THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal No. 2013000714

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

CASE NUMBER 2009-CP-26-3596
Consolidated with
CASE NUMBER 2010-CP-26-11320

Ronald Jarmuth Appellant,

v.

The International Club Homeowners Association, Inc., Rosemary Toth, and K. A. Diehl & Associates Respondents.

INITIAL BRIEF OF APPELLANT

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
Appellant, Pro Se

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STATEMENT OF THE CASE

A Complaint was filed on April 7, 2009 (2009-CP-26-3596) by Appellant, the Defendants being the International Club HOA ("HOA") and Rosemary Toth ("Toth") the HOA (then) President. It was Answered. The Complaint was amended May 15, 2009 adding the HOA's management company KA Diehl ("Diehl") and Henrietta Golding as defendants and added alleged additional torts including Defamation. Golding was subsequently dismissed in a Rule 12(b) hearing which was upheld on appeal.

The Complaint demanded that the Court issue declaratory judgments as to the pre-emptive effect of the South Carolina Non-Profit Corporation Act ("The Act") on the Covenants and Bylaws including amendments; whether the Act nullified various acts of

the HOA or mandated other ways of doing business; and whether certain Amendments were made in a prohibited fashion. It demanded a Declaratory Judgment as to the meaning of certain Amendments particularly those affecting restrictions on use of property. It demanded to know whether certain decisions by the HOA violated the HOA's obligation to act with good faith and fair dealing, were arbitrary and capricious, and whether other acts were illegal under The Act.

Another Complaint was filed by Appellant October 12, 2010 in the Magistrate Court and was transferred December 1, 2010 at Respondents' request to the Circuit Court as 2010-CP-26-11320 and later consolidated September 16, 2011 at Respondents' request with the 2009 case. This case alleged that Respondent is not the Homeowners Association named in the Covenants and thus has no standing and no rights under the Covenants, that the Covenants do not apply to Appellant's subdivision, an invasion of privacy issue, and that the HOA violated it's Bylaws and acted improperly in dealing with Appellant on property restriction issues.

Through October, 2011 hearings were held on discovery issues. Motions for Summary Judgment were denied when the court determined there were contested issues of fact. On October 24, 2011 the Respondents amended their Answers to allege that Appellant violated the Covenant by not asking the HOA's Architectural Review Board for permission to install a modification permitted under the Covenants. Petitioner responded with a 12(b) Motion alleging lack of standing and non-compliance by the HOA with it's own Bylaws (denied because of factual issues); Responded Answered on December 20, 2011 and added a claim under the S.C. Frivolous Proceedings Act.

The case was initially set for trial January 17, 2012. On January 13, 2012 Respondent served their Rule 16 statement on Appellant without any actual exhibits. Many of the listed exhibits had never been given Appellant in discovery and none

corresponded by name with any given Appellant in discovery.[1] On January 17, 2012 Appellant served and filed his Rule 16 Statement. All listed exhibits were provided Respondent in bound paper books.

Through June, 2012 the cases appeared on every trial roster but the Court refused to try the cases [2] citing lack of available trial time. On June 13, 2012, at Respondents' request, the court entered a consent Order of Reference to Special Referee ("SR") Hon. Ralph Stroman ("Stroman") who had previously agreed to a trial of at least five (5) days, including a Saturday and Sunday. The Order provided that the Respondent would pay all costs. The Court refused to provide an official court reporter and Respondent contracted with a private court reporter, Appellant objecting. The Special Referee scheduled a trial to last from Wednesday August 8, 2012 through Sunday August 12, 2012 (five days). The Clerk of Court arranged to provide Court Officers and Sheriff Deputies over the weekend. Appellant's Rule 16 Statement was was served with paper copies of the Exhibits on Respondent weeks before the trial. A day before trial Respondent sent Appellant a copy of a revised and expanded Rule 16 Exhibit List – but no paper copies and gave the paper copies to Appellant in the Courtroom as the trial began with no time to examine them. Appellant objected calling this "Trial By Ambush" . The Court deferred and never made a decision on the issue.

At trial the SR refused to allow Appellant to make an opening statement, directing that Appellant go directly into calling witnesses. The SR took Defense Witnesses out of turn before the issues they addressed were argued. The SR prematurely ended the trial in three (3) days because of the SR's "private business", denying Appellant an opportunity to call one Defendant ("Toth", listed and subpoenaed

[1] Until August 8, 2012 Respondent did not give Appellant a single document on paper. Everything Respondent provided in discovery was on CD with "Bates" numbered titles.
[2] At the roster call, the Court stated from the bench that the case would never go to trial.

by Appellant, and in the Court room) and denied Appellant an opportunity to close. At the end of the trial the SR complimented Appellant on a very efficient and effective presentation and stated no findings of fact or conclusions of law from the bench. The only documents the SR had at trial were the trial exhibits placed before him in the Courtroom by the parties. No pleading or other case document was delivered to the SR by the Clerk of Court. After the trial the Respondent's contract court reporter removed the exhibits from the courthouse without the consent or knowledge of the Clerk of Court and without an Order from the SR. On August 13, 2012 the court reporter sent the SR a CD with unknown trial exhibits of unknown reproduction quality. The exhibits listed in the trial transcript include some added Defense exhibits never given Appellant at trial and some exhibits per the transcript whose titles differ from the paper copies given to Appellant at trial. On January 17, 2012 the Chief Administrative Judge had ordered depositions could be taken to be offered at trial in lieu of or to supplement testimony at trial; Appellant did so and pre-filed (April 4 and 20; July 18, 2012) them with the Clerk of Court. At trial the SR directed that the depositions not be read to him in the Courtroom, that he would read them, but he never had possession of the depositions which were pre-filed with the Clerk of Court and could not have read them.[3]

On September 10, 2012 the SR signed and adopted word for word, without any changes, a forty eight (48) page order prepared by Defense Counsel. On August 22, 2012 Appellant filed an objection to the SR adopting proposed findings of fact and conclusions of law submitted by Respondent without giving Appellant an opportunity to respond – stating that Respondent's draft order included material never before the court at trial which constituted an ex-parte extension of the trial and denied Appellant a chance at rebuttal. The Order cited issues, documents, law, and arguments never raised

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[3] **The trial transcript's list of trial exhibits does not include the deposition transcripts.**

at trial.

On September 19, 2012 Appellant filed a post-trial "Rule 50, Rule 52, Rule 59" Motion for Relief and New Trial. On October 17, 2012 the SR Recused himself. On March 11, 2013 the Chief Administrative Judge, acting for the SR, denied that motion. This appeal of the trial procedure and final order followed.

FACTS

1. Who is "The Association".

The Murrells Inlet Golf Plantation Association ("MIGPA") is a non-profit corporation organized under the South Carolina Non-Profit Corporation Act, S.C. Code Ann. § 33-31-1404. Section 1.3 of the Covenants (PL TE 547 February 8, 1999) names MIGPA as the "Association" for all intents and purposes. The Respondent International Club Home Owners Association (IHOA) is chartered under the same act. Respondent's name never appears in the Covenants. Article III of the Covenants gives the HOA named as "The Association" (MIGPA) the rights and obligations of the HOA, particularly the rights to impose assessments and fines and to enforce the covenants.[4] The name of the development in the Covenants was the "Murrells Inlet Golf Plantation". Amendment 1 to the Covenants (May 10, 2000) changed the PUD name

> "to International Club. Wherever the name "Murrells Inlet Golf Plantation" appears in the Declaration, it should now be read as "International Club"."

still never naming the Respondent IHOA. The "International Club Association" ("ICA") is another non-profit organized under The Act. If the name change algorithm was applicable to The Association name as well as to the PUD name, The Association would be ICA – not Respondent IHOA (Pl TE 567).

Covenant Amendments # 4 para 4 (December 28, 2004) and 5 para 3 (June 20,

[4] Owners of housing units also have the right to enforce the covenants. The IHOA does not own any housing units.

2008 (Pl TE 561, and 563) both state that

> "Owners of Units ... shall pay the Capital Contribution Fee to the International Club Association, Inc. ... "

On Page 10 para 1 line 4 of the September 10, 2012 Final Order the SR made a Conclusion of Law that Amendment #1 May 10, 2000 (Pl TE 551) changed the "Association" name to "the International Club" (the ICA) which is not the Respondent "International Club Home Owners Association". On March 7, 2010 the ICA merged into MIGPA (Pl TE 571).

Section 4.17 (Wells and Effluent) of the Covenants granted MIGPA riparian rights which are deeded equitable rights. The section reads

> "There is hereby reserved for the benefit of ... the Association ... an ... perpetual right and easement: (i) to pump water from lagoons, ponds and other bodies of water located within the Subdivision ...; (ii) to drill, install, locate, maintain and use wells, pumping stations, water towers ..."

2. Covenants and Pebble Creek.

On January 29, 1999 Plantation A.D. sold "Pebble Creek" where Appellant's home is located to Sunbelt Development, [5] delivering a grant deed and receiving payment that day. On January 29, 1999 there were no covenants of record for Pebble Creek. On February 8, 1999, ten days later, the seller recorded the Covenants without an endorsement from Sunbelt agreeing to the post-sale imposition of restrictions and obligations. Per the Declaration the filing of the Covenants did not subject any of the land in the PUD to the Covenants but that only

> so much of it as Developer may ... see fit to ... dedicate, and as, by subsequent amendment hereto, may be subjected to this Declaration, shall be ... subject to the ... easements, restrictions, covenants, charges, liens and conditions"

Amendment 1 (February 8, 1999) attempted to subject some "multi-family" area to the Covenants but omitted it's description of property in Exhibit A thus no property was

[5] Appellant's vertical predecessor in privity and equity.

subjected to covenants that day. On May 9, 2000 Plantation AD sold an un-named mutli-family area to another developer, "International Club Villas". On December 29, 2004, more than four years after The Villas was sold, the Developer [6] subjected The Villas to the Covenants through Covenant Amendment 4.

3. Pebble Creek Roads.

On February 4, 1997 the Horry County Planning Commission approved the Site Plan for the Murrells Inlet Golf Plantation PUD, ("the PUD") requiring that "all roads and rights of way shall be designed and built ... for the purposes of Dedication to Horry County Government". On January 21, 2003 Horry County Council (Resolution R009-03) Resolved "to accept dedication of the roads and drainage at Pebble Creek" from Sunbelt Development, the owner of Pebble Creek [7]. The resolution said that all "fully executed dedication documents" had been provided. One was the standard "Certification of Non-Litigation" which stated that the roads were dedicated "fee simple" [8].

4. Cash Distribution Of Profits From Sale.

On June 19, 2009 the IHOA paid the Developer five dollars for a private road and adjacent land on which the homeowners had a non-exclusive easement of use. No homeowner had ownership interest in the area. On April 10, 2010 at a special meeting of the IHOA Board including co-defendant Rosemary Toth ("Toth") the Board members unanimously voted to sell easement rights to Central Electric for $ 83,000 a profit of $ 82,995. In addition Central Electric agreed to restore any property damage at it's own expense. Toth and the IHOA Board voted to and subsequently did distribute $ 50,250 in cash to the homeowner members of the IHOA who had no equitable claim in

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[6] D.R. Horton to whom Plantation AD sold it's interests and rights on April 29, 2003.
[7] Not from the Plantation AD.
[8] The "boiler plate" language in the standard form, Appendix L, Planning Regulations.

the money. Per the November 16, 2010 IHOA Budget for 2011 the IHOA had 2010 revenues of $ 282,670 which was $8,724 more than it's expenses; the surplus was placed in IHOA reserves. On September 15, 2010 at the annual meeting IHOA members voted to place the 2010 excess assessments into the reserve account.[9] The $82,995 was not part of the IHOA 2010 Budget but the receipt and the disbursements to homeowners did appear in the 2010 IHOA General Ledger.[10]

5. Missing Capital Contribution Funds.

Since at least September 10, 2002[11] Defendant K.A. Diehl ("Diehl") has been the management company for the IHOA. On October 11, 2011 non-party Developer D.R. Horton ("Horton") was ordered to produce it's records documenting Horton's payment of Capital Contributions to Diehl as fiduciary on behalf of the IHOA. In discovery the IHOA produced it's general ledgers, Per Horton's records[12] for January 13, 2005 through April 30 2006 Horton gave Diehl $46,834.00. Per the IHOA ledgers[13] maintained by Diehl, Diehl credited the IHOA $30,771.00 with $16,063.00 unaccounted for[14]. No analysis was possible for other periods because Horton had destroyed the rest of it's records.

6. Capital Contribution Payment Requirement.

Section 3.5 of the covenants required the developer to pay a capital contribution to "The Association" when it sold a home. On September 27, 2001 Appellant's vertical predecessor bought a home in Pebble Creek from Sunbelt. On March 29, 2004 Horton imposed a new burden on homeowners without their consent. Horton's Amendment #3

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[9] **IHOA document Bates 393 November 4, 2010.**
[10] **IHOA document Bates 2692 receipt; Bates 2817 – 2822 homeowner distributions.**
[11] **IHOA Board Minutes.**
[12] **Plaintiff's TE 701.**
[13] **Plaintiff's TE 703.**
[14] **Plaintiff's TE 704.**

imposed an obligation on homeowners to pay an additional capital contribution when a home was resold.[15] The golf course which pays annual assessments was not required to pay a capital contribution.[16] Section 8.5 of the Covenants provides that

> **"in the event that such amendment materially ... alters or changes any Owner's right to the use and enjoyment of such Owner's Unit ... such amendment shall be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby"**

7. Planting Bed Edgers.

Article VII (Use Restrictions) of the Covenants has no restriction on planting bed edgers ("edgers"). "Section 7.33 Landscaping" " reserves the right to restrict the placement of landscaping" to "The Developer" who never delegated or assigned (Covenants Section 8.4) this right to "The Association" or to the IHOA. The IHOA's July 2010 Architectural Review Board ("ARB") Guidelines (Pl TE 371) is silent about planting beds and edgers. The IHOA approved Appellants' use of the same edgers for a Palm Tree bed (photos Pl TE 21, 25), along the entire rear and left lot lines (photos Pl TE 26, 27), in front of a power box (Pl TE 23, 24), for the house across the street (photos Pl TE 40), at the home of the ARB Chairman (photo Pl TE 42), and had no objection to and allowed without application use by hundreds of homeowners. Since at least 2002, when the same edgers were installed around an outside power box (photo Pl TE 22) adjacent to the same edgers (photo Pl TE 30) which the IHOA objected to September 22, 2010 (Pl TE 627). The denied installation was to protect Appellant's irrigation line which IHOA ARB member / neighbor Jay Cartman had damaged by driving stakes into (photos Pl TE 621, 622, 623). On September 30, 2010 (Pl TE 629) Appellant applied to erect a vinyl FENCE and edgers for the plant bed to go under the fence on the lot line

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[15] **The language was repeated by Horton's unilateral Amendment #4 December 28 2004.**

[16] **The golf course was resold April 21, 2006 to Davis Mining and resold on December 10, 2008 to International Club LLC a private "for profit" corporation – not the IHOA.**

next to Cartman to protect Appellant's irrigation line and Appellant's children from the hypodermic (photo Pl TE 620) needles Cartman was throwing in Appellant's yard. No "Wall" was ever erected. The IHOA's ARB approved use of the edgers in front of the power box, but (October 8, 2010 Pl TE 632) refused the fence and edgers between Appellant's and Cartman's property.

The IHOA had previously approved a vinyl fence down the street from Appellant (Louis Tabor, 276 Pickering, photos Pl TE 42, 44, 46) along the entire left, rear, and right lot lines, and fences on the lot lines of 17 other. On March 17, 2011 answering Interrogatory 16 (Pl TE 604) the IHOA admitted to approving 28 fences beginning February 8, 2004 including those on lot lines and facing streets. Appellant's proposed fence (photo Pl TE 36) met the location requirements of Section S of the ARB Guidelines (PL TE 371) in that it was not near the Golf Course, was on the side of Appellant's house, and did not block any views.

Appellant installed the edgers BUT NO FENCE in September, 2010. On October 11, 2011 Respondent filed a counter – claim asserting (Para 32) that Appellant "constructed a brick wall on the property" and demanded that the Court order Appellant to "remove the brick wall from the Property". It never asserted Appellant had installed edgers and had no demand for the removal of edgers.

8. Attorney Fees.

Section 6.1 of the Covenants (Pl TE 547) "Lien" provides for attorney fees and court costs to collect unpaid assessments but not covenant violations. The Covenants do not give the ARB any enforcement authority (Sections 7.2, 7.3 ARB). Per Section 8.1 (Enforcement) only "The Developer, the [named] Association, and any Owner" have the right to enforce the Covenants but the enforcement section does not provide for recovery of the costs of an enforcement action. Both of Appellant's lawsuits alleged that the

IHOA violated the covenants (and laws). On October 15, 2009 the IHOA paid Golding $2,500 (Df TE 62) to defend against the 2009 lawsuit. On June 10, 2010 the IHOA paid Golding $2,500 (Df TE 79) to defend against the 2010 lawsuit. Both were insurance deductibles. The IHOA never paid any other litigation expenses. On October 24, 2011 Respondent filed word for word identical counter – claims in both cases alleging that Appellant built a brick wall and demanded attorney fees for the enforcement of the covenants. The IHOA paid the insurance deductibles in the 2009 case a year before the edgers were installed and in the 2010 case over three months before they were installed at a time when the IHOA was not alleging any violation of covenants. No additional money was paid by the IHOA to enforce the covenants. [17]

9. Swing Sets.

The Covenants have no restriction on swing sets. The sole restriction in the April 2008 ARB Guidelines (Pl TE 600) is Section L2 which provides that they must be "securely anchored per hurricane specifications." On July 21, 2009 Appellant applied for permission to install a swing set to the rear of his side yard (Pl TE 601). Page 3 of the application included a photo of Appellant's neighbor's (Parr) swingset directly across the street in full view from Appellant's porch with no obstructions to view and where children can be heard at play. Photos of 3 other swing sets were provided showing them fully visible from the street. On August 5, 2009 (Pl TE 602) the IHOA denied the application the reasons given being (1) it is in the side yard; (2) it is visible from the street; and (3) it infringes on Appellant's neighbor's "enjoyment of their property". The PUD is not an "adult community". Appellant's neighbor Cartman who was an ARB board member and who did not recuse himself was quoted in the

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[17] **No complaint, answer, reply, or counter – claim was actually before the SR at trial except to the extent that Appellant read the parts into the record where the Respondent complained about a "wall" being installed, not edgers.**

Application as saying the swing set would diminish the value of his property (PL TE 601 pg 4). On March 17, 2011 Respondent answered Interrogatory 15 (Pl TE 604) admitting that the IHOA had approved 17 swing sets, among them #13 for "Sobczyk" at 1212 Harrogate Court in Pebble Creek. Sobczyk's house is identical to that of Appellant (photo Pl TE 611). The swing set is located in exactly the same location as that requested by Appellant – on the right side of the house (photo Pl TE 612) and is clearly visible from the street from where the photo was taken. The swing set is much larger than that proposed by Appellant (photo Pl TE 610).

10. The ARB and Invasion of Financial Privacy.

> **Section 3.1 of the Covenants (Pl TE 547) states that**
>
> **"The Association [named in the covenants] shall be authorized but not required ... (d) To set up and operate the Architectural Review Board ..."**

Covenant "Section 7.3 Objectives of the Architectural Review Board" states that the ARB's duties are limited to reviewing plans and provides no authority for enforcement, detection of covenant violations, or imposition of fines or penalties. The ARB in this case was not created by MIGPA or the ICA but by the IHOA Board which issued it's charter (Def TE 106), appointed every ARB member, approved every set of ARB Guidelines, completely funds the operation of it's ARB, and requires the ARB to periodically report to it at IHOA Board meetings.[18] The Covenants and ARB Guidelines (2008 – Pl TE #600; 2010 – #371; and 2011 - # 385) and Application Form (Pl TE #601) only require architectural and plan information and say nothing about the status of an applicant's account. On March 6, 2012 (Pl TE 643) the IHOA ARB considered Appellant's routine request (Pl TE 642) to expand an existing Palm Tree bed. Vanessa Fattoross an employee of co-defendant Diehl attended the meeting and gave the

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[18] **IHOA Board Meeting Minutes, Pl TE 300 – 384, September 10, 2002 through February 11, 2011.**

ARB details of Appellant's financial account with the IHOA to which the ARB members do not have access. On March 16, 2012 Fattoross wrote Appellant that the ARB refused to approve the routine request which duplicated one previously approved because Appellant's "HOA account needs to be brought current. As of today your account balance is $ 1,735.00". Appellant's assessment account was current and sum was the money the IHOA was demanding in their counter – claim the IHOA alleging Appellant had built a "wall". This financial data was privileged.

> **Section 13.3 of the IHOA's Bylaws, Enforcement Procedures provides that**
>
> **the Board shall not impose a fine, ... or infringe upon or suspend any other rights of an Owner ... for violations of the Declaration, ... rules and regulations for the Association, unless and until the following procedure is followed:**
> **13.3.1 Written demand to cease and desist (with) ... A time period of not less than ten (10) days during which the violation may be abated without further sanction, ... a statement that any further violation ... may result in the imposition of sanctions after notice and hearing.**
> **13.3.2 Within two (2) months ... written notice of a hearing to be held by the Board in executive session.**
> **13.3.3 The hearing shall be held ... and shall afford the alleged violator a reasonable opportunity to be heard. Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting ... together with a statement of the date and manner of delivery [of the notice] ... by the ... director ... who delivered such notice. ...The minutes of the meeting shall contain a ... statement of the results of the hearing and the sanction imposed, if any."**

On September 27, 2010 Defendant Diehl employee Julie Case imposed a $ 50.00 fine on Appellant without any action of the IHOA and without any offer of hearing (Pl TE 627) which Appellant paid under protest September 29, 2010 (Pl TE 628). Julie Case's October 8, 2010 letter (Pl TE 632) denying Appellant's fence / edger request threatened a fine of $ 100 per month but did not have ANY of the statements and warnings required by Bylaws Section 13.3. On October 11, 2010 (Pl TE 633) Appellant wrote the IHOA Board reminding them of Section 13.3 and demanded a hearing prior to imposition of any fine or any action being taken. On October 14, 2010 co-defendant

Diehl employee Beckie Abel wrote Appellant a letter on behalf of the IHOA (Pl TE 634) which ignored the appeal hearing demand and now called the edgers a "brick fence foundation". Diehl's letter did not have any of the mandatory elements required by Section 13.3. On October 23, 2010 (Pl TE 635) Appellant wrote another letter to the IHOA Board which quoted Section 13.3 and demanded the hearing. No response was sent and the hearing was never held. There is no entry in the minutes of any meeting of the Board related to Appellant's ARB issues. Despite no hearing having been held the IHOA has been imposing fines each month (Def TE 103).

11. Defamation.

On May 28, 2009 Diehl employee Julie Case emailed 577 individuals (Pl TE 525, 526) material about Appellant. Many of the recipients, such as "Larry Sherman"[19] were not owners or renters in the PUD. On May 28, 2009 Diehl paid a Carolina Mail House an outside vendor to reproduce and send the same material to 546 addresses via US Mail (Pl TE 522). Carolina Mail House billed to and was paid by Diehl. At that time Diehl, the contract management company, was not a party to this litigation. The material included an alleged "List of Lawsuits Associated with Plaintiff" (Pl TE 515) and included original text. The material included an allegation (#10) that Appellant had sued an FBI employee ("Frinzi") alleging that co-employee Frinzi had defamed Appellant by reporting some misconduct by Appellant to the FBI that led to Appellant's "termination with the FBI for on 4/21/01" all of which was a lie by Diehl. Appellant's federal personnel record from 1998 through 2006 (Pl TE 511) showed that Appellant was never terminated from federal employment and was in fact given thousands of dollars in cash performance awards and a pay increase for the period in question.

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[19] **On July 15, 2010 Sherman sold his house in Pebble Creek and moved out of the area. Diehl / IHOA has a record of all current owners.**

Frinzi was never an FBI or other federal employee (Astorino Dep March 27, 2012 Exhibit 2 page 9). The "List of Lawsuits" also alleged that Appellant had sued "Dr. Brian Krolczyk" [20] which was deceptive because Krolczyk was not a licensed psychologist and not allowed to use the title "Dr.". For the only time ever related to a disciplinary matter on July 27, 2003 (Pl TE 507) West Virginia published in it's Official Register that Krolczyk had practiced Psychology without a license and had lied at a trial about his credentials and license status to testify as an expert witness adverse to Appellant in a West Virginia Court.

In 2009 after Appellant sued the IHOA, IHOA Board member Michael Templeton told various people including Michael Butryn and Louis Astorino not to associate with Appellant. Templeton also directed that Appellant's friend Pete Pizzi be fired from his position on an HOA Committee because Pizzi was seen going into Appellant's house (Pl TE 517) with papers.

HOA Financial Committee member (Toth Dep February 17, 2012, Pp 15) / ARB Member (Toth Dep Pp 108) William Fletcher told Astorino that Appellant is a "pedophile" and Astorino should not associate with Appellant (Tr Trans Pp 473).

The emails from Diehl caused homeowners who had never met nor had any communication with Appellant to circulate emails threatening Appellant with bodily harm (Pl TE 518, May 27, 2009):

> **"He has finally pushed me to the limit ... I and 25 others are now going to take action against him in person ... I will not have a big bully do this to me and my son ... they have medication or clinics for people like him"**
> **- Ainee Huckazalie**

12. Voter List.

July 24, 2008 Appellant mailed Defendant Toth (then IHOA President) a request for the Members List for Voting (Pl TE 333). Appellant wrote

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[20] **He was sued as "Brian Krolczyk" Pl TE 508.**

"The list is requested for the purpose of communicating with members eligible to vote, and to verify the validity of votes cast at the general meeting."

Toth sent a "dump" of the names and address which individuals had posted in a social list on the IHOA web site, including non-members and excluding members who chose not to participate. The IHOA never sent the "official" member list they use.

April 28, 2009 Appellant requested a current Members List for Voting, (PL TE 358; the request was titled "Request for Copy of HOA Voter List". The letter stated "The purpose of this request is to communicate with fellow homeowners". The HOA ignored this request entirely.

September 3, 2009 a week before the Annual Meeting where Directors would be elected Appellant sent a "Request for Copy of HOA Voter List". The request stated "The purpose of this request is to communicate with fellow homeowners." There was no response from the IHOA.

ARGUMENTS

I. Applicable Standards

Appellant met his burden in fact and law in every issue but the SR ignored the facts, the law, and the standards. The SR also violated the standard of judicial practice and accepted standards of due process in the conduct of the trial.

Several areas of law are present: (a) covenants as deeds; (b) interpretation of restrictive covenants; (c) a HOA's obligation of "reasonableness" in it's dealings with homeowners; (d) Privity and Equitable Interest to be eligible to impose or enforce covenants; (e) distinctions between proper servitudes that touch and run with the land and personal service contracts; (f) the Pre-emptive nature of statutes on covenants and contracts; (g) sovereignty of government when taking title to land;

Reasonableness. Courts have determined that the business judgment rule from

the 3rd Restatement of Contracts is inapplicable in dealings with homeowners and the stnandard instead arises from the 3rd Restatement of Servitudes.

> **"Discretionary decisions of an association are subject to a reasonableness standard" Tierra Ranchos, 216 Ariz. at 201-02, ¶¶ 23-28, 165 P.3d at 179-80. "We declined to follow the business judgment rule, which would require only that a reviewing court determine whether an association had acted within the scope of its authority and in good faith. *Id.* Instead, we adopted the reasonableness standard outlined in the Restatement (Third) of Property: Servitudes § 6.13 (2000), which addresses the duties of an association to its members." Id at 201-02, ¶¶ 25-28, 165 P.3d at 179. "Among other duties, the Restatement imposes upon the association the duty to 'treat members fairly' and the duty to 'act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers.'" *Id.* at 201, ¶ 25, 165 P.3d at 179 (quoting Restatement (Third) of Property: Servitudes § 6.13(1)(b), (c)).**

In David Schuman v. Greenbelt Homes, Inc., No. 2020, Md. Ct. Spec. App. (2012) the Appellate Court noted that

> **"The Restatement (Third) of Property: Servitudes, in section 6.13 Duties of a Common-Interest Community to Its Members, recommends not using the business judgment rule to shield common interest community board decisions: "The business judgment rule is not adopted because the fit between community associations and other types of corporations is not very close, and it provides too little protection against careless or risky management of community property and fmancial affairs.,,46"**

The Court quoted from the Restatement of Servitudes:

> **"... First, the stakes of association members are generally much higher than those of shareholders in business corporations. ... Second, the range of power the association holds over the member's well-being and the range of decisions the association is called on to make is significantly broader than in the typical business corporation. ... The third difference is that association members cannot ordinarily sell their homes as easily as they can sell shares of stock in a business corporation. Association members are more like shareholders in closely held corporations where liquidity is absent, an area where courts increasingly inquire into the substance of business decision"**

The applicable standard and threshold of proof which Plaintiff has to meet is very low: (a) That it is more likely than not that the facts are favorable to Plaintiff.; and (b) That if ambiguity exists in covenants, it must be resolved in favor of the Plaintiff, in favor of the free use of property, and likewise against a developer or Declarant'.

Covenant Interpretation.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). 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, 32 S.C. at 4, 498 S.E.2d at 864. -- Hardy e at v Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006),

The "rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Citing Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902

"Deed restrictions are encumbrances on realty and therefore, under common law, are to be strictly construed in favor of the free use of land." -- Levine v. Turner, 264 S.W.2d 478 (Tex.Civ.App.--El Paso 1954, writ dism'd); Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981).

"An unrecorded grant deed is valid between the parties. (Civ. Code, § 1217; Devereaux v. Frazier Mountain Park etc. Co. (1967) 248 Cal.App.2d 323, 328.)

"if the mortgage holder has notice of a prior purchase money mortgage, then it cannot prevail under the recording statute by virtue of filing first." Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 308, 257 S.E.2d 496, 497 (1979).

"A seller can not free himself from the burdens of owning a property by sale and avail himself of the benefits of controlling it afterwards merely by virtue of the deed of sale being unrecorded." Fred L McMillan v Giorgio M Aru, Court of Appeals of Missiissippi, 1999-CA-00018-COA.

"The burden is on the defendant to prove the satisfaction of all elements of contracts at issue Speed v. Speed, 213 S.C. 401, 49 S.E.2d 588 (1948): and every one of the essential elements must be proved Cash v. Maddox, 265 S.C. 480, 220 S.E.2d 121 (1975): (1) capacity; (2) statute of frauds ([i] identify what is contracted; [ii] identify the parties to the contract; [iii] state that it is a contract for goods or services; [iv] state with absolute certainty all the essential terms of the agreement.

"Any ambiguity is resolved in favor of the least restrictive reasonable interpretation." -- Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, 848 S.W.2d 772 (Tex.App.--Texarkana, 1993).

"... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. - Arcadian Shores Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007.

II. The Special Refere denied Appellant a fair trial prejudicing the outcome against Appellant.

The Special Referree denied Appellant a chance to make opening and closing arguments. Rule 43(j), SCRCP, which is Appellant's right under the rule. Appellant began an opening statement (TT Pg 96 L-14). The Court stopped this and directed Appellant to skip to the calling of witnesses (TT Pg 96 L-24). At the end of the her case presentation when Respondent said "No Further Witnesses" (TT pp 1028 L-1) the SR terminated the trial (TT Pg 1028 L-3) without asking whether either party wanted to make a closing statement. A party is not required to ask to exercise the "right" to close the case.

The Special Referee arbitrarily truncated the trial to three from the agreed upon trial duration of at least five days because of the SR's private business over the weekend. The SR did not permit the case to continue until there was no more probative evidence or testimony. At beginning a trial, not knowing the nature of the defense, a plaintiff can not predict what he must do to counter the defense presentation. The SR violated Appellant's constitutional right of due process when he set a trial limit.

On Friday August 10, 2012, the SR said the following (TT pg 721, L-1:

I've got stuff Monday. I'm going to give you 'til twelve o'clock. ... You've had two full days. Everything has got a beginning and a middle and an end ... but at twelve o'clock she has a right to present her case. ... But like I told you, I had a little surgery, so I don't want to do too much, Okay?

In consenting to the June 13, 2012 Order of Reference (SR signature pg 6) the SR himself scheduled the trial and agreed that "the ... trial shall continue until concluded". When the SR set August 8, 2012 to begin trial, he stated his intent to conduct court on Saturday and Sunday August 11 and 12, and arrangements were made with the Clerk of Court and the Sheriff for court personnel for five days.

Appellant did not have the days "allotted" to present his case because, over Appellant's objections (TT Pg ,) the SR ordered that Respondent could call one Expert and two fact witnesses (C. Sullivan, Ambuhl, and M. Sullivan) whose testimony totaled half a day. On Friday Appellant explicitly stated his desire and need to call Defendant Toth who he subpoenaed and who was in the court room; the SR wrongly denied Appellant an opportunity to do so prejudicing Appellant. TT Pg 331 L-19

> **Jarmuth: I'm going to come to the topic of the Amenity Center Parking Lot when I call Ms. Toth as a witness. She's a named witness who was subpoenaed ... and she's in the room...**
> **The Court: All right.**

On Friday Appellant stated his need to make up the half day of Plaintiff trial time that the SR gave to Defendant: TT pg 720 L-16:

> **"I believe I'm going to need or collectively will need an extra half day beyond what we can accomplish today".**

<u>The SR improperly ignored the mandate of the Statutory Judgment Act to make Declaratory Judgments</u> about the "The Act", other statutes, and about provisions of IHOA Bylaws: TT Pg 176 @ 25; 124 @ 25; 182 @ 17-22; 207 @ 14-16; 264 @ 6-15.

<u>The SR violated Appellant's right to due process by collecting</u> [21] and depending on numerous facts and documents in his final order not presented as evidence or testimony at trial. <u>Exhibit A</u> to Appellant's September 19, 2012 Post-Trial Motion.

<u>The SR improperly used the Respondent's Draft Order Without an Opportuity</u>

[21] **The notes to Rule 3B, CJC, Rule 501, SCACRB, (Canon 3B) states "A judge must not independently investigate facts in a case and must consider only the evidence presented.**

for Apellant to Comment and Oppose. Without stating from the bench any findings of fact or conclusions of law at the end of the trial the SR invited Respondent's counsel to write whatever final order she pleased and adopted it word for word without giving Appellant an opportunity to be heard, violating Rule 3B, [22] CJC, Rule 501, SCACR. On August 21, 2012 Appellant filed his objections to what the SR was doing. This was reiterated in Appellant's September 19, 2012 Post-Trial Motion.

Trial By Ambush. The SR improperly allowed three surprise witnesses to testify who had not been noted on Respondent's Pre-Trial Brief provided earlier. On January 13, 2012 Respondent served a Rule 16 Brief listing 7 trial witnesses and evidence to be used at the January 17, 2012 trial. On January 17, 2012 Chief Administrative Judge Steven John ordered a continuance so that Appellant could depose Respondent's listed witnesses. On August 17, 2012 Appellant received Respondent's revised list which listed 9 witnesses 4 of them different, including Fact Witnesses Denise Ambuhl and (HOA Board Member) Maureen Sullivan, and Expert Witness Christopher Sullivan – none of whom Appellant had an opportunity to depose.

Appellant objected to "Trial By Ambush" TT Pg 79 L-25 to 90 @ 25. Per Rule 26(4)(C) SCRCP Appellant had a right to depose Defense Expert Chris Sullivan.

The SR improperly allowed "surprise" Defense exhibits. Well before the trial Appellant provided Respondent bound paper copies of every document Appellant proposed to use at trial as listed in Appellant's Rule 16 Brief January 17, 2012 revised July 30, 2012. As the trial began Respondent finally gave Appellant a thick binder of the exhibits Respondent listed in Respondent's Rule 16 Brief – none had been served prior to trial. At trial Appellant handed the SR a "screen dump" of the document titles

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[22] A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

of what Respondent had provided Appellant in discovery (all on CD) and almost none corresponded to Respondent's Rule 16 Exhibit list. Respondent's January 13, 2012 document listed 79 Exhibits and no Plats or Posters (none of which were served). Respondent's August 8, 2012 document listed 104 Exhibits; many of the first 79 had changed as well; Plat Exhibits A through J were added the day of trial. The document set Respondent gave Appellant at trial did not include Plats A through I. At trial Respondent introduced additional exhibits 105 through 108 (per the transcript) never previously listed and never ever provided Appellant, who objected (TT Pg 79 L-25 to Pg 90 L 25). At trial Appellant handed the SR marked up copies of the Respondent's Rule 16 Evidence lists noting the "surprise" documents. The SR never dealt with the issue which prejudiced Appellant's right to due process.

The SR ignored the "trial" testimony of witnesses taken in deposition per the January 27, 2012 Order and pre-filed per Rule 32 SCRCP. Appellant informed the SR that the transcripts had been pre-filed with the Court, TT Pg 90 L 6-25. At trial the SR stated he would read the depositions -- not to read them into the record (TT Pg 93 L 9). As cited supra, the SR never obtained the deposition transcripts from the Clerk of Court and ignored them. Every deposition was held by Appellant with the intent of use at trial to aid his case. One deposition was of Defendant Toth who the Court did not permit Appellant to question at trial because of the SR's desire to use the required time for the SR's personal business (see supra).

III. The SR Erred when he ruled that the "Waivers" or Restrictions on Use in Amendment 1 to the Covenants applied to "The Villas" and not to all homeowners.

In Amendment 1 (Pl TE 501) to the Covenants filed May 10, 2000 the Developer made the following changes which apply to the entire PUD: (a) Changed the PUD name; (b) stated that there is no "common area"(#3) in the multi-family area, which per the PUD Master Plan (PL TE 450) has three separate Multi-Family areas; (c) "deleted" the

prohibition on "any" (plural) property management firms (#4) (plural) in "the Multi-family Parcel" which was actually three areas per the 1997 PUD approval by Horry County; (d) prohibited owners in the "multi-family parcel" from using recreational amenities (#5) owned by "The Association"; (d) mandated that the Association(s) (plural) for the units in the "Multi-Family Parcel" will collect (#6) assessments for "The Association"; (e) required separate accounting (#8) of the two reserve funds relevant to the entire PUD and specified that no one in ANY Multi-family parcel will pay to the reserves for the Amenity Center; (f) without any reference to the phrase "multi-family" "waived"(#9) easements in Sections 4.10, Section 4.11, Section 4.12, Section 4.16 and Section 4.17 ; (g) without use of the phrase "Multi-Family" waived (#11) restrictions on use in "Sections 7.2 in Article VII and of Section 7.4, Section 7.25 and Section 7.31 of the Declaration"; (h) waived "golf course" related easements in Section 7.37 (#12) over property adjacent to golf course playing areas. The language of these amendments never mentioned the name "Villas" and never said the waivers were limited in any way.

Amendment #1 (Para #2) granted another developer, "International Club Villas, LLC", the right to build anywhere in the multi-family parcel without any more specifics; Para #7 designated the other developer a "Designated Builder" which meant that no restriction on use applied to the named builder.

The "plain and ordinary meaning" of Amendment #1 is that the "waivers" applied to everyone in the PUD – Hardy v Aiken ob cit. Any narrower reading must arise from finding ambiguity in the language of Amendment #1 and any ambiguity must be resolved in favor of the "free use of property" and "against the party seeking enforcement" - Hamilton v. CCM, Inc.; Taylor v. Lindsey; and Hoffman v. Cohen ob cit, and "are to be strictly construed in favor of the free use of land." - Levine v. Turner, 264 S.W.2d 478 (Tex.Civ.App.--El Paso 1954, writ dism'd); Davis v. Huey, 620 S.W.2d

561, 565 (Tex. 1981).

There is simply no reason why restriction should be lifted for one part of the multi-family parcel and not others. On page 4 and 23 of the SR's Order he held that the waivers applied to the "Villas Horizontal Property Regime only" [23] and the Declarant "did not waive the applicability of the covenants to the rest of the Community". This reading is contrary to the facts before the SR at trial. Maureen Sullivan, on the boards of both The Glens (multi-family) and the IHOA, testified that The Glens has it's own association and likewise The Cambridge which would be prohibited by the SR's interpretation. Pl TE 107 through 110 and (plats) PL TE 128 to 130 showed the SR that The Glens has the same parking arrangements as The Villas. There is no reason why the Golf Course would not need to clear shrubs from the golf course area near The Villas but would need to do so elsewhere. Since the LLC named in Amendment #1 became a "designated builder" the language at the end of Covenant Section 7.2 exempted that builder from all restrictions and no waivers would be needed. Further, at the time of Amendment #1 (2000) the Villas area was not subjected to the Covenants until four years later through Amendment #4 December 28, 2004 (Pl TE 561) when the Developer subjected The Villas to "all" the covenants of record, none excepted. It is thus more likely than not that the "waivers" applied to the entire PUD and any ambiguity in the matter must be resolved opposite to how the SR's ruled.

IV. The SR Erred in Assigning to the Respondent IHOA any rights under the Covenants.

The burden was on the Respondent, not the Appellant, to prove the satisfaction of one of the essential elements of the Covenant as a Contract or Deed – that Respondent was an actual party to the Covenant. Speed v. Speed, 213 S.C. 401, 49 S.E.2d 588

[23] There is no such entity. One condominium which did not exist in 2000 is called "The Vilas at International Club".

(1948): Cash v. Maddox, 265 S.C. 480, 220 S.E.2d 121 (1975): and Respondent's identity as a party to the document must be clearly expressed in the writing -- Cash v. Maddox, 265 S.C. 480, 484, 220 S.E.2d 121, 122 (1975)).

As set out in "Facts" supra, the Covenants Pl TE 547 named MIGPA as "The Association". Amendment #1 Pl TE 551 changed the name of the PUD to "The International Club" and directed that said phrase replace "Murrells Inlet Golf Plantation" (the former PUD name) in the Covenants. Amendment #4 and #5 directed homeowners in condominiums with their own sub-association to pay assessments to "The International Club Association" (ICA). not to the Respondent. At trial (TT pg 119 L-2 through [24] Pg 124 L 15) Appellant demonstrated (Pl TE 567) that no convoluted explanation of Amendment #1 could show that Amendment #1 named Respondent as "The Association".

The SR assigned "The Association's" rights under the covenants to Respondent without a finding that Respondent is a named party to the Covenants; in fact the SR found that the name transposition of The Association was intended (contrary to the plain language of Amendments 4 and 5) to change MIGPA to ICA as "The Association. On Page 10 of the Final Order as a Conclusion of Law the SR wrote that Amendment #1 modified the Covenants to NOW read

> **"The Developer will cause to be incorporated ... *International Club Association Inc* ... for the purpose of exercising ... the terms of the Declaration ..." (italics added)**

The ICA exists and (facts, supra) merged with MIGPA which under the standards of interpreting covenants and contracts is "The Association" leaving Respondent without any standing to enforce the covenants, to pose a counter – claim, to collect attorney fees under any theory, or to compel homeowners to join Respondent's corporation. This is

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[24] **Particularly Pg 123 @ 3.**

so obvious a conclusion and so easy to note that the Trial Court should have found for Appellant's assertion added by Amendment that the Respondent's counter – claim is frivolous in the extreme because Respondent is obviously not "The Association".

On Page 11 of the SR's Final Order he held that the above argument "is without merit" without reconciling it to his finding that ICA is named, not the IHOA. He correctly noted that all the documents should be read together (citing Palmetto Dunes Resort v Brown, 287 SC 1m 6, 336 SE 2d 15, 18 (Ct App 1985 which works in Appellant's favor) to note the intent but ignored the absolute clarification of Amendments #4 and #5. It was noted at trial that the IHOA is a legitimate non-profit corporation entitled under the Covenants to operate amenities and clubs independent of "The Association" (Covenants Sections 1.24 Recreational Amenities and Section 2.5 Private, Semi Private, or Public Clubs and Facilities) Pl TE 547. The SR instead assigned The Association's rights to Respondent IHOA under a theory that you can become a party to a deed or covenant by acting like a party to the covenant. On Page 10 of the final order the SR wrote:

> **"the Defendant HOA has been the only non-profit corporation homeowners association to exercise the powers granted in the Declaration. .. It is the entity that owns the common areas in the community, that collects the assessments and fines, and that ... [maintains] the common facilities ... Finally, it is the entity that enforces covenants and restrictions in the Declaration."**

The panel should note that the IHOA in fact is maintaining the property it owns as a corporation and that the finding is an admission that the IHOA has been acting without authority under the covenants. The legitimate Association exists, but owns no property and thus has no need to collect assessments. The Covenants explicitly provide that there is no obligation under the covenants to create common areas and in Covenants Section 1.6 defines "Common Areas" as those areas owned by "The Association" and in Section 2.1 states that only "The Association" can operate and impose charges to use Amenities

as referred to in The Covenants. The SR adopted the circular logic of Respondent's counsel that Respondent is the Association because it acts like The Association and if they act like the Association they must be The Association. This argument runs afould of the Standards for interpreting contracts and covenants – since IHOA is not a named party to the Covenants and can not become one through it's own self-serving action.

V. The SR Erred in ignoring concepts of Privity and Equitable Interest in making a Conclusion of Law that Pebble Creek is subject to The Covenants, 3-13

In his final order the SR erred in writing that Appellant argued that "The Meadows" (another area) was the second of "two subdivisions in the community [that Appellant argued] are not subject to the Declaration". Appellant argued that the other is "The Villas" because the Declarant attempted to subject it, like Pebble Creek, to the Covenants long after he no longer had any equitable interest or privity in the land.

The SR also erred by writing that "The Plaintiff introduced two deeds Plaintiff's Exhibits 544 and 545 as being deeds .... relating to Pebble Creek." Appellant's # 544 is the deed to the Golf Course while # 545 is the deed to Pebble Creek both of which were executed January 29, 1999. At trial (TT Pg 116 @ 8) Appellant introduced # 544 as the deed to the golf course. Respondent's Counsel Golding, when she ghost – wrote the SR's Order, mis-stated what happened. It was SHE who jumped out of her seat after Appellant had addressed the issue, waving # 544 up and claiming that the golf course deed was another different deed to Pebble Creek (TT pg 159 L 6). The Court Reporter accurately wrote (TT Pg 42) that Pl TE 544 is "Deed 2117 at 1413 99 Yr Golf Deed" not another Pebble Creek deed.

Appellant's trial presentation stated (TT Pg 116 L-7,8) that # 544 was the golf course deed and that # 545 was the Pebble Creek Deed and that (TT Pg 152 L-23) Plantation sold Pebble Creek "on January 29, 1999" and (TT Pg 153 12 -17) "At the

moment of sale, there were no covenants running with purchased land" and that while the deeds contained the standard boiler plate and said (L-15 to 16) "that Pebble Creek would be subject to covenants of record, such as they existed" but none did.

The body of the Deed, Pl TE #544, pg 1, does not have the word "covenants". Deed Pg 3, Exhibit A, the property description, refers to the land by Plat Book and Page. It goes on to say that

> **"This property is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (the "Declaration" which is recorded in Deed Book _____ at Page _____ of the Real Property Recorsd of Horry County."**

In Player v. Chandler, 299 S.C. at 105, 382 S.E.2d at 894, the South Carolina Supreme Court held that

> **such phrases as "subject to covenants of record" when there are none of record are meaningless and unenforceable – all terms must exist and be in writing at the time the deed is signed. The terms can not be interpreted to include a "secret purpose or intention on the part of one of the parties, stored away in his mind ... "**

Cited in Clardy and Clardy v Bodolosky and United Land-Magnolia, LLC, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009). On January 29, 1999 there was no "Declaration of Covenants" recorded in the Deed Books of Horry County. The Covenants (Pl TE 547) did not exist until February 8, 1999 and there is nothing to prove that the Purchaser Sunbelt saw or agreed to the Covenants as they were ultimately written and recorded and a blank in the deed is not a legally sufficient reference anyway. A covenant is a modification of a deed and must meet the same recording standards as any deed. As the exclusive owner of the Pebble Creek property, Sunbelt would have had to at least endorse in writing the substantial restrictions on use of land. There is nothing in the trial record to indicate such agreement or even Sunbelt's knowledge that Plantation was filing the Covenants.

On February 8, 1999 Plantation had no horizontal privity or equitable interest in

the Pebble Creek land (TT {g 153 L 3-5). At trial Appellant introduced Black's definitions of privity (Pl TE 90).

On page 14 of the Final Order the SR held that Pebble Creek is subject to the Covenants because the deed has a reference to covenants of record, even though the book page is blank and none existed at the time of sale. Black's points out that for Plantation to create an enforceable contract or covenant against Sunbelt and Appellant as it's vertical successor relating to land, both Plantation and Sunbelt must have an equitable interest in the land at the moment the Covenant was filed, which did not exist.

The January 29, 1999 deed of sale to Pebble Creek extinguished any capacity in Plantation to impair Pebble Creek in any way, particularly with any document filed with the Recorder of Deeds ten day later. A seller instantly loses his relationship with the property at the moment of sale and the seller is on notice that moment. Clifford v Transouthern Financial Corp; 566 F.2d 1023, 2 Fed. R. Evid. Serv. 950 No. 76-2347., United States Court of Appeals, Fifth Circuit; Jan. 30, 1978, citing citing **Gray Lumber Co. v. Harris, 127 Ga. 693, 56 S.E. 252 (1906); Hawes v. Glover, 126 Ga. 305, 55 S.E. 62 (1906); Howard v. Russell, 104 Ga. 230, 30 S.E. 802 (1898); Long v. Georgia Land & Lumber Co., 82 Ga. 628, 9 S.E. 425 (1889); see Northrop v. Columbian Lumber Co., 186 F. 770 (5th Cir. 1911). In McMillan v Giorgio, Court of Appeals of Missiissippi, No. 1999-CA-00018-COA April 7, 2000, it was held that**

> **"A seller can not free himself from the burdens of owning a property by sale and simultaneously avail himself of the benefits of controlling it afterwards merely by virtue at the time that his deed of sale had not yet been recorded by the purchaser."**

with a similar conclusion reached in Regions Bank v. Wingard Properties; SCCA No 4846; June 22, 2011, and Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 308, 257 S.E.2d 496, 497 (1979).

In Raintree Corp. v. Rowe, 38 N.C. App. 664, 669, 248 S.E. 2d 904, 907-08 (1978) the Court held that.

> **"We adhere to the rule that a party seeking to enforce a covenant as one running with the land at law must show the presence of both horizontal and vertical privity" when the covenant was created and to a party to a validly created covenant. Respondent has no vertical privity to a party with horizontal privity when the Covenant was created.**

As a matter of law based on the actual facts, Pebble Creek is not subject to the Covenants. This conclusion also applies to The Villas multi-family area, which was sold four years prior to Amendment #4 in 2004 whih attempted to subject The Villas (not the Meadows) to the Covenants. See "Facts" supra.

VI. The SR erred as a matter of law in holding that the Covenants can compel a homeowner to join and remain a member of Respondent non-profit corporation.

At trial Appellant raised the issue of pre-emption by "The Act" of the related Covenant provisions noting that Respondent was chartered under "The Act" and is thus subject to all it's provisions. At issue are SC Code Ann 33-31-601 Admission of Members (Pl TE 219) and SC Code Ann 33-31-620, Resignation of Members (Pl TE 221). The Final Order ignored both, which Appellant argued at trial (TT Pg 126 L-12 to Pg 128 L-3). South Carolina law pre-empts any covenant provision in conflict with it and there is no case law excepting non-profit corporations which are homeowner associations from any of the statutory provisions of The Act. As Appellant stated at trial, the South Carolina Legislature has considered the issue and chosen to ignore it.[25] specifically.

SC Code Ann 33-31-601(b) says that "No person may be admitted as a member without his consent." The Journal of the House of Representatives of the 2nd Session of the 110th General Assembly Tuesday, January 11, 1994 says the legislative intent is to

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[25] **The Judiciary Committee of the State Senate has held hearings on the matter.**

> allow corporations to "establish conditions for admission of members" and "admit members." The requirements for admission are normally set forth in the article, bylaws or a resolution adopted by the board.

but that subsection (b)

> "prevents corporations from admitting people as members unless they consent to becoming members. ... Corporations sometimes name people as members without knowing or having the ability to identify individual members ... As a result of section 6.01, the above bylaw provision simply authorizes ... people in the area to become members. Before they became members they would have to apply for or consent to joining ... Until they had manifested this consent they would not be "members" as that term is defined in section 1.40(2"

SC Code Ann 33-31-620(a) (Resignation) provides that "A member may resign at any time." The legislative notes state the intent of the legislature as being that

> "Section 6.20(a) sets forth the basic right of a member to resign from a nonprofit corporation at any time. A nonprofit organization cannot force a person to belong to it."

The legislature noted that it felt this provision to be very important and that "This provision had no counterpart in former statutory law".

Section 3.3 of the Covvenants (Pl TE 547) requires that

> Every person or entity who is an Owner of any Unit shall be a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of the Unit"

which is totally pre-empted by The Act; the intent of the Covenants is to relate living in a geographic area to membership in The Association. There is no provision for resignation; the comment of Respondent is sell one's house if one wants to resign. The Act allows a citizen to resign and remain a member of a geographic area – it imposes no conditions on resignation.

Whether one agrees or disagrees on the wisdom of the legislature, it's manifesto is absolute and applies to any entity chartered under The Act – including Respondent IHOA. The Bylaws which Respondent IHOA uses includes the same pre-empted mandate. Section 2(a) if the IHOA Bylaws reads as follows:

"All persons who are Owners as deemed in the Declaration shall be members of this Association, ..."

The Bylaws likewise has no resignation provision.

In paragraph 5a to Appellant's 2009 Complaint Appellant challenged the legal viability of some or all of the Covenant's provisions. In Paragraph 14 (page 6) of the 2010 Complaint Appellant alleged demanded all assessments be returned because there is lacking a "consensual agreement to participate in the IHOA. Because the assessments were illegally and coercively collected under threat of lien, the demand for return of assessments relates back from 2009 to the limits of the statutory limitation period. Since 2009 every Appellant assessment payment (by check) has been marked "paid under protest".

The SR's final order bundled the requirement to be an involuntary member under his citation to the 3rd Restatement of Servitudes, which is not itself law and is preempted in this instance, and by the SR's erroneous citation to the Condominium Act, SC Code Ann 27-31-190 (Final Order, Section 5, Pg 18).

VII The SR Erred in granting Defendant Diehl Litigation Privilege Immunity When Diehl Republished Defamatory Material About Appellant.

In para 19 of the Final Order the SR held that "The Plaintiffs Defamation Claim is Without Merit", The Order claimed the Appellant had admitted at trial that "...nothing in the letter is defamatory" and therefore "he can no longer claim defamation". That admission is not in the transcript. Appellant singled out the "List of Lawsuits (TT 586 L-10) as defamatory and agreed only that the List was attached to Golding's letter and that Appellant (TT 587 L3-7) was going to ignore the body of the cover letter. The Court asked what was Defamatory (TT 587 L-12) and Appellant answered "The Attachments" (L-17).

This appeal does not contest the finding that the original defendants Toth and the

IHOA are shielded by Litigation Privilege from their written publication of certain material but Appellant contests that the final order ignored the spoken statement by William Freiboth that Appellant is a "pedophile" and the words and actions of the IHOA Board telling homeowners not to associate with Appellant.[26] The 2009 Complaint was filed April 7, 2009. At the moment of defamation May 29, 2009 Diehl was not a party to the original complaint and nothing was introduced to show any reason why Diehl would believe it would be joined as a Defendant. Diehl is a for – profit corporation and neither it nor it's employees are officers, employees, or members of the IHOA. There was no evidence that Diehl had been sued before on similar matters. As a matter of law Diehl is not entitled to Litigation Privilege. Diehl was sued for Defamation and other misconduct by Amendment 1 to the Complaint, June 9, 2009.

Diehl's October 12, 2012 Answer to the Amended 2009 Complaint asserted the following defenses:

> **"32. Any and all matters ... are absolutely privileged in that all ... are contained in Court decisions and opinions. ... 34. ... made in good faith ... 36. ... fair comment and thereby protected. ... 38. ... neutral reportage ... 40. . facts relating to litigation involving the Plaintiff are privileged.**

The List of Lawsuits (Pl TE 515) is not a court document but instead contains editorial comments about lawsuits. At trial various homeowners testified that Diehl's republication of the List of Lawsuits was identifiable to Appellant, that the contents impugned Appellant's reputation and was written such that they assumed the editorial comments were actually words of the courts (e.g., Michael Butryn, Louis Astorino) and that the editorial remarks imparted a negative image of Appellant.

At trial (TT Pg 804 – 828) Appellant went through the List showing it to contain extensive adverse editorial comments including outright lies. For brevity Appellant

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[26] **Including firing from committee positions anyone seen associating with me.**

focuses on #1, #2, and #10 which were the same case where Appellant was represented by Counsel (originating in USDC-MD-PA Federal Court and being transferred to USDC-ND-WV). At trial Appellant's witnesses Butryn and Astorino testified of their belief that it is exceedingly difficult to terminate a long time federal employee and that if Appellant was terminated from the FBI it would have had to have been for a serious wrong. Per the "Facts" supra, List item #10 gave the impression (as confirmed by Butryn and Astorino) that Appellant had been an FBI employee, that he had done some wrong, that fellow employee Frinzi had disclosed the wrong, that as a result Appellant had been "terminated" on "4/21/01" (the exact date conveying the impression of truth), that Appellant next sued Frinzi for defamation and Appellant lost. None of this was true. All clearly applied to Appellant and the allegations are defamatory per se.

At trial Appellant asked IHOA Board Member Maureen Sullivan what the IHOA had done to verify what was written about Appellant and (TT 693 L-13) and she responded they had done nothing. Diehl employee Julie Case was the individual who contracted with Carolina Mail House to reproduce and mail 646 copies of the material some world wide and who personally emailed 577 copies of the material, many to out of state non-owners. At her deposition Pg 6 L-17-26 Case testified she knew of nothing anyone had done to verify the material, and she admitted also to having posted the material on a Diehl website (Pg 13 L-20-24) as directed by her Diehl supervisor, all her acts as part of her official duties. The bill from Carolina Mail House, Pl TE 522, states that the Republication was ordered by and shall be billed to – DIEHL

In the final order (Pg 42) the SR wrote:

> **"Communications between officers and employees of a corporation are qualifiedly privileged" [and] ""communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable."**

The communications was from Diehl to persons who were arguably not Diehl's customers and the matter communicated did not relate to anything Diehl had in common with the homeowners and the scores of non-residents / non-homeowners [27] who they also sent the material to (and the public at large who had potential access to the same material on Diehl's web site). No Diehl employee is an "officer or employee" of the IHOA. It was plainly apparent that the whole communication was meant to "smear" Appellant and the republication by Diehl was made with reckless disregard and no attempt to verify the contents. No privilege attaches, certainly not litigation privilege.

While Carolina Mail House is eligible for the "Innocent Dissemination" defense, Diehl is not. Diehl never attempted to show it took reasonable care in relation to the publication and did not know, and had no reason to believe, that they caused or contributed to the publication of a defamatory statement. The reckless way that Diehl republished to the world at large with false material obviously meant to "smear" Appellant makes Diehl ineligible for the Fair Comment defense. Further, Diehl did not meet it's burden of showing: (a) the subject matter was a matter of public interest; (b) the expression of opinion was based on a true factual background; (c) the comment must be understood by the reasonable reader as comment rather than an imputation of fact; (d) and the comment was an opinion an honest minded person could make on the facts. At trial Diehl put on no defense at all. Malice is implied if the statement is made with "reckless indifference as to its truth".

VIII The SR erred when his order omitted the IHOA's Tortuous Interference with Appellant's Social Relationships and the Verbal Defamation by William Fletcher.

At her deposition, Toth (Facts, supra) confirmed Fletcher was officially on various IHOA Committees and the Board. At his deposition and at trial (TT 473 L 12-

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[27] **Eg, Larry Sherman.**

17) Astorino confirmed this as well and that Fletcher told Astorino (L-8) that Appellant is "a pedophile". This is defamatory per se. Astorino testified that Board Member Michael Templeton likewise sought to interfere with Appellant's relationship with Astorino.

"Tortuous interference" is the intentional interference with relations, The testimony of Butryn and Astorino is that a relationship existed, that the IHOA knew of the relationship, that the IHOA had the intent of interfering with the relationship, that it was intentional, and that, with regard to Pete Pizzi (who was "terminated" from his committee position when he was "seen going into Appellant's house with papers) it was meant to harm Appellant's gathering of material related to this civil lawsuit.[28]

Sufficient facts have been stated to satisfy a de nova finding by the Court that the IHOA both defamed and interfered with Appellant's social relationships.

IX The SR Erred When He did Not Find the Roads in Pebble Creek to be owned by the County free of the Covenants.

The SR erred when he wrote "The streets and the roads in the Community were initially owned by the Developer. D.R. Horton". The Streets [29] in Pebble Creek were conveyed by Plantation to Sunbelt in 1999 when Sunbelt bought Pebble Creek (Pl TE 545). The only mention of roads in the deed was that Sunbelt received (Exhibit A to Deed) a non-exclusive easement over roads Plantation would build in the future, and Plantation with-held an easement for golf carts to cross future Pebble Creek roads. No reservation or easement was made for Plantation regarding future Pebble Creek roads. On May 29 2003 (Pt TE 556) Plantation sold most of it's interests to Horton, including easements Plantation had, and reserving non-exclusive easements for Plantation's remaining land over roads in the area sold to Horton. While not a deed of sale,

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[28] **This could be construed with interfering with or hindering a witness which is a crime.**

[29] **At the time there were no actual roads or streets.**

Amendment #2 to the Covenants (Pl TE 555, pg 3) April 29, 2003 relates that Plantation owned the remaining roads and was not transferring them to Horton. It has been shown that a condition of the February 1, 1997 approval (Pl TE 450) of the development was a dedication, without conditions, of the roads to Horry County and that when the roads in Pebble Creek were dedicated to Horry County by Sunbelt December 21, 2003 (Pl TE 401) it included a document which mentioned the dedication as "Fee Simple". At trial (TT 171 L 1-6) it was pointed out that the 1997 Plat says that acceptance of the roads would be delayed until they were built and inspected for quality. At trial Butryn authenticated an August 24, 2009 Horry County letter (Pl TE 61, to him on behalf of the IHOA Board) which stated that Horry County owns the roads. Appellant had provided Respondent this letter in discovery in 2009. At trial it was noted (TT 198 @ 1-10) that in all approval documents from Horry County after 1997 the plats are annotated that the roads are marked "public" and where an easement is in place, it is marked "easement" (the roads are marked "public").

At trial Appellant cited case law that unless a government explicitly notes some reservation, the transfer of ownership to government is without restriction and the grantor can not impose a restriction on the grantee government without the later's consent. There was no reservation in the dedications. TT 343 L1 to 345 L 17:

a. The SC Constitution says that government is sovereign and can't be restricted by individuals in use of public property

b. US v 194.08 Acres of Land, 135 F.3rd, 1025, 1029 5th Circuit LA 1998, - when government takes ownership of land it creates a new title extinguishing all prior interests; DOT v. Shealey 561 South 2nd 515, Alabama, 1990 - unless the government explicitly recognizes a limitation the government gets the land "free simple, free from the burdens of the covenants," citing Newberry v ANDAL USIA 257 Alabama 49,

Alabama 1952,"; US v. Carmack 329 U.S. 230 West 1946 - "The Government's rights are distinct from those of an ordinary purchaser of property".

At trial the SR agreed with Appellant: TT Pg 350 L 5- 19:

> **Jarmuth: Does the Cases I've cited say the covenants are extinguished when the roads become dedicated to the county ... and the state gets more than an easement and the dedication equates to title to the roads without any restrictions?**
> **The Court: I'm with you.**

The SR erroneously wrote in the final order that on February 26, 2006 Horton conveyed easements of use to Horry County, but that is contrary to the facts above and a non-exclusive easement can not be re-conveyed by a dominant easement holder except his own easement when he deeds his property to another. Again, Sunbelt dedicated the roads in Pebble Creek in 2003, not Horton in 2006.

The ghost written order finally stated that the IHOA's control over the roads comes down to the Covenants saying they control the roads: "Pursuant to the Declaration, the Defendant HOA has the right to restrict parking at the Amenity Center and on the streets within the Community" (Order Pg 24 para 7). The ghost written Order cited Sloan v. City of Greenville, 111 235 S.C. 277, 111 S.E.2d 573 (1959) noting that a dedication accepted for a specific purpose can only be used for that purpose, which case referred to utility easements, and which is inapplicable to this case, where no limitation was stated in the dedication. The ghost writer went on to cite cases relating to granting of easements between private individuals and deeds between private individuals with existing restrictions, which assumes incorrectly that governments are not sovereign and ignores the applicable specific case law.

In a particular twist of logic, the IHOA asserts that homeowners in Pebble Creek have certain restrictions on how they may use the roads, but that the general public can use the roads in any way they see fit, since the general public is not bound by the Covenants. Such a view is against public policy. In another twist Appellant

objected to, the IHOA insists that homeowners maintain the area between their lot property lines and the curb, even though the covenants say nothing about this and even thought that area is in the right of way (owned by the county).

The practical implications include: can a homeowner be fined for not mowing the public grass; can a homeowner be fined for parking along the street just as a member of the general public; can the IHOA limit a homeowner's erection of a mail box of the homeowner's choice approved by the US Postal Service in the right of way owned by the County; and can the IHOA control the landscaping in the right of way between the lot lines and the curb? Appellant asserts they can not and by implication the SR holds the IHOA can. [30]

It is more likely than not that the roads in Pebble Creek were conveyed by Sunbelt and accepted by Horry County without reservations or limitations, that Horry County owns the roads, and that there are no restrictions on use relating to those roads.

X The SR Erred by Not Requiring the IHOA to comply with the law relating to the Member List of Voters and by finding the IHOA was not required to provide it.

Per facts supra, the IHOA was sent three requests at widely separated dates for the member list of voters. The IHOA responded with a "social media" list to the first and ignored the later two requests.

On Page 8 of the Final Order the SR wrote

> **"the Defendant HOA maintains a website for its members, and the members list is readily available to Plaintiff; however, Plaintiff has refused to access the website for he does not want to disclose his email address or to accept the website's privacy policy. Plaintiff has also received the membership list in the past and has accessed the Defendant HOA's website through other Community homeowners."**

He also wrote

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[30] **The all presupposes that the IHOA is "The Association". If it is not it has no standing to contest the matter.**

Finally, the evidence established that the Plaintiff always had access to the membership list but he did not choose to access the Defendant HOA's website.

This is erroneous for several reasons: (1) the web site has a voluntary social media list which does not contain the data a voter list must contain; (2) the law does not impose any conditions on requesting a member list, such as waiving privacy rights or joining a web group; (3) the IHOA has Appellant's email address and has used it to communicate with Appellant many times; (4) whether another homeowner has accessed the IHOA web site for Appellant is irrelevant and the evidence is that the web site only has the "social" voluntary list.

Trial Testimony. Diehl employee Abel admitted receiving the requests and that neither the IHOA nor Diehl provided the lists. On Cross examination Abel (TT 1005) also admitted (L 20-22) that the web site only had a voluntary social media list without all the mandatory elements and that (TT 1010 L 15-22) she knew that access to the list is mandatory under the law, thus denying it was intentional and improper. Abel (TT 1018 L 13-17) admitted completely ignoring the second two requests.

On December 21, 2011 the South Carolina Attorney General responded to SC State Senator Tom Davis and wrote an official Attorney General's opinion on whether there was any legal limitation or condition an the absolute right of a homeowner to obtain the Members List For Voting SC Code Ann 33-31-720. The question was whether an HOA could use an "interpretive spin" based on SC Code Ann 33-31-1602 "(c) Good Faith Request for Records". Hon. Harrison D. Brant, Assistant Attorney General wrote that the answer is "no" – because subsection (d)(1) of Section 1602 makes Section 1602 inapplicable to requests posed under Section 720. He said the burden under Section 1605 is on the HOA and the homeowner making a request under 720 has no burden of proof to show that he does not intend to use it for improper purpose.

The controlling statute is SC Code Ann 33-31-720(a). Members' list for voting.

The statute says that it

> **shall list the members address and number of votes each member is entitled to vote at the meeting. This list must be prepared on the same basis and be part of the list of members**

which the social media list does not. The statute goes on to say

> **The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting,**

which is the exact wording used in Appellant's demands. If the IHOA refuses,

Appellant has a statutory cause of action and statutory damages:

> **If the corporation refuses to allow a member to inspect the list of members ... or copy the list ... the court of common pleas ... may summarily order the inspection or copying at the corporation's expense ... and may order the corporation to pay the member's costs, including reasonable counsel fees, incurred to obtain the order.**

If the Court finds that the Respondent has violated the law, Appellant is entitled to the entire cost of the case including the appeal. It is more likely than not that the Respondent disobeyed the law and that Appellant is entitled to all statutory remedies.

XI The SR Erred in Holding that Defendant Toth had not acted illegally and had no personal liability to the IHOA because of the Distribution of profits to members related to a sale to Central Electric.

The underlying facts were stated supra. The IHOA bought an area for $ 5.00 and later sold an easement to Central Electric, receiving $ 80,000 plus restoration costs. Toth and the entire board voted (Pl TE 369, Meeting Minutes, April 19, 2010) to distribute $ 50,250 to members who had no ownership rights in the area.

At Page 9 Section 24 of his Order the SR wrote

> **The Defendant HOA shared the proceeds with its members to refund the assessments that the members annually paid because the Defendant received unbudgeted revenue for 2010**

On Page 26, Conclusions of Law Section 9, the SR wrote

> **"Mr. Freiboth, the Defendant HOA's President, testified that this was not a profit distribution but rather for the purpose of passing a benefit to the members. ... "I find that the Defendant HOA ... properly utilized the funds it received from Central Electric".**

The IHOA is organized under "The Act" and is a non-profit corporation. At her deposition February 17, 2012 Toth (who at the time was IHOA Board President) testified (Pg 41 L 16-18) that she voted for the distribution and at Page 98 L 12-17 that this was a unanimous vote of the IHOA Board.

At trial IHOA Board member (then and now) Maureen Sullivan testified (TT 703 L 5-8) that no homeowner had ownership interests in the area with the easement, and that Toth and the other board members (L 20) "felt it was important to share those proceeds " clearly admitting the connection between the profits and the distribution. She also testified that the amount distributed had no computational basis other than (TT Pg 704 L 8) "We felt that was a fair amount" and (TT Pg 705 L4) that homeowners did not give up anything in exchange for the money they got from the IHOA.

Section 11.1.1 of the IHOA Bylaws (Pl TE 548) provides that "proceeds shall be retained by and for the benefit of the Association"

SC Code Ann 33-31-140 (11) defines a "Distribution" as

> **the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers.**

SC Code Ann 33-31-1301 states that "Except as authorized by Section 33-31-1302, a corporation may not make any distributions." The exceptions are (a) a mutual benefit corporation buying back memberships; and (b) when a corporation dissolves.

As a matter of law the distribution of profits from the sale is an "illegal distribution". The law makes any director who consented personally liable for the total amount distributed. Defendant Toth admitted her consent.

SC Code Ann 33-31-833 (Liability for unlawful distributions) reads

> **(a) ... , a director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.**

Nothing could have been distributed without violating The Act.

As a matter of Law, Defendant Toth is personally liable to the IHOA for $ 50,250.00.

XII The SR Erred as a Matter of Law in Granting the IHOA Attorney Fees.

Irrespective of who prevails in this case, as a matter of law the IHOA is not entitled to attorney fees. On Page 46 of this Order the SR identified the proper standard:

> **"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." Seabrook Island Property Owners Assoc. v. Berger, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct.App. 2005). Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge. Menne v. Keowee Key Prop. Owners' Ass'n, 368 S.C. *557,* 569, 629 S.E.2d 690, 696-97, (2006). A provision contained in restrictive covenants allowing for the recovery of attorney's fees is enforceable. Queen's Grant II Horizontal Property Regime, 368 S.C. at 375, 628 S.E.2d at 920.**

The only provisions in the Covenants (Pl TE 547) which would enable the IHOA to recover attorneys fees are the provisions of Sections 6.1, collection of unpaid assessments, and 8.9. Violations. Appellant has always carefully paid his assessments "under protest".[31] Section 8.9 limits the amount recoverable to the actual costs incurred. As the SR recognized in the final order, the only attorney fees incurred by Respondent was in defending accusations that the Respondent itself violated the covenants and the law. On Page 46 line 24 the SR wrote that

> **"Due to the Plaintiff's contesting the enforceability of the Declaration, including the Bylaws, the Defendant HOA paid $5,000.00 to the McNair Law Firm."**

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[31] **Appellant filed a pre-trial motion to pay assessments into the Court's depository.**

and not a penny more to enforce the covenants (see facts supra). The IHOA paid $ 5,000 in insurance deductibles long before the alleged covenant violation (the non-existent "wall") was allegedly built.

On Page 46 Section 23 of the Final Order the SR also wrote that

> **Declaration Section 13.4, specifically provides that should the Defendant HOA employ legal counsel to enforce the Declaration, Bylaws or its Rules and Regulations, the owner shall pay the attorneys fees incurred by the Defendant HOA.**

There is no Section 13.4 of the Declaration, whose last section is 8.10, Rule Against Perpetuities.

Even if the IHOA is successful in the matter of "the wall", it spent no money enforcing the matter.

As a matter of law, based on the facts, the Respondent is not entitled to any attorneys fees.

XIII The SR Erred by Ignoring Appellant's Actual Invasion of Privacy Issue.

At trial Appellant addressed the email / web site / US Mail material sent out by Diehl in May, 2009 as a Defamation issue. Appellant's "Invasion of Privacy" issue related to Diehl alone and the revelation by Diehl employee Vanessa Fattoross to other homeowners (who had no legitimate need for it) privileged details about Appellant's financial account with the IHOA.

On Page 44 Para 21 (Conclusions of Law) of the Final Order the SR ignored the financial information issue argued at trial and substituted one never argued at trial:

> **"The letter to the Community members ... was regarding public matters ... Therefore, his invasion of privacy claim is without merit."**

At trial the transcript (TT p 797-801) confirms that Appellant argued that giving Appellant's account information to the ARB members was an invasion of privacy, that they had no need for that information to perform their duties, that they had signed no

privacy agreement, and that the issue of account status is irrelevant to an ARB decision. The testimony noted that Diehl's contract with the IHOA provides that Diehl will provide staff at four IHOA board meetings, and has no provision for attendance at ARB meetings. At the time Diehl was a Defendant in this suit. Salient points raised at trial: TT Pg 799 - 800 -- that ARB members have no need or right to an applicant's financial information, that the ARB charter and objectives relate only to design documents, that Fattoross gave the information to the ARB, that this was an invasion of financial privacy; that Appellant never signed a release or privacy statement, that ARB members sign no pledge to keep homeowner information secret

There can be no doubt that the issue was placed before the SR and that he ignored it.

The SR correctly identified the legal standard (Order Pg 41 Section 21):

> **"Invasion of privacy is the ..., the publicizing of one's private affairs with which the public has no legitimate concern, ... in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. Meetze v. The Associated Press, 230 S.C. 330, 335, 95 S.E.2d 606 (1956)"**

As a matter of law, Defendant Diehl invaded Appellant's financial privacy. The Appellate Panel should rule accordingly.

XIV The SR Erred in holding that the IHOA's failure to approve a swing set, a fence, and a palm bed extension were valid and further erred in ignoring Bylaws Procedures.

On page 29 of the final order the SR made conclusion of law #12 that the disapprovals were valid. From the "facts" supra it is clear that numerous identical or very similar requests had been made throughout the PUD and that the requests met the Covenant' specific restrictions on use as well as the published ARB usage guidelines. In each instance at trial the SR was shown photos, documents, and heard testimony showing that it is more likely than not that the denials were arbitrary, selective, and capricious, violated the implied covenant of fair dealing, and violated the special

obligation under the 3rd Restatement of Servitudes that an HOA has to it's members. As to the swing set, the SR heard unrefuted testimony and evidence that a neighbor who was on the ARB stated he hated children and would never approve a swing set. The SR agreed with the Respondent's explanation that it could use the "aesthetic" excuse to do anything irrespective of whether a use is actually approved (swing sets, palm trees, fences) in the Covenants. One implication of filing covenants is that they place a potential purchaser on notice as to limitations on use. While restrictive covenants place restrictions on property owners they also place obligations on the HOA not to go beyond them and this is the underlying reason why courts have held that ambiguity and lack of a specific restriction will always be resolved in favor of the free use of property. The refusal to consider the Palm Bed extension equated to denial, not deferment as the IHOA claimed. Section 7.2 of the Covenants includes:

> **"In the event the ... Architectural Review Board fails to approve or disapprove any request within thirty (30) days after complete written plans and specifications have been submitted to it, the same shall be deemed denied**

Since the ARB is charged with relating applications to the covenant provisions it is more likely than not that they and the IHOA Board were aware of this. The reason given for "non-approval" was a disputed previous fine. At trial extensive evidence was given of Appellant's demand that the IHOA comply with it's own Bylaws [32] Section 13.3 Procedures which it ignored, imposing an illegal fine and hence an illegal basis for Palm Bed disapproval. At trial Board President William Freiboth testified (TT pg 961 – 1008) that he knew all about Section 13.3 and that Respondent never held the appeal hearing Appellant requested in writing, yet Respondent proceeded with a counter – claim and imposed fines knowing it was not permitted to do so by the Bylaws, which

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[32] **Respondent had not exhausted the administrative remedies it was required to follow before acting against Appellant.**

supports Appellant's assertion that the counter – claim should have been held by the SR to be a violation of the South Carolina Frivolous Proceedings Act.

It is also more likely than not that the ARB, which the IHOA chartered, controlled, appointed members to, took reports from, and whose guidelines are approved by Respondent IHOA, is in fact a committee of the IHOA and is subject to the Bylaws as well --- not an independent entity whose actions the IHOA is not responsible for.

The facts and the law are supportive that the actions relative to the ARB issues, including fines, fees, disapproval, etc, should have been resolved in favor of Appellant.

XV The SR Erred in failing to hold that the obligation to buy cable tv and garbage services from the IHOA, to join it's Recrational Center and to pay Highway 17 fees is a voidable personal services contract.

On Page 18 of the Final Order the SR held that Appellant must do all of the above "because he is subject to the Declarations" because the 3rd Restatement of Servitudes states homeowners have an unconditional obligation to pay assessments, and because SC Code Ann 27-31-190 requires payment of assessments for amenities whether used or not. The later is a legal error because it applies exclusively to Condominium Apartments. The 3rd Restatement applies only to valid assessments for purposes touching and running with the land.

The Final Order correctly noted (Page 4 Para 11) that only single family homeowners, but not the hundreds of condo and town house owners, are required to buy cable and garbage services from the IHOA which buys it from vendors for resale to home owners. The order recognizes that these are not "bulk bills".

The SR made a conclusion of law on Page 19 #6 of the final order that "The Defendant HOA's Contracts for Bulk Cable Television Services and Garbage Collection are Valid and Enforceable ..." The SR based this on his finding that (page 20) "home

owners are not precluded from contracting with third parties". Respondent's counsel, who wrote the order, next addressed FTC regulations about which not a word was spoken at trial and ignored Appellant's argument that whether the contracts between Respondent and it's vendors are valid or not, they are personal service contracts not valid covenants touching and running with the land.

The cable tv, garbage and amenity center matters were before the court at trial as proven by the transcript, and they were argued at length by Appellant with extensive case citations (TT 362 @ 13 through 365 @ 13 and 426 @ 2 through 432 @ 23).

Courts have held that an obligation to pay money for services including using recreational facilities [33] does not "touch and run with the land" and have set aside covenant provisions requiring same as personal service contracts which do not survive a sale of a home and which contract must meet the requirements of the statute of frauds. These obligations do not meet that standard because the covenants require a homeowner to accept services of no specified price and no details for no specified period but do not obligate the HOA to provide it, and are not uniform because only single family homes are not required to participate. As a covenant obligation, they are ambiguous at best and should be set aside when ambiguous in favor of the free use of property. Cases which support these conclusions were read to the Court and include:

> **Lynch, 159 SE at 30; Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997); MidSouth Golf v. Fairfield Harbourside Condominium Assn, 187 N.C. App 22, 31, 652 S.E.2d 378, 384 (2007); Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978; Nesbit v. Nesbit, 1 N.C. 490,495, 1 Cam. & Nor. 318; Cam. & Nor. 318 (1801); Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (N.Y. 1938).**

In his complaint and at trial, Appellant demanded the return of all money

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[33] **Which is distinguished from paying money for the upkeep of common property open to all. The Amenity Center is not open to all members of the IHOA.**

collected for cable, garbage, and amenity center purposes, as well as assessments in general under the theory that the IHOA is not "The Association" anyway.

As a matter of law Respondent had no right to force homeowners to accept and pay for these services from Respondent under the guise of proper covenants. Respondent should be required to cease this practice and to repay the funds collected, at least to Appellant.

XVI The SR erred in holding that Diehl is not liable for mis-handling funds.

Diehl as a management company to whom the IHOA's funds are entrusted is a fiduciary to the IHOA. It is responsible to properly account for and protect the IHOA's funds. The indisputable fact is that DR Horton entrusted certain Capital Contribution money to Diehl which for whatever reason is missing from Diehl's books maintained for the IHOA. As a matter of law no misconduct need be shown, and Diehl has an absolute liability to make up the shortage.

CONCLUSION

1. The Court did not afford Appellant a fair trial and denied him his constitutional due process rights.

2. The Respondent is not The Association and has no rights under the Covenants. All actions predicated on Respondent being The Association must be set aside.

3. Diehl defamed Appellant through republication and the IHOA defamed Appellant through the words of it's officers; and interfered with Appellant's social relationships.

4. The "waivers" in Amendment #1 are deletions applicable to all homeowners.

5. Pebble Creek and The Villas are not subject to the Covenants.

6. The cable, garbage, and recreational center obligations are personal service contracts and must be voided.

7. Defendant Rosemary Toth is personally liable for the distribution of profits.

8. The IHOA is not entitled to attorney fees.

9. The IHOA is not entitled to fines because if failed to exhaust it's own prescribed administrative remedies. Respondent's counter claim is a frivolous proceeding.

10. The IHOA illegally with-held the Member List and is obligated to Appellant for legal costs.

11. The roads in Pebble Creek are owned by Horry County and are not subject to restrictive covenants.

12. As a matter of law no homeowner can be compelled to join or remain a member of Respondent IHOA.

13. As a matter of law, Appellant was entitled to the approval of his swing set, fence, and palm tree extension.

14. Defendant Diehl invaded Appellant's financial privacy by disclosing financial information to the IHOA ARB members.

May 1, 2013

/s/ Ronald Jarmuth

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