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

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case Number 2009-CP-26-3596
Consolidated With
Case Number 2010-CP-26-11320
Appellate No. 2013-000714

Ronald Jarmuth, ... Pro Se Appellant,

v.

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

APPELLANT'S MOTION FOR REHEARING

Ronald Jarmuth
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Appellant, Pro Se

The Appellant hereby moves the Court of Appeals to Rehear this Appeal and specifically to correct errors of fact and of law contained in the Court's Unpublished Opinion No. 2015-UP-111 filed March 4, 2015. For just cause shown, Appellant Moves the Court to Reverse it's Affirmation and to find in favor of Appellant on the below issues called to the attention of the Court. The Appellate Panel has misconstrued the facts, mis-read the Briefs and the Final Order, and has either applied the wrong statutes and case law, or misapplied applicable law and cases. For cause Appellant states as follows:

1. Issue (9) "Pebble Creek and the Villas were not subject to the declaration of covenants and restrictions". The Panel has upended ancient legal tradition and has held that a deed is no longer effective against a seller upon delivery (and payment) but is now ineffective against a seller until recorded.

It is unrebutted and admitted that the Deed to Pebble Creek was Delivered by Seller Plantation to buyer Sunbelt on January 29, 1999 in exchange for payment (R.pp. 3733-3736); that the Deed was Recorded on February 8, 1999; that the Covenants were not signed by the seller, Plantation until January 30, 1999 (R.p. 3765) and not notarized until February 5, 1999; that there is no evidence and no allegation that the Covenants were ever delivered to buyer Sunbelt or that he agreed to same; that the Covenants were recorded on February 8, 1999 (R.p. 3737); that The Villas was sold by successor developer Horton to The Villas on May 8, 2000 (R.p. 3786) but was not subjected to the Covenants until December 23, 2004 (R.pp. 3824-3825) more than four years after the Declarant ceased to own The Villas property; that in Amendment 4 to the Covenants, December 23, 2004 (R.p. 3823) the

Developer stated that the Covenants did not apply to any specific property until (R.p. 3723) an additional Amendment to the Covenants specifically bound that property; that the Covenants (R.p. 374) explicitly did not subject any property to the Covenants until such property was so subjected by separate Amendment [1]; and that Pebble Creek has never been subjected to the Covenants by such separate Amendment. Appellant raised these points in his Brief (R.pp. 27-30).

The Appellate Opinion mis-applied the law confusing Recordation with Delivery (of Deeds), failed to note that the "race concept" does not apply to the seller of property (who is on actual notice at the moment of sale) and overlooked that to subject Pebble Creek to the Covenants required the second, non-existent act of actually subjecting Pebble Creek to the Covenants by subsequent Amendment. The Panel failed to note that Privity ceases in a Seller at the moment of sale and Delivery of the Deed, not at the moment of Recordation of the Deed. Without Privity, a seller lacks the legal capacity to impose a restriction on property even if he "wins the recordation race" and his covenant is void as a matter of law.

The controlling authority on the "race to recordation" is McMillan v Giorgio, Court of Appeals of Mississippi, No. 1999-CA-00018-COA April 7, 2000 where the Court held that

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

Authorities holding a fatal loss of Privity and effective notice to the seller at the moment of sale include Clifford v Transouthern Financial Corp; 566 F.2d 1023, 2

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1 ""the Property ... may ... by subsequent amendment hereto, may be subjected to this Declaration".

Fed. R. Evid. Serv. 950 No. 76-2347; United States Court of Appeals, Fifth Circuit; Jan. 30, 1978, citing citing Gray Lumber Co. v. Harris, 127 Ga. 693, 56 S.E. 252 (1906); Hawes v. Glover, 126 Ga. 305, 55 S.E. 62 (1906); Howard v. Russell, 104 Ga. 230, 30 S.E. 802 (1898); Long v. Georgia Land & Lumber Co., 82 Ga. 628, 9 S.E. 425 (1889); see Northrop v. Columbian Lumber Co., 186 F. 770 (5th Cir. 1911).

The chief authority cited by the Panel, First Union Nat'l Bank of S.C. v Shealy, 325 S.C. 351 (S.C. App. 1996) faults the Panel because it held that the Seller "divest himself of his property rights at the time he executed the deed" and that a seller "effectively delivered the subject deed by giving the document to" the buyer, and there is no consideration as to the date of recordation. The other case the Panel depended on, Williams v. Lawrence, 194 S.C. 1, 6, 8 S.E.2d 838, 840 actually held that for a "deed to be valid and operative it must not only be duly executed, but must be delivered by the mortgagor and accepted". There is no evidence of acceptance of the Covenant by the buyer of Pebble Creek ten days after sale. Williams went on to hold "where the evidence and circumstances are inconsistent with that presumption, the presumption must yield." The Court in Williams voided the mortgage despite recordation. Given that the Deed was delivered ten (10) days before recordation, that the Declarant was on actual notice when the Deed was delivered and not at the moment of recordation – thus lacking Privity, that there is no evidence of delivery of the Covenants to the buyer [2], and that the Declarant never executed an Amendment to the Covenants subjecting Pebble Creek to the Covenants, the Covenants are void as to Pebble Creek; due to the four year lapse in

2 The covenants did not exist until January 30, 1999 two days after the sale and have no provision for the post-sale acceptance of the Covenants by the buyer.

Privity they are void as to The Villas.

With this correct application of the law and the facts, the Covenants do not apply to Pebble Creek nor to The Villas; and all the actions of Respondent International Club Homeowner Association (IHOA) complained of towards Appellant are null and void and do not need further consideration by the Panel.

A finding for Appellant leaves the other subdivisions subject to the Covenants.[3]

2. Order Issue (3) the International Club Homeowners Association, Inc. (the Association) did not have any rights under the declaration of covenants and restrictions". This was "Issues on Appeal III Which corporation has rights under the covenants?"

The Panel erred in finding that this was an "action for breach of restrictive covenants". This aspect of Appellant's Complaint was an Action to Quiet Title since it concerned rights under a deed - Section 15-67-10 of the Code addressing actions to determine "the rights of the parties" related to "real property". In Highlands Property v. Shumaker Land, LLC., 724 S.E.2d 685 S.C. Ct. App. 2012) this Court held that the Standard for Review in a case involving assigned rights under a covenant is de nova: "In an appeal from an action in equity, tried by a judge alone, this court may find facts in accordance with its own view of the preponderance of the evidence." Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). The panel's dependence on O'Shea v. Lesser 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) is erroneous because O'Shea did

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[3] **Highlands, Glens, Meadows, Links. Cambridge.**

not concern determining who had rights under a covenant but how those with undisputed rights executed them. In Conner v. Alvarez, 328 S.E.2d 334 (S.C. 1985) 285 S.C. 97 (1985) 328 S.E.2d 334 held that

> "The law in this state regarding the construction and interpretation of contracts is well settled. When it is perfectly plain and capable of legal construction, the language itself determines the full force and effect of the document. Gilstrap v. Culpepper, S.C. 320 S.E. (2d) 445 (1984); Superior Auto Co. v. Maners, 261 S.C. 257, 199 S.E. (2d) 719 (1973)"
>
> "When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect. Ellie, Inc. v Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)."

The Covenant is unambiguous stating in Covenant Section 1.3 Definition. "Association means Murrells Inlet Golf Plantation Association, Inc" (MIGPA). R.p. 3740 which the Trial Court Order acknowledged on Order P. 10, R.p. 37 which conveys irrevocable legal rights under a deed. The Trial Court then concluded that without a Quiet Title action, Covenant Amendment #1 re-conveyed those legal rights (R.p. 37) "to the International Club". The admitted evidence before the Trial Court included the minutes of respondent board meeting, financial documents, payment vouchers, and Respondent letters through just prior to trial. Through at least June 10, 2008 Respondent exclusively used the name "International Club Property Owners Association" to which assessment checks were written. lt never used the name "International Club Association". The first time Respondent used the name "International Club Home Owners Association" in its dealing with homeowners was September 17, 2008 (R.P.3398). The panel cited McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct. App. 2005) ("[A] corporation may be known by several names in the transaction of its general business." in defending the final order but Respondent never transacted business in either of the legal names

entitled through deeded rights to assert rights under the Covenants. As a factual error, The Panel's Order erroneously implied that Respondent used the name designated in the Covenants. The final order never asserted that Respondent used a fictional name in business or that it used any of the names from the Covenant. From 2008 Respondent has only used it's legal name. McCall v. IKON actually held that when a corporation does business under an assumed name, to protect customers, there is personal jurisdiction to sue the corporation under the assumed name. The S.C. Non-Profit Corporation Act, as cited in Appellant's Brief, requires registration of assumed names and Respondent registered only "International Club HomeOwners", not International Club Association or MIGPA [4].

Per SC 33-31-401, Respondent may not use or be known by a name already used by another incorporated entity, and both MIGPA and International Club Association (ICA) are legitimate S.C. corporations – acknowledged by the trial court (R.p. 38). On March 1, 2001, more than two (2) years after Plantation sold its entire interest in the Pebble Creek subdivision to Sunbelt Development (January 29, 1999), Plantation imposed Amendment #1 which introduced ambiguity by changing either the name of the subdivision but not necessarily that of the Association to the International Club (Trial Court Order p.10 R.p. 37). In asserting that the Covenants do not apply to the Pebble Creek subdivision, Appellant noted at trial and in appeal that Plantation ceased to own any portion of Pebble Creek on January 29, 1999. Appellant's Brief (P.2) asserted that "certain amendments were made in a prohibited fashion". At trial, Transcript L 11-13, R.p. 1982 Appellant

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[4] **"Murrells Inlet Golf Plantation Association, Inc," into which "International Club Association" was legally merged.**

testified that no lot owner was asked before nor notified after any of the five amendments were made by the Developer. Amendment #1 introduced the ambiguity which the Trial Court relied on to depart from the exact legal definition of which corporation held "association" deeded rights in Pebble Creek. In AJG Holdings v. Dunn; 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011), October 22, 2014, the Court held that amendments to a covenant are void IF a Declarant either lacks a sufficient property interest (in Pebble Creek), OR IF he failed to notify land owners of an Amendment after the fact, OR IF he failed to solicit owner consent (as required by the Covenants). Amendment #1 failed all three prongs. Appellant noted in his Brief P.6 that the Covenants deeded equitable riparian rights to the Murrells Inlet Golf Plantation also named as "The Association". Plantation lacked legal capacity to transfer that and other deeded equitable rights to the Respondent by amendment (at least in so far as Pebble Creek and The Villas).

The final order assigning legal rights under the covenant to Respondent is unsupported by any evidence and depends on an erroneous legal citation. That Order (R.p. 38) relied on Palmetto Dunes Resort v Brown, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985) stating that a court should read "the governing documents ... to determine the intent of the Developer". The order stated that the court's inquiry was limited to "the Declaration, together with the amendments, as well as the Defendant HOA's Articles of Incorporation". There is no ambiguity that Covenants and Amendments point to MIGPA or ICA and provide no insight into an alternative intent of the Developer. The correct governing cases are:

> "The law in this state regarding the construction and interpretation of contracts is well settled." Conner v Alvarez, 285 S.C. 97, 101, 328 S.E.2d

334, 336 (1985). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect. Ellie, Inc. v Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Id. (citing Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)). "The "rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902.

The trial court never inquired into the intent of the Declarant and at trial Respondent never argued or presented any evidence of the Grantor / Declarant's intent. The acts of Respondent mentioned in the final order are non-probative acts of the pretender to grantee status. A Finding for Appellant does not leave the development without a homeowners' association; they become subject to the HOA named in the Covenants – the Murrells Inlet Golf Plantation Association, Inc.

3. If Pebble Creek is not subject to the covenants OR if Respondent is not the legal Grantee per the Covenants, then all issues related to acts of Respondent towards Appellant are resolved in Appellant's favor.

4. Issue (13) the Association was not entitled to attorney's fees.

Respondents' case at the trial court level was based on perjury and fraud, and in the Appellate level on fraud. The cases cited by the Panel allow attorneys fees only when money is actually spent to actually enforce covenants and the cases cap a trial court's discretion in determining such an award at the amount actually spent. Any award in excess of the actual amount spent to enforce the covenants is an abuse of discretion. As the Panel and Respondent jointly point out, the award of

attorney's fees is limited by the covenants and in this case money spent defending a lawsuit is not enabled by a contract provision and is an abuse of discretion.

Respondents never paid a single cent to enforce the covenants. Respondents paid only a single $ 2,500 insurance deductible to McNair (Defendants / Respondents counsel) to defend any lawsuit filed against them by Appellant and that occurred in 2009 over a year before the alleged violation occurred. Respondent's assertions that the payment in 2010 of $2,500 to McNair to defend the 2010 suit is either perjury or a fraud – that check was written two months before the 2010 lawsuit was filed. On page 40 in the first sentence of Respondent's brief their counsel continues to lie to this court that $5,000 was spent FOR ANY PURPOSE in the two cases. This number arises from McNair law's own ledgers and from the two $2,500 checks they fraudulently presented as evidence in support of their claim. Instead of rewarding the Respondents with money they are not entitled to, tbe Respondents and their counsel should be sanctioned.

The assertion that Respondent's August 10, 2010 [5] check is the insurance deductible related to case 2010-CP-26-11320 rises to the level of perjury. There is no evidence supporting the trial court's findings and the Panel should have "disturbed the findings of fact of the trial court" - O'Shea, 308 S.C. at 14, 416 S.E.2d at 631 [6]. All evidence and testimony favors Respondent.

The only finding of fact is at R.p.30, #30 in the final order:

> **"30. The Defendant HOA has paid $5,000.00 to the McNair Law Firm in attorneys' fees to seek Plaintiffs compliance with the Declaration." [7]**

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[5] **R.P. 4326 Defense Trial Exhibit 79.**
[6] **Cited by the Panel,**
[7] **The amount and the purpose being fraudulent, the judgment must be reversed.**

The evidence before the trial court and before the appellate panel:

a. October 15, 2009 Check to McNair Law $2,500.00 R.p. 4298 Def #62 paid more than six months after the supposedly related suit was filed and more than a year before the alleged covenant violation took place.

b. August 10, 2010 Check to McNair Law $2,500.00 R.p. 4326 Def #79 paid more than two months before the "2010" suit was filed and likewise before the alleged covenant violation took place.

c. April 7 2009 Complaint 2009CP263596 R.p. 113.

d. May 12, 2009 Respondent Answer to Complaint 2009-CP26-3596 R.pp. 185-186 which has no Counter-Claim for Breach of Covenants and demands money solely for "the defense of this action" in which Appellant accused Respondent of misconduct. [8]

e. October 24, 2011 Respondent (added) Counter-Claim to Complaint 2009-CP-26-3596 asserting for the first time in the 2009 case a breach of covenants.

f. October 12, 2010 Appellant Complaint 2010-CP-26-11320.[9]

g. November 17, 2010 Respondent Answer to Complaint 2010-CP-26-11320. R.p. 92 with no Counter-Claim; Complaint asserted Respondent is not the HOA.

h. October 29, 2011 Respondent Counter-Claim to Complaint 2010-CP-26-11320 R.pp. 96-100 asserting for the first time in the 2010 case a breach of covenants.

The ONLY alleged covenant violation is a purported "wall" which Appellant in October 2010 was requesting permission to erect . Respondent paid its first

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[8] **The date of this check SIX MONTHS after the suit was filed is suspicious.**
[9] **2010CV26107294 filed in Magistrate Court later transferred to Circuit Court.**

insurance deductible six months after the 2009 suit was filed and a year before the alleged covenant violation existed and it's second insurance deductible two months before the "related" suit was even filed and before the alleged covenant violation existed. The first deducible was related to their answer to the 2009 Complaint and did not assert a covenant violation – demanding only reimbursement of their deductible to defend the suit. The answer to the second complaint did not assert any Counter-Claim at all and did not assert a covenant violation. There is no evidence [10]or testimony that Respondent paid anything besides the two checks to enforce the covenants. The documentary evidence is that Respondent paid nothing to enforce the covenants and nothing at all beyond the first $2,500. [11]

At trial Respondent's Counsel led William Freiboth, HOA President, through direct testimony (R.pp. 2773-2774). The dialog was a suborned perjury. [12] He testified that "Defendant's Exhibit 62" "October 25th, 2009" "was our insurance deductible for this lawsuit" "to enforce the covenants". Likewise he was led by Respondent's counsel [13] to testify that "Defendant's Exhibit 79" "August 10th, 2010" was "to enforce the covenants" and that the total amount "the Homeowner's Association paid to ... enforce the covenants" was "five thousand dollars". On Cross-Examination Freiboth admitted R.p. 2811 that when the first check was paid no covenant violation existed and he fraudulently testified that R.pp. 2814-2815 the second check "was paid for the ARB violation for your fence" which did not exist

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[10] phony or otherwise.
[11] And the six months delay opens that payment to question.
[12] The checks were payable to McNair Law Firm and Respondent Counsel personally did the work which both checks paid for – thus knew what they were for.
[13] The author of the Response Brief conducted the direct exmination at trial.

until two months after the second check was paid, and two months before the 2010 complaint was filed.

The Response Brief (P. 12) says as a statement of fact "The Association paid $5,000.00 ... to secure Jarmuth's compliance with the Declaration" (R.pp. 4298, 4326) which is the sum of the two checks. This is a fraud and the Panel apparently relied on that statement, disbelieving Response Counsel would lie. Respondent's related "Analysis" Resp. Brief Pp. 40-41 asks the Panel to depend on Seabrook Island Property Owners Assoc v Burger, 616 S.E.2d 431 (S.C. Ct. App. 2005) writing that Seabrook "encompasses defending lawsuits initiated by Jarmuth challenging the Association's authority". This citation is erroneous because Seabrook sued Berger over a floating dock and says nothing about the award of attorney's fees to defend a law suit, holding instead that an HOA plaintiff is entitled to costs only if the HOA sues to enforce covenants and such award is authorized in the covenants. In this case it is an abuse of judicial discretion to reimburse attorney's fees not paid to enforce a covenant violation; Berger, 365 S.C. at 240, 616 S.E.2d at 434.

5. Issue "(6) Rosemary Toth and K.A. Diehl were liable to the Association for mishandling Association funds". Appellant stated the issue in his brief as:

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

The Panel wrote:

> **"As to Issue 6: Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit."); Ellie, Inc., 358 S.C. at 99, 594 S.E.2d at 496 ("[W]here an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal.")"**

This is a "first impressions" case in South Carolina as there is no case law to be found relating to violation of S.C. Code Ann. § Section 33-31-140 (definition of Distribution), S.C. Code Ann. § 33-31-1302 (complete bar on any distribution) and S.C. Code Ann. § 33-31-833 (Director's Liability for Unlawful Distributions). Yet the law exists and it is unambiguous.

A glance at Appellant's Brief makes clear that Ellis is inapplicable because the argument ran the better part of 3 pages, with 10 citations to the Record on Appeal and analysis of the applicability of 4 statutes. No citation to case law was made because none exists. It was pointed out that Respondent's Bylaws explicitly requires that all funds be retained by Respondent HOA (Section 11.1.1) and the only provision for distribution is upon dissolution – there is no discretion for Board Members "business judgment". The law likewise is absolute and per S.C. Code Ann. § 33-31-1302, directors may make NO distributions of any kind; the definition of a distribution in S.C. Code Ann. § 33-31-140(11) is all inclusive: any assets or any income or any profits, which leaves no loophole to distribute cash profits from the sale of an easement as "a benefit". The only case law to be found is from our sister state in North Carolina, Happ v. Creek Pointe Homeowner's Ass'n, 717 S.E.2d 401 (2011), where the court held that distributions are permitted only if not prohibited by the Bylaws.[14] As the Bylaws provide that all "proceeds shall be retained by and for the benefit of the Association", Happ is on point that Respondent Toth is personally liable for her action. Seeking to reverse an obvious discrepancy between Findings of Fact and Conclusions of Law when the Code and the Bylaws is so clear

[14] **North Carolina does not have a counter-part to the non-distribution provisions of the South Carolina Non-Profit Corporation Act.**

is "with merit".

> **The only Finding of Fact that the trial court made is (R.p. 35)**
>
> **23 As a consideration for this easement, the Defendant HOA received $83,000.00 ...**
> **24. Part of the consideration that the Defendant HOA received from Central Electric was distributed to the members. ... The Defendant HOA shared the proceeds with its members"**

The applicable statutes are:

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

The final order Conclusions of Law held that a distribution of the cash "proceeds" was a "benefit" and not a "distribution". But the Court's prior Findings of Fact held that the distribution "shared the proceeds" and did not hold it was a benefit. Conclusions of Law must be consistent with the Findings of Fact on which the law is applied.

> **"Conclusions of Law R.p. 52 ... The Act permits the Defendant HOA to distribute benefits to its members in conformity with its purposes. SC Code 33-31-140(11)(b)."**

Whether the cash distribution was illegal or not hinges on an analysis of S.C. Code Ann. § 33-31-140(11)(b) which analysis the trial court did not make. The statute reads:

> **(11) "Distribution" means the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers. The term does not include:**
> **(b) conferring benefits on its members in conformity with its purposes;**

In analyzing a statute where specific inclusions are listed before residual ambiguous exceptions, the analysis does not proceed beyond the specific to the residual if the facts are an exact match with an inclusion set off by the legislature before a residual "catch all exclusion". The conclusion of law made by the trial judge is as if the

statute does not exclude cash "profits of a corporation", would allow any distribution because anything of value is a "benefit", and would render the entire definition meaningless. If the legislature stated it banned distribution of assets or cash income or profits, the clear intention is to allow non-cash benefits such as free use of facilities or discounts on what members have to pay for goods or services.

The Panel erred in failing to discern the inconsistency between the Finding of Fact and the Conclusion of Law and the construction of the controlling statute.

6. Appellate Order Issue (5) "K.A. Diehl & Associates, Inc., and the Association were liable to him for defamation and invasion of privacy".

Panel Errors: (1) Analysis focused on Respondent Association whose litigation privilege was not contested; (2) Analysis focused on invasion of privacy instead of defamation applying a case [15] involving simple assault and giving no legal consideration to the law as to defamation; (3) There are no findings of fact to support the trial court's granting of litigation privilege to Diehl; (4) The Panel ignored evidence that Diehl acted recklessly and republished absolutely false, easily confirmed, harmful lies. The Panel ignored evidence that Diehl republished the lies to persons who Diehl had no relationship with outside the development. [16]

The actual issue presented to the Panel was:

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

The Panel's citations of law and of facts relating to invasion of privacy are thus erroneous. [17]. The Brief focused narrowly on false and defamatory original text

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[15] Mellen v. Lane, 377 S.C. 261, 275, 659 S.E.2d 236, 244 (Ct. App. 2008)
[16] Thus no corresponding interest.
[17] Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 396, 665 S.E.2d 222, 227 (Ct. App.

republished by Diehl which falsely implied it was from a court case: R.p. 3705:

> "10. Jarmuth v. Frinzi: 94 Fed. Appx 969 (Table), 2004 WL 737027, CA4(PA) 3/24/04 (no. 02-2630) - 2006 WL 4730263 (n.D.W.Va) 7/25/2006 Legal action by Jarmuth in which he alleged defamation by some of his co-employees at the FBI. He also alleged that their defamation led to the termination of his employment with the FBI for on 4/21/01."

The evidence at trial included the defamatory statement, R.p. 3705; the Deposition Testimony [18] of Diehl employee Julie Case R.pp. 1025-1152; the U.S. Postal Service count of the number of defamatory publications through mail R.pp. 3711-3720 (646 envelopes); Case's report of the number of defamatory publications by email (577 emails sent) R.p. 3721; the testimony of Appellant R.pp. 2459-2673; and Appellant's federal personnel file which showed he had never been terminated but instead given a merit award for the time in question R.p. 3701.

There was a single Trial Court Findings of Fact – R.p. 34:

> "21. The Directors ... instructed K.A. Diehl to mail Ms. Golding's letter to all Community members."

At trial only Beckie Abel testified for Diehl, R.pp. 2863-2901. William Freiboth (R.pp. 2753-2862) and Maureen Sullivan (R.pp. 2523-2702) testified for the HOA There is no testimony in the trial transcript that any of them said anything about the circumstances of Diehl mailing the defamatory material, Abel was silent about the matter." There is no document in the Record to support that finding of fact. Without that finding of fact there is no connection between Diehl's defamatory publication and the 2009 Case as filed and there was no testimony, pleading, or

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2008) and McCormick v. England, 328 S.C. 627, 640, 494 S.E.2d 431, 437-38 (Ct. App. 1997 are thus inapplicable.

[18] The trial court ordered that depositions may be taken and used as if the deponent had testified at trial and at trial the court ordered that the depositions not be read into evidence – that he would read them.

evidence to support a proposition that Diehl anticipated being sued.

The only affirmative defense that Diehl raised in its July 8, 2009 Rule 12(b) Motion was

> **"the claims asserted against K.A. Diehl & Associates, Inc. fail to state facts sufficient to constitute a cause of action against it and the moving Defendant is a Property Management Company for the Defendant"**

and was aimed at the June 9, 2009 Amended Complaint which raised a defamation claim against Diehl.

Diehl never asserted the "litigation privilege" in its Answer R.p. 280 filed December 17, 2011 more than two years after the 2009 complaint was filed and (the Answer) 30 days before the scheduled trial date which was after discovery had closed. Diehl's answer said "40. Any and all facts relating to litigation involving the Plaintiff are privileged" without explicitly asserting the litigation privilege and without raising it in a Rule 12(b) Preliminary Motion.

As a matter of law, no affirmative defense was available for either the trial court or the Panel to rely on, because no facts were presented to support such a claim and no claim was properly raised.

> **"Failure to raise an affirmative defense in pleadings deprives the opposing party of precisely the notice that would enable it to dispute the crucial issues of the case on equal terms. ... When an opposing party does receive notice of a previously unpled defense when a dispositive motion is filed, it lacks the advance notice required by Rule 8(c) that would ... On its face and on its logic, Rule 8(c) requires that a party actually plead its affirmative defenses" Geraldine Harris v U.S. Department of Veterans Affairs USCA-DC October 10, 1997 126 F.3d 339, 342 (D.C.Cir.1997).**

This being an error of law the Panel is entitled to set the verdict aside per Mellen v Lane. op. cit. .

In the final order's conclusions of law the trial court wrote:

"a. The Defense of Absolute Privilege Bars Plaintiffs Claims ... (and) b. The Defendants' statements are privileged."

As proven in Appellant's brief and at trial the defamatory material was absolutely false, easily verified as false, and was not the text of a court order or pleading. The Panel must reverse its determination with regard to Diehl and Defamation.

7. Panel Issue "(12) the Association illegally withheld the voter list from him." Presented as Issue on Appeal XI "Did the IHOA illegally with-hold the voter list?" and argued as "X The SR Erred by Not Requiring the IHOA to comply with the law relating to the Member List of Voters and by finding the IHOA was not required to provide it.". Because this is a question of law, it is reviewed De Nova. There are no facts or law to support ignoring a request for a voting list after an election was noticed.

The Panel erred in affirming because it applied the wrong law [19] and failed to discern the applicable facts. The panel cited "S.C. Code Ann. § 33-31-1602(c) (2006), but the Briefs of Appellant (Brief, pp. 39-41) and Respondent (Brief, p. 31) both cited and argued the issue of the 2009 Voter List Request per S.C. Code Ann. § 33-31-720 which statute leaves no discretion when the request is made after notice of an election is posted. The trial court's Conclusion of Law erred by depending entirely on Section "1602" holding that Appellant's 2009 voter list request was "properly denied" "after Plaintiff commenced this suit" improperly citing S.C. Code Ann. § 33-31-1602, R.p. 51. That was likewise the trial court's Finding of Facts R.p. 34.

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[19] "S.C. Code Ann.§ 33-31-1602(c) (2006), Appellant demanded the list per S.C. Code Ann. § 33-31-720 and briefed citing the "720" section.

On August 24, 2009 Respondent provided notice that the Annual Membership Meeting would be held on September 17, 2009. On September 3, 2009 [20] Appellant wrote Respondent R.p. 3486 stating a "Request for Copy of HOA Voter List" citing "a. SC Code Section 33-31-720 Members' List". While not required, the demand said "The purpose ... is to communicate with fellow homeowners regarding ... the forthcoming election". A list which does not contain the number of eligible votes per S.C. Code Ann. § 33-31-720 and which includes persons ineligible to vote does not satisfy the law. In the development a single house unit is entitled to one vote but the "social list" [21] referred to by the trial court and Respondent omits many members (including Appellant), includes multiple family members implying each has a vote, and, as Respondent Diehl's representative Julie Case testified R.p. 1100 the Golf Course had between 0 and 450 votes. [22] – she couldn't tell from the list. Case testified R.p. 1101 that the actual voter list omitted homeowners (listed on the "social list") ineligible to vote for various reasons. At trial Respondent Board Member Abel admitted R.p. 2870 that what they were offering me is the "Print owner telephone directory." Abel testified R.p. 2882 that Respondents ignored the September 2009 Voter List request because and only because Appellant had sued the HOA. The Golf Course was not listed on the "web / telephone list" [23]. The Trial Court and the Panel erred finding that the "social / web" list satisfied the mandate of S.C. Code Ann. § 33-31-720. The record lacks a response to

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[20] Fourteen (14) days before the Annual Meeting.
[21] The "Web Site" list with voluntary entries and ommission of members, such as Appellant, who chose not to be listed.
[22] The Golf Course was thousands of dollars in arrears on assessments.
[23] The list included renters not entitled to vote and people who had sold their unit.

Appellant's September 3, 2009 request because Respondent admits having ignored the request. There is a Trial Court Finding of Fact R.p. 34 #22 reflecting the trial testimony of Respondent's witnesses that Respondents' Counsel told them to refuse and was misapplying inapplicable S.C. Code Ann. § 31-32-1602(c). Per S.C. Code Ann. § 33-31-720, after an election is noticed the HOA has no discretion and must at least provide the minimum mandated information – not no information at all.

There are two authorities on the matter – both Attorney General's Opinions: December 11, 2011 Opinion R.p. 3086 specifically noting that S.C. Code Ann. § 33-31-1602 but rather S.C. Code Ann. § 33-31-720 applies when an election has been noticed. Another Attorney General Decision was issued on February 3, 2014 (after briefs were final). The Attorney General stated he was offering these opinions because "the state does not have a large body of non-profit corporation case law". On Page 5 the Attorney General wrote

> **"The simple answer to your question is yes, non-profit corporations have to follow the law. As this Office stated in a prior opinion: This Office agrees with the statement ... the "HOA" should be under all the laws, rules and regulations that [the State of South Carolina] and the federal government already have in place. Neither management companies nor HOAs may act contrary to the laws of this state; such entities must operate within the boundaries set forth in our Code of Law .... ." citing S.C. Atty. Gen. 2010 WL 267896 (June 2, 2010).**

Trial testimony of Diehl employee Beckie Abel R.p. 2889:

> **"Q: Isn't it a fact that after April of 2009, the registered agent, K.A. Diehl, would not permit me to inspect a copy, in the office of the registered agent, a single document relating to the IHOA?**
> **A: You were not allowed to copy, I do know that. "**

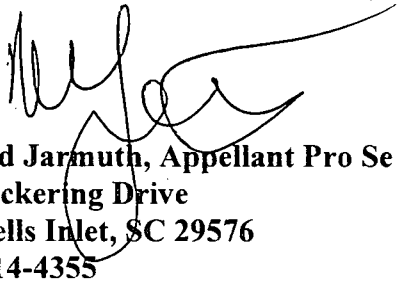
S.C. Code Ann. § 33-31-720 Members' list for voting:

> **(a) ... The list must show the address and number of votes each member is entitled to vote ...**
> **(b) The list of members must be available for inspection by any member for**

the purpose of communication with other members concerning the meeting, beginning the day after notice is given of the meeting.

Appellant's September 3, 2009 request R.p. 3486 used the language of the statute [24] to assure compliance.

WHEREFORE Appellant, for just cause shown, Moves the Court of Appeals to Rehear this Case and to Reverse its Affirmation on the issues presented.



Ronald Jarmuth, Appellant Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
March 12, 2015

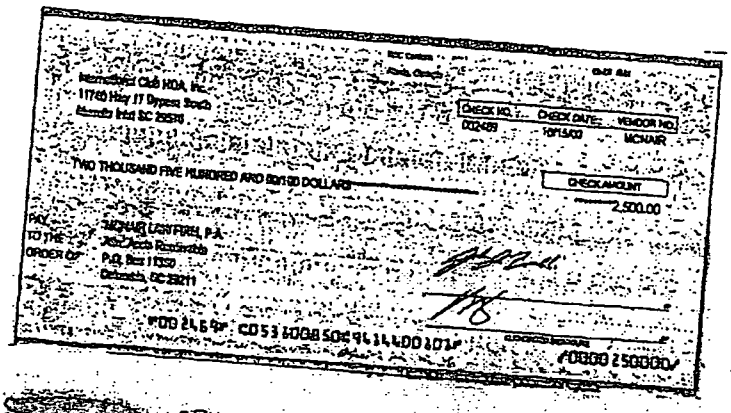
[24] **"The purpose of this request is to communicate with fellow homeowners regarding matters germane to the forthcoming election.**

EXHIBITS

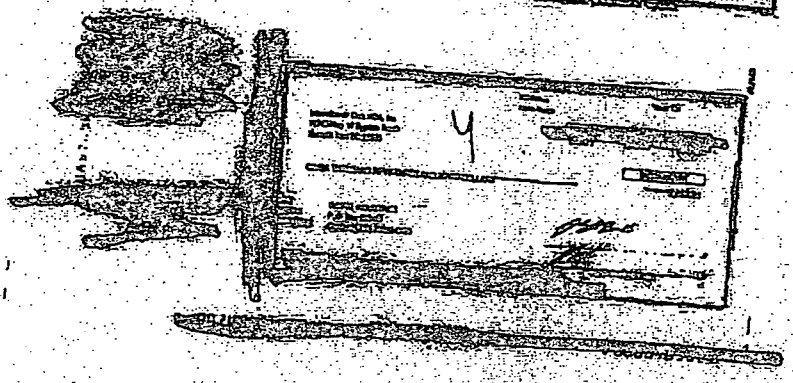
A	October 15, 2009 Check to McNair Law.
B	August 10, 2010 Check to McNair Law.
C	April 7, 2009 Complaint (clocked page)
D	May 12, 2009 Answer (Counter - Claim)
E	October 24, 2011 Amended Answer (Counter - Claim)
F	October 12, 2010 Complaint (date page)
G	November 17, 2010 Answer
H	October 24, 2011 Amended Answer (Counter Claim)
I	William Freiboth, Direct Testimony at Trial
J	William Freiboth, Cross Examination at Trial
K	McNair Appeal Response Brief
L	September 3, 2009 Jarmuth Voter List Request
M	September 17, 2009 Draft Minutes of Annual Meeting with Election
N	December 21, 2011 S.C. Attorney General Opinion
O	February 3, 2014 S.C. Attorney General Opinion

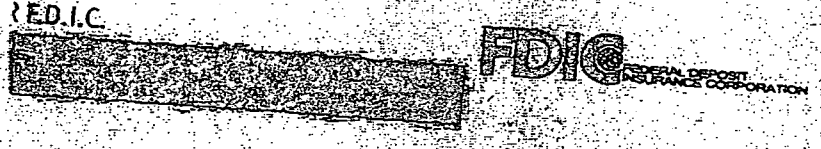
AUTHORITIES

Cases

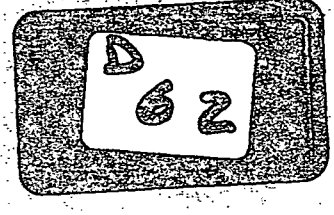

TWO THOUSAND FIVE HUNDRED AND 00/100 DOLLARS
CHECK AMOUNT
2,500.00
PAY TO THE ORDER OF
MICHAEL LICHTMAN, P.A.
P.O. Box 11030
Orlando, FL 32811
FDIC

Oct 15, 2009




FDIC
FEDERAL DEPOSIT INSURANCE CORPORATION

A


D 62

AC

Aug 10, 2010

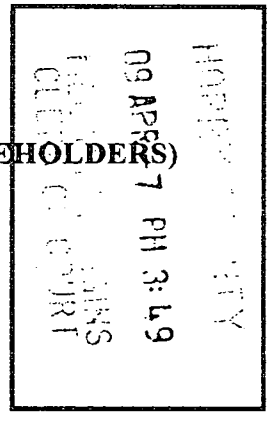
RBC Bank

3320 HOLCOMB BRIDGE ROAD
NORCROSS, GEORGIA 30092
PHONE 770-242-8582
FAX 770-242-8253

B

INTERNATIONAL CLUB 004334

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**Civil Action No. 2009-CP-26 -3596**
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	**COMPLAINT**
	)	**(NON-JURY)**
vs.	)	
	)	**(DECLARATORY JUDGMENT)**
The International Club Homeowners Association, Inc.,	)	**(AND EQUITABLE RELIEF)**
	)	**(DERIVATIVE ACTION BY SHAREHOLDERS)**
And	)	
	)	
Rosemary Toth	)	
	)	
Defendants	)	
	)	



Ronald Jarmuth ("Jarmuth" complaining of the Defendants, The International Club Homeowners Association, Inc ("HOA") and Rosemary Toth, putative President of the HOA, respectfully shows and alleges unto this Honorable Court as follows:

1. The Plaintiff is a citizen of South Carolina, a resident of Horry County, a member of the HOA and is an owner of a lot in the International Club Planned Unit Development ("PUD") and which lot is subjected to certain covenants which allegedly apply to all properties within the PUD.

2. The Defendant HOA is a non-profit corporation organized and existing under the laws of the State of South Carolina by virtue of its non-profit corporation Articles of Incorporation filed with the Office of the Secretary of State of South Carolina on or about March 1, 2001.

3. Rosemary Toth is the putative President of the HOA. She is the co-owner (with Charles Roche) of a lot in the HOA subject to the same certain covenants under dispute.

4. The property that is the subject of this action is located in Horry County, South Carolina and lies within the PUD. The events that are the subject of this action took place in Horry County, South Carolina.

5. This is an action for declaratory judgment relief pursuant to the Uniform Declaratory

FIFTH DEFENSE

13. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

14. The Answering Defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

15. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

16. The Answering Defendants assert consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

17. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

18. The Defendant, Rosemary Toth, at all times, has acted and continues to act within the powers and authorities given to her by the governing documents for the Defendant HOA and therefore, is immune from any claims asserted by the Plaintiff.

EIGHTH DEFENSE
AND COUNTERCLAIM

19. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

20. Upon the dismissal of Plaintiff's claims, the Defendants seek an Order of the Court declaring that the Plaintiff is totally and solely liable for all attorney's fees, costs and expenses associated with the defense of this action and therefore seek a judgment against the

Plaintiff for all attorney's fees, costs and expenses incurred in this action to defend the claims of the Plaintiff.

WHEREFORE, having answered the Complaint, the Defendants pray that the same be dismissed and that the Court issue an Order directing that the Plaintiff be solely and totally responsible and liable for all attorney's fees, costs and expenses in the defense of this action, and for such other and further relief as this Court may deem just and proper.

McNair Law Firm, P.A.

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Email: hgolding@mcnair.net
asmith@mcnair.net
Attorneys for the Defendants

Myrtle Beach, South Carolina
May 12th, 2009

SEVENTEENTH DEFENSE AND SECOND COUNTERCLAIM

49. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth Defenses are incorporated herein and made a part and parcel hereof.

50. The Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina.

51. Upon information and belief, the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina.

52. Upon information and belief, the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property").

53. The Property is located in Horry County, South Carolina, and this Court has jurisdiction over both the Property and the parties to this action.

54. As the owner of the Property, the Plaintiff is subject to the Governing Documents.

55. The provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision.

56. Section 7.2 of the Declaration provides:

> "Prior Review of All Plans. No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement...shall be commenced, erected, or maintained upon any portion of the Subdivision, nor shall any exterior addition or change be made until the plans and specifications...showing the grading, filling nature, kind, size, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to the harmony of the exterior design and location in relation to the surrounding structures and topography by the Developer...Provided however, that upon Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association."

E

57. The Architectural Review Board for the Defendant HOA holds the architectural review rights pursuant to the Governing Documents. All Owners within the International Club apply to the Architectural Review Board for approval of plans and specifications for improvements constructed within the International Club.

58. The Defendant HOA enacted Architectural Guidelines in 2005 and has amended them from time to time.

59. Upon information and belief, the Plaintiff applied to the Architectural Review Board for approval of improvements on several occasions, and the Plaintiff's plans and specifications were approved.

60. Upon information and belief, the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.

61. The Defendant HOA, through its Architectural Review Board, sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.

62. Thereafter, the Plaintiff applied to the Architectural Review Board for approval of the brick wall and a fence, as well as a flower bed and edging.

63. Pursuant to Section 7.4 of the Declaration:

> "Fences. No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board in their sole discretion may require...No fences shall be permitted which obstruct the view of any stream or other body of water, golf courses or recreational amenity when viewed from inside any other Unit, or which interfere with the playing of golf on any nearby golf course or with the use of any Recreational Amenity."

64. The Architectural Review Board approved the Plaintiff's request for the flower bed and edging and denied the Plaintiff's request to construct the fence and wall, because the proposed construction violated the Governing Documents and the Architectural Guidelines and did not comply with the general scheme of development for the International Club.

65. The Architectural Review Board also demanded that the brick wall be removed from the Property within fifteen (15) days or he would be subject to monthly fines in the amount of One Hundred and 00/100 ($100.00) Dollars.

66. Upon information and belief, the Plaintiff paid a fine for constructing the brick wall in the amount of Fifty and 00/100 ($50.00) Dollars imposed by the Defendant HOA under protest several weeks later and threatened to sue the Defendant HOA.

67. Although the Plaintiff's application for the fence and the brick wall were denied and the Defendant HOA directed the Plaintiff to remove the brick wall, the Plaintiff failed and refused to remove the brick wall constructed.

68. The brick wall is a continuing violation of the Governing Documents and the Defendant HOA's Architectural Guidelines, and the Plaintiff has been fined accordingly.

69. Moreover, the Plaintiff has failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same.

70. Pursuant to the provisions of the Governing Documents, Plaintiff is responsible for paying assessments, fines, late fees, interest and other related charges to the Defendant HOA.

71. Provisions of the Governing Documents further provide that if the Plaintiff does not pay the assessments, fines or other related charges, Plaintiff is responsible for all costs of collection, including reasonable attorney's fees, that are incurred by the Defendant HOA.

72. The Plaintiff, as owner of the Property, was and is assessed regular assessments, fines, late fees, interest and other related charges. As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 ($1,132.00) Dollars plus the costs of collections for his continuing violation of the brick wall, which the Plaintiff has not paid despite due demand being made upon him to pay said assessments and fines.

73. The Plaintiff, as current owner of the Property, continues to incur fines, fees and additional related charges throughout the pendency of this case during his continued ownership of the Property.

74. As a direct and proximate result of the Defendant HOA pursuing collection of these fees and costs, Defendant HOA has and will continue to incur attorney's fees and costs.

75. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, and therefore, the Defendant HOA is entitled to a judgment in an amount to be determined by this Court, together with costs and attorney's fees incurred in bringing this action as well as an order requiring the Plaintiff to comply with the Governing Documents and the Architectural Guidelines and to remove the brick wall from the Property.

WHEREFORE, having answered the Plaintiff's Complaint and the First Amendment to the Complaint, the Defendants hereby pray as follows:

a. the Plaintiffs' Complaint and First Amendment to the Complaint be dismissed with prejudice;

b. judgment against the Plaintiff in an amount to be determined by the Court;

c. an order requiring Plaintiff to comply with the Defendant HOA's Governing Documents and Architectural Guidelines and to remove the brick wall from the Property in violation of the Governing Documents and Architectural Guidelines;

d. this Court award reasonable attorney's fees and costs to the Defendant HOA; and

e. for such other and further relief as this Court deems just and proper.

McNair Law Firm, P.A.

Henrietta U. Golding, SC Bar #2173
Alicia E. Thompson, SC Bar #77056
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athompson@mcnair.net
Attorneys for the Defendants

Myrtle Beach, South Carolina
October 24, 2011

Plaintiff's use of his property or requiring him to have any dealings at all with Defendant regarding any matter; and

c. Contingent on any party appealing a judgment bearing on this Count to the Circuit Court / Court of Common Pleas, a demand for punitive damages in the amount of $25,000.00 (twenty-five thousand dollars). This demand for punitive damages is effectively waived before the Magistrate's Court because of statutory limits on jurisdiction, but is contingently stated to conform with rules of pleading, should the matter proceed to a higher court.

FURTHER REQUEST

24. Plaintiff further requests that the Court award the costs of this action as provided by statute and for such other and further relief as this Court may deem just.

I state under the penalty of perjury that the above is correct and truthful, except those based upon my information and belief.

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

October 12, 2010

[6] Community Associates Institute's server none-the-less has been provided by Defendant with private financial and other information relating to all homeowners in the PUD, regardless of whether or not said individual homeowner has agreed to the release to CAI of said private information.

F

20. All actions of the Defendants were undertaken in good faith and in accordance with the business judgment rule.

TENTH DEFENSE

21. Paragraphs 1-20 above are incorporated herein by reference and made a part and parcel to Defendant's Tenth Defense.

22. The Plaintiff's claims are barred by the doctrine of equitable estoppel.

WHEREFORE, having answered the claims of the Plaintiff, the Defendants hereby prays as follows:

a. that the Complaint be dismissed; and

b. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

Henrietta U. Golding, SC Bar #2173
P.O. Box 336
Myrtle Beach, SC 29578-0336
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Email: hgolding@mcnair.net
Attorney for the Defendant

Myrtle Beach, South Carolina
November 17, 2010

ELEVENTH DEFENSE AND FIRST COUNTERCLAIM 2010-CP-26-11320

21. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Defenses are incorporated herein and made a part and parcel hereof.

22. The Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina.

23. Upon information and belief, the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina.

24. Upon information and belief, the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property").

25. The Property is located in Horry County, South Carolina, and this Court has jurisdiction over both the Property and the parties to this action.

26. As the owner of the Property, the Plaintiff is subject to the Governing Documents.

27. The provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision.

28. Section 7.2 of the Declaration provides:

> "Prior Review of All Plans. No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement...shall be commenced, erected, or maintained upon any portion of the Subdivision, nor shall any exterior addition or change be made until the plans and specifications...showing the grading, filling nature, kind, size, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to the harmony of the exterior design and location in relation to the surrounding structures and topography by the Developer...Provided however, that upon Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association."

H

29. The Architectural Review Board for the Defendant HOA holds the architectural review rights pursuant to the Governing Documents. All Owners within the International Club apply to the Architectural Review Board for approval of plans and specifications for improvements constructed within the International Club.

30. The Defendant HOA enacted Architectural Guidelines in 2005 and has amended them from time to time.

31. Upon information and belief, the Plaintiff applied to the Architectural Review Board for approval of improvements on several occasions, and the Plaintiff's plans and specifications were approved.

32. Upon information and belief, the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.

33. The Defendant HOA, through its Architectural Review Board, sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.

34. Thereafter, the Plaintiff applied to the Architectural Review Board for approval of the brick wall and a fence, as well as a flower bed and edging.

35. Pursuant to Section 7.4 of the Declaration:

> "Fences. No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board in their sole discretion may require...No fences shall be permitted which obstruct the view of any stream or other body of water, golf courses or recreational amenity when viewed from inside any other Unit, or which interfere with the playing of golf on any nearby golf course or with the use of any Recreational Amenity."

36. The Architectural Review Board approved the Plaintiff's request for the flower bed and edging and denied the Plaintiff's request to construct the fence and wall, because the proposed construction violated the Governing Documents and the Architectural Guidelines and did not comply with the general scheme of development for the International Club.

37. The Architectural Review Board also demanded that the brick wall be removed from the Property within fifteen (15) days or he would be subject to monthly fines in the amount of One Hundred and 00/100 ($100.00) Dollars.

38. Upon information and belief, the Plaintiff paid a fine for constructing the brick wall in the amount of Fifty and 00/100 ($50.00) Dollars imposed by the Defendant HOA under protest several weeks later and threatened to sue the Defendant HOA.

39. Although the Plaintiff's application for the fence and the brick wall were denied and the Defendant HOA directed the Plaintiff to remove the brick wall, the Plaintiff failed and refused to remove the brick wall constructed.

40. The brick wall is a continuing violation of the Governing Documents and the Defendant HOA's Architectural Guidelines, and the Plaintiff has been fined accordingly.

41. Moreover, the Plaintiff has failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same.

42. Pursuant to the provisions of the Governing Documents, Plaintiff is responsible for paying assessments, fines, late fees, interest and other related charges to the Defendant HOA.

43. Provisions of the Governing Documents further provide that if the Plaintiff does not pay the assessments, fines or other related charges, Plaintiff is responsible for all costs of collection, including reasonable attorney's fees, that are incurred by the Defendant HOA.

44. The Plaintiff, as owner of the Property, was and is assessed regular assessments, fines, late fees, interest and other related charges. As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 ($1,132.00) Dollars plus the costs of collections for his continuing violation of the brick wall, which the Plaintiff has not paid despite due demand being made upon him to pay said assessments and fines.

45. The Plaintiff, as current owner of the Property, continues to incur fines, fees and additional related charges throughout the pendency of this case during his continued ownership of the Property.

46. As a direct and proximate result of the Defendant HOA pursuing collection of these fees and costs, Defendant HOA has and will continue to incur attorney's fees and costs.

47. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, and therefore, the Defendant HOA is entitled to a judgment in an amount to be determined by this Court, together with costs and attorney's fees incurred in bringing this action as well as an order requiring the Plaintiff to comply with the Governing Documents and the Architectural Guidelines and to remove the brick wall from the Property.

WHEREFORE, having answered the claims of the Plaintiff, the Defendants hereby prays as follows:

a. that the Complaint be dismissed;

b. judgment against the Plaintiff in an amount to be determined by the Court;

c. an order requiring Plaintiff to comply with the Defendant HOA's Governing Documents and Architectural Guidelines and to remove the brick wall from the Property in violation of the Governing Documents and Architectural Guidelines;

d. this Court award reasonable attorney's fees and costs to the Defendant HOA; and

e. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

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Attorneys for the Defendant HOA

Myrtle Beach, South Carolina
October 24, 2011

thousand, five hundred dollars to enforce the swing set regulations, did the Association also have to pay two thousand, five hundred to enforce the covenants in this action?

A: Yes, we did.

Q: I want you to go to Defendant's Exhibit 62, please.

A: All right.

Q: And Exhibit 62 is a copy of a check from the Association to the McNair Law Firm?

A: Yes.

Q: And what's the date, can you read the date on that check?

A: October 15th, 2009.

Q: And the amount of that check?

A: Twenty-five hundred dollars.

Q: And for what reason was that twenty-five hundred dollars paid to the McNair Law Firm?

A: I believe that was our insurance deductible for this lawsuit.

Q: Those are attorney's fees to enforce the covenants?

A: Yes, they are.

Q: I want you to go to Exhibit 79.

A: All right.

Q: Defendant's Exhibit 79 is what?

A: That's another check for twenty-five hundred dollars.

Q: And who's it payable to?

A: McNair Law Firm.

Q: And the date of that check?

A: I'm having a little trouble seeing it, but I think it's August 10th, 2010.

Q: So how much in attorney's fees has the Homeowner's Association paid to the McNair Law Firm to enforce the covenants with respect to Mr. Jarmuth?

A: With those two checks, five thousand dollars.

Q: If you add up together the fines of two thousand, three hundred twenty-six dollars and five thousand dollars, that would be seven thousand, three hundred and twenty-six dollars?

A: That's correct.

Q: Is the Association seeking a judgment against Mr. Jarmuth for the sum of seven thousand, three hundred and twenty-six dollars?

A: Yes, we are.

Q: Is the Association seeking an Order of the Court requiring Mr. Jarmuth to remove the brick foundation that was not approved?

what change to my property resulted?

A: I, I believe that -- that's a long question. Could you give that back to me again?

Q: Well, I filed the South Carolina Human Rights Commission complaint, build swing sets?

A: Uh-huh (affirmative response).

Q: Sir?

A: You, you did file one, yes.

Q: When I filed that complaint, had I done any modification to my property?

A: You accused the ARB members of wrongdoing and we hired an attorney as we would for any proceeding like that.

Q: I think you can answer the question. Had I made any modification to my property?

A: I don't believe that ---

Q: Can I take that ---

A: No.

Q: --- as a no?

A: No. No.

Q: What particular violation of the covenant can you cite that entitles you to get money because you prevailed in the South Carolina Human Rights complaint?

A: I believe you were challenging our authority to

-- of, of, of how we were enforcing the covenants.

Q: True or false, didn't I say simply that one of the ARB members had stated that he hates children, that being Mr. Cartman, and he was a member of the ARB official, and that was my belief that the denial of my swing set was because that it was related to my familial status; isn't that what I told them?

A: I'm not sure what you told them in that case, but I believe that your suit was more because your swing set was denied and that your belief about it being -- it shouldn't have been.

Q: Well, let's talk about the Civil Rights aspect. Do you know anything about Civil Rights complaints?

A: Not extensively, no.

MR. JARMUTH: I THINK I'D BE WASTING MY TIME PURSUING THIS. I THINK THE COURT CAN TAKE JUDICIAL NOTICE OF THE POINT I'M MAKING.

Q: Now, let's look at the next one. What was the next twenty-five hundred dollars for?

A: Well, first of all, you added, I believe, to this

lawsuit your ARB violation that, that is still running, lawsuit itself, but mostly I think we're enforcing the covenants.

Q: Let's go back to this originally captioned case, 2009-CP-26-3596. By filing that lawsuit where I alleged that the Board was in violation of the covenants, what violation of the covenant did I commit?

A: I believe you were challenging its authority to enforce its own covenants in many aspects.

Q: But please answer the question, what violation of the covenants did I make that would entitle you to collect attorney's fees to enforce the covenants.

A: For the original, for the original lawsuit.

Q: Original lawsuit.

A: I don't have the text of all the details. There were a lot of them there, and I would stick to the answer that I have, you were challenging our authority as an Association to be here and to enforce covenants.

Q: Have you read the Answer to the original Complaint?

A: A long time ago.

Q: Isn't it true that the only Counter-Complaint

which was, I believe, at the tenth defense where it said, "And we want attorney's fees," and that did not cite any covenant violation?

A: I don't recall.

MR. JARMUTH: THE COURT IS -- I'D ASK THE COURT, IN ITS DISCRETION, TO READ THAT, AND I'D PROFFER THAT IT DID NOT -- THAT AT THE TIME OF THE ORIGINAL COMPLAINT, THE DEFENDANT DID NOT CITE ANY VIOLATION OF COVENANTS.

Q: Now, let's turn to the last twenty-five hundred dollars. Now, looking at the palm tree application, did I actually install any palm trees?

A: No, and we didn't deny your request. We, we tabled it.

Q: But wouldn't you agree that in conjunction with the palm tree which you -- I just heard a few minutes ago as a basis for attorney fees, I -- true or false, I did not violate any covenants?

A: It wasn't for the palm trees, it was for the ARB

violation for your fence. The palm tree hasn't been decided. All that was done was to table it.

MR. JARMUTH: I'D LIKE FOR THE COURT TO TAKE THAT AS A NO, THE DEFENDANT IS UNABLE TO CITE A VIOLATION OF THE COVENANTS IN CONJUNCTION WITH THE PALM TREE. I BELIEVE THE COURT WE WILL FIND THAT THE DEFENDANT CITED TO THE PALM TREES.

Q: Now, let's look at -- that leads to the, the, the fence. Now, in your Counter-Complaint, did you say that I laid paver bases or did you say I built a wall?

A: I don't remember what was in, in the Counter-Complaint. I remember the instance of how it started and evolved.

Q: Isn't it true that Ms. Golding, the defense counsel, a little while ago led you through answering yes or no when she referred to walls, not edges?

A: No. I'm very familiar with that history.

Q: Now, have you ever personally installed a fence or had a fence installed for you at any property

filed his lawsuit challenging the ARB's authority to act under the Declaration. (**R. pp. 76-88**). Such actions constitute a waiver. (**R. p. 26**).[18]

Accordingly, Jarmuth's argument that § 13.3 of the Bylaws bars the fines levied against him is without merit.

M. The Award of Attorneys' Fees to the Association is Proper

The Special Referee did not abuse his discretion by awarding the Association $5,000 in attorneys' fees pursuant to the Declaration. Jarmuth contends that defending his claims does not constitute "enforcement of the Declaration" under §§ 8.1 and 8.9 of the Declaration. (**Jarmuth's Brief, pp. 43-44**).

The Declaration and Bylaws contain provisions that clearly provide that the Association is entitled to attorneys' fees when it employs legal counsel to enforce any of the rules of the Association, including the Declaration, Bylaws, and Rules and Regulations.[19] In Seabrook Island Property Owners Association, this Court acknowledged that the term "enforcement" in an attorneys' fees covenant has broader implications than filing suit. 365 S.C. at 237, 616 S.E.2d at 433. "Enforcement" includes

---

Association in this matter I am disputing the necessity of an appeal." This language constitutes a waiver of any right he had to a hearing under § 13.3 of the Bylaws.

[18] Jarmuth's waiver of any right to a hearing is the law of the case, and therefore, this issue is barred by the two issue rule. (**R. p. 26**).

[19] Under the Declaration, Section 8.9, "[s]hould any person employ counsel to enforce any of the foregoing covenants, conditions, reservations, or restrictions, because of a breach of the same, all costs incurred in such enforcement, including a reasonable fee of counsel shall be paid by the Owner of such Unit or Units in breach thereof." (**R. p. 4113**). Section 8.1 similarly grants the Association enforcement rights. (**R. p. 4111**). Likewise, the Bylaws Section 13.4, provides that "[s]hould the Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner." (**R. pp. 4131-4132**).

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any attempts by an attorney to seek the removal of unapproved improvements, including correspondence sent before a case commences. Id.

Under Seabrook Island Property Owners Association, the term "enforcement" encompasses defending lawsuits initiated by Jarmuth challenging the Association's authority to enforce the Declaration architectural review rights. **(R. pp. 76-88, 113-182, 4299-4303)**. It certainly includes filing a counterclaim. **(R. pp. 93-100, 268-279)**. Jarmuth's initiation of the lawsuit before the Association asserted its claim should not preclude the Association from recovering its fees. **(R. p. 20)**.

IV. The Final Order Should Not Be Disturbed to Address Meritless Claims

Jarmuth asks that the Final Order be reversed to address unsubstantiated claims. **(Jarmuth's Brief, pp. 30-32, 44-46)**. Pursuant to South Carolina Appellate Court Rule 220(c), the Court of Appeals "may affirm any ruling, order, decision, or judgment upon any ground(s) appearing on the Record on Appeal." Jarmuth's meritless grounds do not provide a basis for reversing the Final Order.

A. Declaration is Consistent with the Non-Profit Corporation Act

Jarmuth's Brief asserts that the Final Order is in error, because it does not contain a legal conclusion that the Declaration is inconsistent with the Non-Profit Corporation Act. **(Jarmuth's Brief, pp. 30-32)**. In his Post-Trial Motions, Jarmuth made this argument, and it was rejected by the circuit court. **(R. pp. 21-22)**.

Under S.C. Code Ann. § 33-31-620, members of a non-profit corporation may resign at any time. At trial, Jarmuth argued that the Declaration is invalid under the Non-Profit Corporation Act, because it requires owners of International Club property to be members of the Association. **(Jarmuth's Brief, pp. 30-32)**. The Declaration does not

Respectfully submitted,

McNAIR LAW FIRM, P.A.
Henrietta U. Golding
Alicia E. Thompson
P.O. Box 336
Myrtle Beach, South Carolina 29578
Phone: 843-444-1107
Fax: 843-443-9137
Attorneys for Respondents
The International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, Inc.

Myrtle Beach, South Carolina
Date: November 18, 2013

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
ronaldjarmuth@msn.com
September 3, 2009

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International Club Homeowners Association Inc
c/o Registered Agent (Diehl)
Attention: Beckie Abel (beckie.abel@kadiehl.com)

DELIVERED BY E-MAIL

SUBJECT: Request for Copy of HOA Voter List

Dear Sirs:

1. Reference
   a. SC Code Section 33-31-720, Members' list.
   b. sc Code Section 33-31-1601(c) Permanent Records.
   c. SC Code Section 33-31-1602 Inspection of Records.
   d. SC Code Section 33-31-1604 Court Ordered Inspection.

2. I am requesting to be given an opportunity within a day of your choice within the seven days commencing September 9, 2009 to either
   a. inspect and copy the membership and voting list of the HOA; or
   b. be given a copy of same.

3. I insist that the voting / member list contain all the information in your possession which you use to communicate with members / voters by e-mail or by US Postal Service mail, or to talk with them (i.e., name, address of property, vote-eligible status [banned from voting?], address for mail, e-mail address, and telephone number).

4. The purpose of this request is to communicate with fellow homeowners regarding matters germane to the forthcoming election.

Ronald Jarmuth

Ronald Jarmuth, Homeowner & Member of the HOA

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International Club Homeowner's Association, Inc.
Sixth Annual Members' Meeting
September 17, 2009 – 7:00 PM

Minutes

The International Club HOA Sixth Annual Members Meeting was held at St. James High School located at 10800 Highway 707, Murrells Inlet, SC 29576.

I. Pledge of Allegiance

II. Call to Order
The meeting was called to order at 7:00pm. In attendance were Rosemary Toth, Maureen Sullivan, Bill Jacques, Ed Courtney and Bill Freiboth. Also present were Beckie Abel and Julie Case with K.A. Diehl & Associates. Candidates up for the election, John Bianchi and Camille Noonan were also present.

III. Appointment of Recording Secretary – Julie Case
Rosemary announced to the membership that Julie Case will serve as the recording secretary for the Sixth Annual Members Meeting.

IV. Opening Statements
Chairman Toth thanked all members for attending and introduced all current Board Members, Candidates and Management staff that were present at the meeting.

A. Verification of Quorum
Management reported that the quorum requirements have been met and there were 22.95% present by proxy and 10.24% were present in person with a total quorum of 33.19%.

B. Notice of Proof of Mailing
The proof of mailing was announced as received and in hand of Chairman Toth.

C. Minutes of the Fifth Annual Members Meeting
A motion was made to dispense the reading of the Fifth Annual Members Meeting Minutes and approve as written.

Motion made by:	Tom Bielli
Seconded by:	Lucille DiPaolo
Vote:	Passed unanimously

D. Minutes of Special Meeting – August 6, 2009
A motion was made to dispense of the reading of the Special Members Meeting from August 6, 2009 and approve as written.

Motion made by:	Pat Zigler
Seconded by:	Dotty Paton
Vote:	Passed unanimously

V. Election of Director

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Rosemary opened the floor for nominations. There were no nominations from the floor so a motion was made to close nominations.

Motion made by:	Angelo Rubano
Seconded by:	Pat Trasport
Vote:	Passed unanimously

Chairman Toth announced the election results and announced that John Bianchi was elected and was given congratulations from the Board and Community. Camille Noonan was thanked for her interest in serving on the Board and she was encouraged to participate in other committee positions available.

VI. Reports

Bill Freiboth – Web Site Demo

Bill introduced the new HOA website, internationalclubhoa.com. He demonstrated the sign-in process and how to register. After registration he navigated through the site sharing all of its capabilities. He showed how to check personal account information and all the areas to contact the Board of Directors.

A. Committee Reports

1. Maureen Sullivan – Committees in General
   Maureen introduced the new committees that are currently being organized. She asked for volunteers and shared that anyone interested in serving the community to sign up online. If any persons would like to sign up tonight we have forms for them to do so.

2. Leslie Zensky – Social
   Leslie introduced all of the committee members that have been organizing the community events. She shared that they have been very busy and announced some of the upcoming scheduled events.

3. Joe Harry – Pool
   Joe thanked the committee members for all of their participation and also announced that he will be stepping down as the committee chair. He reported on all current pool activity.

4. June Lee – Welcome
   Terry McCartney reported for the welcome committee in June Lee's stead. She shared that they have been greeting all new members of the community and enjoy welcoming the new members to the neighborhood.

5. Bill Dear – Neighborhood Watch
   Bill Dear is the Chair for the newly organized Neighborhood Watch. They are still looking for volunteers and they should be a fully organized and functional within the next month.

6. Bob Buller – Golf Course
   Bob shared that there is good relationship with the golf course and the possibility of events to be scheduled.

7. Ed Courtney – ARB
   Ed introduced all of the committee members to the membership. He recognized their hard work and also shared the proper process for submitting applications.

B. Board Report – Rosemary Toth
   Bill Jacques said a few words to the community since this was his last day serving on the Board of Directors. He shared what a pleasure it has been working with the various Board Members over the year and thanked the members for all of their continued support.
   Chairman Toth then shared what the community accomplishments were as well as what upcoming projects are being considered. Bill Freiboth shared the cable options.

C. Financial Report – Beckie Abel
   Beckie reported on the community financial status as of date.

VII. Excess Income Motion – Beckie Abel
The Board adopted the excess income resolution.

A motion was made to adopt the excess income resolution in accordance with the IRS regulations.

Motion made by:	Pat Ellen
Seconded by:	Joe Harry
Vote:	Passed unanimously

Ron Jarmuth called a point of order and asked for further explanation. The Board provided a brief explanation and asked Mr. Jarmuth to contact the management office for further explanation if necessary.

VIII. Unfinished Business
There was no unfinished business to be discussed at this time.

IX. Member Comment
Angelo Rubano – Mr. Rubano asked what the status of the current lawsuit. The Board answered that it was in the discovery stage and there was not much to report at this time.

Ronald Jarmuth – Mr. Jarmuth asked why the playground gets minimum usage and voiced his concern that the seats get too hot during the summer.

Reserve Study- Mr. Jarmuth expressed concern of the 2009 Reserve Study and stated that he felt it was plagiarized from an earlier study.

Pool Drains- Mr. Jarmuth refered to the pool drains and the need to be in compliance with the new laws. The Board responded that the pool drains were already taken care of in early March.

Insurance for Committee Members – Ms. Gray asked if committee members are covered under the Associations insurance policy. The Board replied that they are as long as the committee is acting under the Association.

Ken Bernstein – Mr. Bernstein stated that he feels that all legal matters that have been filed need to be announced to the community. He also asked how much the litigation expenses have costs as of this year to date. The Board stated that the lawsuits were posted on the community website and they gave an estimate of the legal expenses.

Cheryl Chmilewski – Ms. Chmilewski expressed many concerns

Bill Fletcher – Mr. Fletcher asked the Board how the legal expenses incurred will be paid for, for the Special Members Meeting. The Board replied that the HOA is responsible for the fees.

Janet Verdi – Ms. Verdi suggested that the current Board counter sue the members responsible.

X. Adjournment

A motion was made to adjourn at 8:35pm.

Motion made by:	Tom Bielli
Seconded by:	Dotty Paton
Vote:	Passed unanimously

Respectfully submitted by: _____
Julie Case, Assistant Association Manager

Approved by: _____
Rosemary Toth, President

ALAN WILSON
ATTORNEY GENERAL

December 21, 2011

The Honorable Tom Davis
Senator, District No. 46
P.O. Box 142
Columbia, S.C. 29202

Dear Senator Davis,

You requested an opinion of this Office as to whether the provisions of section 33-31-1602 of the South Carolina Code (Supp. 1994) supersede the bylaws and covenants of gated communities.

Law/Analysis

The statute you reference provides the members of a nonprofit corporation with the right to inspect the corporation's records subject to certain conditions and restrictions:

> (a) Subject to subsection (e) and Section 33-31-1603(c), a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e) if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.
>
> (b) Subject to subsection (e), a member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (c) and gives the corporation written notice at least five business days before the date on which the member wishes to inspect and copy:
>
> (1) excerpts from any records required to be maintained under Section 33-31-1601(a), to the extent not subject to inspection under Section 33-31-1602(a);
> (2) accounting records of the corporation; and
> (3) subject to Section 33-31-1605, the membership list.
>
> (c) A member may inspect and copy the records identified in subsection (b) only if:
>
> (1) the member's demand is made in good faith and for a proper purpose;
> (2) the member describes with reasonable particularity the purpose and the records the member desires to inspect; and
> (3) the records are directly connected with this purpose.

N

(d) This section does not affect:

(1) the right of a member to inspect records under Section 33-31-720 or, if the member is in litigation with the corporation, to the same extent as any other litigant; or
(2) the power of a court, independently of this chapter, to compel the production of corporate records for examination.

(e) **The articles or bylaws of a religious corporation may limit or abolish the right of a member under this section to inspect and copy any corporate record.**

S.C. Code § 33-31-1602 (Supp. 1994) (emphasis added).

The preceding statute is part of the South Carolina Nonprofit Corporation Act of 1994 ("Nonprofit Act"), S.C. Code sections 33-31-101 et seq., which generally governs the establishment, organization, and operation of nonprofit organizations.[1] Thus, we interpret your question as one concerning the validity of the bylaws of a nonprofit corporation under State law.

South Carolina courts have recognized the general rule that the bylaws of a corporation are invalid to the extent they are inconsistent with State law. See King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936) ("All resolutions and by-laws must be conformable and subordinate to the general laws"); Davis v. S.C. Cotton Growers' Co-op. Ass'n, 127 S.C. 353, 121 S.E. 260, 261 (1924) ("Bylaws regulating in a reasonable manner, the method of voting at corporate elections will be sustained, if their provisions do not conflict with the charter or statute"); Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986) aff'd as modified, 291 S.C. 201, 352 S.E.2d 707 (1987) ("A corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and any by-laws made pursuant thereto"); Ortega v. Kingfisher Homeowners Ass'n, Inc., 314 S.C. 180, 182-83, 442 S.E.2d 202, 204 (Ct. App. 1994) (provision in association's bylaws calling for up to five directors with staggered terms violated statute requiring at least nine directors in order to stagger terms); see also 18 C.J.S. Corporations § 163 ("by laws inconsistent with statutory law, the common law, or with public policy or good morals, are void").

The general rule that a corporation's bylaws must be consistent with State law has also been codified by the General Assembly. See § 33-3-102(3), (15) (every corporation generally has power to adopt bylaws or do any other act not inconsistent with State law). The Nonprofit Act describes the general powers of a corporation, in pertinent part, as follows:

> Unless its articles of incorporation provide otherwise, **every corporation...has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including, without limitation, power:**

[1] The provisions of the South Carolina Business Corporation Act of 1988, which encompasses Chapters 1 through 20 of Title 33 of the S.C. Code, are applicable to nonprofit corporations to the extent such provisions are not inconsistent with those of the Nonprofit Act. § 33-20-103.

([3]) **to make and amend bylaws *not inconsistent*** with its articles of incorporation or ***with the laws of this State*** for regulating and managing the affairs of the corporation;

(18) **to do all things necessary or convenient, *not inconsistent with the law,*** to further the activities and affairs of the corporation.

§ 33-31-302 (emphasis added); *see also* § 33-31-206(b) ("The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation").

Consistent with the general rule set forth in the case law and statutes discussed above, we have no difficulty concluding that a nonprofit corporation's bylaws concerning a member's inspection rights are valid only to the extent they are consistent with the provisions of section 33-31-1602. Further support for this conclusion is found in subsection (e) of this statute. See 33-31-1602(e) ("The articles or bylaws of a *religious corporation may* limit or abolish the right of a member under this section to inspect and copy any corporate record") (emphasis added). It would have been unnecessary for the Legislature to expressly allow only religious corporations to adopt bylaws abolishing or limiting a member's statutory inspection rights if the general rule did not otherwise apply to all nonprofit corporation. Thus, it is our opinion that the bylaws of a nonreligious, nonprofit corporation such as a gated community concerning the inspection rights of members must be consistent with the provisions of § 33-31-1602.

We note that "[t]his Office is not a fact-finding entity; investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court." Op. S.C. Atty. Gen., September 23, 2011. We have not been provided with the bylaws of any corporation in conjunction with this request, and thus provide no opinion as to the validity of the bylaws of any particular corporation.

Very truly yours,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

February 3, 2014

The Honorable William G. Herbkersman
Member, House of Representatives
308B Blatt Building
Columbia, SC 29201

Dear Representative Herbkersman:

Attorney General Alan Wilson has referred your letter of September 23, 2013 to the Opinions section for a response. The following is our understanding of your question and the opinion of this Office concerning the issue based on that understanding.

Issue: Do S.C. Code § 33-31-620 and § 33-31-621 concerning resignation and termination in a nonprofit corporation apply to a nonprofit corporation that is also a property owner's association?

Short Answer: Yes, S.C. Code § 33-31-620 and § 33-31-621 regarding resignation and termination apply to a South Carolina nonprofit corporation such as a homeowner's association incorporated pursuant to S.C. Code § 33-31-101 et seq. and registered with the South Carolina's Secretary of State's Office.[1]

Law/Analysis:
The South Carolina Nonprofit Corporation Act of 1994[2] provides that:

> ...
> **SUBARTICLE C: RESIGNATION AND TERMINATION**
> **SECTION 33-31-620. Resignation.**
> (a) A member may resign at any time.
> (b) The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation.

[1] S.C. Code § 33-31-180 concerns religious corporations. Based on the information provided, it is this Office's understanding your question does not concern a religious nonprofit corporation.

[2] S.C. Code § 33-31-101 (1976 Code, as amended) states: "[t]his chapter may be cited as the South Carolina Nonprofit Corporation Act of 1994." "[E]xcept for those nonprofit corporations which are governed exclusively by the provisions of Chapter 31 of this title [Title 33], Chapters 1 through 20 of this title [Title 33] apply to every domestic nonprofit corporation and to any other foreign nonprofit corporation which is authorized to or transacts business in this State except as otherwise provided in Chapters 1 through 20 of this title or by the law regulating the organization, qualification, or governance of the nonprofit corporation." S.C. Code § 33-20-103 (1976 Code, as amended).

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SECTION 33-31-621. Termination, expulsion, and suspension.
(a) No member of a public benefit or mutual benefit corporation may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith.
(b) A procedure is fair and reasonable when either:
(1) the articles or bylaws set forth a procedure that provides:
(i) not less than fifteen days prior written notice of the expulsion, suspension, or termination and the reasons therefore; and
(ii) an opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension, or termination by a person or persons authorized to decide that the proposed expulsion, termination, or suspension not take place; or
(2) it is fair and reasonable taking into consideration all of the relevant facts and circumstances.
(c) Any written notice given by mail must be given by first class or certified mail sent to the last address of the member shown on the corporation's records.
(d) A proceeding challenging an expulsion, suspension, or termination, including a proceeding in which defective notice is alleged, must be commenced within one year after the effective date of the expulsion, suspension, or termination.
(e) A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension.

SECTION 33-31-622. Purchase of memberships.
(a) A public benefit or religious corporation may not purchase any of its memberships or any right arising therefrom.
(b) A mutual benefit corporation may purchase the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions set forth in or authorized by its articles or bylaws. No payment shall be made in violation of Article 13.

SUBARTICLE D: DERIVATIVE SUITS
SECTION 33-31-630. Derivative suits.
Derivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure.
HISTORY: 1994 Act No. 384, Section 1.

S.C. Code § 33-31-620 through § 33-31-630 (with titles and emphasis added). Pursuant to the South Carolina Nonprofit Corporation Act, S.C. Code § 33-31-206 and the official comments state:

(a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

> OFFICIAL COMMENT[3]
> A nonprofit corporation is required to adopt bylaws. The term "bylaws" has a broad meaning. See section 1.40(3). Failure to adopt bylaws will lead to much confusion and uncertainty about the internal structure and organization of the corporation. However, failure to adopt bylaws will not affect the de jure status of a corporation.
>
> The bylaws may contain any provision regulating and managing the affairs of the corporation not inconsistent with law or the articles. If a nonprofit corporation has members, its bylaws frequently contain detailed provisions dealing with their characteristics, qualifications, rights, limitations and obligations. Such provisions may relate to voting rights procedures governing admission, expulsion, suspension and other matters. The bylaws may either specify the exact number of directors or specify that the number of directors may be fixed within a stated range by the board or the members. Additional provisions that may appear in bylaws include: provisions for distribution of assets on dissolution in addition to those required by the articles (see section 2.02(a)(7)); levying dues, fees and assessments; setting the fiscal year; notice and the mechanics of meetings of directors and members; indemnification of officers, directors and agents; conventions and appointing delegates, if any; the authority of the officers and the executive director, if any; procedures to be followed in regard to checks and bank accounts; keeping and inspecting corporate records; and provisions, not inconsistent with the Model Act or articles, for amending the bylaws.
> The incorporators or initial directors should adopt the initial bylaws of a corporation prior to the admission of members. The Model Act contains specific procedures that must be followed to amend the bylaws or to repeal them and adopt new bylaws. See sections 10.20-10.22.

(Emphasis added). Therefore, a nonprofit corporation must adopt bylaws, but the bylaws may not conflict with the laws governing nonprofit corporations. Id. This Office issued an opinion in 2011 in which we stated:

> The preceding statute [S.C. Code § 33-31-1602] is part of the South Carolina Nonprofit Corporation Act of 1994 ("Nonprofit Act"), S.C. Code sections 33-31-101 et seq., which generally governs the establishment, organization, and operation of nonprofit organizations.[4] Thus, we interpret your question as one concerning the validity of the bylaws of a nonprofit corporation under State law.
>
> South Carolina courts have recognized the general rule that the bylaws of a corporation are invalid to the extent they are inconsistent with State law. See King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936) ("All resolutions and by-laws must be conformable and subordinate to the general laws"); Davis v. S.C. Cotton Growers' Co-op. Ass'n, 127 S.C. 353, 121 S.E. 260, 261 (1924) ("Bylaws regulating in a

[3] "The Official and South Carolina Reporters' Comments are intended to assist those who use and interpret this act to determine the intention of the drafters and the interrelationship between the various sections. As such, the comments serve the same function and purposes as the comments to the Uniform Commercial Code, Title 36, of the 1976 Code. They can be useful particularly in a state like South Carolina because the State does not have a large body of nonprofit corporation case law. The comments are not, however, part of the statutory law and, therefore, are not binding on any court or other adjudicatory body." S.C. Code § 33-31-101: South Carolina Reporters' Comments.

reasonable manner, the method of voting at corporate elections will be sustained, if their provisions do not conflict with the charter or statute"); Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986) aff'd as modified, 291 S.C. 201, 352 S.E.2d 707 (1987) ("A corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and any by-laws made pursuant thereto"); Ortega v. Kingfisher Homeowners Ass'n, Inc., 314 S.C. 180, 182-83, 442 S.E.2d 202, 204 (Ct. App. 1994) (provision in association's bylaws calling for up to five directors with staggered terms violated statute requiring at least nine directors in order to stagger terms); see also 18 C.J.S. Corporations § 163 ("by laws inconsistent with statutory law, the common law, or with public policy or good morals, are void").

The general rule that a corporation's bylaws must be consistent with State law has also been codified by the General Assembly. See § 33-3-102(3), (15) (every corporation generally has power to adopt bylaws or do any other act not inconsistent with State law). The Nonprofit Act describes the general powers of a corporation, in pertinent part, as follows:

> Unless its articles of incorporation provide otherwise, **every corporation ...has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including, without limitation, power:**
> ....
> (3) **to make and amend bylaws *not inconsistent*** with its articles of incorporation or ***with the laws of this State*** for regulating and managing the affairs of the corporation;
> ....
> (18) **to do all things necessary or convenient, *not inconsistent with the law,*** to further the activities and affairs of the corporation.

§ 33-31-302 (emphasis added); *see also* § 33-31-206(b) ("The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation").

Op. S.C. Atty. Gen., 2011 WL 6959369 (December 21, 2011).

It addition to adopting bylaws, every nonprofit corporation in South Carolina must elect to be a public benefit corporation, a mutual benefit corporation, or a religious corporation. S.C. Code § 33-31-202 (a)(2). Regarding resignation rights in nonprofit corporations, it should be noted that South Carolina law states:

> (a) A public benefit or religious corporation may not purchase any of its memberships or any right arising therefrom.
> (b) A mutual benefit corporation may purchase the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions set forth in or authorized by its articles or bylaws. No payment shall be made in violation of Article 13.
> (c) Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member.

S.C. Code § 33-31-611 (1976 Code, as amended). Without having information as to the name of the nonprofit or the election it is designated as, this Office can only bring these statutes to your attention. We hope this assists in your question. As this Office stated in a prior opinion,

> The simple answer to your question is yes, nonprofit corporations have to follow the law. As this Office stated in a prior opinion:
>
> > This Office agrees with the statement ... the 'HOA [Homeowner's Association] should be under all the laws, rules and regulations that [the state of South Carolina] and the federal government already have in place.' Neither management companies nor HOAs may act contrary to the laws of this state; such entities must operate within the boundaries set forth in our Code of Law and remain bound to any contractual obligations created. However, the determination as to whether [the management] violated any code of law is factual in nature and thus, beyond the scope of this opinion and better addressed by a court.
>
> Op. S.C. Atty. Gen., 2010 WL 2678696 (June 2, 2010) (citing Ops. S.C. Atty. Gen., 2006 WL 2849809 (September 14, 2006); 2006 WL 2382449 (July 19, 2006); 2006 WL 1207270 (April 6, 2006)).

Op. S.C. Atty. Gen., 2013 WL 3479876 (June 26, 2013).

Conclusion: S.C. Code § 33-31-620 and § 33-31-621 regarding resignation and termination apply to a South Carolina nonprofit corporation such as a homeowner's association incorporated pursuant to S.C. Code § 33-31-101 et seq. and registered with the South Carolina Secretary of State's Office. However, as stated above, please note the statute also provides transfer restrictions on nonprofit corporations depending on whether they are registered as a public benefit, mutual benefit, or a religious nonprofit corporation. This Office has not examined any documents from your nonprofit corporation, nor do we even know the name of the entity, and thus we make no assertions or validations of any specific nature. This Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Solicitor General

RECEIVED
MAR 12 2015
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

CASE NUMBER 2009-CP-26-3596

Ronald Jarmuth, Appellant,

v.

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

PROOF OF SERVICE

I certify that on March 12, 2015 I served Appellant's "Motion for Rehearing" by depositing a copy of same in the United States Mail, postage prepaid, addressed to Respondent's common counsel, Henrietta Golding and Alicia Thompson; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164

March 12, 2015

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March 12, 2015

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211-1629
803-734-1890

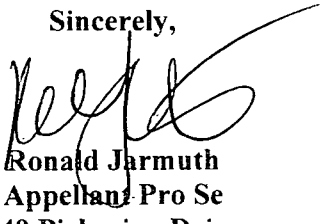
Re: Motion For Rehearing - in Appeal 2013000714 Jarmuth v International Club HOA et al
2009CP263596 in the Court of Common Pleas, Horry County
Appellate No. 2013-000714

Dear Madam Clerk:

Please file the attached Motion for Rehearing , which I provide as one unbound plus six bound copies, together with my check in the amount of twenty five dollars, the motion filing fee.

Thank you for your attention to this matter.

Sincerely,



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Enc: as
Cf: Henrietta Golding and Alicia Thompson, Attorneys for Respondents