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 REPLY TO RESONDENTS' RETURN TO APPELLANT'S MOTION FOR REHEARING

The Appellant, Ronald Jarmuth ("Jarmuth"), hereby submits this Reply to Appellants' Return (received served March 25, 2015) to Appellant's Motion for Rehearing (March 12, 2015). [1]

1. The Panel's March 4, 2015 Affirmation was skeletal and generally consisted only of citations to law, implicating findings of fact which must be present in the final order. The Petition for Rehearing is not a "regurgitation" of prior argument but the demonstration that there are no facts in the record to support the law which the Panel's Affirmation cited, that the actual facts contradict the Panel's findings,

[1] The Return was required by March 23, 2015.

and that the laws which the Affirmation depends on are clearly erroneous.

2. Respondent's Return is nothing more than a "strawman" in that it ignores the issues raised in the Petition and mis-states the Record to support it's position. The Return almost never actually cites to the actual Record and ignores the Petition's citations to the Record. The evidence and testimony supports the Petition.

3. <u>Pebble Creek is not subject to the Covenants</u>.

a. Respondent has ignored and thus acknowledged Appellant's assertion that the Covenants were never delivered to Sunbelt, the January 29, 1999 purchaser of Pebble Creek from Plantation AD, the Declarant of the Covenants. The Covenants stands as a deed and, as briefed by Appellant, requires delivery to and acceptance by Sunbelt. Appellant argues that the Deed was "delivered" to Sunbelt when recorded, but is silent as to the Covenants – the central issue. There is no evidence that the Covenants were ever delivered or accepted. The evidence is that the Covenants could not be delivered when Sunbelt bought Pebble Creek because the Covenants did not exist until February 5, 1999 (Appellant Petition, P2, R.p. 3765).

b. Respondent's Return (p.2) abandons the "race to the deed book" argument and now argues for the first time that the Deed was "delivered" (Response p.2) on February 8, 1999 when the Deed was ultimately recorded. Respondent says that

> **"no evidence exists in the record to support the finding that the Pebble Creek Deed was delivered on January 29, 1999".**

The Deed was cited at trial and in the Briefs by both parties. It was Plaintiff's Evidence #545 R.pp. 3733-3734. On it's face the Deed reads:

> **"this 29th day of January, 1999 ... Signed, Sealed and Delivered in the Presence of Plantation A.D., LLC ... Personally appeared before me ... the within named Plantation AD, LLC, by it's Manager ... Sworn to before me this 29th day of January, 1999".**

The deed also states that

> **"One Million, Eighty Hundred Forty Five Thousand (dollars) ... paid by Sunbelt ... receipt of which is hereby acknowledged."**

and by that instrument on January 29, 1999 "Plantation A.D. has granted, bargained sold and released" all current and prospective rights in Pebble Creek. On February 8, 1999 Plantation had no Privity in Pebble Creek and the Covenants required rights which Plantation had surrendered ten days before.

c. Respondent did not respond to the assertion that the Covenants themselves to not bind any property, requiring separate amendment to the Covenants binding specific property. They have conceded the point - that no Covenant Amendment ever specifically bound Pebble Creek to the Covenants (Petition p3 citing R.p.3723) where the Covenants state such an additional amendment is required.

4. <u>The "Villas" (subdivision) is not subject to the Covenants</u>.

Respondents argue that this was "raised for the first time on appeal and was not properly ruled upon by the trial judge" (Response p.3)." It was, however, argued at trial. As Appellant's Brief pointed out, the Final Order ignored many issues and a Declaratory Judgment as to The Villas because of lack of Privity is one of them. The Trial Court's Order, R.p. 41, erroneously named the Meadows (Privity never argued) and ignored The Villas. Appellant, however, raised this in his Brief pp. 7, 24, and 30 citing the four year lapse in Privity (sold May 9, 2000 subjected to Covenants by Amendment #4 December 20, 2004); and citing the final order confusing "The Meadows" with "The Villas". The Panel never determined that the trial court's Post-Trial Order denying a new trial and refusing to amend the final order made any new findings of fact or conclusions of law and Respondent's

Responsive Brief never argued that any new findings or conclusions were made; Respondent never moved for rehearing on that and thus abandoned that premise. The April 3, 2013 Notice of Appeal cited the March 11, 2013 trial court order and Appellant's Brief P.5 and Reply Brief P.1 noted that the March 11, 2013 Order made no new findings of fact nor conclusions of law to contest. There are no "implications in the Final Order" as to The Villas. Since the 2000 sale date and the date of the 2004 attempt to subject The Villas to the covenants are not contested, this is a matter of law and the Panel should have held as briefed by Appellant. There is no finding of the Trial Court to reverse. In affirming the trial court it affirmed a legal nullity, misapprehended the law and the facts and by reason of lack of Privity should have found for Appellant.

5. <u>Respondent HOA has no rights under the Covenants as a Deed</u>.

a. The "quit claim" issue raised as to Respondent because a quit claim action is the only way Respondent could gain deeded rights (as the Association) where another legal entity (MIGPA) is explicitly and unambiguously named as "The Association" – and Respondent's Answer did not ask the trial court to correct the Deed (Covenants). The Deed (Covenants) stand today as written. Appellant needed only to prove more likely than not that Respondent HOA is NOT the legal entity named in the Covenants to prevail – and the Panel missed this point 'though plead and briefed. Appellant's Complaint 2010CV26-1072943 later 2010CP26-11320 R.p. 81 para 14 demanded that the Court hold that

> **"Defendant HOA lacks a basis founded in the covenants or an agreement consensually entered into by Plaintiff to entitle Defendant to demand the payment to Defendant of any assessment at all."; "Wherefore Plaintiff asks for relief consisting of the return of all sums collected from Plaintiff or**

> **Plaintiff's predecessor owner of Lot 12 (Pebble Creek) for assessments in general; and for an Order barring Defendant from any future acts attempting to enforce any obligation by Plaintiff towards Defendant as to the payment of any assessments or charges of any nature." (R.p. 84 Para 16); and "Defendant association has no l... legally enforceable authority to enforce it's By-Laws over the PUD and Plaintiff. ... the homeowners in the PUD, ... are bound by the By-Laws of MIGA" (R.p. 86).**

This demand for Declaratory Judgment is simultaneously a demand for a Quiet Title decision quieting any claim by Respondent that they hold the deeded right to be "The Association". Respondent never asked the trial court to alter the deed (Covenant) and the trial court did not do so.

b. The bigger issue here is Ancient law as to property and deeds – which requires a strict enforcement of named rights in deeds and as briefed. Whether a corporation can sue or be sued in an alias name has nothing to do with deeded rights. The evidence is clear that Respondent is not a party to the Covenants, even way beyond the "more likely than not" standard. The Panel erred in implying that Respondent used the name cited in the deed – which it never did, and which would have been illegal since "MIGPA" or International Club Association" are existing South Carolina corporations. McCall v. Ikon [2] cited by Respondent is limited to personal jurisdiction in lawsuits and is inapplicable to deeded property rights. Respondent was absolutely correct in writing (Response P.4): "The Association's transaction of business under different names does not affect the Association's rights under the Declaration" – which are none.

6. The Panel erred in affirming that Respondent was entitled to attorney's fees it never paid in connection with the underlying action, for which the Covenants as a contract do not allow, and which Respondent's did not request in their Answer or

[2] McCall v Ikon; 363 S,C, 646m 652m 611 S,E.2d 315, 318 (Ct.App. 2005)

Counter – Claim.

The Panel and Respondents err in depending on Seabrook Island Prop. Owners' Ass'n v Berger, 365 S.C. 234, 240, 616 S.E.2d 431, 434 (Ct. App. 2005). This Court put Seabrook into context in S.C. Elec v Hartough 375 S.C. 541 (S.C. App. 2007) :

> **"Generally, a party may not recover attorney's fees absent a contract or statute. Blumberg v Nealco Inc, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). When an award of attorney's fees is based upon a contract between the parties, the determination of the fees is left to the discretion of the trial court. Seabrook Island Prop. Owners' Ass'n v Berger, 365 S.C. 234, 240, 616 S.E.2d 431, 434 (Ct. App. 2005) (citing Baron Data Sys. Inc v Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989)."**

Thus the court's discretion is limited to contracts (covenants) which actually allow attorney's fees. Appellant's Brief Section 8 P.10 pointed out that the Covenants have NO PROVISION TO COLLECT ATTORNEY FEES TO ENFORCE THE COVENANTS (Section 8.1) R.p. 3763 which grants "the Association and any Owner ... the right to enforce by any proceedings at law or in equity, all of the restrictions". Per Blumberg and S.C. Elec v Hartough the Panel erred as a matter of law. Per Covenants Section 6.1 (Assessments) R.p. 3752, "costs of collection, and reasonable attorney's fees for the collection ... (of the) annual and special assessments" is allowed. This was argued at trial and Appellant Briefed this to the Court of Appeals. There was no "award of attorney's fees based upon restrictive covenants" as argued by Respondent's Return P.5. Costs of defending a discrimination complaint construed by Respondent as "defending the covenants" is barred because attorney's fees are not allowed to defend the covenants". Further, Respondents did not plead nor ask the Court for their insurance deductible with regards to the investigation by the S.C. Human Affairs Commission – and the Final

Order cited the $ 5,000 as deductibles to enforce the covenants [3] within the context of the lawsuit, not the Human Affairs matter. Demanding attorney fees from a relator in connection with a Human Affairs Investigation violates 24 C.F.R. § 100.400 and S.C. Code Ann. § 31-21-80 -- the claim that the Return now states..

The Petition for Rehearing pointed out, with citations, where William Freiboth testified and where Respondent's Counsel wrote under affirmation that the $ 5,000 was totally the deductibles for the 2009 and 2010 Complaints and exclusively to enforce the covenants. Respondents now admit that they lied – saying in the Return (p.p. 5-6) that the 2009 check was for "defending an administrative action" to which Appellant was not a party (it was S.C. Human Affairs Commission v the IHOA) and that "the insurance deductible (was) to defend the administrative action". The Panel's Affirmation was obtained by fraudulent pleading by Respondents to this Court and by Perjury at the trial court level.

Respondent's Answer . Counter-Claim never asked the Court for the costs of defending the Discrimination matter and asked R.p.274 "for all attorney's fees, costs and expenses associated with the defense of this action" and R.p. 99 "in bringing this action ... requiring the Plaintiff to comply with the Governing Documents" which are barred by S.C. Elec v Hartough (op. cit.). Clearly the Panel misconstrued the facts (the covenants, the complaints and answers, and the text of the final order) and thus misapplied applicable law. The Panel is further asked to be mindful that the evidence is that Respondents PAID NOTHING (neither check was related to the 2009 or the 2010 case) to enforce the covenants (see Appellant's Petition).

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[3] Which is thus an error of law because there is no provision for attorney's fees to enforce covenants.

7. Respondent Rosemary Toth violated the Law when she distributed profits from the sale of an easement to Central Electric.

Respondent's and the Panel misconstrued this as a "business judgment" case and erroneously included K.A. Diehl in that matter. Appellant never alleged "mishandling" but rather that as a matter of law Toth's conduct was illegal and per the statute she is personally liable for the repayment of the illegal distribution. There is but one applicable legal citation: Attorney General Opinion February 3, 2014 stating he was offering his opinion "because "the state does not have a large body of non-profit corporation case law" writing on Page 5 .

> "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).

Respondents claim that the testimony (they cite R.p.2568-2569) "was a refund in assessments". That's what Respondent's Counsel Henrietta Golding wrote in the Final Order. But that's not the evidence. The HOA President, William Freiboth, in the page of the trial testimony cited by Respondents, testified it wasn't. He testified:

> "of the eighty thousand dollars in cash that we got, we gave back to six hundred and fifty homeowners a seventy-five dollar check. We felt it was important to share those proceeds and put that money directly in the pocket of the homeowners. ... We could've just given a credit to every homeowner's account, but you're not really feeling that, you know, it's one thing to get a check for seventy-five dollars and ... go out to dinner. A credit on the account, we didn't know would have the same impact."

No mention or evidence of "a refund in assessments". Freiboth's testimony was

cited in Appellant's Brief and it IS EVIDENCE. Refund of Assessments was never argued at trial and first appeared when Ms. Golding [4] wrote the Final Order, ignoring the evidence and testimony at trial and inserting a never argued "refund" to avoid the consequence of violating the S.C. Non-Profit Corporation Act. Toth is liable for the refund not for mishandling funds but for violating the law.

8. Diehl lacks any immunity as to Defamation.

The Error is that the Panel erroneously mis-read the final order and ignored Appellant's Brief. As briefed by Appellant, the final order DID NOT grant immunity to Diehl – it granted it to the HOA and ignored Diehl's defamation. Appellant plead at trial and briefed Diehl's failure to properly assert any "qualified privilege"; Respondent mis-states the error.[5] Appellant points out that absent a defense to a claim of defamation, absent a properly asserted Rule 12(b) claim of privilege, and absent a place in the final order PROPERLY granting immunity, the Panel clearly erred in not finding for Appellant as a matter of law because Diehl had foregone any defense. The non-existent final order finding is a phantom. Appellant briefed that Diehl acted in bad faith because Diehl employee Julie Case testified that Diehl made no attempt to verify the facts (which were out and out lies) and communicated to persons who were not even homeowners or even residents. [6]

9. Respondent HOA illegally denied the Voter List After Election noted.

Respondent's return asserts two points neither of which were briefed by

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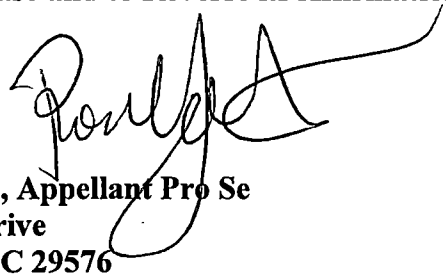
[4] Ms. Golding's draft order is in the Record on Appeal, R.pp. 563 – 610.
[5] Return Brief p.6 VI: "lower court's ruling that K.A. Diehl' statements are protected by a qualified privilege".
[6] Respondent's sole citation is a lie because in Snavely this court held that the patient had consented to the release of her medical information; Snavely is not a defamation case and the quoted phrase is NOT in the Court's decision.

Respondent nor argued at trial:[7] (1) that there is no "evidence that ... the (September 3, 2009 voter list) request was made before the 2009 Annual Meeting" and (2) that no "law exists exempting requests for membership lists from S.C. Code Ann. 33-31-1602". Respondent lies.

One need look no further than Appellant's Motion where Exh. L (R.p.3486 Pl. Exh. 361 at trial) is the September 3, 2009 request which refers "to the forthcoming election" and Exh. M (R.pp. 3487-3490 P. Exh. 362 at trial) which is the minutes of the September 17, 2009 Annual Membership Meeting with an Election held 14 days after the request. The non-existent evidence was before Respondent.

Appellant's Motion (pp 19-22) extensively briefed the law. Appellant pointed out that S.C. Attorney General Opinion December 21, 2011 [8] noted that HOA's were illegally with-holding voter lists by relying on S.C. Code Ann. § 33-31-1602 but that S.C. Code Ann. § 33-31-720 applies when a voting list was requested prior to a HOA election. The Panel's affirmation should be reversed because the facts and the law favor Appellant and the final order was erroneous as to the law and the facts.

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



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[7] As Respondent points out, Respondent may not raise either argument for the first time in response to a Motion for Rehearing.
[8] Exhibit N to Motion for Rehearing; R.p. 3086.

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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 27, 2015 I served Appellant's "Reply to 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

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The Honorable Jenny Abbott Kitchings, Clerk
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Re: Reply to 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 Appellant's Reply to Respondents' Return to Motion for Rehearing.

The Motion for Rehearing was filed on March 12, 2015.

The Return was filed on March 23, 2015 but not served until March 25, 2015.

The Reply is provided as one unbound plus six bound copies.

Thank you for your attention to this matter.

Sincerely,

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