deed regarding any restrictions on the [Respondents'] leases not set forth in the Master Deed." The parties reached a temporary agreement shortly after litigation began to preserve the status quo regarding the rentals until the circuit court issued its ruling.

On May 30, 2019, Appellant filed an amended answer and counterclaim seeking a declaratory judgment and an order enjoining Plaintiffs from facilitating the short-term rental of their units, an order enforcing restrictive covenants, and an order requiring Plaintiffs to specifically perform under the provisions of the governing documents. In its counterclaim, Appellant contended that Article XI, Section A(1) of the Bylaws prevents short-term rentals by using the language "[a]partments in Phase 1 shall be used only as residences." Additionally, Appellant filed a third-party complaint against Krebone Enterprises ("Krebone"), a limited liability company Respondents had created to facilitate the short-term rental of the apartments.

After Krebone moved to dismiss the third-party complaint, the parties entered into a consent order pursuant to which they mutually agreed to join Krebone as an additional Plaintiff.

A trial was held before the Honorable Kristi F. Curtis on January 29, 2021. On March 3, 2021, the circuit court entered an order ruling in favor of the Respondents. Thereafter, on March 15, 2021, Appellant filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. Judge Curtis issued an order denying Appellant's motion on April 12, 2021. Appellant timely filed a Notice of Appeal on April 30, 2021.

STATEMENT OF THE FACTS

Appellant is a Horizontal Property Regime created under a Master Deed executed and recorded pursuant to the South Carolina Horizontal Property Act (SCHPA), S.C. Code Ann. § 27-31-10 *et seq.* (Trial Exhibit 3 p. 1 and Exhibit 5 p. 1). Middleborough is an eighteen-story high rise condominium located in Columbia, South Carolina. (Tr. Ex. 3, ¶ C). As provided in the Master Deed, Middleborough consists of two phases: Phase 1 consists of 192 residential apartments. (Tr. Ex. 3 p. 1). Phase 2 was created by amendment to the Master Deed dated December 21, 1984, adding the first floor and basement as residential rental space and allowing use of those areas as residential rental space or as commercial retail or office space. (Tr. Ex. 3). The Bylaws of Middleborough Horizontal Property Regime (the "Bylaws") were recorded as Exhibit D to the Master Deed and incorporated therein. Article XI, Section A(1) of the Bylaws, captioned "Restrictions," provides as follows: "Apartments in Phase I shall be used only as residences." (Tr. Ex. 3 p. 1 and Ex. 5 p. 12).

Respondents are the owners of Apartment Units 2J and 14G located within Phase 1 of the Middleborough Horizontal Property Regime. (Transcript p. 7, lines 9-15). They purchased the units on March 31, 2015 and August 25, 2017, respectively. (Trans. p. 7, lines 7-15).

Respondents thereafter renovated and furnished the apartments so as to be suitable for short-term rentals and established an LLC, Krebone, along with a website to facilitate the rental of the units. (Tran. p. 10, lines 7-18). However, Respondents decided not to use Krebone to rent the units after learning about the online platforms of Airbnb and VRBO. (Tran. p. 10 lines 20-25, p. 11, line 1).

Since their purchase of Unit 2J, Respondents have continuously advertised and rented the unit as a short-term rental through Airbnb and VRBO. (Tran. p. 38, lines 22-23, p. 39, lines 1-2). At trial, Mr. O'Hara testified that Unit 2J is available to reserve for a two-night minimum, as enumerated on the VRBO listing of the property presented at trial. (Tran. p. 8, lines 21-25, p. 9, lines 1-16; p. 41, lines 4-6; p. 43, line 20). Mr. O'Hara further testified that the average stay for Unit 2J over the previous five years was 4.6 nights. (Tran. p. 50, lines 23-25). Both the Airbnb and VRBO listings for Unit 2J advertise the property as "perfect for Gamecock Football weekends, short corporate visits, family events, or weekend getaways." (Tran. p. 40, lines 7-11). The listings also provide for a "check-in" time at 4:00 p.m. or later and a "checkout" time of 11:00 a.m. (Tran. p. 41, lines 4-6; p. 43, line 20). At trial, Mr. O'Hara reaffirmed his deposition testimony that people "have typically come for some event," and they're often not even eating in the unit. (Tran. p. 40, lines 2-3; p. 47, lines 15-18).

According to Mr. O'Hara's testimony, no one renting his units at Middleborough has ever established utilities or a mailbox in their name. (Tran. p.51, lines 5-18). Mr. O'Hara was only able to specifically recall one individual who rented the property for more than thirty days and he confirmed a nightly rate for renting Unit 2J. (Tran. p. 51, lines 19-22). Mr. O'Hara testified they do not know the person(s) staying in the Unit prior to meeting with them to hand them the key fob to Middleborough. (Tran. p. 52, lines 10-13). The VRBO listing actually

allows "instant confirmation" of some users who wish to reserve the property. (Tran. p. 43, lines 22-25, p. 44, lines 1-4). Mr. O'Hara testified that he or his wife, Mrs. O'Hara, clean and replenish the unit between reservations. (Tran. p. 40, lines 24-25). Respondents testified they have only stayed in the units themselves once or twice while their house was being renovated. (Tran. p. 36, lines 13-15).

LEGAL STANDARD

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) "An action to enforce restrictive covenants by injunction is in equity." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). "This [c]ourt reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("A legal question in an equity case receives review as in law." (quoting *Sloan v. Greenville Cty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003))).

"On appeal from an action in equity, [the appellate court] may find facts in accordance with its view of the preponderance of the evidence." *Walker v. Brooks*, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015). "However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the trial judge was in a better position to assess the credibility of the witnesses." *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001). In an action for declaratory relief, the burden of proof rests with the party seeking the declaration, and that party must meet its burden by a greater

weight or preponderance of the evidence. *See Vt. Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994); *see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT APPELLANT'S MASTER DEED AND BYLAWS PROHIBITED RESPONDENTS' USE OF THEIR APARTMENTS AS SHORT-TERM RENTALS.

A. The circuit court erred in failing to find that Respondents were not using their apartments "only as residences."

Respondents' use of Unit 2J and their intended use of Unit 14G as a short term-rental is prohibited by Article XI, Section A(1) of Appellant's Bylaws, which provides, "Apartments in Phase I shall be used only as residences." The determinative question is whether Respondents' use of the units constitutes something other than "as residences." Because the record in this case shows that Respondents' Unit 2J is demonstrably not being used "only as residences," the circuit court erred in failing to find that Respondents' use of their apartments as short-term rentals violates the Bylaws.

"The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998). "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.* (quoting *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (1985)).

Under any conceivably applicable definitions of "residence," Respondents' repeated and continuous rental of their property in Middleborough to transient customers does not comply

with a requirement that the property be used "only as a residence." *Black's Law Dictionary* defines "residence" as "personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently." *Black's Law Dictionary* (5th ed. 1979). This definition was published two years prior to the recording of Appellant's Master Deed and Bylaws. A prior edition of *Black's Law Dictionary* defined residence as follows: "The place where a man makes his home or where he dwells permanently for a considerable length of time." *Black's Law Dictionary* 1543 (3d ed. 1933), quoted in *Roof v. Tiller*, 195 S.C. 132, 10 S.E.2d 333, 335 (1940). *Oxford Languages*, the online dictionary integrated with Google, defines "residence" as "a person's home; the place where someone lives." Another applicable definition of "residence" comes from Merriam-Webster: "the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn." *Merriam Webster's Collegiate Dictionary* 996 (10th ed. 1993); *see also Hensley v. Gadd*, 560 S.W.3d 516, 523 (Ky. 2018) (residence is a "dwelling place or abode of a single person or family unit").

In addition, South Carolina law draws a distinction between permanent residences and transient housing, which includes rooms at hotels, motels, inns and the like. For example, "[w]herever fees are charged in this State for any rooms, lodging, or accommodations furnished to transients by any hotel or motel, the rooms, lodgings, or accommodations must be furnished with" a lock system and a device allowing sight outside the door; however, these provisions do not apply to "residences of any nature." S.C. Code Ann. § 45-1-90 (2015). While these definitions are not dispositive of the issue, they support the proposition that transient lodging is inconsistent with what is commonly considered a "residential use." *See Taylor v. Lindsey*, 332

S.C. at 4, 498 S.E.2d at 863 ("Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution.").

Furthermore, while the term "residence" may have multiple meanings, it adopts a more definite meaning when accorded with the purpose behind the restriction. In this instance, the use of the word "only" to modify the phrase "as residences" is a clear indication that the drafters of the covenant intended to prohibit any use of the apartments that was not a residence. Viewing this language in conjunction with other restrictions in the document, the drafters evidenced a clear intent to preserve the character of the property as residential to the exclusion of commercial or business uses. *Id.* at 4, 498 S.E.2d at 863-64 ("'Restrictive covenants are contractual in nature,' so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." (quoting *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (1985))). Specifically, Article XI(A)(2) provides:

> No Co-owner shall maintain or permit any nuisance within his Apartment or unreasonably interfere with the use and enjoyment of the Apartment by any other person entitled to the same by creating anywhere on the Property of permission within his Apartment the creation of excessive noise, smoke or offense odors. No person shall maintain on the Property, and no Co-owner shall permit within his Apartment, any condition which is unreasonably hazardous to the life, health or property of any other person.
>
> (Tr. Ex. 5, p. 12).

This provision suggests that incidental uses to a prescribed residential use may not violate the covenant if it is casual, infrequent, or unobstructive, and if it causes neither appreciable damage to neighboring property nor inconvenience, annoyance, or discomfort to neighboring residents. Thus, while the occasional renting of a spare room to a transient guest may not be in violation of the spirit of the restriction, an operation that significantly impairs the residential nature of the apartment may.

The record in this case reveals that Plaintiffs have not and are not using Unit 2J as a residence, and therefore their proposed use of Unit 14G in the same manner would also not constitute use as a residence. Again, Unit 2J is available for reservations through Airbnb and VRBO for a minimum of two nights, is rented on a nightly rate with a "check-in" time of 4:00 p.m. or later and a "checkout" time of 11:00 a.m. (Tran. p. 41, lines 4-6; p. 43, line 20). Mr. O'Hara testified the average stay at the property is only 4.6 nights. (Tran. p. 50, lines 23-25). Such transient occupancy does not constitute the act of residing, living in, or making the property home. It is also significant that no customers who have rented the property have established utilities in their name or maintained a postal address at Middleborough. (Tran. p.51, lines 5-18). In fact, Mr. O'Hara testified most of those staying at the property are not even eating there. (Tran. p. 47, lines 15-18). Accordingly, the circuit court erred in failing to find that the property at issue is not being used only as a "residence" under any applicable definition thereof.

B. The circuit court erred in failing to distinguish between a covenant restricting property to "residential purposes" and the provision in Appellant's Bylaws that "Apartments in Phase 1 shall be used only as residences."

Additionally, Appellant respectfully submits that the circuit court failed to squarely address a key component of Appellant's argument at trial. Appellant argued that Respondents' use of Unit 2J and intended use of Unit 14G as short term-rental properties is prohibited by Middleborough's Bylaws requiring "Apartments in Phase I shall be used only as residences." The circuit court's order devotes the majority of its analysis to the question of whether a restrictive covenant limiting property to "residential use" or for "residential purposes" constitutes a prohibition on short-term rentals. The circuit court ultimately concluded that such a restriction does not prohibit short-term rentals because the term "residential purposes" generally "relates to

the character of the use, not its term, and that short-term rentals are not precluded as inconsistent with residential uses." (Final Order, at p. 11).

In reaching this conclusion, the circuit court relied almost exclusively on cases that discuss short-term rentals in the context of restrictive covenants that require property be used for "residential purposes," or zoning cases that discuss whether the use of the property constitutes a "residential" purpose as opposed to a "commercial" purpose. (Order, at p. 10-11). However, Appellant does not argue that short-term rentals cannot ever be used for "residential" purposes, such as eating, sleeping, or other activities generally associated with a personal dwelling. Rather, Appellant's argument centers on the distinction between a provision restricting property to "residential purposes" and Middleborough's specific provision that apartments shall be "used *only* as *residences*" (emphasis added).

While neither term is defined in the Bylaws or Master Deed, Appellant maintains that the term "residential purposes," is less restrictive than a provision requiring apartments be "used only as residences." As the circuit court notes, the term "residential purposes" relates to "the character of its use, not its term." (Order, at p. 11). In that regard, a property such as a hotel, business, or even an office building may arguably be used for "residential purposes" when a person uses the property for activities generally associated with a personal dwelling. A "residence," on the other hand, refers to the specific physical place where a person makes his or her home, coupled with an intent to reside there for an undetermined period. *See Black's Law Dictionary* (5th ed. 1979) (defining "residence" as "personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently"); *see also Black's Law Dictionary* 1543 (3d ed. 1933) ("The place where a man

makes his home or where he dwells permanently for a considerable length of time."); *Merriam Webster's Collegiate Dictionary* 996 (10th ed. 1993) ("the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn."). Therefore, although the manner in which Plaintiffs have used their apartments arguably may not always be inconsistent with a "residential purpose," it is certainly inconsistent with the common definitions of the term "residence."

The circuit court's focus on a "residential purpose" restriction failed to address this distinction. While the Order states in passing that the "word 'residence' is one of multiple meanings," it does not actually cite to or analyze any of those definitions. (Order, at p. 11). Under South Carolina law, the language of a restrictive covenant is to be construed according to the "plain and ordinary meaning attributed to it *at the time of execution*." *Taylor v. Lindsey*, 332 S.C. at 4, 498 S.E.2d at 863-64 (emphasis added). The definition of "residence" from just two years prior to the execution of Middleborough's Master Deed and Bylaws was "personal presence at some place of abode with no present intention of definite and early removal and with the purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently." *Black's Law Dictionary* (5th ed. 1979); *see also Berkeley Cty. Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009) ("Whe[n] a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning."); *S.C. Pub. Int. Found. v. City of Columbia*, 431 S.C. 164, 168-69, 847 S.E.2d 257, 259 (Ct. App. 2020) (relying on *Black's Law Dictionary* and *Merriam-Webster's Collegiate Dictionary* to define the word "residence"); *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 144, 750 S.E.2d 65, 71 (2013) (relying on *Black's Law Dictionary* and *Merriam-Webster's Collegiate Dictionary* to provide the meaning of a word not defined in the statute).

When considered in the context of the dictionary definition at the time of the covenant's execution, as required by South Carolina case law, the only reasonable interpretation of the provision that "Apartments in Phase I shall be used only as residences" would operate to preclude transient use of the property for short, predetermined durations lasting as few as two nights by occupants who are unlikely to return or make the property their home. Plaintiffs' short-term rental of their units does not conform to this requirement.

C. In addition to the distinction between "residential purposes" and "used only as residences," the case law cited in the Order is readily distinguishable from the present case.

Notwithstanding the above-mentioned distinction, the majority of recent case law regarding short-term rentals supports the conclusion that Respondents' use of the property would not be permitted even under a distinguishable "residential purposes" provision. The circuit court cites to the case of *Landing Development Corp. v. City of Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985) for the proposition that the short-term rental of condos does not constitute a hotel operation. (Order, at p. 10). However, *Landing Development Corp.* can be distinguished on the basis that it is a zoning case rather than a case addressing restrictive covenants. Moreover, the zoning ordinance addressed in *Landing Development Corp.* did not contain any provision that the properties be used "only as residences" or even for "residential purposes," but rather was concerned the makeup of the buildings. In fact, the word "residence" is completely absent from the opinion. Additionally, the supreme court ruled against the ordinance in part because the City had previously enforced the ordinance in an entirely contrary manner. By contrast, Appellant's provision is clearly denoted as a use restriction rather than a zoning/building restriction, and the provision actually requires that the properties be used only as residences.

The circuit court also relied on the case of *Community Services Associates, Inc. v. Wall*,

421 S.C. 575, 808 S.E.2d 831 (Ct. App. 2017), which concerned the short-term rental of property simultaneously occupied by the owner. In *Wall*, a pair of homeowners allowed a portion of their house to be rented on a short-term basis through Airbnb, which the homeowners association alleged violated a "residential purposes" restriction in their governing documents. Like the majority of cases concerning short-term rentals, *Wall* involved a covenant restricting the use of lots to "residential purposes" rather than a provision calling for use "only as residences," as in the present case. However, unlike the present case, the homeowners in *Wall* actually lived at the home and continued to do so while the portion of the home was being occupied by the customers. Based on the specific provisions applicable to the property in *Wall*, the Court held that the homeowners' rental activity, renting out the first floor of their single-family residence while simultaneously occupying the upstairs guest suite, did not violate the covenants regarding "residential purposes." *Id. at 584-85. Wall* is therefore distinguishable from the present case based on the language of the covenant at issue and the fact the owners actually occupied the home.

Moreover, the more recent case of *South Carolina Public Interest Foundation v. City of Columbia*, which is not cited in the circuit court's order, merits consideration. 431 S.C. 164, 847 S.E.2d 257 (Ct. App. 2020). In *South Carolina Public Interest Foundation*, this Court addressed the question of whether student dormitories constituted an "industrial or business" use or a "residential" use under a statute granting tax incentives for industrial or business developments. *Id.* This Court found that student dormitories which "engage in the continuous activity of letting beds to students through the entering of a lease or other contractual arrangements between the student and the developer or property manager" were "commercial, not residential, in nature." *Id.* at 169, 847 S.E.2d at 259. This Court further noted that the dormitories were not owner-

occupied, and were therefore taxed as commercial properties under the applicable statute. *Id.* at 166.

Finally, although Appellant acknowledges a split among the jurisdictions that have addressed whether restrictive covenants limiting properties to residential uses can prohibit short-term rentals, two cases that warrant close review are *Hensley v. Gadd*, 560 S.W.3d 516 (Ky. 2018) and *Hoffman Revocable Trust v. Marshall*, 2020 WL 748180 (Ky. Ct. App. Feb. 14, 2020), *review denied* (May 20, 2020). In *Hensley*, the Kentucky supreme court addressed a restrictive covenant requiring that property be "used only for residential purposes." While the provision is distinguishable from provision in Appellant's Bylaws that apartments "be used only as residences," the fact pattern in *Hensley* is remarkably similar to the present case. In *Hensley*, Gadd purchased a lot and began advertising the property for short-term rental on websites. *Hensley*, 560 S.W.3d at 519. The *Hensley* court ruled that "one-night, two-night, weekend, weekly inhabitants cannot be considered 'residents' within the commonly understood meaning of that word, or the use by such persons as constituting 'residential.'" *Id.* at 524. In fact, the *Hensley* court noted such use of the property was akin to a hotel, being a "building or structure kept, used, maintained, advertised, or held out to the public as a place where sleeping accommodations are furnished to the public." *Id.* at 527. Ultimately, the court in *Hensley* concluded:

> The issue before us is whether Gadd's renting on a short-term, transient basis is permitted under the restrictions. The clear answer is "no." We have no difficulty concluding that short-term rentals are prohibited because Gadd's advertising of such rentals renders his property the equivalent of a hotel, which is not a permitted use on his lot. Residential rentals are permitted. While we might be tempted to opine that a "residential rental" is one month or more, that issue is not before us.

Id. at 255.

The court in *Hensley* also noted that *Black's Law Dictionary* defines "residence"

as "personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently." *Id.* at 523-524 (citing *Residence,* Black's Law Dictionary (5th ed. 1979)). The court also noted the Merriam-Webster definition of "reside:" "to dwell permanently or continuously; [to] occupy a place as one's legal domicile." *Id.* (citing *Reside*, Merriam-Webster Dictionary, https:/www.merriamwebster.com/dictionary/reside (last visited October 9, 2018)). The court held that Gadd "knows, or should know, perfectly well" that he was prohibited from renting his property on a "short-term transient basis" under the restriction at issue in that case. *Id.* at 526.

In the case of *Hoffman Revocable Trust v. Marshall*, the Kentucky Court of Appeals, relying on the decision in *Hensley*, found that a restrictive covenant limiting use of the property to "private summer residences" prohibited short-term rentals. No. 2019-CA-000622-MR, 2020 WL 748180, at *4 (Ky. Ct. App. Feb. 14, 2020). Again, the facts of the present case are remarkably similar to the facts in *Marshall*. The *Marshall* court summarized those facts as follows:

> The Marshalls claim that after purchasing the property, they stayed in the residence briefly before moving back to Paducah, where they continue to reside. After purchasing the property, the Marshalls set up an LLC to rent the property and began advertising the property online as a short-term vacation rental. They used Airbnb, Vacation Rental By Owner [VRBO], and HomeAway.com to attract customers. They named the property "Lincoln Lodge," and named their LLC "Lincoln Lodge LLC." … [T]hey rented the property 233 out of the first 328 days that they owned it. The property has never been rented for longer than seven nights at any one time.

Id. at *1. The *Marshall* court concluded the short-term rentals were prohibited by language limiting use to "private summer residence." *Id.* at *4.

Similarly, Respondents' use of Unit 2J and proposed use of 14G for transient occupancy does not conform to the requirement in Appellant's Bylaws that the property be used only as a residence. It is clear from the testimony and exhibits presented that the customers staying at the property are not using the property as a residence. Accordingly, the circuit court erred in finding that Respondents' use of their apartments was not in violation of Appellant's Master Deed and Bylaws.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the circuit court's order and hold that Appellant's Master Deed and Bylaws prevent the Respondents from leasing their units as short-term rentals.

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CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on counsel by depositing a copy of said documents in the United States Mail, postage prepaid, on June 21, 2021, addressed to Respondents' attorneys of record as follows:

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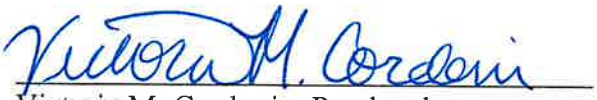

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1220 Senate Street
Columbia, South Carolina 29201

Re: *Kevin O'Hara, Rebekah H. O'Hara and Krebone Enterprises, LLC v. Middleborough Horizontal Property Regime*
Civil Action No.: 2019-CP-40-01231
SC Court of Appeals Case No. 2021-000465
A&R File No.: 000006-003933

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal. By copy of this letter, I am serving all counsel of record with the brief and designation of matter as set forth in the enclosed Proof of Service. Please call me if you have questions.

Sincerely,

Kirby D. Shealy III

KDSIII/vmc
Enclosures
cc: Wesley D. Peel, Esq.
Abigail A. Carson, Esq.
Christian Saville, Esq. (via e-mail only)
D. Ryan McCabe, Esq (via e-mail only)