

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

**Appeal No. 2013000714**

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**APPEAL FROM HORRY COUNTY  
Court of Common Pleas**

**Ralph P. Stroman, Special Referee**

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

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**Ronald Jarmuth**

**Appellant,**

**v.**

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

**Respondents.**

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**REPLY BRIEF OF APPELLANT**

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

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... iii

**TABLE OF AUTHORITIES** .....v

**CASES** .....v

**STATUTES** .....v

**RULES** ..... vi

**OTHER AUTHORITIES** ..... vi

**ARGUMENTS** .....1

    1.    **March 11, 2013 Order.** .....1

    2.    **Brevity of Certain arguments in Appellant’s Brief.** .....1

    3.    **Controlling Declaratory Judgment Requests ignored by the 2013 Order:** .....1

    4.    **The Trial Court’s prejudicial violations of the Code of Judicial,  
          Conduct and of Defense Counsel’s Violations of the Civil Rules  
          Ignored in the 2013 Order.**.....4

    5.    **No Declaratory Judgment (one way or the other) rendered.**.....6

    6.    **Critique of Specific Allegations in Respondent Brief, by Page.**.....8

**CONCLUSION** .....25

**CERTIFICATE OF COUNSEL**.....

**PROOF OF SERVICE** .....

SC Code Ann § 33-31-720.....	21
SC Code Ann § 33-31-804.....	3
SC Code Ann § 33-31-1301.....	3
SC Code Ann § 33-31-1302.....	3
SC Code Ann § 33-31-1602.....	21

**RULES**

Rule 6, SCRCP .....	9
Rule 43, SCRCP .....	17
Rule 46, SCRCP .....	15
Rule 59, SCRCP .....	7

**OTHER AUTHORITIES**

<u>Am. J. Trial Advoc</u> 293 S.C. 415, 417, 361 S.E. 2d 328, 329 10 Am. J. Trial Advoc. 47 (1986-1987).....	18
<u>Am. Jur., Privacy</u> 77 C.J.S., Right of Privacy, § 1; 41 Am. Jur., Privacy, Section 2 .....	24
<u>Law of Torts</u> W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts, § 15, at 91-92 (5th ed. 1984).....	25
<u>4 Restatement, Torts</u> , Section 867.....	25

## TABLE OF AUTHORITIES

### CASES

Arizona v. Fulminante, 499 U.S. 279 (1991)).....	7
Atlantic Coast Builders & Contractors, LLC, v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 287 (2012).....	17
Bradley v. Guess, 165 S.C. 161, 163 S.E.2d 466 (1932).....	2
Brenco v. S.C. Dep't of Transp., 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005) .....	15
Charleston Lumber Co v Miller II, 338 SC 171 SC 2nd 869 (2000).....	16
Clark v. Clark, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987).....	18
Fields v Melrose 398 S.C. 323, 330, 730 S.E.2d 282, 287 (201 SC CA) .....	16
Gignilliat v Bettis, 385 S.C. 452, 684 S.E.2d 756 (2009) .....	25
Griffin v Capital Cash 10 S.C. 288 (1992), 423 S.E.2d 143 .....	19
Herr ing v. New York 422 U.S. 853 (1975) .....	18
In re Dickey, 395 S.C. 336, 360, 718 S.E.2d 739, 751 (2011) .....	7
In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003).....	7
Kneale v. Bonds, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994) .....	15
O'Shea v Lesser, 308 S.C. 10, 416 S.E.2d 629 (1992).....	14
Queen's Grant v Greenwood 368 S.C. 342, 361, 628 S.E.2nd 902, 913 (Ct. App 2006) .....	20
S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001).....	15
Shealy, 323 S.C. at 355, 479 S.E.2d at 847 .....	20
State v. Mouzon 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) .....	7
Sumter Tobacco Warehouse Co V Phoenix Ins Co, 76 SC 76, 56 SE 654 (1901).....	19
Thomas v. Thomas, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985).....	2
Walsh v. Woods, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) .....	7
Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) .....	7

### STATUTES

SC Code Ann § 33-31-140.....	3
SC Code Ann § 33-31-601.....	24
SC Code Ann § 33-31-612.....	4
SC Code Ann § 33-31-701.....	3

## ARGUMENTS

### 1. March 11, 2013 Order.

The March 11, 2013 Order after the February 4, 2013 hearing made no new findings of fact or conclusions of law. Like the September 10, 2012 Order, it failed to make any of the sought Declaratory Judgment. It left undisturbed the findings and conclusions of September 10, 2012. It failed to find whether specific prejudicial alleged violations of Judicial and Attorney Ethical Rules occurred at and after trial and whether the Special Referee (SR) had prejudicially forgotten to make controlling procedural decisions (e.g., evidence) which is not the exercise of judicial discretion. On page 17 Respondent admits that no such decision was made at the trial level although briefed.

### 2. Brevity of Certain arguments in Appellant's Brief.

On April 18, 2013 Appellant filed a timely motion to write a longer brief, noting that merely reciting details of the issues on appeal would take most of the 50 pages. The Motion was denied hence some issues are briefly treated. A fuller statement of the problems is in the Record in Appellant's September 19, 2012 Motion for New Trial and January 22, 2013 Post-Trial Brief.

### 3. Controlling Declaratory Judgment Requests ignored by the 2013 Order: [1]

At trial and in the Complaints Jarmuth asked the Court to answer the following questions as Declaratory Judgments relating to the South Carolina Non-Profit Corporation Act ("The Act") and the Defendant IHOA's Bylaws: (a) What corporation is named as "The Association" in the Covenants? (and how can the IHOA enforce the covenants when they are not a named party to the covenants?)

"Covenants Sec. 1.3. Association means Murrells Inlet Golf Plantation Association, Inc. " R.p. 3740.

(b) Under the Covenants, can only "The Association" named in the Covenants

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1 Both the 2012 and 2013 Orders were written by Defense Counsel Golding. Honest answers to the ignored issues are fatal to the Defendants.

appoint an Architectural Review Board (ARB)? R.p. 3745.

“Covenants Sec. 3.1. The Association. ... The Association shall be authorized but not required (d) To set up and operate the Architectural Review Board “

(c) Did the Declarant of the Covenants (Plantation) have legally effective privity with Pebble Creek when it filed the Covenants? Plantation sold Pebble Creek January 29, 1999. Plantation filed the Covenants February 8, 1999.

(d) Does S.C. Code Ann. § 30-7-20 require an actual, valid “book and page” entry in the deed to Pebble Creek in order for covenants to be legally indexed (the place for the references is blank)?

“proper indexing supplies inquiry notice of an instrument, while recordation without proper indexing supplies no notice at all.” Thomas v. Thomas, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985) (citing Bradley v. Guess, 165 S.C. 161, 163 S.E.2d 466 (1932)).

(e) Does the absence of a provision in the Covenants providing for attorneys fees to collect fines or penalties bar the award of attorneys fees for the enforcement of covenants; and if allowed, are attorneys fees NOT paid by the IHOA to collect assessments and NOT to enforce covenants awardable as “enforcement of covenants”?

“Covenants Sec 6.1. Creation of the Lien and Personal Obligation of Assessments. The annual and special Assessments, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof, shall be a charge on the Unit.” R.p. 3752.

The IHOA paid insurance deductibles October 15, 2009 (\$2,500 (R.p. 4298) and June 10, 2010 (\$2,500 R.p. 4326) both to Golding. September 27, 2010 Defendant Diehl noted an alleged plant bed edger violation (R.p. 3900). October 11, 2011 IHOA filed a counter – claim for violation of covenants, paying no additional attorney fees or costs.

(f) Are the Contracts and Acts of the IHOA prior to September 2007 void as a matter of law because prior to that no board member was a member of the IHOA and none of them were elected? R.p. 3769.

“Bylaws Article 2. (a) ... no non-owner, ... or assignee shall be a member, nor have voting rights in this Association. The right ... to vote and to hold an office

in the Association, may be exercised by a member “

S.C. Code Ann. §33-31-804. Election of directors. “(a) If the corporation has members entitled to vote ... all the directors ... must be elected at the first annual meeting of members, and at each annual meeting thereafter...”;

S.C. Code Ann. §33-31-701. Annual and regular meetings “(a) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.”

Bylaws Article 3(a) Annual Meetings. “(a) The annual members' meeting shall be held ... on the second Saturday in March of each year”

(g) Is a cash profit from the sale of an easement an “asset”, “income”, or “profit” as defined in “The Act” and thus a “distribution” as defined (and prohibited)?

Sec 33-31-140. Definitions. (11) “Distribution” means the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members,

Sec 33-31-1301. Prohibited distributions. Except as authorized by Section 33-31-1302, a corporation may not make any distributions

Sec 33-31-1302. Authorized distributions. (b) Corporations may make distributions upon dissolution .....

(h) To declare whether a homeowner obligation to buy “personal use” goods or services (cable tv / garbage) from The Association or to pay another entity for services performed outside the PUD on (Highway 17 Connector) a public highway never subject to The Covenants are personal services contracts. The lower court was specifically requested to define what constitutes a personal services contract disguised as a covenant – which was an issue before the trial court. The 2013 Post-trial Order ignored the question which is now left to the Appellate Court. The ruling that the HOA had valid contracts with Highway 17 Association ((R.p. 67) and garbage and cable tv vendors does not address the actual question. The 2013 Order (R.p. 47) said contracts

“for the operation of property owners associations are covenants running with the land”

but none of these services concern the operation of HOA property, and by this rubric nothing can be called a personal service contract since anything has

“a beneficial effect on the value of the owners' properties because it lowers the cost of the services”

which are reasons to enter into personal services. [2] Both orders ignored the request for declaration as to whether covenant provisions holding members liable for the debts of the HOA for goods or services (eg cable contract with HTC) are pre-empted by law:

**S.C. Code Ann. § 33-31-612 Member liability to third parties. A member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation.**

(i) To declare whether a contractor who is not a party to a lawsuit and has no expectation of being joined enjoys litigation privilege for the contractor's republication of defamatory material. The final order was silent on the liability of co-Defendant / contractor KA Diehl for defamatory republication. In the 2013 Order R.p. 74 the SR held that parties to a lawsuit have "absolute privilege" but Diehl was not a party to the lawsuit at the time – and the Order did not name Diehl as benefiting from this - privilege. On R.p. 74 the 2013 Order held that "Communications between officers and employees of a corporation are qualifiedly privileged" but the over 1000 members of the public who were mailed or emailed by Diehl are not "officers or employees" of Diehl nor of the IHOA; the order did not name Diehl here either. Diehl's lack of culpability was unmentioned in the 2013 order as in the 2012 Final Order.

**4. The Trial Court's prejudicial violations of the Code of Judicial Conduct and of Defense Counsel's Violations of the Civil Rules Ignored in the 2013 Order.**

a. SC Code of Judicial Conduct and the SC Civil Rules prohibit [3] certain specific actions by Judicial Officers and Attorneys because they violate the constitutional due process rights and are extremely prejudicial to parties. The Special Referee ("SR") admitted on the record that he was sick and the trial was beyond him, forced the trial to an irregular end, did not bother to read a single case document, and assigned the role of judge to defense counsel who wrote a final order without any guidance from the Special

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2 Not all contracts entered into by a non-profit corporation are enforceable against it's members.

3 They are beyond the realm of judicial discretion.

Referee.

(b) Appellant's Motion for Post-Trial Relief noted that the SR ordered Appellant not to make opening or closing statements; ended the trial early so that (on the record) the SR could take care of personal business because he felt sick and because the SR did not want to sit through additional trial days. The SR confused the SC Condominium Act with the SC Non-Profit Corporation Act; allowed Defense Counsel to write proposed findings of fact and conclusions of law (the final order) without an opportunity to controvert; and conducted an off-the-record investigation into the facts and law since he cited arguments and evidence not mentioned at trial, names not in the transcript, and documents not in the court house. He mistook a contract to pick up garbage cans at a Myrtle Beach office a dozen miles from the PUD for a (non-existent) contract for garbage in the PUD. He forgot that he had stated on the record at the beginning of trial that he would deal with Defense Counsel's serving her trial exhibits on Appellant - for the first time - in the courtroom minutes before trial began, making no such decision. He just forgot; he did not exercise discretion which would be an act found in the record and never ruled "to allow everything". The SR forgot to deal with Defense Counsel Golding naming Chris Sullivan as expert witness after the time agreed (and ordered by the Chief Administrative Judge) ended to depose witnesses. In the second deposition of Lou Astorino on May 25, 2012, R.pp. 1787-1792 Mr. Astorino testified under oath that Golding assaulted him, Appellant, and Appellant's wife in a lull in earlier depositions on March 27, 2012, and that Golding put her face a foot or so in front of Astorino (who she knew was medicated in end-stage renal cancer) during the entire deposition, yelling in his face - over looked because the SR never read the deposition transcripts. The SR also incorporated a prejudicial fraud in the final order - that there were two deeds to Pebble Creek, and that one contained the book / page of the covenants thus making the

reference properly indexed. However the transcript relates that the deed with the entry R.p. 3728 is the deed to the golf course not to Pebble Creek. This is arguably prejudice by the SR (writing this in his final order; cited in the post-trial motion) because at trial the SR never looked at the exhibit, never removed them from the court room, and immediately after the trial Respondent's contract court reporter removed all exhibits from the Court house without the permission of the Clerk of Court. See Appellant's Brief for citations to record and to the specific Ethical Rules applicable. The failure to make decisions is not judicial discretion and the judge's personal reasons stated on the record are not proper reasons for judicial decisions. On November 16, 2012 Appellant wrote the Clerk of Court R.p. 3083 asking to examine the trial exhibits, noting that they were missing from the Court House since immediately after the trial which put this into the record. Jarmuth asked for the logs of what case materials left the clerk's possession from before the trial through November, and to whom and when. There were no logs since nothing was signed out. On January 23, 2013 the Clerk of Court gave Appellant a document R.p. 3084 stating that Sharon Brock, Respondent attorney's contract employee, had the exhibits from immediately after the trial until that moment. These documents and information was provided to the Court for the February 4, 2013 Post-Trial Hearing and the March 11, 2013 Post-Trial Order R.pp. 15-27 ignored the issues.

(c) Post-trial the SR was asked to deal with this. He recused himself. The 2013 Order is silent on the effect of alleged judicial and defense misconduct on the outcome of the trial and on Appellant's constitutional right to present a full case; and is silent on whether or not the cited ethics rules were violated.

5. No Declaratory Judgment (one way or the other) rendered.

The trial court failed to render declaratory judgments on issues which control most of the case about the pre-emptive effects of law and bylaws, and judicial misconduct.

The 2013 order was written almost word for word (just as the 2012 final order was) by Respondent Counsel Golding. The raised but undecided issues are preserved for appeal. The 2013 Order does not add or change a single conclusion or finding made for issues raised at trial and addressed in the 2012 final order. The 2013 Order does not replace or supplement the decisions of the 2012 Order with different rationales or conclusions, leaving the same imperfect conclusions in place. The actual decision that the Court made after the February 4, 2013 Hearing is preserved in a February 21, 2013 email R.p. 3103 from Hon. Judge John, the Chief Administrative Judge who presided at the hearing – to simply deny a retrial; Respondent Counsel was asked to write such a simple order, but instead repeated what she wrote for the SR.

"Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." In re Dickey, 395 S.C. 336, 360, 718 S.E.2d 739, 751 (2011) (quoting In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)).

"When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court". Walsh v. Woods, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion)

"The South Carolina Supreme Court distinguished between "trial errors, which are subject to harmless error analysis," and "structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards." State v. Mouzon 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (quoting Arizona v. Fulminante, 499 U.S. 279 (1991))

6. Critique of Specific Allegations in Respondent Brief, by Page.

Page 1. There is no evidence or testimony that the Declarant "Plantation" intended the IHOA to be "The Association". Later Covenant amendments required payment of

capital contributions to the ICA [4] by name, not to the IHOA. The IHOA never used the name ICA and through 2007 the minutes of every director meeting and the assessment coupons read "International Club Property Owners Association" (R.p. 1562). Other HOA's in the PUD include The Glens, The Cambridge, and the Villas who do everything the IHOA does (including owning common property) that the SR stated the IHOA does and The Villas even has an Amenity Center just as the IHOA does. Every justification cited by the final order in support of IHOA authority is satisfied by each of the other three HOA's – yet none of the four is named in the Covenants, which permits additional HOA associations to exist.

The testimony of her trial witnesses that Respondent quotes is not evidence and at trial many of Goodling's quoted statements were impeached with evidence. At trial Respondent presented almost none of the evidence she cites in her Response and the evidence actually introduced (e.g.. dates on Attorney fee checks) support Appellant.

The Covenants named as "The Association" is the "Murrells Inlet Golf Plantation Association, Inc" (MIGPA) not the IHOA. Both were Chartered well after the Covenant was filed. The Incorporator of the IHOA, Ken Grover, acted in a private capacity R.p. 3786 and he was not the Declarant of the Covenants nor the seller of the PUD to Pebble Creek. Grover was never eligible for membership in the IHOA per it's Bylaws R.p. 3769. The ICA, which the SR found [5] was "The Association" per Amendment 1 to the Covenants, is a legitimate SC non-profit corporation which does not levy assessments because it does not own common property. The IHOA levied assessments for years even though it did not own property until late in 2007. Per Appellant's Brief, and the SR's finding of the identity of "The Association" only the

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4 International Club Association, Inc. ("ICA").

5 Final Order R.p. 39 line 15.

ICA, as "The Association" not any of the other 4 HOAs, [6] has authority to name and operate an ARB under the covenants. All four HOA's own and maintain property. [7]

Page 2. One suit was filed in 2009 and the other in 2010. Respondent paid \$5,000 to defend them [8]. Respondent's counter-claim was filed November 2011, when the brick edgers were installed – and paid nothing for the counter-claim. Appellant, not Respondent, asked for Injunctive Relief. The final order does not grant injunctive relief.

Page 3. Line 6 admits that some of Respondent's witnesses were not "listed in Respondent's January 2012 Brief" thus Appellant had no opportunity to depose them. "Before Trial" is inaccurate because Respondents dropped all of them on Plaintiff's table at the trial with no opportunity to read them. Respondent's list of exhibits and witnesses were received by Appellant (no exhibits) the business day before trial. Many Respondent trial Exhibits were not on the list and were never given Appellant - ever. Per SCRCivP Rule 6(b) these should have been served at least ten days before trial – a prejudicial violation of Appellant's Right to a Fair Trial.

Exhibits. R.pp. 1941 line 20 through p. 1947 line 9. Appellant made a verbal motion to exclude relating "Trial by Ambush". The SR never acted on the motion, although earlier he stated he would consider evidence "subject to objections". Respondent agree this was promised – but never happened – prejudicing Appellant. The SR made NO rulings.

Page 4. "Judge John reviewed the Court record" – but not the CD allegedly seen by SR since the CD disappeared. There is no testimony or evidence as to what was on it

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6 The Glens, The Villas, The Cambridge, and the IHOA.

7 Respondent asserts only the IHOA may own and maintain property. At trial the Court was shown The Villas Complaint which demanded reimbursement because The Villas was required to maintain non-Villas property (International Club Drive). This was settled with the IHOA paying The Villas \$ 10,000 of Central Electric money (Toth Deposition).

8 Insurance deductibles.

and it supposedly contained documents not introduced at trial thus not subject to challenge – a prohibited independent investigation and it was improper to draw inferences without the opportunity for rebuttal. Golding wrote the post-trial order without the Court stating any findings to include in it. This 2013 order was silent about procedural issues relating to the evidence and lack of an opportunity to challenge. The 2013 Order made no new findings to appeal and left the final order untouched.

Page 5. Respondent admits that “MIGPA” not Respondent is named as “The Association” in the Covenants. The Covenants did not subject any land to the Covenants, but said incorporation would be made by later amendment - never done as to Pebble Creek (see Appellant Brief) but done for every other area of the PUD showing that this method was the intent of the Declarant – leaving Pebble Creek out.

“On the same day ...”. Untrue. Pebble Creek was sold with deed delivered and payment made ten days before the Covenants were written and filed. When the Covenants were filed Plantation had no privity in Pebble Creek. Plantation was on actual notice (of his own sale) on January 29, 1999 not February 8, 1999..

Page 6. Exhibit A R.p. 3735 to the Pebble Creek deed did say the property was conveyed subject to Covenants as recorded (at the time) with the Horry County Recorder of Deeds – but none were recorded at the time which is why there was no legally sufficient book / page reference [9]. There is no testimony or evidence that the Covenants as recorded was even seen or agreed to by Sunbelt. Privity requires that Sunbelt must subscribe to later covenants – he didn't.

The Covenants authorized only MIGPA, as the named “Association”, to form an ARB. MIGPA, which exists, has declined to form such an ARB. “Beginning in the early 2000's the ARB Members...”. There is no record in the IHOA Board Minutes that ARB

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9 No correction to the deed was ever filed inserting a book / page reference.

members were appointed by the IHOA prior to late 2007. Respondent admits that the First Covenant Amendment changed the designated Association to ICA. What was incorporated in March, 2001 was IHOA, not ICA. "The Association was formally named" is misleading because ICA, not IHOA, was formally named in the Covenants. IHOA named itself IHOA [10], which conveys no rights, privileges, or obligations under the Covenants to which IHOA is not a party. The exercise of deeded rights without the consent of the parties to a deed does not alter a deed. ICA didn't consent [11].

Page 7. Amendment #4, April 29, 2003 R.p. 3823 attempted to subject The Villas to the Covenants three years after sale - Horton had no privity in 2003 to do so.. The attempt confirms that areas were not subject to the Covenants until named in an Amendment. In 2000 no area was subjected to the Covenants contrary to Golding's assertion that The Villas was so subjected by Amendment 1 R.p. 3786 on May 10, 2000.

On December 29, 1998 when Highway 17 Covenants were filed R.p. 4026 Plantation did not own any of the Highway 17 Property nor any nearby. Any covenant promise by Plantation to pay to maintain Highway 17 property is a personal services contract not a true servitude, which does not survive transfer of ownership. [12] While "The Association assesses each homeowner..." on behalf of Highway 17, Highway 17's Covenant says that Highway 17 will directly assess each homeowner and no document obliges homeowners to pay The Association anything for Highway 17. The IHOA is not a successor to a party to the Highway 17's covenant R.p. 4026.

"In January 2003..." Sunbelt dedicated R.p. 3664 the Pebble Creek roads R.p. 3664 to Horry County October 15, 2002. Horton was not present until late 2003. When

10 Pursuant to IHOA's own Articles of Incorporation, not the Covenants. Articles are not Covenants but only govern the internal workings of a non-profit corporation.

11 ICA's Charter is PI TE 570.

12 Shortly later the Connector Road was deeded to Horry County and is known as Tournament Drive. Since it is not private land no property taxes are levied on it. Horry County Letter directed by Horry County Council, January 6, 2013.

Plantation sold Horton property in 2003 Plantation retained ownership of remaining roads and Horton got a a non-exclusive easement and Horton could only convey it's easement outside Pebble Creek. From 1999 Sunbelt owned the Pebble Creek roads since the Pebble Creek Deed R.p. 3733 left Plantation with a non-exclusive easement of use over those roads. At trial Golding argued that Horton dedicated the Pebble Creek streets on May 18, 2004 (R.p. 3650). Horton is not Sunbelt's vertical successor in ownership of anything.

Page 8. Jarmuth's checks have stated "paid under protest". There is no evidence that Jarmuth used HOA services. Jarmuth's uncontroverted testified is that he brings his garbage to the nearby Horry County recycling center. Jarmuth does not put a garbage can on the street and testified he uses the Ocean not the pool. Entrance to the Amenity Center is by electronic pass. The IHOA did not present entry logs in discovery or at trial to controvert Jarmuth's testimony of non-use. The ARB applications, in evidence, all began with Jarmuth's statement that IHOA authority is disputed.

Page 9. Purchasers of homes were never given the Covenants or Bylaws, neither of which are indexed to The International Club or the IHOA. [13] Until Jarmuth gave them, the IHOA was unaware of Amendments 2 through 5. [14]

Page 10. On December 11, 2011 at the request of the SC Legislature the SC Attorney General issued a letter opinion stating that if a homeowner demands a voter list "to communicate with other homeowners" HOA 's have no discretion and must provide it.[15] Jarmuth wrote he wanted the lists to communicate with fellow homeowners. The statute does not require a homeowner to provide an email address or access a web site. The IHOA provided nothing, rather than only the information they

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13 They are indexed to Murrells Inlet Golf Plantation

14 June 20, 2008 years after the Declarant sold his last home lot. In September 2007 Horton allowed the first election of board members

15 Hon. Judge John was provided a copy.

claimed they were allowed to give. The July 24, 2008 request was a year before the Complaint was filed.[16] There is no evidence that Jarmuth received or accessed the IHOA web site or received the social media list aka "voter list "in the past.[17]

June 17, 2009 R.p. 3836 the IHOA bought the "front entrance" from Horton R.p. 3836 for \$5.<sup>00</sup> and on April 20, 2010 sold an easement to Central Electric for \$ 83,000 a big profit. This money was income, not an overcharge of homeowners.[18] The IHOA did not take a tax deduction for the money it gave to the homeowners.[19] Maureen Sullivan testified at trial that Golding advised them on the sale but not on distributing money. The minutes state that Toth [20] voted for the sale and distribution. At each year's annual meeting the owners vote to place excess revenue in reserves because the IHOA CPA has stated the only legal use is to credit excesses to future assessments or place the money in the reserves and any other use is taxable income. [21]

Page 11. Trial testimony and photos of the Sobczyk swing set showed the IHOA approved a swing set in the corresponding spot on Sobczyk's side yard (same house model). No one has ever denied IHOA ARB member Cartman made his statement. [22] The evidence is that the ARB never met to impose a fine on anyone and Diehl employees Case and Abel testified that Diehl imposed the fines on their own without a vote of the

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16 Golding writes that it was after the Complaint was filed.

17 The list included non-owners in foreign countries and other states, and renters.

18 The IHOA's records show they paid taxes on the profit, while none is due for assessment overcharges.

19 April 19, 2010 R.p. 3523 Board Special Meeting to approve sale and use of the money.

20 Toth was also on Highway 17's Board which got no money when Central Electric crossed Tournament Drive since Horry County by dedication owns Tournament Drive. This is additional evidence that a Horry County dedication is a complete taking of title.

21 The IRS considers charges for services to homeowners such as cable tv or garbage as non-assessment income even if collected as assessments. R.p. 3260.

22 At trial photos were shown that Cartman was throwing used hypodermic needles where Jarmuth's children play in the side yard, and police reports are on file. The "wall" was laid per the suggestion of the Horry County Police when ARB member Cartman was driving stakes (photos at trial) into Jarmuth's irrigation system along their common side yard lot line. R.pp. 3891, 3892, 3893, 3894, 3896.

ARB or the IHOA board. The ARB charter R.p. 4404 from the IHOA Board does not grant the ARB that authority and likewise the Diehl contract lacks that delegation of authority. There is no evidence that the ARB has ever voted to issue any violation notices either – Diehl employees admit they do this on their own to earn Diehl \$ 10 per notice. Diehl levied a \$ 50 fine [September 27, 2010 R.p. 3900] on Jarmuth even before the ARB met on the plant bed edger issue.

Per the Clerk of Court the SR never signed out any deposition.

Page 12. Jarmuth sent two letters per Bylaws Section 13.3 demanding a “pre-fine” hearing which Freiboth testified he ignored. Bylaws 13.3.3 says no fine may be imposed before such a hearing is Completed. The SR and Judge John ignored this issue. No minutes exist showing that the fine was imposed by the IHOA and Diehl employee Abel admitted she imposes the fines on her own. No quorum existed for the 2012 Palm Bed ARB consideration because Bob German was both a board and ARB member, a Bylaws violation and member Charles Roche Defendant Toth’s husband had a conflict of interest, leaving only one viable ARB member. [23] The lower Court ignored this issue in the final and in 2013 orders (there is no finding on the issue).

Page 13. Jarmuth sought the equitable relief of the return of assessments and paid fines, repayment of the Central Electric distribution, Diehl’s return of missing Capital Contribution deposits, and damages for defamation. Jarmuth sought an injunction.

Page 14. The IHOA admits there is no direct limitation on plant bed edgers or swing sets.[24] Golding is wrong about cases O’Shea v Lesser which actually reads

“an action for breach of restrictive covenants was at law, because relief sought was general damages for loss of view and invasion of privacy”

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23 Transcript R,pp. 2127, 2128

24 In evidence was the IHOA approval of dozens of swing sets, fences, walls, and the allowance of plant bed edgers throughout the community without requiring ARB approval including some at the home of the ARB Chairman R.pp. 4025, 4026.

An honestly applicable case is Kneate v. Bonds, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994) (“An action to enforce restrictive covenants by injunction is in equity.”) and S.C. Dep’t of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). The SC Supreme Court has held that such actions are subject to de nova review by the Appellate Court: Brenco v. S.C. Dep’t of Transp., 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005

“action is one to enforce restrictive covenants by injunction, it is in equity, we may find facts in accordance with our own view of the evidence.”

The Two Complaints were filed as a derivative action on behalf of the homeowners, an action in defamation, a demand for declaratory judgment to interpret the SC Non-Profit Corporation Act, The Covenants, and Bylaws; for injunctive relief; for invasion of privacy, etc. The appeal includes procedural misconduct by the trial judge and defense counsel which is independent of the counts themselves.

Page 15. The issues include violation of judicial canons including the absolute prohibition on inviting proposed findings and conclusions without allowing an opportunity to controvert, that the the SR conducted an independent investigation and cited evidence and arguments never raised at trial. An abuse of discretion occurs, when the only covenant provision [25] allowing for fees is for non-payment of assessments and when the defendant’s evidence shows that no money was paid to enforce the covenants.

Page 16. The issues on appeal were raised by letter August 28, 2012 R.p. 3078 to the SR before the final order was entered, with a timely 98 page motion filed September 19, 2012 days after the final order. The filing and at trial objections preserved the issues for appeal. Appellant complied with SCRCivP Rule 46 (Exceptions Unnecessary). When the trial judge said “I don’t want to hear about that again” R.p. 2093 and 2247 relating

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25 The provision cited by Respondent for attorneys fees is in the Bylaws, which has the caveat of requiring a hearing which Defendant admitted not conducting. Bylaws do not constitute a covenant.

to objections on witnesses, evidence, length of trial, or decisions on the conduct of trial, no time to call a subpoenaed witness in the courtroom. (Defendant Toth) that must be obeyed. At trial and post-trial the applicability of the 4th Restatement of Servitudes and inapplicability of the Restatement of Contracts [26] was raised (see Appellant Brief). Where pre-emptive laws apply common law and covenant provisions are irrelevant. The controlling pre-emptive laws affect every issue relating to HOA operations. Contracts and decisions by a board which per the bylaws can not hold office are per se ultra vires. Good faith is irrelevant when money held by a fiduciary comes up missing. Only the entity named in the covenants can be The Association and enforce the covenants. A person without privity can not file covenants and lacks it after delivering a deed and receiving payment. Homeowners and non-owners are not officers or employees of a corporation and an outside contractor's communications to them are never privileged. Every issue cited by Respondent on pages 16 and 17 are of record at trial and in the Post-Trial motion and in the January 22, 2013 Brief and Memo. On Line 10 of Page 17 Respondent admits that no ruling was ever made on the issues Jarmuth asserts are without a ruling. The short conclusory statements are sufficient to show prejudicial errors.

Pages 17-18 Fields v Melrose 398 S.C. 323, 330, 730 S.E.2d 282, 287 (201 SC CA) does not hold that an issue is abandoned without supporting case citations in a brief, but rather that issues are abandoned if not discussed at all in the brief.

Page 18. The post-trial order made no new findings and conclusions to challenge – it affirmed those made in the final order or ignored issues entirely. In Charleston Lumber Co v Miller II, 338 SC 171 SC 2nd 869 (2000) the Supreme Court held that a party had to appeal new rulings on issues but in 2013 the trial court left the final order

26 The phrase “business judgment” was NEVER spoken at trial and appeared for the first time when Golding wrote it into the final order.

unmodified. The post-trial court did not address the violations of judicial ethics or gross violations of rules of procedure which are not subject to judicial discretion.

In Atlantic Coast Builders & Contractors, LLC, v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 287 (2012) the Court ruled that the 2-issue rule applies (only) where a finding of fact or conclusion of law is viable based on one of many alternative reasons cited in a final order. In the post-trial motion, brief, and appeal, for every issue appealed, every rationale (where one was given, and none exists for those ignored) used at the trial level was challenged. All grounds used to support the findings and conclusions were appealed; none were left unmentioned.

Page 20, Discretion. The SR did not exercise discretion as he made no decision at all on evidentiary and witness issues. At trial Jarmuth handed the SR a “dump” R.p. 3071 of the file names of the evidence provided in discovery [27] and marked up copies of Respondent’s January 13, 2012 R.p. 3089 and August 6, 2012 R.p. 3094 evidence / witness lists showing evidence not produced in discovery, new witnesses listed post-deposition, and evidence identified for the first time at trial start. Post-trial Appellant identified Respondent additional evidence R.p. 1927 introduced during trial [28] not in discovery nor on any of her lists. No oversize exhibit plat was provided by Respondant in discovery. After reducing the time the SR allowed Appellant for trial from five days to two and a half, he then allotted half a day (allocated to Appellant) to Respondent for her three out-of-turn witnesses.

Page 21. SCRCivP Rule 43(j) provides that the amount of time allowed for statements rests within the trial judge's discretion but he is not permitted to bar them completely. [29] Center v. Kelton (1912) 20 Cal.App. 611, 615, 129 P 960, 961. The right

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27 Did not contain the documents marked as “new” on Respondent’s Exhibit Lists.

28 None of this was impeachment material.

29 “This basically means counsel may be restricted to a discussion of matters relevant to

to present opening and closing arguments

“begins with the fundamental procedural right to be heard, which is the right to give a closing argument,” - 293 S.C. 415, 417, 361 S.E. 2d 328, 329 10 Am. J. Trial Advoc. 47 (1986-1987). “A party has a constitutional right under the Sixth Amendment to the U.S. Constitution to have his or her counsel make a closing argument. Herring v. New York 422 U.S. 853 (1975)

Clark v. Clark, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987) does not hold that a closing argument may be skipped in a non-jury case (as claimed by Golding), but rather that the plaintiff must “plead the ultimate facts which will be proved at trial”.

Page 22. Appellant stated he needed an extra half day to call Defendant Toth, to make up for the half day consumed by the three out-of-turn witnesses. This was refused. The refusal was clearly prejudicial and unconstitutional. The consent agreement for the Order of Reference was predicated on the SR’s agreement to conduct a five day trial following the Court’s refusal from January through July 2012 to allocate a week of court time. [30]

Page 22-23. Any inference by the trial court that Amendment 1 in 2000 was for “The Villas” is irrational since The Villas was (improperly) subjected to the Covenants by Amendment 4 December 28, 2004. [31] Respondent’s expert witness, Jeffrey King, testified R.p. 2716 that The Villas was not subjected to the Covenants by Amendment 1. At trial R.p. 2839 IHOA President Freiboth conceded that when any area was subjected to the Covenants it was specifically named, but Amendment 1 never named The Villas nor stated the area where The Villas stands. At trial the issue of Covenants and The Villas was thus raised – and the controlling issue of Declarant’s lack of privity when Amendment 4 was enacted is absent from the final order and the 2013 order.

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the case and restrained from wasting time by useless repetition”

30 It is suspicious that Golding consistently stated at roster calls that only 3 days was needed.

31 Amendment 4 R.p. 3824 Para #1 reads that The Villas is subject to ALL covenant restrictions which is the opposite of the trial court’s conclusion that the intent of Amendment 1 was for The Villas to be subject to NO restrictions.

Page 24. Pyle at deposition never stated that waivers were for the benefit of The Villas and could not identify why waivers not deletions were written R.p. 2750 and stated he did not write or recall the Covenants. At trial R.pp. 2738 -2742 Mr. King stated he never read the Covenants about which he was testifying and couldn't even find The Villas on the Plats. Respondent and the trial court stated that the IHOA acted as The Association but failed to find authority in the Covenants to support that, nor was it shown that the IHOA is even a party to The Covenants. [32]

Page 25-26. Jarmuth's position is that MIGPA is The Association but if it isn't it is ICA, which still leaves IHOA out. Griffin v Capital Cash 10 S.C. 288 (1992) 423 S.E.2d 143 holds only that a corporation can be sued and served in any name it actually used in business. The IHOA used "International Club Property Owners Association Inc" exclusively through 2007 but it NEVER used the ICA name. At trial Respondent never claimed the IHOA used the ICA name and raises this argument for the first time on appeal. The ICA is a separate corporation Per S.C. Code Ann. §333-4-101 (b)(1) and (4) the IHOA may not use or gain rights under the ICA name. The correct point of Sumter Tobacco Warehouse Co V Phoenix Ins Co, 76 SC 76, 56 SE 654 (1901) was that slight and obvious mis-spelling in contracts do not invalidate them if both parties understand the intended parties to the contract which is promptly corrected. Sumter actually used the new name in place of the old name.

Page 27. The Villas, the Glens and The Cambridge are HOA's in the same PUD as The IHOA, own their own common areas, have officers, "collect assessments, hold meetings, and provide" the same cable and garbage services to their homeowners as the IHOA does for the rest of the PUD. Under Respondent's logic each has a claim to be "The Association". The IHOA was NOT incorporated by the Developer R Scott Pyle or

by Plantation AD. The "Race" theory applies to setting priorities for claims in equity (e.g., which lien has priority) but a verified deed no matter when recorded is always admissible in a claim against a seller. The Pebble Creek Deed was verified, paid for, and delivered on January 29, 1999 and was effective against Plantation at that moment.

Page 28. This also satisfies Shealy, 323 S.C. at 355, 479 S.E.2d at 847 because the Plantation's acceptance of the payment and actual delivery of the deed to Sunbelt evidenced both intent to deliver and actual parting of control of the deed. At trial Respondent's own expert witness, King, testified that with a defect in property reference no property is subjected to the covenants.

Page 29. The board had no legal authority to enter into these contracts because the members were ineligible to hold office as none were homeowners nor elected. See Appellant's Brief for authority that membership in Country Clubs and Amenity Centers is a personal service contract not a true covenant. The Connector Road Covenant is not a covenant in the Pebble Creek chain of title.

Page 30. Queen's Grant v Greenwood 368 S.C. 342, 361, 628 S.E.2d 902, 913 (ct. App 2006) applies only to land actually owned by the HOA. South Carolina has a Condominium Act, 27-31 et. seq. which recognizes their special situation. At trial and in the final order Golding cited the Condo Act, not her new appellate argument. Her cases relating to cable and garbage as valid covenants involve condominiums where the issue were costs to the HOA to repair or upgrade existing common infrastructure (which is owned in Pebble Creek by homeowners, not the HOA). In cases she cited it was held that a majority of the homeowners had to vote for the cable service or it's modification.

Page 31. Pebble Creek Roads. If the roads are private the IHOA must pay taxes on them – but they do not. At trial in evidence was a letter from Horry County to the IHOA stating that Horry County "owns" the roads (August 24, 2009 R.p. 4295, On

On January 6, 2013 Horry County wrote a letter filed prior to the post-trial hearing saying Horry County owns the roads and that the IHOA would otherwise pay taxes on the roads, but does not. In her January 29, 2013 Memo R.p. 775 line 6 Golding wrote that the IHOA acknowledged that the streets are NOT private property. HCC 18-4-2 Sec 2 Street Design Standards R.p. 3215 requires streets in major PUD's to be deeded to the County or if not, maintained by the HOA and taxed. Respondents Exhibit #23 R.p. 4191 , "Horry County Road Warranty Agreement" (a standard Horry County form) reads for every dedication "The developer shall give to Horry County fee simple title". Appellant Brief states the authority that a government taking extinguishes all prior deeds. The County Council Resolution for Pebble Creek Roads R.p. 3629 satisfies the requirement of law for evidence of taking without the necessity of an actual deed since the owner offered it.

Page 32. Voter lists. At trial [33] and post-trial Appellant argued and the Court ignored S.C. Code Ann. §33- 31-1602 which Appellant argued is pre-emptive and instead focused on S.C. Code Ann. §33-31-720. On December 11, 2011 the SC Attorney General wrote an opinion R.p. 3086 on the issue at the request of the Legislature (provided for the Post-Trial hearing) which holds that Section 33-31-1602 controls and HOA's may not impose any test of intent. Respondent's footnote 12, a September 13, 2011 Horry County letter to Appellant, R.p. 4366 says that all Horry County road resolutions are filed with the Recorder of Deeds and offered no opinion on the PUD's covenants. The definitive January 6, 2013 R.p. 3100 Horry County Council letter says that Horry County owns the Pebble Creek roads R.p. 4295.

Page 33. At trial Respondent claimed it was a refund of an overcharge for services Footnote 14 which claims "association members voted to grant an easement to Central

Electric” is a lie. The April 19, 2010 Minutes of the Board’s meeting R.p. 3523 is admissible per SCREvid 1005 and reflects that a vote was demanded by the homeowners and refused by the Board, as was admitted by Defendant / Board President Toth - Deposition R.p. 1425 line 25, R.p. 1483 lines 16-17 and she admitted she voted to distribute the cash. At trial R.p. 2563 line 16 Defense witness / Board Member Sullivan authenticated the document and admitted a vote was demanded and refused.

Page 35. Respondent’s witness Freiboth testified R.pp. 1214-1215 that the advice of Counsel was specifically on the sale [34]; there was no testimony that they sought advice on the use of the proceeds. The Order is silent that IHOA Bylaws Section 11 prohibited any distribution of proceeds from a sale – no business rule discretion.

Page 36 Defamation. Astorino’s contact with Fletcher and Templeton was “official” related to ARB issues. Fletcher was an IHOA ARB member and Templeton was an HOA Board member. Butryn testified that Templeton as a Board Member instructed Butryn to fire P. Pizzi because he was seen going into Jarmuth’s house. Respondent raises the argument “no official capacity” for the first time in this appeal. The Diehl communications were made between Diehl and the public, not between Diehl and it’s employer Diehl republished the material. Home owners and the public are not “servants, business associates, officers, or agents” of Diehl or the IHOA and communications to stock holders is unprivileged. Diehl sent the defamations by mail [35], email [36], and posted them on Diehl’s web site; they were sent world-wide beyond the physical limits of the PUD. R.pp. 3494, 3495, 3711.

Page 37. At trial Respondent provided no explanation why Horton’s records showed more money given to Diehl than Diehl’s records showed credited to the IHOA.

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34 Home owners were demanding that Central Electric be forced to go to court for a condemnation proceeding and a formal valuation of damages.

35 By Diehl’s contractor Carolina Mail House who billed Diehl, not the IHOA.

36 By Diehl employee Julie Case.

A CPA who examines only Diehl records would not catch “short deposits”. Freiboth [37] could not explain the discrepancy. Both trial court orders are silent on the discrepancy in account records. The money was not collected by Horton “on behalf of” but rather was Horton’s own obligation under the covenants then in place.

Page 38 ARB issues. If the IHOA is not “the Association” or Pebble Creek is not subject to the Covenants than the IHOA decision making is non-existent. The collision between Restatement of Contracts v Restatement of Servitudes – discretion in business setting v obligation to homeowners is in Appellant’s Brief and argued at trial but ignored in the orders. Cases upholding “aesthetic” based decisions involved an HOA’s showing exactly how the “aesthetic” aspects of life would be degraded – something the IHOA failed to even mention. In actuality an ARB member openly hostile to children was destroying Appellant’s irrigation system and endangering Appellant’s children (photos at trial) and the ARB exercised selective blunt power without an objective testable justification since an identical swingset at Harrogate was approved (photos in evidence R.p. 3145. Appellant’s swing set would be hidden from view behind Jarmuth’s approved Palm Tree bed with under-plantings. Swing sets are an explicitly allowed use.

Page 40 Association Fines. Jarmuth served two written demands for a hearing. Respondent’s pre-appeal position was that the ARB is not subject to the Bylaws and can do whatever it wants ignoring the IHOA Charter which gives no authority for fines.. Respondent omitted Section 13.3.3 which prohibits imposition of a fine or sanction until a hearing actually is completed – no hearing no sanction. It has no “if” or “may” in it.

13.3.3 ... 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. ... (wit) a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director or other individual who delivered such notice. ... The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed, if any

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37 Freiboth was not offered as a financial expert and did not explain what he did.

On October 14, 2010 R.p. 3919 the IHOA wrote Jarmuth:

"At this time the only recourse for appeal of the decisions made by the ARB is to direct the appeal to the present Board of Directors. Unless you successfully appeal the ARB decision..."

Respondent's argument that the hearing is "optional" is stated for the first time in appeal and is defeated because of the IHOA's letter. Having offered a hearing they were obligated to hold one. The trial court ignored the failure to hold a hearing it offered - administrative due process - in both orders. Appellant requested the hearing - twice R.p. 3916, 3921. Freiboth testified he received these and ignored them.

Page 42 Attorney Fees. See supra and Appellant's Brief. The IHOA spent no money on the counter-claim.

Page 43 Association Membership. See supra and Appellant's Brief. The trial court orders ignored the pre-emptive effect of SC Code Ann 33-31-601 [38] (Membership) which holds that no one can be forced to join in the first place. The question of quitting is irrelevant if one is not a member - Legislative Notes. The assertion that a homeowner can escape by selling a home is at odds with the Restatement of Servitudes:

"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"

Page 44 Diehl and Privacy Rights. The IHOA's ARB Charter R.p. 4404 and the IHOA prescribed ARB Forms R.p. 3937 exclusively deal with architectural / zoning issues. This "entitlement" argument is raised the first time on appeal. That argument would mean a volunteer cleaning the pool deck could read everyone's accounts. See Appellant Brief and supra.

The "right of privacy" has been defined as the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity. 77 C.J.S., Right of Privacy, § 1; 41 Am. Jur., Privacy, Section 2. "A person who

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38 "Admission of Members (b) No person may be admitted as a member without his consent."

unreasonably and seriously interferes with another's interests in not having his affairs known to others or his likeness exhibited to the public is liable to the other." 4 Restatement, Torts, Section 867.

There are "four basic torts under the right to privacy: (1) intrusion, (2) disclosure, (3) false light, and (4) appropriation." - Gignilliat v Bettis, 385 S.C. 452, 684 S.E.2d 756 (2009) citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts, § 15, at 91-92 (5th ed. 1984)

The conduct complained of is #2 in Gignilliat, unwarranted disclosure with its own consequential trade damages (e.g., loss of a contract, disapproval of an ARB application) which need not include "suffering, shame, or humiliation". Respondent's analysis is directed at #3, "false light", whose elements include the human aspect. Appellant clearly has suffered a negative impact on a contractual arrangement (ARB application) as a consequence of Diehl's unjustified disclosure. At trial Respondent never plead that the Diehl disclosure required pleading a human impact and the Respondent failed to present any testimony at all as to how homeowner financial information had anything to do with the ARB committee's operation.

#### CONCLUSION

The lower court in 2013 left unchanged the final order of 2012 rendering no new findings of fact or conclusions of law. Appellant timely has noted the issues on appeal but the lower court has failed to address those controlling the case, particularly those arising from pre-emptive law, as well as the prejudicial issues arising from the conduct of the trial and formulation of the final order. Respondent presents some arguments for the first time in the appeal, depends on inappropriate legal authorities, and inaccurately represented the testimony and evidence at trial.

July 15, 2013

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Ronald Jarmuth

FORM 16  
CERTIFICATE OF COUNSEL IN FINAL REPLY BRIEF

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No. 2000-CP-26-3596  
Consolidated with  
Case No. 2010-CP-26-11320

Ronald Jarmuth, Pro Se

Appellant

v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

July 15, 2013



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**IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

**Appeal No. 2013000714**

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**APPEAL FROM HORRY COUNTY  
Court of Common Pleas**

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**CASE NUMBER 2009-CP-26-3596  
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CASE NUMBER 2010-CP-26-11320**

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**Ronald Jarmuth, Appellant,**

**v.**

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

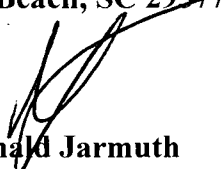
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**PROOF OF SERVICE**

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**I certify that on July 16, 2013 I hand served Appellant's Reply Brief on  
Respondents through Respondent's common counsel, Henrietta Golding; McNair  
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**July 16, 2013**

  
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