

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. 2009-CP-26-3596
Consolidated with
Case No, 2010-CP-26-11320

Appeal No. 2013-000714

RECEIVED

AUG 06 2013

SC Court of Appeals

Ronald Jarmuth,Appellant,

v.

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

APPELLANT'S OPPOSITION TO
RESPONDENT'S
MOTION TO AMEND THE RECORD

Appellant Ronald Jarmuth opposes the Motion of Respondents through Counsel in all respects. The Record on Appeal already includes every document designated by either party – to the extent that any document exists. Every line of text referred to in any Brief is present in the Record on Appeal. Respondent's Counsel has known this since at least July 29, 2013, several days before said Counsel filed the Motion to Amend.

The real problem is that the Special Referee never saw any of the material in the Record on Appeal and thus never had them to consider when formulating his final order. The Record on Appeal presents a false image of what the Special Referee used to prepare

his final order. Per the Clerk of Court (Record on Appeal pp 3083 – 3085) the Special Referee never bothered to obtain (or have delivered to the trial courtroom) any pleading or order: neither the Complaint, Answers, Motions, Orders, or Deposition Testimony pre-filed with the Court for use as if it was witness testimony at trial. The only documents present in the Courtroom during the trial were the evidence books ¹ of the parties which the Special Referee said he would consider after the trial was over, but never did. During the trial the Special Referee never opened a single evidence book to refer to any page and never looked at a single exhibit when court was not in session (lunch and evenings). Likewise per the Clerk of Court (Record on Appeal pp. 3084 – 3085) immediately after trial Respondent's contract employee, Sharon Brock ² removed all evidence books from the Courtroom without the knowledge or consent of the Clerk of Court and kept them at her house until January 23, 2013, four months after the Special Referee entered his Order. A major point of Appellant's appeal is that the only thing that the Special Referee used to formulate his final order was the draft order given him by Respondent's Counsel which he considered ex-parte and which he adopted word for word without consideration of any evidence. When challenged by Appellant, the Special Referee recused himself (Record on Appeal p. 13) rather than defend his actions. The Special Referee has never had to explain how his forty – eight page final order which referred to exhibits, pleadings, deposition testimony and orders without ever actually seeing any of those documents. Further, per the trial transcript, at trial Respondent's counsel never mentioned most of the exhibits she

¹ None of the evidence was actually admitted by the Special Referee. At trial he stated his intention of making a decision on admissibility at the end of trial, but failed to do so.

² A contract court reporter selected by Respondent's counsel over Appellant's objections. Appellant requested an "official" court reporter. The trial court refused to provide same. Per Respondent's counsel they use Sharon Brock frequently for depositions.

has designated for inclusion in the Record on Appeal or which she refers to in her Brief.

Respondent's Motion is frivolous and filed for improper purpose. Every exhibit line of text or word of testimony which either party relies on in their brief is already reproduced and included in the Record on Appeal as it was presented³ to the Trial Court. There are no pages missing in the Court's copies of the Record on Appeal nor in Respondent's copies. Nothing has been added which was not presented to the judicial officer either at trial or in post-trial proceedings. Respondent's Counsel knew this from at least July 29, 2013 days before Respondent filed the Motion to Amend.

Appellant has not "consented" to anything and Respondent's claim that Appellant has, page 2 of Respondent's Motion, middle, is untrue. As Appellant will point out further in, there are no documents in the Record on Appeal that were not before the trial court either at trial or in the post-trial proceedings.

Respondent either was or should have been aware long ago of any of the "issues" Respondent's counsel claims to have discovered at the last possible moment.

On July 31, 2013 when Respondent's Counsel mailed the Motion to Amend the Record (and the Motion for an Extension of Time) Respondent's Counsel had known for at least two days that none of the "issues" they cite actually exists – if they ever existed at all. On July 29, 2013 the United States Post Office delivered (Exhibit A) (to Respondent's Counsel) Petitioner's July 26, 2013 letter to Respondent with Exhibits (Exhibit B) which responded to a July 26, 2013 email (Exhibit C) from Respondent's counsel stating just about every issue now presented by Motion. On July 29, 2013 Respondent filed (by hand delivery in Columbia at the Court of Appeals) a copy of the July 26, 2013 letter with the

³ Meaning filed with the Court or included in an Exhibit Book for potential admission.

Court of Appeals as an attachment to a July 26, 2013 letter to the Clerk of Court (Exhibit D) alerting the Court of Appeals to the issues raised by Respondent's Counsel and that all issues had been dealt with or did not actually exist. On July 29, 2013, three days before the deadline for Appellant to file the Record on Appeal, Appellant made all the changes to the copies of the Record on Appeal in the Court of Appeals related to the issues raised by Respondent in the July 26, 2013 email (Exhibit C) from Respondent's Counsel.

The Copies of the Record on Appeal in the Court of Appeals and in the hands of Respondent's Counsel are correct and every document cited in every brief accurately reflects how it was presented to the Trial Court. Every other document cited by Respondent, both in the July 26, 2013 email to Appellant in the July 31, 2013 Motion, are present in the Record on Appeal – and Counsel for Respondent knew this at least two days before signing and filing the Motion to Amend and the Motion for an Extension.

I Details – Supposed Omissions

Respondent's Counsel has long had documents sufficient to translate source document page numbers to Record on Appeal page numbers to convert the Initial Response Brief into the Final Response Brief.

Respondent's Counsel Has Known that the Motion to Amend is Moot or Frivolous

No later than January 23, 2012 Respondent's Counsel had a copy of the trial transcript. This is evidenced because on that date Respondent's Counsel filed a Pleading which cited to the transcript by page and line (January 23, 2012 Defendant's Brief in Opposition to Post-Trial Motion; at Record on Appeal beginning at Page 757 by demand of Respondent's Counsel). By inspection of the transcript and corresponding pages in the Record on Appeal, Respondent's counsel knew that any trial transcript page could be

translated to a Record on Appeal page by merely adding “1865” to the trial transcript page number. Respondent’s counsel was explicitly told of that by Appellant in the July 26, 2013 letter to said Counsel.

On June 12, 2013 Appellant served and filed Appellant’s Designation of Record on Appeal incorporating any documents designated by Respondent on June 3, 2013 with those tentatively designated by Appellant on April 22, 2013. For over six weeks Respondent’s counsel has known what Appellant planned to incorporate in the Record on Appeal as it consolidated the designations of both parties.

On July 11, 2013 twenty (20) days before Respondent’s Counsel filed the Motion to Amend the Record, Respondent’s Counsel was hand delivered a copy of the Record on Appeal by Appellant. On July 11, 2013 Appellant filed a Form 14 informing the Clerk of Court of this fact (Exhibit E). Respondent would have the Court believe that the alleged discrepancies were so subtle that they went un-noticed until the last possible moment.

On July 29, 2013 Respondent was in physical possession of the correct Record on Appeal material that said Counsel claimed on July 31, 2013 is either missing or incorrect.

On July 29, 2013 the Deputy Clerk of Court observed Appellant make the changes sought by Appellant to the Court’s copies of the Record on Appeal – to the extent that changes were needed (see details below).

Record on Appeal As Filed Satisfies the Records’ Function

The central purpose of the Record on Appeal is to enable the Appellate Panel to independently assess any document referred to by either party in their Appellate Briefs. That assessment requires that the Record on Appeal reflect each document as it was presented to the Trial Court, complete with any markings which it contained as a Trial

Exhibit.

Respondent's objections to marks on documents is peculiar since Respondent heavily marked up Respondent's Exhibit "J", Record on Appeal pp. 4422 – 4424.

Any document not explicitly referred to by either party in a Brief is irrelevant to the sole task of a party when transitioning from an Initial to a Final Brief. Many if not most of the pages cited in Respondent's motion are thus irrelevant.

At this stage in the Appeal the only task before the parties, respecting their briefs, is the replacement of references to documents and pages within Initial Briefs with page number references to the Record on Appeal. The Record as it stands is sufficient for that..

Why Respondent's "Issues" are Frivolous or Non-Existent

Respondent's Issue #1

"Order Denying Respondents' Motion to Dismiss filed May 16, 2012" "omitted from the Record".

This designated Order does not exist. The Order they desire to include is already in the Record on Appeal at page 6.

On July 26, 2013, E-Mail from Respondent's Counsel that day (Exhibit C) claimed that what was missing was

"The Order Denying Respondents' Motion to Dismiss filed May 6, 2012"

Respondent attached to the email the same Order which now appears as the third page to Respondent's Exhibit B to Respondent's Motion. That Order is titled "Disposition of Motions" and is "clocked" (filed) May 17, 2012. It does not bear the title of the non-existent Order which Respondent's Counsel designated and now complains is missing, and does not bear either the date cited on the July 26, 2013 email to Appellant ("May 6") nor the date in Respondent's Motion ("May 16").

It is surprising that, despite McNair Law firm having almost screamed at trivial “additions” to documents, McNair’s proposed Order has McNair’s addition to the Order at the bottom – the date stamp that McNair apparently received the Order from the Court. This “stamp” is not in the actual order.

The Court is asked to note that the Record on Appeal, as filed, already contains the Order as proposed by Respondent (on physical page 3 to Respondent’s Exhibit B). It is attached as Exhibit E to this Motion.⁴ The current Record on Appeal Index as included in the Record on Appeal (Exhibit F), which was in the possession of Respondent Counsel three days before the Motion was filed ends with the Proof of Service as Page 4450.

The Order was actually designated by Appellant, not Respondent, and its presence was thus intended by Appellant and not considered necessary by Respondent – since Respondent did not designate the Order they now present for inclusion.

Thus Respondent’s Issue #1 is moot or non-existent.

Respondent’s Issue #2

“Trial Transcript pp. 1012, 1014, 1016, 1018, 1020, 1022, 1024, 1026, 1028, 1030, 1032, and 1034” “omitted from the record”

The pages are not missing from anyone’s copy of the Record on Appeal.

This was #5 in the email from Respondent’s Counsel, except the email used the phrase “are missing”.

On July 29, 2013 Appellant examined each of the fourteen (14) bound copies of the Record on Appeal at the Court of Appeals and none of them were missing those pages – and neither is Appellant’s copy.

No later than January 23, 2012 Respondent’s Counsel had physical possession of

⁴ Duplexed pages 5 and 6. The Order is at page 6.

those pages when Respondent's Counsel received the complete Trial Transcript and used it in a pleading filed by said counsel that same day. Respondent admits that counsel has possession of the duplexed "odd" pages on the obverse of each sheet and thus the issue, if it existed at all, was no impediment to converting transcript page citations to Record on Appeal page citations. If those putatively "missing" pages were both missing and necessary for Respondent's Brief, the time to raise this would have been when Respondent filed the Initial Response Brief. Clearly Respondent has those pages back then. Respondent is thus not claiming that Respondent's Counsel is not in possession of those pages but that Respondent is confused as to how to number those pages.

Rather than make a big deal about whether or not the reverse sides of certain pages in Respondent's copy of the Record were blank (but mysteriously not in the sixteen other copies printed) on July 29, 2013, three days before the Motion was filed, Appellant provided replacement pages so that in the three days remaining Respondent's Counsel could insert page numbers from those "missing" 12 reverse sides into the Final Response Brief. As Appellant pointed out in his July 26, 2013 letter to Respondent, it took Appellant slightly more than two hours to make the page translations on July 26, 2013, and certainly two staff attorneys could have done this in three days.

The issue is moot because the pages were not missing from the copies at the Court of Appeals and were in possession of Respondents for three days before the Motion was filed – and Respondent's Counsel had the pages (as part of the transcript) for eighteen (18) months prior to July 31, 2013.

Respondent's Issue #3

"An unaltered copy of Respondents' August 8, 2012 Witness and Exhibit Lists"

The Record on Appeal has had an "unaltered copy" since before the Motion was

filed.

This appeared in Respondent's July 26, 2013 e-mail as follows:

"Appellant's notations are included on the Respondents' August 8, 2012 pre-trial brief, Record pp. 3065-3071"

As Appellant informed Respondent in Appellant's July 26, 2013 letter (delivered July 29, 2013) the Exhibit ends on RoA page 3070. RoA Page 3071, Item # 49 in the Record on Appeal, is Appellant's "dump" of the CD file names of the documents provided Appellant (none on paper) by Respondent (as Defendant) during pre-trial discovery.

On July 29, 2013 Respondent was provided copies of these duplexed pages without the notations for insertion in Respondent's copy of the Record on Appeal.

On July 29, 2013, Appellant substituted unmarked pages for the marked pages in the Court of Appeals copies of the Record on Appeal. Both the Court and Respondent have unmarked pages in their copies of the Record on Appeal. In Appellant's July 26, 2013 letter to Respondent's Counsel, said counsel was informed of the planned substitution at the Court of Appeals. The dependence on his in Respondent's Motion filed three days later is frivolous and filed for improper purpose.

The issue was irrelevant from the beginning as far as affecting Respondent's capacity to translate to Record on Appeal page numbers. Those numbers were the same with or without the notations.

Respondent's Issue #4

"A complete copy of Respondents' Exhibit 53" ("omitted")

Respondent's Exhibit 53 appears in the Record on Appeal as it was provided Appellant. Respondent's Brief cites to content in the two pages (letter from Respondent's Counsel) in supporting Respondent's argument. The "missing" first page is a transmittal

email (serving the same function as an envelope) which says, per Respondent, “see attached”.

In Respondent’s June 3, 2013 Designation of the Material to be included in the Record on Appeal, Respondent without clarification designated “Respondents’ Exhibits 28 – 54”. The Exhibit 53 “issue” was apparently not “known” to Respondent on July 26, 2013 because it was absent from the email of that day.

The two pages of the document putatively omitted is at Respondent’s Exhibit B on pages numbered at top 4458 through 4459, Respondent’s pages 4460 through 5561 are already present as Record on Appeal pages 4277 and 4278. Respondent never provided Appellant the first two of those four pages. The last two pages, those that Respondent provided as Exhibit 53, are included in the Record on Appeal as Respondent’s Exhibit 53 pages 4277 and 4278.

Respondent’s Page 2 is the attachment – one of many of Appellant’s demands for the voter list. At trial Appellant was unable to discover a possible issue because Respondents’ / Defendants’ Counsel dropped all of her exhibits (their first delivery) on Appellant’s / Plaintiff’s Courtroom desk as the trial began – Defendant having failed to serve any of her exhibits prior to trial. Pages 3 and 4 are Respondent’s letter answer to the demand. Those pages are what Respondent refers to in her Response Brief. Neither party denies that a demand for the voter list was made. The refusal to provide the voter list is also what Appellant refers to in Appellant’s Briefs. The issue is the reasons Respondent’s Counsel, as Defendant’s attorney, gave for refusing the voter list.

Respondent’s entire argument on the refusal of Respondent’s Counsel to provide the voter list depends on the second paragraph of Respondent’s letter of April 28, 2009

which is in the Record on Appeal at page 4277. The decision as to whether Respondent violated the South Carolina Non-Profit Corporation Act in so denying depends on a December 11, 2011 Attorney General Opinion on the obligations of home owner associations and rights of home owners regarding voter lists which is found at Record on Appeal page 3086.

Respondent's Issue #5

“An unaltered copy of Respondent's Exhibit 88”.

The document is not referred to in either party's Brief and is irrelevant to the Appeal. It's content is thus immaterial to the appeal.

This “issue” was not stated in Respondent's July 26, 2013 email to Appellant.

The document is found in the Record on Appeal at pages 4358 – 4359 (Exhibit G). It is the Minutes of the Architectural Review Board dated December 7, 2010.

The “alteration” is a faint line forming an almost unnoticeable “box” around the name “Fletcher” on the document. This is trivial compared to the markings that Respondent placed on her Poster Exhibit J (Record on Appeal pp. 4422 – 4424) and far more trivial than the McNair “Received” stamp added by Respondent's Counsel to their proposed substitution of the May 6 / 16, 2012 Order.

That this “issue” was raised for improper purpose by Respondent (in the Motion) is demonstrated by the fact that the “index” of documents Respondent proposes to add (the second page of their Exhibit B) the index omits this document.

The almost unnoticeable box does not affect Respondent's task to translating the reference to Exhibit 88 (since Respondent never refers to it) to a citation to the Record on Appeal.

Respondent's Issue #6

“An unaltered copy of Appellant's Exhibit 556”

The document as it appears in the Record on Appeal is exactly as it was included in the Plaintiff's Trial Exhibit Books.

This “issue” was not raised in Respondent's July 26, 2013 email to Appellant.

The document is an April 29, 2003 Deed from Plantation AD to its successor developer D.R. Horton, found at Record on Appeal pages 3795 – 3796.

The markings are on the Exhibits as presented at trial. If Appellant were to remove the notations the Court of Appeals would not see the exhibit as it was presented to the trial judge. The document, with notations, is as it was presented to Respondent by Appellant – SIX YEARS AGO in 2009. Since the Record on Appeal must reflect what was before the trial court, the pages should not be altered to suit the whims of Response Counsel.

Although Respondent designated Appellant's Trial Exhibit # 556 Respondent never cites to it in the Response Brief thus Respondent's “concern” is plainly irrelevant to Respondent and clearly raised only for improper purpose.

This is clearly a “non-issue”.

It clearly does not justify an extension of time for Respondent to file a final brief.

II. Details – Documents Supposed Not Part of the Record

A duplicate copy of any page or document does not invalidate the index which points to the first page of the first copy of any duplicate. Duplication does not render the contents unauthentic. It is peculiar that fifteen days after Respondent's Counsel received the Record on Appeal (July 11, 2013) and two days before Respondent's Final Response Brief was due, Respondent's Counsel now complains that they have discovered the issue

and that the issue interferes with the proper use of the Record on Appeal.

Respondent's Insertion Issue #1

“Duplicate copies of the Record pp. 101, 1972, 1973, 1974, and 2852”

Pages 101 and 2852 are not duplicated. Respondent's Motion is silent on where the alleged duplicate pages are. There is no duplicate page which Appellant could find.

As to transcript pages 107 through 109, Pages 1969 through 1974 of the Record on Appeal, Respondent never cites to those pages of the transcript in Respondent's Response Brief. The “concern” about these pages is clearly raised for improper purpose. IF Respondent HAD cited to those transcript pages a citation to either copy in the Record on Appeal would have sufficed to enable the Panel to confirm what was said.

The pdf file provided by the contract court reporter employed by Respondent's counsel repeated pages 107 through 109 – a harmless error reflecting the transcript as provided by the contract court reporter. The pages themselves are accurate.

Respondent's Insertion Issue #2

“Duplicate copy of the Respondents' Proposed Final Order, pp 611 through 658.”

There are no duplicates of these pages in the Record on Appeal and Respondent knew this prior to filing the Motion.

In Respondent's July 26, 2013 email this was stated as

“Two copies of the Respondents' proposed Final Order are included in the Record, pp. 563-610 and 611-658”

The issue is moot. A fix was prepared July 26 and accomplished⁵ July 29, 2013 several days before Respondent filed the Motion.

On July 26, 2013 Appellant wrote Respondent's Counsel stating that Appellant

⁵ The correction to Respondent's copy was received by Respondent's Counsel on July 29, 2013 at which time she was told that all other copies were likewise corrected.

would remove the pages in the Record on Appeal at pages 611 to 658 which duplicate pages 563 to 610. It is significant that the Index pointed to page 563, not 611, so if the Panel used the index to find this document it would be taken to the first copy. The July 26th letter provided a duplex page for Respondent to use to replace pages 611 to 658 which explains the absence of the duplicate pages. Exhibit I. Respondent was instructed to replace pages 611 to 658 of their copy with the slip page.

In July 29, 2013 the duplicate pages were removed from the copies of the Record on Appeal at the Court of Appeals and replaced with the duplex page at Exhibit I.

That being said, the duplication was a “harmless error”.

Respondent’s Insertion Issue #3

“Duplicate copy of Respondents’ Exhibit 28, Record pp 4207 through 4215.”

Respondent’s July 26, 2013 email does not assert this “issue”. It is a harmless error.

Respondent’s Exhibit 28 begins on page 4196 which is where the index “points” to and runs through page 4206.

Respondent’s reliance on Exhibit 28 in Respondent’s Brief is limited to stating the existence of Guidelines, but says nothing about the contents of the Guidelines – it does not cite to any text. On page 21 of Respondent’s Brief Respondent says that Guidelines exist and cites to Respondent’s #28 as an example.

The issue is clearly frivolous.

Furthermore, on April 16, 2013 Appellant moved the Court of Appeals to preclude duplicates and this Court declined to issue such an order.

The presence of a duplicate exhibit does not preclude Respondent from citing to the first set in a Final Response Brief – which is where the existing index points to.

Respondent's Insertion Issue #4

“Respondents’ Witness and Exhibit List, Record pp 859 through 864, 3065 through 3070, and 3089-3099 that include Appellant’s notations and that were not before the trial court”.

These documents are superfluous to either party’s Briefs because no brief cites to the document containing those pages. The “issue” is frivolous.

Respondent’s Initial Response Brief never cites or refers to her Rule 16 Witness / Exhibit Lists, either of them. Likewise, Respondent’s Brief never refers to Respondent’s January 23, 2013 Memo which contains Record on Appeal pp 859 through 864 (an Exhibit to that Memo).

Appellant’s Briefs, however, do refer to Respondent’s Rule 16 Exhibit and Witness Lists, but not via Respondent’s Memo (or exhibits). The “marked up” copies were handed to the Special Referee during the trial to support Appellant’s objections to “Trial by Ambush” and are (and are referred to by Appellant) at Record on Appeal item # 55, pp. 3089 – 3093; item # 56 pp. 3094 – 3099 (Exhibit J) . Respondent’s Brief ignores the issue of the “Trial by Ambush” – the appearance of new witnesses and exhibits the day of trial the moment the trial was to begin.

Respondent has raised the issue of these pages she never refers to for improper purpose. Since Respondent did not deal with the “Trial By Ambush” issue in her Response Brief she now seeks, as an improper purpose of this Motion, to cripple Appellant’s argument by keeping the supporting documents from the Panel.

Per the trial transcript, these documents were handed to the Special Referee during the trial and extensive argument ensued about “Trial By Ambush”⁶.

⁶ That Respondent was presenting evidence and witnesses made known to Appellant the day of trial.

Respondent's July 26, 2013 email raised these as two (2) "issues:

"Appellant's notations are included on the Respondents' August 8, 2012 pre-trial brief, Record pp. 3065-3071"

And

"Exhibit lists found in the Record with your notations, pp. 3089 3099, were not handed up to the trial judge and should be stricken"

None of these "issues" prevents Respondent from citing to the pages in the Record on Appeal nor merit an extension of time. Since Respondent has had the Record on Appeal since July 11, 2013 and the Index since June 12, 2013, there is a question as to why Respondent waited until the day Respondent's Final Response Brief was due to raise these issues.

On July 26, 2013 Appellant wrote Respondent that pages 3065 through 3071 would be replaced with un-notated pages; a set was provided for Respondent to use. The page numbers, however, remained the same.

These pages state exhibits and witnesses which were identified for use by Respondent for the first time the day of trial – in the Courtroom.

On July 29, 2013 those pages in the Record on Appeal at the Court of Appeals were replaced with un-notated pages. Respondent knew all this on July 31, 2013 when Respondent's counsel filed the motion.

By strictly applying Respondent's view of what is in the actual record, these unmarked up copies of Respondent's Rule 16 Brief do not belong in the Record on Appeal since they were not filed by Respondent and do not appear in either the Case Dockets nor in the list of evidence as perpetuated by the Court Reporter.

Pages 3089 through 3099.

These are Record on Appeal items # 55 and # 56 and are Appellant's duplicate

copies of Respondent's January 13, 2012 first list of witnesses and exhibits and Respondent's August 8, 2012 (day of trial) revised list of witnesses and exhibits. These support Appellant's claim of unconstitutional "Trial by Ambush" stated during the trial as perpetuated on the transcript, raised in the Statement of Issues on Appeal.

As handed up to the trial judge the markings on these pages were present. To remove the markings would be to alter the evidence.

Respondent denies they were handed to the trial judge at trial in support of Appellant's argument that Respondent was presenting evidence not provided in discovery and not identified prior to trial, and that the new witnesses violated an Order of Court providing that Appellant would have an opportunity to depose any Respondent trial witness, as well as violating a Rule of Procedure requiring identification of expert witnesses and making them available for deposition well before trial.

Through Appellant's July 26, 2013 letter to Respondent, Respondent Counsel knew this argument was frivolous, but raised it anyway by Motion.

This is a genuine issue of the Panel and the Panel is entitled to the related evidence.

The following excerpts from the trial transcript support that these marked up copies of Respondent's Rule 16 papers were "handed to the judge".

Transcript Page 80 RoA Page 1942

23 EXHIBITS, I BELIEVE, IN JULY, AND THEY WERE IDENTIFIED BY -- IF I MAY

Transcript Page 81 RoA Page 1943

I PASS THIS TO THE DEFENDANT AND I CAN PASS IT TO YOU, THIS IS HOW THEY'RE IDENTIFIED ON THE CD, WITH THE TITLES OF THE EXHIBITS.

20 MR. JARMUTH: BUT AS YOU CAN SEE, THERE ARE BATES NUMBERS ON EACH AND A CRYPTIC DESCRIPTION,

Transcript Page 87 RoA Page 1949

10 THE BIG PROBLEM IS IT ADDED THREE WITNESSES WHO WERE NOT ON THE JANUARY 11TH LIST, AND THEREFORE, I DID NOT HAVE AN OPPORTUNITY TO DEPOSE THEM, AND I BELIEVE THAT THAT CONSTITUTES A TRIAL BY AMBUSH.

Transcript Page 88 RoA Page 1950

1 SECONDLY, THE JANUARY 11TH VERSION OF THE RULE 16, WAS THE 79 EXHIBITS.

9 THAT. IN THE THING THAT I GOT BY EMAIL YESTERDAY, WHICH I'VE NEVER GOTTEN PAPER, WHICH WAS DATED TODAY, AS A MATTER-OF-FACT, THE RULE 16 IS SIGNED BY MS. GOLDING, AUGUST 8TH AS THE DATE, THEY LISTED A TOTAL AMOUNT OF 114 EXHIBITS, WHICH ARE COMPLETELY DIFFERENT THAN THE LIST ON THE JANUARY 11TH THING AND, MOST IMPORTANTLY, IF YOU LOOK AT THE EXHIBIT LIST, THEY BEAR ABSOLUTELY NO RELATIONSHIP TO THE THING THEY GIVE ME

Transcript Page 89 RoA Page 1951

1 ON THE CD. EARLIER, THEY SHOULD BE INADMISSIBLE BECAUSE IT'S TRIAL BY AMBUSH. YOU CAN'T ON THE DAY OF THE TRIAL BRING IN EVIDENCE THAT YOU HAVEN'T PROVIDED THE OTHER SIDE,

Respondent's Insertion Issue #5

"Appellant's Exhibit 556 with his notations, R. pp. 3795 through 3798, that was not before the trial court."

This is a repeat of Respondent's "Omission" Issue # 6, which Appellant has already dealt with supra. Respondent's "Omission" Issue #6 reads:

"6. An Unaltered copy of Appellant's Exhibit 556"

This is the April 29, 2003 deed from the second developer, Plantation AD, to their successor developer, D.R. Horton, for some of the remaining property in the development.

The Record on Appeal pages 3797 and 3798 have no "notations" added.

Respondent has clearly cited four pages not two for improper purpose – to give their "concern" unjustified weight.

As was explained supra, the notations on the first two pages of the deed have been

present on the document as used in numerous pre-trial pleadings AND in the exhibit as it was submitted at trial.

Most significantly, none of the Briefs cite to Exhibit "556"⁷. Thus notations on the Deed do not affect either party's arguments in any way and certainly do not interfere with Respondent's current task of translating page numbers.


The issue is frivolous.

⁷ The phrase "556" is absent from all the Briefs.

Conclusion

Respondent's Motion should be denied.

1. There is no need to alter or amend the Record on Appeal as it exists today.
2. The Record on Appeal, as it exists today, includes all the material actually cited to by either party in their Briefs.
3. The index and contents of the existing Record on Appeal supports renumbering references in Initial Briefs to pages in cited documents with references to counter-part pages in the Record on Appeal.
4. The Record on Appeal accurately reflects the evidence, testimony and pleadings that would have been available to the Special Referee had he bothered to obtain them from the Clerk of Court.


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Exhibits in Appellant's Response:

- A July 29, 2013 United States Post Office Delivery Status for Exhibit B
- B July 26, 2013 Appellant's letter to Respondent w/o Exhibits
- C July 26, 2013 email from Respondent's Counsel
demanding changes to the Record w/o Exhibits
- D July 26, 2013 Appellant's letter to the Clerk of Court (less exhibits)
- E Record on Appeal pages 5 / 6
- F Record on Appeal, current Index
- G Respondent's Trial Exhibit 88, per Record on Appeal pp 4358 -4359.
- H Appellant's trial Exhibit 556, April 29, 2003 Deed from Plantation AD to successor
developer D.R. Horton, Record on Appeal pp 3795 – 3796
- I Record on Appeal pp 611 / 612: "pull sheet" for Record on Appeal pp 611 to 658
- J Record on Appeal pp 3089 – 3099.

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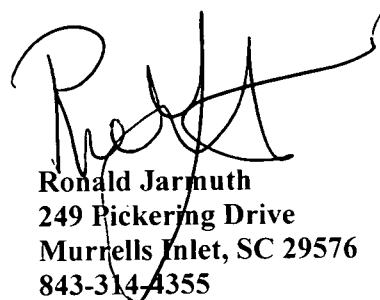
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and K. A. Diehl & Associates, Respondents.

PROOF OF SERVICE

I certify that on August 3, 2013 I served the attached Appellant's Opposition to Respondent's Motion to Amend the Record, with Exhibits, on Respondents' common counsel McNair Law Firm by mailing same to said counsel via United States Priority prepaid mail addressed to Henrietta U. Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164



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