

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Petition for Writ of Certiorari
To The Court of Appeals
(Appeal No. 2013000714)

S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Ralph P. Stroman, Special Referee

Ronald Jarmuth

Petitioner
Appellant,

v.

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

Respondents.

APPENDIX

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In the Court of Appeals**

Appeal No. 2013000714

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

Ralph P. Stroman, Special Referee

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

Ronald Jarmuth

Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT

**Ronald Jarmuth
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STATEMENT OF ISSUES ON APPEAL

- I. Was Appellant denied a constitutionally sufficient fair trial?
- II. Did the Court address all the issues before it?
- III. Which corporation has rights under the covenants?
- IV. What are the Pre-emptive effects of the South Carolina Non-Profit Corporation Act on the covenants and practices of Respondent home owner association?
- IV. Are Diehl and the IHOA liable to Appellant for defamation and invasion of privacy?
- V. Are Toth and Diehl liable to the IHOA for mishandling IHOA funds?
- VI. Are certain covenant obligations voidable personal service contracts?
- VII. Was Appellant entitled to the approval of various modifications at his unit?
- VIII. Are Pebble Creek and The Villas subject to the Covenants?
- IX. Are certain waivers of the covenants general or limited?
- X. Are the roads owned by Horry County free of Covenant restrictions?
- XI. Did the IHOA illegally with-hold the voter list?
- XII. Is the IHOA entitled to attorney fees?

STATEMENT OF THE CASE

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

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

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

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

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

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

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

Through June, 2012 the cases appeared on every trial roster but the Court refused to try the cases² citing lack of available trial time. On June 13, 2012, at Respondents' request, the court entered a consent Order of Reference to Special Referee ("SR") Hon. Ralph Stroman ("Stroman") who had previously agreed to a trial of at least five (5) days, including a Saturday and Sunday. The Order provided that the Respondent would pay all costs. The Court refused to provide an official court reporter and Respondent contracted with a private court reporter, Appellant objecting. The Special Referee scheduled a trial to last from Wednesday August 8, 2012 through Sunday August 12, 2012 (five days). The Clerk of Court arranged to provide Court Officers and Sheriff Deputies over the weekend. Appellant's Rule 16 Statement was served with paper copies of the Exhibits on Respondent weeks before the trial. A day before trial Respondent sent Appellant a copy of a revised and expanded Rule 16 Exhibit List – but no paper copies and gave the paper copies to Appellant in the Courtroom as the trial began with no time to examine them. Appellant objected calling this "Trial By Ambush". The Court deferred and never made a decision on the issue.

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

¹ Until August 8, 2012 Respondent did not give Appellant a single document on paper. Everything Respondent provided in discovery was on CD with "Bates" numbered titles.

² At the roster call, the Court stated from the bench that the case would never go to trial.

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

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

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

at trial.

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

FACTS

1. Who is “The Association”.

The Murrells Inlet Golf Plantation Association (“MIGPA”) is a non-profit corporation organized under the South Carolina Non-Profit Corporation Act, S.C. Code Ann. § 33-31-1404. Section 1.3 of the Covenants (R.p. 3740) February 8, 1999) names MIGPA as the “Association” for all intents and purposes. The Respondent International Club Home Owners Association (IHOA) is chartered under the same act. Respondent’s name never appears in the Covenants. Article III of the Covenants gives the HOA named as “The Association” (MIGPA) the rights and obligations of the HOA, particularly the rights to impose assessments and fines and to enforce the covenants.⁴

The name of the development in the Covenants was the “Murrells Inlet Golf Plantation”. Amendment 1 to the Covenants (May 10, 2000) changed the PUD name

“to International Club. Wherever the name "Murrells Inlet Golf Plantation" appears in the Declaration, it should now be read as "International Club".” R.p. 3786.

still never naming the Respondent IHOA. The “International Club Association” (“ICA”) is another non-profit organized under The Act. If the name change algorithm was applicable to The Association name as well as to the PUD name, The Association would be ICA – not Respondent IHOA R.p. 3842.

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

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

2008 both state that

“Owners of Units ... shall pay the Capital Contribution Fee to the International Club Association, Inc. ... “ R.pp. 3824, 3832.

On Page 10 para 1 Line 4 R.p. 37 of the September 10, 2012 Final Order the SR made a Conclusion of Law that Amendment #1 May 10, 2000 R.p. 3786 changed the “Association” name to “the International Club” (the ICA) which is not the Respondent “International Club Home Owners Association”. On March 7, 2010 the ICA merged into MIGPA (R.p. 3849.

Section 4.17 (Wells and Effluent) R.p. 3750 of the Covenants granted MIGPA riparian rights which are deeded equitable rights. The section reads

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

2. Covenants and Pebble Creek.

On January 29, 1999 R.p. 3733 Plantation A.D. sold “Pebble Creek” where Appellant’s home is located to Sunbelt Development,⁵ delivering a grant deed and receiving payment that day. On January 29, 1999 there were no covenants of record for Pebble Creek. On February 8, 1999, R.p. 3737 ten days later, the seller recorded the Covenants without an endorsement from Sunbelt agreeing to the post-sale imposition of restrictions and obligations. Per the Declaration the filing of the Covenants did not subject any of the land in the PUD to the Covenants but that only

so much of it as Developer may ... see fit to ... dedicate, and as, by subsequent amendment hereto, may be subjected to this Declaration, shall be ... subject to the ... easements, restrictions, covenants, charges, liens and conditions” R.p. 3740.

Amendment 1 (February 8, 1999) R.p. 3786 attempted to subject some “multi-family” area to the Covenants but omitted it’s description of property in Exhibit A thus no

⁵ Appellant’s vertical predecessor in privity and equity.

property was subjected to covenants that day. On May 9, 2000 Plantation AD sold an un-named mutli-family area to another developer, "International Club Villas". On December 29, 2004, more than four years after The Villas was sold, the Developer⁶ subjected The Villas to the Covenants through Covenant Amendment 4 R.p. 3827.

3. Pebble Creek Roads.

On February 4, 1997 r.P. 3672 the Horry County Planning Commission approved the Site Plan for the Murrells Inlet Golf Plantation PUD, ("the PUD") requiring that "all roads and rights of way shall be designed and built ... for the purposes of Dedication to Horry County Government". On January 21, 2003 Horry County Council (Resolution R009-03 R.pp. 3629, 3664) Resolved "to accept dedication of the roads and drainage at Pebble Creek" from Sunbelt Development, the owner of Pebble Creek⁷. The resolution said that all "fully executed dedication documents" had been provided. One was the standard "Certification of Non-Litigation" which stated that the roads were dedicated "fee simple"⁸.

4. Cash Distribution Of Profits From Sale.

On June 19, 2009 R.p. 3836 the IHOA paid the Developer five dollars for a private road and adjacent land on which the homeowners had a non-exclusive easement of use. No homeowner had ownership interest in the area. On April 10, 2010 at a special meeting of the IHOA Board including co-defendant Rosemary Toth ("Toth") the Board members unanimously voted to sell easement rights to Central Electric for \$ 83,000 a profit of \$ 82,995 R.p. 3523. In addition Central Electric agreed to restore any property damage at it's own expense. Toth and the IHOA Board voted to and subsequently did distribute \$ 50,250 in cash to the homeowner members of the IHOA

⁶ D.R. Horton to whom Plantation AD sold it's interests and rights on April 29, 2003.

⁷ Not from the Plantation AD.

⁸ The "boiler plate" language in the standard form, Appendix L, Planning Regulations.

who had no equitable claim in the money. Per the November 16, 2010 IHOA Budget for 2011 R.p. 3598 the IHOA had 2010 revenues of \$ 282,670 which was \$8,724 more than it's expenses; the surplus was placed in IHOA reserves. On September 15, 2010 at the annual meeting IHOA members voted to place the 2010 excess assessments into the reserve account.⁹ The \$82,995 was not part of the IHOA 2010 R.p. 3598 Budget but the receipt and the disbursements to homeowners did appear in the 2010 IHOA General Ledger.¹⁰

5. Missing Capital Contribution Funds.

Since at least September 10, 2002¹¹ Defendant K.A. Diehl ("Diehl") has been the management company for the IHOA. On October 11, 2011 non-party Developer D.R. Horton ("Horton") was ordered to produce it's records documenting Horton's payment of Capital Contributions to Diehl as fiduciary on behalf of the IHOA. In discovery the IHOA produced it's general ledgers, Per Horton's records¹² for January 13, 2005 through April 30 2006 Horton gave Diehl \$46,834.00. Per the IHOA ledgers¹³ maintained by Diehl, Diehl credited the IHOA \$30,771.00 with \$16,063.00 unaccounted for¹⁴. No analysis was possible for other periods because Horton had destroyed the rest of it's records.

6. Capital Contribution Payment Requirement.

Section 3.5 of the covenants required the developer to pay a capital contribution to "The Association" when it sold a home. On September 27, 2001 Appellant's vertical predecessor bought a home in Pebble Creek from Sunbelt. On March 29, 2004 Horton

⁹ IHOA document Bates 393 November 4, 2010.

¹⁰ IHOA document Bates 2692 receipt; Bates 2817 – 2822 homeowner distributions.

¹¹ IHOA Board Minutes R.p. 3262.

¹² Plaintiff's TE 701 R.p. 3948.

¹³ Plaintiff's TE 703 R.p. 3961.

¹⁴ Plaintiff's TE 704 R.p. 3971.

imposed a new burden on homeowners without their consent. Horton's Amendment #3 imposed an obligation on homeowners R.p. 3816 to pay an additional capital contribution when a home was resold.¹⁵ The golf course which pays annual assessments was not required to pay a capital contribution.¹⁶ Section 8.5 of the Covenants provides that R.p. 3763

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

7. Planting Bed Edgers.

Article VII (Use Restrictions) of the Covenants has no restriction on planting bed edgers (“edgers”). “Section 7.33 Landscaping” R.p. 3759 “ reserves the right to restrict the placement of landscaping” to “The Developer” who never delegated or assigned (Covenants Section 8.4 R.p. 3763) this right to “The Association” or to the IHOA. The IHOA's July 2010 Architectural Review Board (“ARB”) Guidelines R.p. 3531 is silent about planting beds and edgers. The IHOA approved Appellants' use of the same edgers for a Palm Tree bed (photos R.pp. 3128, 3132) along the entire rear and left lot lines (photos R.pp. 3133-3134), in front of a power box (R.pp. 3130-3131), for the house across the street (photos R.p. 3146), at the home of the ARB Chairman (photo R.p. 3147), and had no objection to and allowed without application use by hundreds of homeowners. Since at least 2002, when the same edgers were installed around an outside power box (photo R.p. 3129) adjacent to the same edgers (photo R.p. 3137) which the IHOA objected to September 22, 2010 (R.p. 3900). The denied installation was to protect Appellant's irrigation line which IHOA ARB member / neighbor Jay

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

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

Cartman had damaged by driving stakes into (photos R.pp. 3892-3894). On September 30, 2010 (R.p. 3902) Appellant applied to erect a vinyl FENCE and edgers for the plant bed to go under the fence on the lot line next to Cartman to protect Appellant's irrigation line and Appellant's children from the hypodermic (photo R.p. 3891) needles Cartman was throwing in Appellant's yard. No "Wall" was ever erected. The IHOA's ARB approved use of the edgers in front of the power box, but (October 8, 2010 R.p. 3915) refused the fence and edgers between Appellant's and Cartman's property.

The IHOA had previously approved a vinyl fence down the street from Appellant (Louis Tabor, 276 Pickering, photos R.pp. 3148-3150 along the entire left, rear, and right lot lines, and fences on the lot lines of 17 other. On March 17, 2011 answering Interrogatory 16 (R.p. 3872) the IHOA admitted to approving 28 fences beginning February 8, 2004 including those on lot lines and facing streets. Appellant's proposed fence (photo R.p. 3142) met the location requirements of Section S of the ARB Guidelines (R.p. 3536) in that it was not near the Golf Course, was on the side of Appellant's house, and did not block any views.

Appellant installed the edgers BUT NO FENCE in September, 2010. On October 24, 2011 Respondent filed a counter – claim asserting (R.p. 97 Para 32) that Appellant "constructed a brick wall on the property" and demanded that the Court order Appellant to "remove the brick wall from the Property". It never asserted Appellant had installed edgers and had no demand for the removal of edgers.

8. Attorney Fees.

Section 6.1 of the Covenants (R.p. 3752 "Lien") provides for attorney fees and court costs to collect unpaid assessments but not covenant violations. The Covenants do not give the ARB any enforcement authority (Sections 7.2, 7.3 ARB R.p. 3755). Per Section 8.1 (Enforcement R.p. 3763) only "The Developer, the [named] Association, and

any Owner” have the right to enforce the Covenants but the enforcement section does not provide for recovery of the costs of an enforcement action. Both of Appellant’s lawsuits alleged that the IHOA violated the covenants (and laws). On October 15, 2009 the IHOA paid Golding \$2,500 (R.p. 4298) to defend against the 2009 lawsuit. On June 10, 2010 the IHOA paid Golding \$2,500 (R.p. 4326) to defend against the 2010 lawsuit. Both were insurance deductibles. The IHOA never paid any other litigation expenses. On October 24, 2011 Respondent filed word for word identical counter – claims in both cases alleging that Appellant built a brick wall and demanded attorney fees for the enforcement of the covenants. The IHOA paid the insurance deductibles in the 2009 case a year before the edgers were installed and in the 2010 case over three months before they were installed at a time when the IHOA was not alleging any violation of covenants. No additional money was paid by the IHOA to enforce the covenants.¹⁷

9. Swing Sets.

The Covenants have no restriction on swing sets. The sole restriction in the April 2008 ARB Guidelines (R.p. 3855) is Section L2 which provides that they must be “securely anchored per hurricane specifications.” On July 21, 2009 Appellant applied for permission to install a swing set to the rear of his side yard (R.p. 3861). Page 3 of the application included a photo of Appellant’s neighbor’s (Parr) swingset directly across the street in full view from Appellant’s porch R.p. 3864 with no obstructions to view and where children can be heard at play. Photos of 3 R.p. 3863-64 other swing sets were provided showing them fully visible from the street. On August 5, 2009 (R.p. 3870) the IHOA denied the application the reasons given being (1) it is in the side yard; (2) it is visible from the street; and (3) it infringes on Appellant’s neighbor’s “enjoyment of their

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

property”. The PUD is not an “adult community”. Appellant’s neighbor Cartman who was an ARB board member and who did not recuse himself was quoted in the Application as saying the swing set would diminish the value of his property (R.p. 3862 Para 4). On March 17, 2011 Respondent answered Interrogatory 15 (R.p. 3872) admitting that the IHOA had approved 17 swing sets, among them #13 for “Sobczyk” at 1212 Harrogate Court in Pebble Creek. Sobczyk’s house is identical to that of Appellant (photo R.p. 3885). The swing set is located in exactly the same location as that requested by Appellant – on the right side of the house (photo R.p. 3886) and is clearly visible from the street from where the photo was taken. The swing set is much larger than that proposed by Appellant (photo R.p. 3884).

10. The ARB and Invasion of Financial Privacy.

Section 3.1 of the Covenants (R.p. 3745) states that

“The Association [named in the covenants] shall be authorized but not required ... (d) To set up and operate the Architectural Review Board ...”

Covenant “Section 7.3 Objectives of the Architectural Review Board” R.p. 3755 states that the ARB’s duties are limited to reviewing plans and provides no authority for enforcement, detection of covenant violations, or imposition of fines or penalties. The ARB in this case was not created by MIGPA or the ICA but by the IHOA Board which issued it’s charter R.p. 4404, appointed every ARB member, approved every set of ARB Guidelines, completely funds the operation of it’s ARB, and requires the ARB to periodically report to it at IHOA Board meetings.¹⁸ The Covenants and ARB Guidelines (2008 – R.p. 3851; 2010 – R.p. 3531; and 2011 – R.p. 3584) and Application Form (R.p. 3861) only require architectural and plan information and say nothing about the status of an applicant’s account. On March 6, 2012 (R.p. 3941) the IHOA ARB

¹⁸ IHOA Board Meeting Minutes, R.pp. 3262-3579, September 10, 2002 through February 11, 2011.

considered Appellant's routine request (R.p. 3937) to expand an existing Palm Tree bed. Vanessa Fattoross an employee of co-defendant Diehl attended the meeting and gave the ARB details of Appellant's financial account with the IHOA to which the ARB members do not have access. On March 16, 2012 R.p. 3943 Fattoross wrote Appellant that the ARB refused to approve the routine request which duplicated one previously approved because Appellant's "HOA account needs to be brought current. As of today your account balance is \$ 1,735.00". Appellant's assessment account was current and the sum was the money the IHOA was demanding in their counter – claim the IHOA alleging Appellant had built a "wall". This financial data was privileged.

Section 13.3 R.p. 3783 of the IHOA's Bylaws, Enforcement Procedures provides that

the Board shall not impose a fine, ... or infringe upon or suspend any other rights of an Owner ... for violations of the Declaration, ... rules and regulations for the Association, unless and until the following procedure is followed:

13.3.1 Written demand to cease and desist (with) ... A time period of not less than ten (10) days during which the violation may be abated without further sanction, ... a statement that any further violation ... may result in the imposition of sanctions after notice and hearing.

13.3.2 Within two (2) months ... written notice of a hearing to be held by the Board in executive session.

13.3.3 The hearing shall be held ... and shall afford the alleged violator a reasonable opportunity to be heard. Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting ... together with a statement of the date and manner of delivery [of the notice] ... by the ... director ... who delivered such notice. ... The minutes of the meeting shall contain a ... statement of the results of the hearing and the sanction imposed, if any."

On September 27, 2010 Defendant Diehl employee Julie Case imposed a \$ 50.00 fine on Appellant without any action of the IHOA and without any offer of hearing (R.p. 3900) which Appellant paid under protest September 29, 2010 (R.p. 3901). Julie Case's October 8, 2010 letter (R.p. 3915) denying Appellant's fence / edger request threatened a fine of \$ 100 per month but did not have ANY of the statements and warnings required by Bylaws Section 13.3. On October 11, 2010 (R.p. 3916) Appellant wrote the IHOA

Board reminding them of Section 13.3 and demanded a hearing prior to imposition of any fine or any action being taken. On October 14, 2010 co-defendant Diehl employee Beckie Abel wrote Appellant a letter on behalf of the IHOA (R.p. 3919) which ignored the appeal hearing demand and now called the edgers a “brick fence foundation”.

Diehl’s letter did not have any of the mandatory elements required by Section 13.3. On October 23, 2010 (R.p. 3921) Appellant wrote another letter to the IHOA Board which quoted Section 13.3 and demanded the hearing. No response was sent and the hearing was never held. There is no entry in the minutes of any meeting of the Board related to Appellant’s ARB issues. Despite no hearing having been held the IHOA has been imposing fines each month.

11. Defamation.

On May 28, 2009 Diehl employee Julie Case emailed 577 individuals (R.p. 3721) material about Appellant. Many of the recipients, such as “Larry Sherman”¹⁹ were not owners or renters in the PUD. On May 28, 2009 Diehl paid a Carolina Mail House an outside vendor to reproduce and send the same material to 546 addresses via US Mail R.p. 3711. Carolina Mail House billed to and was paid by Diehl. At that time Diehl, the contract management company, was not a party to this litigation. The material included an alleged “List of Lawsuits Associated with Plaintiff” R.pp. 3704-05 and included original text. The material included an allegation (#10) that Appellant had sued an FBI employee (“Frinzi”) alleging that co-employee Frinzi had defamed Appellant by reporting some misconduct by Appellant to the FBI that led to Appellant’s “termination with the FBI for on 4/21/01” all of which was a lie by Diehl. Appellant’s federal personnel record from 1998 through 2006 R.p. 3701 showed that Appellant was never

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

terminated from federal employment and was in fact given thousands of dollars in cash performance awards and a pay increase for the period in question. Frinzi was never an FBI or other federal employee R.p. 1574. The “List of Lawsuits” also alleged that Appellant had sued “Dr. Brian Krolczyk”²⁰ R.p. 1573 which was deceptive because Krolczyk was not a licensed psychologist and not allowed to use the title “Dr.”. For the only time ever related to a disciplinary matter on July 27, 2003 R.p. 3694 West Virginia published in it’s Official Register that Krolczyk had practiced Psychology without a license and had lied at a trial about his credentials and license status to testify as an expert witness adverse to Appellant in a West Virginia Court.

In 2009 after Appellant sued the IHOA, IHOA Board member (R.pp. 3703, 3709) Michael Templeton told various people including Michael Butryn and Louis Astorino not to associate with Appellant. Templeton also directed that Appellant’s friend Pete Pizzi be fired from his position on an HOA Committee because Pizzi was seen going into Appellant’s house (R.p 3706) with papers.

HOA Financial Committee member (Toth Dep February 17, 2012, R.p. 1399) / ARB Member (Toth Dep R.p. 1492) William Fletcher told Astorino that Appellant is a “pedophile” and Astorino should not associate with Appellant (Trial R.p. 2338).

The emails from Diehl caused homeowners who had never met nor had any communication with Appellant to circulate emails threatening Appellant with bodily harm (R.p. 3707 May 27, 2009):

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

12. Voter List.

July 24, 2008 Appellant mailed Defendant Toth (then IHOA President) a request

²⁰ He was sued as “Brian Krolczyk”.

for the Members List for Voting (R.p. 3394). Appellant wrote

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

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

April 28, 2009 Appellant requested a current Members List for Voting R.p. 4277; the request was titled “Request for Copy of HOA Voter List”. The letter stated “The purpose of this request is to communicate with fellow homeowners”. The HOA ignored this request entirely.

September 3, 2009 R.p. 3486 a week before the Annual Meeting where Directors would be elected Appellant sent a “Request for Copy of HOA Voter List”. The request stated “The purpose of this request is to communicate with fellow homeowners.” There was no response from the IHOA.

ARGUMENTS

I. Applicable Standards

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

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

Reasonableness. Courts have determined that the business judgment rule from

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

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

In David Schuman v. Greenbelt Homes, Inc., No. 2020, Md. Ct. Spec. App. (2012)

the Appellate Court noted that

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

The Court quoted from the Restatement of Servitudes:

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

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

Covenant Interpretation.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property."

Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor, 32 S.C. at 4, 498 S.E.2d at 864. -- Hardy e at v Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006),

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

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

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

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

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

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

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

"... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. - Arcadian Shores

Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007.

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

The Special Referee denied Appellant a chance to make opening and closing arguments. Rule 43(j), SCRCP, which is Appellant's right under the rule. Appellant began an opening statement (trial R.p. 1958 Line 14). The Court stopped this and directed Appellant to skip to the calling of witnesses (Trial R.p. 1958 Line 24). At the end of the her case presentation when Respondent said "No Further Witnesses" (Trial R.p. 2893 Line 1) the SR terminated the trial (Trial R.p. 2893 Line 3) without asking whether either party wanted to make a closing statement. A party is not required to ask to exercise the "right" to close the case.

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

On Friday August 10, 2012, the SR said the following (Trial R.p. 2586 Line 1):

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

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

Appellant did not have the days “allotted” to present his case because, over Appellant’s objections (Trial R.p. 2092-2093) the SR ordered that Respondent could call one Expert and two fact witnesses (C. Sullivan, Ambuhl, and M. Sullivan) whose testimony totaled half a day. On Friday Appellant explicitly stated his desire (R.p. 2196 Line 19, and need to call Defendant Toth who he subpoenaed and who was in the court room; the SR wrongly denied Appellant an opportunity to do so prejudicing Appellant.

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

The Court: All right.

On Friday Appellant stated his need to make up the half day of Plaintiff trial time that the SR gave to Defendant: Trial R.p. 2586 Line 16:

“I believe I’m going to need or collectively will need an extra half day beyond what we can accomplish today”.

The SR improperly ignored the mandate of the Statutory Judgment Act to make Declaratory Judgments about the “The Act”, other statutes, and about provisions of IHOA Bylaws: Trial R.pp. 2041 Line 25; 1989 Line 25; 2047 L 17-22; 2072 L14-16; 2129 L 6-15.

The SR violated Appellant’s right to due process by collecting ²¹ and depending on numerous facts and documents in his final order not presented as evidence or testimony at trial. Exhibit A to Appellant’s September 19, 2012 Post-Trial Motion R.p. 673.

The SR improperly used the Respondent’s Draft Order Without an Opportunity for Appellant to Comment and Oppose. Without stating from the bench any findings of fact or conclusions of law at the end of the trial the SR invited Respondent’s counsel to write whatever final order she pleased and adopted it word for word without giving

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

Appellant an opportunity to be heard, violating Rule 3B,²² CJC, Rule 501, SCACR.

On August 21, 2012 Appellant filed his objections to what the SR was doing. This was reiterated in Appellant's September 19, 2012 Post-Trial Motion R.p. 659.

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

Appellant objected to "Trial By Ambush" Trial R.pp. 1941 Line 25 to 1952 Line 25. Per Rule 26(4)(C) SCRCF Appellant had a right to depose Defense Expert Chris Sullivan.

The SR improperly allowed "surprise" Defense exhibits. Well before the trial Appellant provided Respondent bound paper copies of every document Appellant proposed to use at trial as listed in Appellant's Rule 16 Brief January 17, 2012 revised July 30, 2012. As the trial began Respondent finally gave Appellant a thick binder of the exhibits Respondent listed in Respondent's Rule 16 Brief – none had been served prior to trial. At trial Appellant handed the SR a "screen dump" of the document titles of what Respondent had provided Appellant in discovery (all on CD R.p. 3071) and almost none corresponded to Respondent's Rule 16 Exhibit list R.p.3094. Respondent's

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

January 13, 2012 R.p. 3089 document listed 79 Exhibits and no Plats or Posters (none of which were served). Respondent's August 8, 2012 R.p. 3094 document listed 104 Exhibits; many of the first 79 had changed as well; Plat Exhibits A through J were added the day of trial. The document set Respondent gave Appellant at trial did not include Plats A through I. At trial Respondent introduced additional exhibits 105 through 108 (per the transcript) never previously listed and never ever provided Appellant, who objected (Trial R.pp. 1941 Line 25 to 1952 L 25). At trial Appellant handed the SR marked up copies of the Respondent's Rule 16 Evidence lists noting the "surprise" documents. The SR never dealt with the issue which prejudiced Appellant's right to due process.

The SR ignored the "trial" testimony of witnesses taken in deposition per the January 27, 2012 Order and pre-filed per Rule 32 SCRCF. Appellant informed the SR that the transcripts had been pre-filed with the Court, Trial R.p. 1952 L 6-25. At trial the SR stated he would read the depositions -- not to read them into the record (Trial R.p. 1955 L 9). As cited supra, the SR never obtained the deposition transcripts from the Clerk of Court and ignored them. Every deposition was held by Appellant with the intent of use at trial to aid his case. One deposition was of Defendant Toth who the Court did not permit Appellant to question at trial because of the SR's desire to use the required time for the SR's personal business (see supra).

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

In Amendment 1 to the Covenants filed May 10, 2000 the Developer made the following changes R.pp. 3786-7 which apply to the entire PUD: #1 Changed the PUD name; #3 stated that there is no "common area" in the multi-family area, which per the PUD Master Plan (R.p. 3672) has three separate Multi-Family areas; #4 "deleted" the prohibition on "any" (plural) property management firms (plural) in "the Multi-family

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

Amendment #1 (Para #2 R.p. 3786) granted another developer, “International Club Villas, LLC”, the right to build anywhere in the multi-family parcel without any more specifics; Para #7 designated the other developer a “Designated Builder” which meant that no restriction on use applied to the named builder.

The “plain and ordinary meaning” of Amendment #1 is that the “waivers” applied to everyone in the PUD – Hardy v Aiken ob cit. Any narrower reading must arise from finding ambiguity in the language of Amendment #1 and any ambiguity must be resolved in favor of the “free use of property” and “against the party seeking enforcement” - Hamilton v. CCM, Inc.; Taylor v. Lindsey; and Hoffman v. Cohen ob cit, and “are to be strictly construed in favor of the free use of land.” - Levine v. Turner, 264 S.W.2d 478 (Tex.Civ.App.--El Paso 1954, writ diss’d); Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981).

There is simply no reason why restriction should be lifted for one part of the multi-family parcel and not others. On page 4 R.p. 31 and 23 R.p. 50 of the SR's Order he held that the waivers applied to the "Villas Horizontal Property Regime only"²³ and the Declarant "did not waive the applicability of the covenants to the rest of the Community". This reading is contrary to the facts before the SR at trial. Maureen Sullivan, on the boards of both The Glens (multi-family) and the IHOA, testified that The Glens has it's own association and likewise The Cambridge which would be prohibited by the SR's interpretation. Pl Exhibits R.pp. 3209-3212 (#107 through 110) and (plats) R.pp. 3228-3231 (#128 to 130) showed the SR that The Glens has the same parking arrangements as The Villas. There is no reason why the Golf Course would not need to clear shrubs from the golf course area near The Villas but would need to do so elsewhere. Since the LLC named in Amendment #1 became a "designated builder" the language at the end of Covenant Section 7.2 exempted that builder from all restrictions and no waivers would be needed. Further, at the time of Amendment #1 (2000) the Villas area was not subjected to the Covenants until four years later through Amendment #4 December 28, 2004 (R.p. 3827) when the Developer subjected The Villas to "all" the covenants of record, none excepted. It is thus more likely than not that the "waivers" applied to the entire PUD and any ambiguity in the matter must be resolved opposite to how the SR's ruled.

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

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

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

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

As set out in "Facts" supra, the Covenants R.p. 3740 named MIGPA as "The Association". Amendment #1 R.p. 3786 changed the name of the PUD to "The International Club" and directed that said phrase replace "Murrells Inlet Golf Plantation" (the former PUD name) in the Covenants. Amendment #4 and #5 directed homeowners in condominiums with their own sub-association to pay assessments to "The International Club Association" (ICA). not to the Respondent R.pp. 3824, 3832. At trial (R.pp. 1984 Line 2 through ²⁴ 1989 L 15) Appellant demonstrated R.p. 3842 that no convoluted explanation of Amendment #1 could show that Amendment #1 named Respondent as "The Association".

The SR assigned "The Association's" rights under the covenants to Respondent without a finding that Respondent is a named party to the Covenants; in fact the SR found that the name transposition of The Association was intended (contrary to the plain language of Amendments 4 and 5) to change MIGPA to ICA as "The Association. On Page 10 of the Final Order R.p. 37 as a Conclusion of Law the SR wrote that Amendment #1 modified the Covenants to NOW read

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

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

²⁴ Particularly R.p. 1988 Line 3.

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

On Page 11 R.p. 38 of the SR's Final Order he held that the above argument "is without merit" without reconciling it to his finding that ICA is named, not the IHOA. He correctly noted that all the documents should be read together (citing Palmetto Dunes Resort v Brown, 287 SC 1m 6, 336 SE 2d 15, 18 (Ct App 1985 which works in Appellant's favor) to note the intent but ignored the absolute clarification of Amendments #4 and #5. It was noted at trial that the IHOA is a legitimate non-profit corporation entitled under the Covenants to operate amenities and clubs independent of "The Association" (Covenants Sections 1.24 Recreational Amenities and Section 2.5 Private, Semi Private, or Public Clubs and Facilities) R.pp. 3742, 3744. The SR instead assigned The Association's rights to Respondent IHOA under a theory that you can become a party to a deed or covenant by acting like a party to the covenant. On Page 10 of the final order R.p. 37 the SR wrote:

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

The panel should note that the IHOA in fact is maintaining the property it owns as a corporation and that the finding is an admission that the IHOA has been acting without authority under the covenants. The legitimate Association exists, but owns no property and thus has no need to collect assessments. The Covenants explicitly provide that there is no obligation under the covenants to create common areas and in Covenants Section 1.6 R.p. 3740 defines "Common Areas" as those areas owned by "The Association" and in Section 2.1 R.p. 3742 states that only "The Association" can operate and impose

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

V. The SR Erred in ignoring concepts of Privity and Equitable Interest in making a Conclusion of Law that Pebble Creek is subject to The Covenants, R.p. 40

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

The SR also erred by writing that “The Plaintiff introduced two deeds R.p. 41 Plaintiff's Exhibits 544 and 545 R.pp. 3728-36 as being (two) deeds relating to Pebble Creek.” Appellant's #544 R.p. 3728 is the deed to the Golf Course while # 545 R.p. 3733 is the deed to Pebble Creek both of which were executed January 29, 1999. At trial R.p. 1981 Line 8 Appellant introduced #544 as the deed to the golf course. Respondent's Counsel Golding, when she ghost – wrote the SR's Order, mis-stated what happened. It was SHE who jumped out of her seat after Appellant had addressed the issue, waving #544 up and claiming that the golf course deed was another different deed to Pebble Creek (R,p. 2024 Line 6). The Court Reporter accurately wrote R.p. 1909 that #544 is “Deed 2117 at 1413 99 Yr Golf Deed” not another Pebble Creek deed.

Appellant's trial presentation stated R.p. 1981 Line 7,8 that # 544 was the golf course deed and that #545 was the Pebble Creek Deed and that R.p. 2017 Line 23 Plantation sold Pebble Creek “on January 29, 1999” and R.p. 2018 L 12 -17 “At the

moment of sale, there were no covenants running with purchased land” and that while the deeds contained the standard boiler plate and said R.p. 2018 Line 15-16 “that Pebble Creek would be subject to covenants of record, such as they existed” but none did.

The body of the Deed, #544 R.p. 3728 does not have the word “covenants”. Deed Pg 3, Exhibit A R.p.3735 the property description, refers to the land by Plat Book and Page. It goes on to say that

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

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

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

Cited in Clardy and Clardy v Bodolosky and United Land-Magnolia, LLC, 383 S.C.

418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009). On January 29, 1999 there was no

“Declaration of Covenants” recorded in the Deed Books of Horry County. The

Covenants R.p. 3737 #547 did not exist until February 8, 1999 and there is nothing to

prove that the Purchaser Sunbelt saw or agreed to the Covenants as they were

ultimately written and recorded and a blank in the deed is not a legally sufficient

reference anyway. A covenant is a modification of a deed and must meet the same

recording standards as any deed. As the exclusive owner of the Pebble Creek property,

Sunbelt would have had to at least endorse in writing the substantial restrictions on use

of land. There is nothing in the trial record to indicate such agreement or even

Sunbelt’s knowledge that Plantation was filing the Covenants.

On February 8, 1999 Plantation had no horizontal privity or equitable interest in the Pebble Creek land Trial R.p. 2018 L 3-5. At trial Appellant introduced Black's definitions of privity R.p. 3192.

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

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

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

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

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

the Court held that.

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

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

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

At trial Appellant raised the issue of pre-emption by "The Act" of the related Covenant provisions noting that Respondent was chartered under "The Act" and is thus subject to all it's provisions. At issue are SC Code Ann 33-31-601 Admission of Members and SC Code Ann 33-31-620, Resignation of Members. The Final Order ignored both, which Appellant argued at trial (Trial R.p. 1991 Line 12 to p. 1983 Line 3). South Carolina law pre-empts any covenant provision in conflict with it and there is no case law excepting non-profit corporations which are homeowner associations from any of the statutory provisions of The Act. As Appellant stated at trial, the South Carolina Legislature has considered the issue and chosen to ignore it.²⁵ specifically.

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

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

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

but that subsection (b)

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

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

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

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

Section 3.3 of the Covvenants R.p. 3746 requires that

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

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

Whether one agrees or disagrees on the wisdom of the legislature, it’s manifesto is absolute and applies to any entity chartered under The Act – including Respondent IHOA. The Bylaws which Respondent IHOA uses includes the same pre-empted mandate. Section 2(a) if the IHOA Bylaws R,p, 3769 reads as follows:

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

The Bylaws likewise has no resignation provision.

In paragraph 5a to Appellant's 2009 Complaint Appellant challenged the legal viability of some or all of the Covenant's provisions. In Para 14 of the 2010 Complaint R.p. 81 Appellant demanded all assessments be returned because there is lacking a "consensual agreement to participate in the IHOA. Because the assessments were illegally and coercively collected under threat of lien, the demand for return of assessments relates back from 2009 to the limits of the statutory limitation period. Since 2009 every Appellant assessment payment (by check) has been marked "paid under protest".

The SR's final order bundled the requirement to be an involuntary member under his citation to the 3rd Restatement of Servitudes, which is not itself law and is preempted in this instance, and by the SR's erroneous citation to the Condominium Act, SC Code Ann 27-31-190 (Final Order, Section 5, R.p. 45).

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

In para 19 R.p. 68 of the Final Order the SR held that "The Plaintiffs Defamation Claim is Without Merit", The Order claimed the Appellant had admitted at trial that "...nothing in the letter is defamatory" and therefore "he can no longer claim defamation". That admission is not in the transcript. Appellant singled out the "List of Lawsuits Trial R.p. 2451 Line 10 as defamatory and agreed only that the List was attached to Golding's letter and that Appellant Trial R.p. 2452 L3-7 was going to ignore the body of the cover letter. The Court asked what was Defamatory Trial R.p. 2452 Line 12 and Appellant answered "The Attachments" R.p. 2452 Line 17.

This appeal does not contest the finding that the original defendants Toth and the IHOA are shielded by Litigation Privilege from their written publication of certain material but Appellant contests that the final order ignored the spoken statement by William Freiboth that Appellant is a "pedophile" and the words and actions of the

IHOA Board telling homeowners not to associate with Appellant.²⁶ The 2009 Complaint was filed April 7, 2009. At the moment of defamation May 29, 2009 Diehl was not a party to the original complaint and nothing was introduced to show any reason why Diehl would believe it would be joined as a Defendant. Diehl is a for – profit corporation and neither it nor it’s employees are officers, employees, or members of the IHOA. There was no evidence that Diehl had been sued before on similar matters. As a matter of law Diehl is not entitled to Litigation Privilege. Diehl was sued for Defamation and other misconduct by Amendment 1 to the Complaint, June 9, 2009.

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

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

The List of Lawsuits R.p. 3704 is not a court document but instead contains editorial comments about lawsuits. At trial various homeowners testified that Diehl’s republication of the List of Lawsuits was identifiable to Appellant, that the contents impugned Appellant’s reputation and was written such that they assumed the editorial comments were actually words of the courts (e.g., Michael Butryn, Louis Astorino) and that the editorial remarks imparted a negative image of Appellant.

At trial R.pp. 2669 2693 Appellant went through the List showing it to contain extensive adverse editorial comments including outright lies. For brevity Appellant focuses on #1, #2, and #10 R.pp. 3704-5 which were the same case where Appellant was represented by Counsel (originating in USDC-MD-PA Federal Court and being transferred to USDC-ND-WV). At trial Appellant’s witnesses Butryn and Astorino

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

testified of their belief that it is exceedingly difficult to terminate a long time federal employee and that if Appellant was terminated from the FBI it would have had to have been for a serious wrong. Per the "Facts" supra, List item #10 gave the impression (as confirmed by Butryn and Astorino) that Appellant had been an FBI employee, that he had done some wrong, that fellow employee Frinzi had disclosed the wrong, that as a result Appellant had been "terminated" on "4/21/01" R.p. 3705 #10 (the exact date conveying the impression of truth), that Appellant next sued Frinzi for defamation and Appellant lost. None of this was true. All clearly applied to Appellant and the allegations are defamatory per se.

At trial Appellant asked IHOA Board Member Maureen Sullivan what the IHOA had done to verify what was written about Appellant and she responded they had done nothing R.p. 2558 Line 13 . Diehl employee Julie Case was the individual who contracted with Carolina Mail House to reproduce and mail 646 copies of the material some world wide and who personally emailed 577 copies of the material, many to out of state non-owners. At her deposition R.p. 1060 Line 17-26 Case testified she knew of nothing anyone had done to verify the material, and she admitted also to having posted the material on a Diehl website R.p. 1067 Line 20-24 as directed by her Diehl supervisor, all her acts as part of her official duties. The bill from Carolina Mail House R.p. 3711 states that the Republication was ordered by and shall be billed to – DIEHL

In the final order R.p. 55 the SR wrote:

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

The communications was from Diehl to persons who were arguably not Diehl's customers and the matter communicated did not relate to anything Diehl had in

common with the homeowners and the scores of non-residents / non-homeowners²⁷ who they also sent the material to (and the public at large who had potential access to the same material on Diehl's web site). No Diehl employee is an "officer or employee" of the IHOA. It was plainly apparent that the whole communication was meant to "smear" Appellant and the republication by Diehl was made with reckless disregard and no attempt to verify the contents. No privilege attaches, certainly not litigation privilege.

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

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

At her deposition, Toth (Facts, supra) confirmed Fletcher was officially on various IHOA Committees and the Board. At his deposition and at trial R.p. 2338 L 12-17 Astorino confirmed this as well and that Fletcher told Astorino (LINE 8) that Appellant is "a pedophile". This is defamatory per se. Astorino testified that Board

²⁷ Eg, Larry Sherman.

Member Michael Templeton likewise sought to interfere with Appellant's relationship with Astorino.

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

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

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

The SR erred when he wrote "The streets and the roads in the Community were initially owned by the Developer. D.R. Horton". The Streets²⁹ in Pebble Creek were conveyed by Plantation to Sunbelt in 1999 when Sunbelt bought Pebble Creek R.p. 3733. The only mention of roads in the deed was that Sunbelt received R.p. 3735 a non-exclusive easement over roads Plantation would build in the future, and Plantation withheld an easement for golf carts to cross future Pebble Creek roads. No reservation or easement was made for Plantation regarding future Pebble Creek roads. On May 29 2003 R.p. 3795 Plantation sold most of it's interests to Horton, including easements Plantation had, and reserving non-exclusive easements for Plantation's remaining land over roads in the area sold to Horton. While not a deed of sale, Amendment #2 to the Covenants R.p. 3793 April 29, 2003 relates that Plantation owned the remaining roads and was not transferring them to Horton. It has been shown that a condition of the

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

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

February 1, 1997 approval R.p. 3672 of the development was a dedication, without conditions, of the roads to Horry County and that when the roads in Pebble Creek were dedicated to Horry County by Sunbelt December 21, 2003 R.p. 3629 it included a document which mentioned the dedication as "Fee Simple". At trial R.p. 2036 L 1-6 it was pointed out that the 1997 Plat says that acceptance of the roads would be delayed until they were built and inspected for quality. At trial Butryn authenticated an August 24, 2009 Horry County letter R.p. 4295 to him on behalf of the IHOA Board which stated that Horry County owns the roads. Appellant had provided Respondent this letter in discovery in 2009. At trial it was noted R.p. 2063 1-10 that in all approval documents from Horry County after 1997 the plats are annotated that the roads are marked "public" and where an easement is in place, it is marked "easement" (the roads are marked "public").

At trial Appellant cited case law that unless a government explicitly notes some reservation, the transfer of ownership to government is without restriction and the grantor can not impose a restriction on the grantee government without the latter's consent. There was no reservation in the dedications R.pp. 2208 L1 to 2210 L 17.

- a. The SC Constitution says that government is sovereign and can't be restricted by individuals in use of public property
- b. US v 194.08 Acres of Land, 135 F.3rd, 1025, 1029 5th Circuit LA 1998, - when government takes ownership of land it creates a new title extinguishing all prior interests; DOT v. Shealey 561 South 2nd 515, Alabama, 1990 - unless the government explicitly recognizes a limitation the government gets the land "free simple, free from the burdens of the covenants," citing Newberry v ANDAL USIA 257 Alabama 49, Alabama 1952,"; US v. Carmack 329 U.S. 230 West 1946 - "The Government's rights are distinct from those of an ordinary purchaser of property".

At trial the SR agreed with Appellant: R.p. 2215 L 5- 19:

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

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

The ghost written order finally stated that the IHOA's control over the roads comes down to the Covenants saying they control the roads: "Pursuant to the Declaration, the Defendant HOA has the right to restrict parking at the Amenity Center and on the streets within the Community" (Order R.p. 51 para 7). The ghost written Order cited Sloan v. City of Greenville, 111 235 S.C. 277, 111 S.E.2d 573 (1959) noting that a dedication accepted for a specific purpose can only be used for that purpose, which case referred to utility easements, and which is inapplicable to this case, where no limitation was stated in the dedication. The ghost writer went on to cite cases relating to granting of easements between private individuals and deeds between private individuals with existing restrictions, which assumes incorrectly that governments are not sovereign and ignores the applicable specific case law.

In a particular twist of logic, the IHOA asserts that homeowners in Pebble Creek have certain restrictions on how they may use the roads, but that the general public can use the roads in any way they see fit, since the general public is not bound by the Covenants. Such a view is against public policy. In another twist Appellant objected to, the IHOA insists that homeowners maintain the area between their lot property lines and the curb, even though the covenants say nothing about this and even thought that area is in the right of way (owned by the county).

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

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

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

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

On Page 8 of the Final Order R.p. 35 the SR wrote

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

He also wrote

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

This is erroneous for several reasons: (1) the web site has a voluntary social media list which does not contain the data a voter list must contain; (2) the law does not

³⁰ This presupposes that the IHOA is "The Association". If it is not it has no standing to contest the matter.

impose any conditions on requesting a member list, such as waiving privacy rights or joining a web group; (3) the IHOA has Appellant's email address and has used it to communicate with Appellant many times; (4) whether another homeowner has accessed the IHOA web site for Appellant is irrelevant and the evidence is that the web site only has the "social" voluntary list.

Trial Testimony. Diehl employee Abel admitted receiving the requests and that neither the IHOA nor Diehl provided the lists. On Cross examination Abel R.p. 2870 also admitted (L 20-22) that the web site only had a voluntary social media list without all the mandatory elements and that R.p. 2875 L 15-22 she knew that access to the list is mandatory under the law, thus denying it was intentional and improper. Abel R.p. 2883 L 13-17 admitted completely ignoring the second two requests.

On December 21, 2011 the South Carolina Attorney General responded to SC State Senator Tom Davis and wrote an official Attorney General's opinion R.p. 3086 on whether there was any legal limitation or condition on the absolute right of a homeowner to obtain the Members List For Voting SC Code Ann 33-31-720. The question was whether an HOA could use an "interpretive spin" based on SC Code Ann 33-31-1602 "(c) Good Faith Request for Records". Hon. Harrison D. Brant, Assistant Attorney General wrote that the answer is "no" – because subsection (d)(1) of Section 1602 makes Section 1602 inapplicable to requests posed under Section 720. He said the burden under Section 1605 is on the HOA and the homeowner making a request under 720 has no burden of proof to show that he does not intend to use it for improper purpose.

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

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

the list of members

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

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

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

Appellant has a statutory cause of action and statutory damages:

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

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

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

The underlying facts were stated supra. The IHOA bought an area for \$ 5.00 and later sold an easement to Central Electric, receiving \$ 80,000 plus restoration costs. Toth and the entire board voted R.p. 3523, Meeting Minutes, April 19, 2010 to distribute \$ 50,250 to members who had no ownership rights in the area.

At Page 9 Section 24 of his Order R.p. 36 the SR wrote

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

On Page 26, Conclusions of Law Section 9 R.p. 53 the SR wrote

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

The IHOA is organized under "The Act" and is a non-profit corporation. At her

deposition February 17, 2012 Toth (who at the time was IHOA Board President) testified R.p. 1425 L 16-18 that she voted for the distribution and R.p. 1482 L 12-17 that this was a unanimous vote of the IHOA Board.

At trial IHOA Board member (then and now) Maureen Sullivan testified R.p. 2568 L 5-8 that no homeowner had ownership interests in the area with the easement, and that Toth and the other board members (L 20) “felt it was important to share those proceeds “ clearly admitting the connection between the profits and the distribution. She also testified that the amount distributed had no computational basis other than R.p. 2569 L 8) “We felt that was a fair amount” and R.p. 2570 L4 that homeowners did not give up anything in exchange for the money they got from the IHOA.

Section 11.1.1 of the IHOA Bylaws R.p. 3779 provides that “proceeds shall be retained by and for the benefit of the Association”

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

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

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

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

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

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

Nothing could have been distributed without violating The Act.

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

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

Irrespective of who prevails in this case, as a matter of law the IHOA is not entitled to attorney fees. On Page 46 of his Order R.p. 67 the SR identified the proper standard:

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

The only provisions in the Covenants which would enable the IHOA to recover attorneys fees are the provisions of Sections 6.1, collection of unpaid assessments R.p. 3752 and 8.9. Violations R.p. 3764. Appellant has always carefully paid his assessments "under protest".³¹ Section 8.9 limits the amount recoverable to the actual costs incurred. As the SR recognized in the final order, the only attorney fees incurred by Respondent was in defending accusations that the Respondent itself violated the covenants and the law. In the final Order R.p. 73 Sec. 24 the SR wrote that

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

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

In the Final Order R.p. 73 Sec. 24 the SR also wrote that

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

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

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

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

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

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

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

In his Final Order R.p. 71 Sec 21 (Conclusions of Law) the SR ignored the financial information issue argued at trial and substituted one never argued at trial:

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

At trial the transcript confirms R.pp. 2662-2666- that Appellant argued that giving Appellant’s account information to the ARB members was an invasion of privacy, that they had no need for that information to perform their duties, that they had signed no privacy agreement, and that the issue of account status is irrelevant to an ARB decision. The testimony noted that Diehl’s contract with the IHOA provides that Diehl will provide staff at four IHOA board meetings, and has no provision for attendance at ARB meetings. At the time Diehl was a Defendant in this suit. Salient points raised at

trial: R.pp. 2664-65 that ARB members have no need or right to an applicant's financial information; that the ARB charter and objectives relate only to design documents; that Fattoross gave the information to the ARB; that this was an invasion of financial privacy; that Appellant never signed a release or privacy statement; and that ARB members sign no pledge to keep homeowner information secret

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

The SR correctly identified the legal standard R.p. 71 Sec 21:

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

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

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

In his Final Order R.pp. 55-59 the SR made conclusion of law #12 that the disapprovals were valid. From the "facts" supra it is clear that numerous identical or very similar requests had been made throughout the PUD and that the requests met the Covenant' specific restrictions on use as well as the published ARB usage guidelines. In each instance at trial the SR was shown photos, documents, and heard testimony showing that it is more likely than not that the denials were arbitrary, selective, and capricious, violated the implied covenant of fair dealing, and violated the special obligation under the 3rd Restatement of Servitudes that an HOA has to it's members. As to the swing set, the SR heard unrefuted testimony and evidence that a neighbor who was on the ARB stated he hated children and would never approve a swing set. The SR agreed with the Respondent's explanation that it could use the "aesthetic" excuse

R.p. 55 to do anything irrespective of whether a use is actually approved (swing sets, palm trees, fences) in the Covenants. One implication of filing covenants is that they place a potential purchaser on notice as to limitations on use. While restrictive covenants place restrictions on property owners they also place obligations on the HOA not to go beyond them and this is the underlying reason why courts have held that ambiguity and lack of a specific restriction will always be resolved in favor of the free use of property. The refusal to consider the Palm Bed extension equated to denial, not deferment as the IHOA claimed. Section 7.2 of the Covenants R.p. 3754 includes:

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

Since the ARB is charged with relating applications to the covenant provisions it is more likely than not that they and the IHOA Board were aware of this. The reason given for “non-approval” was a disputed previous fine. At trial extensive evidence was given of Appellant’s demand that the IHOA comply with it’s own Bylaws³² Section 13.3 Procedures which it ignored, imposing an illegal fine and hence an illegal basis for Palm Bed disapproval. At trial Board President William Freiboth testified R.pp. 2826-73 that he knew all about Section 13.3 and that Respondent never held the appeal hearing Appellant requested in writing, yet Respondent proceeded with a counter – claim and imposed fines knowing it was not permitted to do so by the Bylaws, which supports Appellant’s assertion that the counter – claim should have been held by the SR to be a violation of the South Carolina Frivolous Proceedings Act.

It is also more likely than not that the ARB, which the IHOA chartered, controlled, appointed members to, took reports from, and whose guidelines are

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

approved by Respondent IHOA, is in fact a committee of the IHOA and is subject to the Bylaws as well --- not an independent entity whose actions the IHOA is not responsible for.

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

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

In the Final Order R.p. 45 the SR held that Appellant must do all of the above "because he is subject to the Declarations" because the 3rd Restatement of Servitudes states homeowners have an unconditional obligation to pay assessments, and because SC Code Ann 27-31-190 requires payment of assessments for amenities whether used or not. The later is a legal error because it applies exclusively to Condominium Apartments. The 3rd Restatement applies only to valid assessments for purposes touching and running with the land.

The Final Order correctly noted R.p. 31 Para 11 that only single family homeowners, but not the hundreds of condo and town house owners, are required to buy cable and garbage services from the IHOA which buys it from vendors for resale to home owners. The order recognizes that these are not "bulk bills".

The SR made a conclusion of law R.p. 46 #6 of the final order that "The Defendant HOA's Contracts for Bulk Cable Television Services and Garbage Collection are Valid and Enforceable ..." The SR based this on his finding that R.p. 47 "home owners are not precluded from contracting with third parties". Respondent's counsel, who wrote the order, next addressed FTC regulations about which not a word was spoken at trial and ignored Appellant's argument that whether the contracts between Respondent and it's vendors are valid or not, they are personal service contracts not

valid covenants touching and running with the land.

The cable tv, garbage and amenity center matters were before the court at trial as proven by the transcript, and they were argued at length by Appellant with extensive case citations R.pp. 2227 Line 13 to R.p. 2230 Line 13 and R.pp. 2291 Line 2 to 2297 Line 23.

Courts have held that an obligation to pay money for services including using recreational facilities³³ does not “touch and run with the land” and have set aside covenant provisions requiring same as personal service contracts which do not survive a sale of a home and which contract must meet the requirements of the statute of frauds. These obligations do not meet that standard because the covenants require a homeowner to accept services of no specified price and no details for no specified period but do not obligate the HOA to provide it, and are not uniform because only single family homes are not required to participate. As a covenant obligation, they are ambiguous at best and should be set aside when ambiguous in favor of the free use of property. Cases which support these conclusions were read to the Court and include:

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

In his complaint and at trial, Appellant demanded the return of all money collected for cable, garbage, and amenity center purposes, as well as assessments in general under the theory that the IHOA is not “The Association” anyway.

As a matter of law Respondent had no right to force homeowners to accept and

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

pay for these services from Respondent under the guise of proper covenants.

Respondent should be required to cease this practice and to repay the funds collected, at least to Appellant.

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

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

CONCLUSION

1. The Court did not afford Appellant a fair trial and denied him his constitutional due process rights.
2. The Respondent is not The Association and has no rights under the Covenants. All actions predicated on Respondent being The Association must be set aside.
3. Diehl defamed Appellant through republication and the IHOA defamed Appellant through the words of it's officers; and interfered with Appellant's social relationships.
4. The "waivers" in Amendment #1 are deletions applicable to all homeowners.
5. Pebble Creek and The Villas are not subject to the Covenants.
6. The cable, garbage, and recreational center obligations are personal service contracts and must be voided.
7. Defendant Rosemary Toth is personally liable for the distribution of profits.
8. The IHOA is not entitled to attorney fees.
9. The IHOA is not entitled to fines because it failed to exhaust it's own prescribed

administrative remedies. Respondent's counter claim is a frivolous proceeding.

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

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

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

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

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

July 20, 2013

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FORM 16
CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

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

Ronald Jarmuth, Pro Se

Appellant

v.

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

Respondents.

CERTIFICATE OF COUNSEL

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

July 20, 2013

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Appellate No.: 2013-000714

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v.

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

FINAL BRIEF OF RESPONDENTS
THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.,
ROSEMARY TOTH, AND K.A. DIEHL & ASSOCIATES, INC.

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STATEMENT OF ISSUES ON APPEAL

- I. Are Jarmuth's Issues on Appeal preserved?
- II. Did the Special Referee abuse his discretion by admitting Respondents' evidence and limiting the duration of trial?
- III. Were the Special Referee's findings of fact and legal conclusions reasonably supported by the evidence?
- IV. Should the Final Order be reversed to address meritless legal arguments asserted by Jarmuth?

STATEMENT OF THE CASE

Civil Action Nos. 2009-CP-26-3596 and 2010-CP-26-11320 arise out of a dispute between the Appellant, Ronald Jarmuth ("Jarmuth"), and the Respondents, International Club Homeowners Association, Inc. ("Association"), Rosemary Toth, a former president of the Association ("Toth"), and the Association's property management company, K.A. Diehl & Associates, Inc. ("K.A. Diehl") (collectively hereinafter "Respondents"), regarding the Association's authority to govern the International Club community pursuant to the Declaration of Covenants and Restrictions for the International Club ("Declaration") filed in Deed Book 2117 at Page 1353 in the Horry County Register of Deed's Office on February 8, 1999. (R. pp. 76-88, 101-109, 113-182, 205-237, 288-296).

Jarmuth owns a home in the International Club Community ("International Club" or "Community") located in Murrells Inlet, South Carolina. (R. pp. 4192-4195). The Association, the governing body for the International Club, was created by the Association's Articles of Incorporation and the Declaration. (R. pp. 4085-4132, 4402-4403). The Declaration grants the Association architectural review rights, the right to assess for services, and the right to maintain property. (R. pp. 4085-4132).

On April 7, 2009, Jarmuth commenced Civil Action No. 2009-CP-26-3596 seeking an order that the Declaration is unenforceable and/or that the Association breached the Declaration in various ways and that its president, Toth, breached her fiduciary duty to the Association and its members. (R. pp. 113-182). The Complaint was amended on June 9, 2009 to add K.A. Diehl and Henrietta Golding as defendants, and to add defamation, outrage, and invasion of privacy as causes of action. (R. pp. 205-237). Ms. Golding was subsequently dismissed. (R. p. 3012).

Civil Action No. 2010-CV-261072943 was filed in Magistrate's Court on October 12, 2010 seeking a declaratory judgment that the Association does not have the authority to act under the Declaration, the Association waived its architectural review rights, and the Association breached the Declaration by denying his application for improvements. (R. pp. 76-78). The 2010 case was removed to circuit court and assigned a new case number, Civil Action No. 2010-CP-26-11320, by order of the Court on December 1, 2010. (R. pp. 1-2).

The Respondents answered in both cases and asserted several affirmative defenses, including the business judgment rule, immunity, absolute and qualified privileges, waiver, estoppel, and unclean hands. (R. pp. 93-100, 268-279). The Association also counterclaimed for breach of the restrictive covenants and injunctive relief due to Jarmuth's failure to remove unapproved improvements on his International Club lot. (R. pp. 93-100, 268-279).

In reply to the Respondents' counterclaims, Jarmuth asserted a cause of action for Violation of the South Carolina Frivolous Proceedings Act. (R. pp. 101-109, 288-296). The Association moved to dismiss, and the Court ordered that the Counterclaim be added as a cause of action. (**Order Denying Respondents' Motion to Dismiss dated May 16, 2012; R. p. 3013**).

Civil Action Nos. 2009-CP-26-3596 and 2010-CP-26-11320 ("Consolidated Cases") were consolidated on August 22, 2011. (R. pp. 3-5). The Consolidated Cases appeared on the non-jury trial roster in January, 2012. (R. pp. 1954, 3013). In preparation for trial, the parties exchanged pre-trial briefs. (R. p. 1954). Jarmuth filed a

motion for a continuance, and the circuit court granted his motion.¹ (R. pp. 3013-3014). Most of Respondents' witnesses and exhibits admitted at the trial of the Consolidated Cases were listed in Respondents' January 2012 brief. (R. pp. 1954, 2916-2918, 3065-3071).

The parties agreed by consent order to refer the Consolidated Cases to Special Referee, Ralph Stroman, and scheduled the trial. (R. pp. 7-12). Before trial, the parties exchanged revised pre-trial briefs that included exhibit and witness lists. (R. pp. 3011-3064). The trial began on August 8, 2012 at 9:00 a.m. and concluded on August 10, 2012 at 5:30 p.m. (R. pp. 1863, 2894-2895, 2900). At the beginning of the trial, the Special Referee ruled that all evidence would be entered subject to the parties' objections, including the parties' trial exhibits. (R. pp. 1936-1941). The Special Referee also stated that, at the conclusion of the trial, the parties must submit proposed orders and that he would sign one order. (R. pp. 2893-2900). No objections were made to the Special Referee's rulings. (R. pp. 1936-1941, 2893-2900). After the trial, the parties submitted proposed orders as instructed. (R. pp. 532-610).

The final order dismissing Jarmuth's claims and awarding judgment in favor of the Association in the amount of \$7,326.00 and granting injunctive relief ("Final Order") was signed and filed on September 10, 2012 and Jarmuth was served with a copy. (R. pp. 28-75). On September 19, 2012, Jarmuth filed his Post-Trial Motions accusing the

¹ Jarmuth also filed a Petition for Writs of Mandamus and Prohibition with the Supreme Court of South Carolina on December 22, 2011 requesting that the Supreme Court order a continuance. (R. pp. 3013-3014). Then Jarmuth filed a Motion to Stay with the Supreme Court on January 5, 2012 seeking a stay of the Consolidated Cases. (R. pp. 3013-3014). The Supreme Court denied his Petition and the request for the stay of the Consolidated Cases by Order dated January 13, 2012. (R. pp. 3013-3014).

Special Referee of misconduct.² (R. pp. 659-756). While “wholeheartedly den[ying] bias or misconduct”, the Special Referee recused himself from hearing the Post-Trial Motions. (R. pp. 13-14). As a result, the Post-Trial Motions were heard by the Honorable Steven H. John, Chief Administrative Judge for the Fifteenth Judicial Circuit. (R. pp. 15-27).

After Judge John reviewed the entire record and the parties’ briefs, Jarmuth’s Post-Trial Motions were denied by a written Order filed on March 11, 2013. (R. pp. 15-27). Judge John specifically ruled as follows:

The findings of fact challenged by [Jarmuth] are supported by the evidence. Additionally, the Final Order is consistent with the record, the pleadings, the legal arguments made at trial and in the parties’ pre-trial and post-trial briefs.

(R. p. 19). The Order also specifically addresses all of the legal issues on appeal, affirming the Special Referee’s Final Order. (R. pp. 15-27). Jarmuth timely filed an appeal of the Final Order on April 3, 2013, however, he failed to appeal the Order Denying the Post-Trial Motions. (Notice of Appeal).

STATEMENT OF THE FACTS

I. The International Club And The Association

Jarmuth resides in the International Club, a residential community consisting of single family and multi-family phases. (R. pp. 29-30, 2715-2719, 4085-4134, 4141-4151, 4163-4166, 4170-4174, 4225-4229). This Community is located off of Tournament Boulevard, a road that connects Highway 707 and Highway 17 in Horry

² Jarmuth filed a second Petition for Writs of Mandamus and Prohibition seeking the same relief as the Post-Trial Motions, which was dismissed. (R. pp. 761, 865-898).

County approximately ten (10) miles south of Myrtle Beach. (R. pp. 29, 2203, 4026-4084).

The Community's original name was "Murrells Inlet Golf Plantation", the name reflected in the Declaration. (R. pp. 4085-4087). The Declaration also contemplated that an association by the name of Murrells Inlet Golf Plantation Association, Inc. would be formed to govern the Community. (R. pp. 4085-4087).

The Community was developed by Plantation A.D., LLC ("Plantation A.D."), the original developer and declarant named in the Declaration. (R. p. 29, 4087). When the Declaration was filed in 1999, Pebble Creek, the single-family phase of the Community that Jarmuth resides in, was specifically incorporated into the Community by reference to its property description in Exhibit "A" to the Declaration. (R. pp. 4085-4088, 4114). On the same day, after the Declaration was filed, Plantation A.D. conveyed the property that constitutes Pebble Creek to Sunbelt & Associates, Inc. ("Sunbelt") by deed recorded in Deed Book 2117 at Page 401 in the Horry County Register of Deeds Office. (R. pp. 3733-3736). The Pebble Creek deed set forth that "[t]he property is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation..." (R. pp. 3733-3736). Sunbelt was the designated builder for Pebble Creek as defined by the Declaration.

The International Club Declaration required the formation and existence of an architectural review board ("ARB"). (R. pp. 35, 4102-4110). Beginning in the early 2000's, the ARB members were appointed by the Association Board of Directors. (R. p. 35). The Declaration specifically requires ARB approval of "any building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, and landscaping, or other

improvement,...vegetation cover, landscaping, grading, filling, or any other item...upon any portion..." of the Community. (R. pp. 35, 4102-4103).

On May 9, 2000, the Community's name was changed to International Club pursuant to the first amendment to the Declaration ("First Amendment") filed in the Register of Deeds Office in Deed Book 2258 at Page 1453. (R. pp. 4133-4134). The First Amendment also changed the name of the governing association to the "International Club Association". (R. pp. 4133-4134). Subsequently, Articles of Incorporation for the Association were filed with the Secretary of State on March 1, 2001. (R. pp. 4402-4403). The Association was formally named "International Club Home Owners Association" pursuant to its Articles. (R. pp. 4402-4403). Although the name of the Association contained in the Declaration and the Articles of Incorporation were not identical, the Association has exercised the rights and privileges of International Club Association under the Declaration since its incorporation in 2001. (R. pp. 1994-2009, 2864-2865).

The First Amendment also brought into the Community Villas Horizontal Property Regime, a multi-family parcel. (R. pp. 30, 4133-4134). With respect to the Villas Horizontal Property Regime only, the Amendment waived Plantation A.D.'s rights under the Declaration. (R. pp. 30, 4133-4134). Those rights included architectural review authority under Article VII of the Declaration. (R. pp. 4085-4134).

Before the Declaration and the First Amendment were filed, the Declaration of Special Covenants for Highway 17 Connector Road Maintenance District Association, Inc. ("Connector Road Declaration") was filed on December 29, 1998 in Deed Book 2105 at Page 607 in the Horry County Register of Deeds Office. (R. pp. 4026-4084).

The Connector Road Declaration contains covenants that bind several neighborhoods on Tournament Boulevard for the purpose of maintaining the Boulevard. (R. pp. 2203, 4026-4084). It was signed by Plantation A.D., as well as the other developers of the surrounding neighborhoods. (R. pp. 4043-4049). Pursuant to the Connector Road Declaration, the entity that has the authority and obligation to maintain Tournament Boulevard is the Connector Road Maintenance District Association, Inc. ("Connector Road Association"). (R. pp. 4026-4084). This association assesses governing associations, including the Association, for funds to maintain Tournament Boulevard. (R. pp. 4032-4033). The Association assesses each International Club homeowner approximately \$6.50 a year for the Connector Road Association assessments. (R. p. 2868).

In January 2003, Sunbelt dedicated the roads in Pebble Creek to Horry County, South Carolina. (R. pp. 3629-3630, 3650-3651, 3664-3668). The resolutions of Horry County reflect that the roads were accepted into the Horry County system. (R. pp. 3629-3630, 3650-3651, 3664-3668). Other roads in the International Club were dedicated to Horry County subject to the Declaration by the successor developer, D.R. Horton, Inc. (R. p. 31).

II. Jarmuth's Disputes With The Association

On October 23, 2006, Jarmuth purchased his Pebble Creek home from Cheryl Essex. (R. pp. 4192-4195). Ms. Essex bought the home in September, 2001. (R. p. 2106). The deed to Jarmuth included the following language:

This conveyance is made subject to that certain Declaration of Covenants and Restrictions of Murrells Inlet Golf Plantation dated January 31, 1999 and recorded February 8, 2000 in Deed Book 2117 at page 1353; also subject to that

certain Amendment to Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (Now International Club) and Additional Property thereto dated May 8, 2000 and recorded in Deed Book 2358 at page 1453, Office of Register of Deeds for Horry County, South Carolina.

(R. pp. 1994-1997, 4192-4195).

Initially, Jarmuth did not dispute that the Association is the governing entity of the Community. Jarmuth paid the Association assessments and accepted its services, including garbage collection, cable television, use of the Amenity Center and Pool, and maintenance of the Common Areas. (R. pp. 1994-2009). In September 2007 and September 2008, he ran for a director position with the Association, however, neither time was he elected. (R. p. 31). Jarmuth also attended board meetings held at the Community's Amenity Center. (R. p. 34). Beginning in 2009, his family attended the Friday socials held at the Amenity Center. (R. pp. 2529-2530). Since 2006, Jarmuth submitted applications to the ARB for a variety of matters. (R. p. 53). He sought approval, and obtained approval, for planting a palm bed, installing an outside bench, and a flower bed. (R. p. 36).

Jarmuth's position as to the Association's validity changed over time. From June 2008 through April 2009, Jarmuth began corresponding with President Toth and K.A. Diehl, the property manager, for the purpose of requesting the Association's documents and other information related to the Association's governance. (R. pp. 4216-4224, 4230-4278). These requests included, but were not limited to: 1) request for voter's lists; 2) information related to the ownership of International Club roads; 3) information regarding the Connector Road Association; 4) requests for financial records; 5) information related to the cable services provided to the Community; 6) K.A. Diehl's

management contracts; and 7) requests to inspect all board minutes. (R. pp. 4216-4224, 4230-4278). K.A. Diehl provided Jarmuth with all of the documents he requested. (R. pp. 2864-2868).

The purpose of the document requests became clear when Jarmuth filed his Complaint with the Clerk of Court's Office in Horry County on April 7, 2009. (R. pp. 113-182). Shortly after service of the Complaint, the Association Directors met with the Association's attorney, Henrietta Golding. (R. pp. 2550-2558). The Board requested that Ms. Golding prepare a letter regarding Jarmuth's claims that included information that could be provided to the Community members. (R. pp. 2550-2558). On May 27, 2009, Ms. Golding sent a letter to the Board of Directors outlining the Association's position as to the various claims asserted by Jarmuth as well as providing information as to Jarmuth's involvement in previous litigation. (R. p. 34). A list setting forth cases that Jarmuth was a party to was included, as well as published Court decisions. (R. p. 34). The Directors, except for the President Toth, instructed K.A. Diehl to mail Ms. Golding's letter to all Community members. (R. p. 34).

Also, after commencement of this legal action, Jarmuth directed a letter to K.A. Diehl seeking a membership list containing the members' email addresses, phone numbers and their delinquency statuses. (R. pp. 34, 4651-4654). This request was denied by the Association's attorney due to Jarmuth seeking email addresses, phone numbers and information regarding a member's payment of assessments, as well as Jarmuth's failure to set forth a good faith basis for requesting the list. (R. pp. 34-35, 4651-4654). Further, the Association maintains a website for its members, and the members list was readily available to Jarmuth; however, he refused to access the website

for he did not want to disclose his email address or accept the website's privacy policy. (R. pp. 2545-2546, 2865-2878). Jarmuth also received the membership list in the past and accessed the Association's website through other Community homeowners. (R. pp. 35, 4233).

On April 20, 2010, the Association's Board of Directors granted a power line easement to Central Electric Power Cooperative, Inc. ("Central Electric"). (R. pp. 35, 4309-4324). As consideration for this easement, the Association received \$83,000.00 as well as an agreement from Central Electric that it would maintain the easement area in good condition as required by a landscape mitigation agreement with the Association. (R. pp. 35, 4309-4324). Part of the consideration that the Association received from Central Electric was distributed to the members, for each member received \$75.00. (R. pp. 2566-2573, 2793-2798). The Association shared the proceeds with its members to refund the assessments that the members annually paid because the Association received unbudgeted revenue for 2010. (R. pp. 2566-2573, 2793-2798).

In July 2009, Jarmuth applied for the installation of a swing set to be placed on the side of his house. (R. pp. 4283-4293). The ARB denied his request, for his application had the swing set positioned in the side yard and visible to the street. (R. pp. 1385, 2760-2761, 4293-4294³). As a result of this denial, Jarmuth filed a claim with the South Carolina Human Affairs Commission contending that the Association discriminated against him due to his foster children. (R. pp. 4299-4303). This discrimination claim was dismissed by the South Carolina Human Affairs Commission

³ Jarmuth filed all the depositions taken in this case before the trial. During the trial, he moved to admit the filed depositions as exhibits and the trial court granted his motion. (R. pp. 2751-2752).

when it issued its determination of no reasonable cause on December 11, 2009. (R. pp. 4299-4303).

In the fall of 2010, Jarmuth undertook to modify an existing landscape bed as well as install a brick/stone addition to his yard along the property line. (R. pp. 36, 4338-4339). The ARB issued a Notice Violation requiring Jarmuth to submit an application. (R. pp. 36, 4338-4339). Subsequently, Jarmuth submitted an application for a 6 foot high vinyl side yard fence with a brick foundation to be installed on his property line and a flower bed with red brick edgers. (R. pp. 36, 4340-4349). The ARB approved the request for the flower bed and edging in the County easement near a power box as long as Jarmuth had an encroachment permit but denied his request to install a 6 foot vinyl fence with a brick foundation. (R. pp. 36, 4350-4353). Additionally, the ARB fined Jarmuth \$50.00 for constructing the brick foundation. (R. pp. 36, 4338-4339). Jarmuth, by letter dated October 11, 2010, disputed the authority of the ARB to deny his request for the fence as well as assess \$50.00. (R. pp. 36, 4354-4357). He further stated that he disputed the necessity of any appeal. (R. pp. 36, 4354-4357).

Jarmuth refused to remove the brick foundation as required by the ARB, and as a result, he was fined \$100.00 a month. (R. pp. 36, 2768-2772). As of the trial date, he owed the Association the sum of \$2,326.00. (R. pp. 36, 2768-2772).

In February 2012, Jarmuth applied to the ARB for a landscape modification. (R. pp. 4376-4380). By letter dated March 16, 2012, the ARB informed Jarmuth that his application was deferred due to the existing violation that could be remedied by removing the brick work along the property line and restoring the sod. (R. pp. 4381-4384). The letter further stated that his account balance as of the date of the letter was \$1,735.00. (R.

p. 4384). Jarmuth asserts that a quorum did not exist at the ARB meeting, because Charles Roche, Toth's husband and an ARB member, was not able to vote on his application due to a conflict of interest. (R. pp. 2660-2661).

The Association paid \$5,000.00 to the McNair Law Firm in attorneys' fees to seek Jarmuth's compliance with the Declaration. (R. pp. 4298, 4326).

STANDARD OF REVIEW

I. Tort Actions

On appeal, Jarmuth challenges the dismissal of his tort actions. (Jarmuth's Brief, *supra*). An action in tort is generally an action at law, unless equitable relief is sought. Culler v. Blue Ridge Electric Cooperative, Inc., 309 S.C. 243, 246, 422 S.E.2d 91, 93 (1992). Therefore, with respect to Jarmuth's tort actions, the findings of fact of the Special Referee will not be disturbed upon appeal unless found to be without evidence which reasonably supports the Special Referee's findings. Townes Associates, Ltd. v. The City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

II. Declaratory Judgment Action

Jarmuth also challenges the declaratory judgments contained in the Final Order that the Declaration is in his chain of title and that the Association did not breach the covenants. "A declaratory judgment action is neither legal nor equitable in nature, but it takes on the tenor of the underlying action." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991); Seabrook Island Property Owners Association, v. Marshland Trust, Inc., 358 S.C. 655, 661, 596 S.E.2d 380, 383-84 (Ct.App. 2004). "[U]nless the cause of action and the relief sought in a declaratory judgment action are distinctly equitable, the action will be considered one at law." Harvey v. South Carolina

Dept. of Corrections, 338 S.C. 500, 507, 527 S.E.2d 765, 769 (Ct.App. 2000). “To determine whether an action is legal or equitable, this court must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought.” Cullen v. McNeal, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct.App. 2011).

The determination of the scope of restrictive covenants is an action that lies in equity and will be reviewed *de novo*. Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006); Cullen, 390 S.C. at 481, 702 S.E.2d at 384. However, “[t]he determination of the existence of ...[restrictive covenants] is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury.” See Hardy, 369 S.C. at 166, 631 S.E.2d at 542; See also, Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (Ct.App. 1997). The question of a delivery of a deed is also legal in nature and subject to the any evidence standard. Godfrey v. Godfrey, 182 S.C. 117, 188 S.E. 653, 655 (1936). Furthermore, when the relief sought is monetary in nature, a claim for breach of the covenants is legal rather than equitable. O’Shea v. Lesser, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992).

The primary purpose of Jarmuth’s lawsuits is to challenge the existence of the Declaration in his chain of title based on the delivery of the deed from the developer to Sunbelt and to seek monetary damages for the Association’s alleged breach of the covenants; accordingly, his claims are at a law. Therefore, the findings of fact of the Special Referee will not be disturbed upon appeal unless found to be without evidence which reasonably supports the Special Referee’s findings. Townes Associates, Ltd., 266 S.C. at 86, 221 S.E.2d at 775. Moreover, although Jarmuth arguably invoked the trial court's equity jurisdiction by praying for injunctive relief in the Complaint, the essential

legal character of the underlying causes of action remains. Harvey, 338 S.C. at 507, 527 S.E.2d at 769, citing Felts, 303 S.C. at 356, 400 S.E.2d at 782.

III. Trial Rulings And Award Of Attorney's Fees

On appeal, Jarmuth challenges several rulings of the Special Referee, including the admission of evidence, the request for proposed orders in lieu of closing arguments, the request that opening arguments be waived, the allowance of witnesses out of order, and the award of attorneys' fees. Trial issues are matters left to the discretion of the judge and, absent clear abuse, rulings on such issues will not be disturbed on appeal. See Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991) (holding that the admission of evidence will not be disturbed on appeal absent abuse of discretion); see also, Yoho v. Thompson, 345 S.C. 361, 548 S.E.2d 584 (2001) (holding that an abuse of discretion required to disturb a ruling on scope of cross-examination). Similarly, an award of attorney's fees based on restrictive covenants is left to the discretion of the judge and will not be disturbed on appeal absent an abuse of discretion. Seabrook Island Property Owners Association, Inc. v. Berger, 365 S.C. 234, 240, 616 S.E.2d 431, 434 (Ct.App. 2005).

ANALYSIS

I. Jarmuth's Issues On Appeal Are Not Preserved

Jarmuth's appeal should be dismissed, because many of the Issues on Appeal were not timely raised with specificity and ruled upon by the trial court. Several Issues on Appeal are also abandoned due to Jarmuth's failure to cite to legal authority and under the two issue rule.

A. Jarmuth Failed to Timely Raise the Issues to the Trial Court with Specificity

The first step in preserving an issue for appellate review is to actually raise it to the lower court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731,733 (1998). The specific grounds for an objection must be stated. Id. The lower court must also rule upon the issue for it to be preserved for review. Id. A party cannot use a Rule 59(e) motion to present an issue that could have been raised prior to the judgment but was not raised. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005). Nor can a party make an objection to a ruling after the trial judge had an opportunity to address it; objections must be contemporaneous with the ruling at issue. State v. Aldert, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999).

Jarmuth failed to raise several objections to the Special Referee's rulings contemporaneously with his ruling on the issue. No objections were made to taking Respondents' witnesses Denise Ambuhl and Maureen Sullivan out order, submitting proposed orders in lieu of summation, the time limitation on trial, and admitting all evidence subject to the parties' objections.⁴ (**R. pp. 17-18**). Additionally, Jarmuth never attempted to call Toth as a witness at trial or object to the lack of time available to examine her. (**R. pp. 17-18**). Although these issues were raised in his Post-Trial Motions, because Jarmuth failed to lodge a contemporaneous objection at trial, the grounds are not preserved for appeal. See, Fields, 363 S.C. at 27, 609 S.E.2d at 510.

Jarmuth also raises several legal issues for the first time on appeal without providing the lower court with an opportunity to rule. Some of these issues are also not

⁴ These issues are also barred by the two issue rule, because the trial court held that they were not preserved, and Jarmuth failed to appeal this ruling. (**R. pp. 17-18**).

set forth as Issues on Appeal. The unpreserved issues include: 1) Whether a reasonableness standard, rather than the business judgment rule, should be applied when reviewing the actions of the Association's Board pursuant to the Restatement of Servitudes (**Jarmuth's Brief, pp. 16-17**); 2) Whether the Villas is subject to the Declaration (**Jarmuth's Brief, pp. 16-17**); 3) Whether resignation from a non-profit corporation must be unconditional under S.C. Code Ann. §§ 33-31-601 and 33-31-620 (**Jarmuth's Brief, pp. 30-32**); 4) Whether the Association is liable for Tortious Interference with Jarmuth's Social Relationships (**Jarmuth's Brief, pp. 35-36**); 5) Did Sunbelt dedicate the roads in Pebble Creek in fee simple without the Declaration in the chain of title? (**Jarmuth's Brief, pp. 36-39**); and 6) Is Jarmuth entitled to attorneys' fees under S.C. Code Ann. § 33-31-720?⁵ (**Jarmuth's Brief, pp. 43-45**). Because Jarmuth failed to raise these issues timely, and no ruling exists, the issues were not properly preserved on appeal. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. To the extent that these issues were before the trial court, Jarmuth failed to raise these issues with specificity and contemporaneously with the ruling, and failed to obtain a ruling from the Court; accordingly, the issues are unpreserved. Id.

B. Jarmuth's Short Conclusory Arguments Without Authority are Abandoned

Jarmuth abandoned arguments by his failure to provide any legal authority in support. See Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App. 1993) (holding that short conclusory arguments are abandoned on appeal). The abandoned arguments include: 1) The Special Referee improperly ignored the "Statutory

⁵ Jarmuth is a pro se party without legal representation. Therefore, this issue is also unnecessary question that need not be addressed by the Court. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

Judgment Act" (**Jarmuth's Brief**, p. 20); 2) The Special Referee relied on facts not in evidence⁶ (**Jarmuth's Brief**, p. 20); 2) K.A. Diehl misappropriated funds from the Association (**Jarmuth's Brief**, p. 49); 3) The Association is liable for Tortuous Interference with Jarmuth's Social Relationships (**Jarmuth's Brief**, pp. 35-36); 4) The Special Referee violated Jarmuth's due process rights (**Jarmuth's Brief**, p. 20). Jarmuth's failure to provide a legal analysis supporting these arguments constitutes an abandonment of the arguments on appeal.

C. The Two Issue Rule Bars Jarmuth's Issues on Appeal

Because Jarmuth failed to appeal the circuit court's grounds for denying his Post-Trial Motions, many of his arguments are barred by the two issue rule.

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge the ruling. See Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. Id. An unappealed order, right or wrong, is ordinarily the law of the case. Charleston Lumber Co. v. Miller House Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000); Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993) (the trial judge's procedural ruling is the law of the case since it has not been appealed).

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903-04 (2010); see also, Anderson v. Short, 323 S.C. 522, 476 S.E.2d

⁶ The Order Denying Jarmuth's Post-Trial Motions specifically held that the Final Order is supported by the Record. (**R. pp. 19, 904-927**).

475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case). The two issue rule is applicable in non-jury cases. Id.

Jarmuth's various arguments that the Declaration and Connector Road Declaration are invalid are barred by the two issue rule.⁷ Pursuant to the Order Denying Jarmuth's Post-Trial Motions, Jarmuth lacks standing to challenge the validity of these documents. (**R. p. 22**). Because Jarmuth did not appeal the circuit court's ruling that he lacks standing, the ruling is the law of the case, and therefore, Jarmuth effectively abandoned his right to challenge the validity of the Declaration and the Connector Road Declaration on appeal.

Another issue abandoned by Jarmuth is whether the Association violated § 13.3 of the Bylaws by imposing fines without a hearing. (**Jarmuth's Brief, pp. 45-47**). Although he appeals the Final Order's ruling that the Board does not have to hold a hearing under § 13.3, he failed to appeal the Order Denying his Post-Trial Motions, which held that he waived his right to an appeal. (**Jarmuth's Brief, pp. 26, 45-47**). Therefore, the holding is the law of the case, and the argument is barred by the two issue rule.

⁷ Jarmuth argues that the Declaration is invalid and unenforceable against his property. (**Jarmuth's Brief, pp. 27-29**). He also argues that the provision of the Declaration providing the Association with the authority to collect assessments for the amenity center, cable television, garbage collection, and the Connector Road Declaration assessments are personal service contracts that do not "run with the land", and therefore, the provision is invalid. (**Jarmuth's Brief, pp. 36-39**). Jarmuth's Brief also makes the argument that the Declaration conflicts with the Non-Profit Corporation Act by requiring Jarmuth to be a member of the Association by virtue of his ownership of an International Club property. (**Jarmuth's Brief, pp. 30-32**). Lastly, he challenges the provisions of the Declaration that provides the Association with the authority to restrict parking. (**Jarmuth's Brief, pp. 36-39**).

II. The Special Referee Did Not Abuse His Discretion

The Initial Brief argues that Jarmuth was not provided a fair trial due to the Special Referee's ruling on evidentiary and procedural issues at trial, including the ruling that no opening or closing arguments were needed and the time limitation on trial. However, the record reflects that Jarmuth was afforded a full and fair opportunity to present his case and was not prejudiced by the Special Referee's rulings. (R. pp. 17-19).

A. The Special Referee Properly Admitted Evidence

The trial court has broad discretion in controlling the examination of witnesses and the admission of evidence. North Greenville College v. Sherman Const. Co., Inc., 270 S.C. 553, 556, 243 S.E.2d 441, 442 (1978); Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 413-14, 697 S.E.2d 558, 561 (2010). However, an abuse of discretion amounting to an error of law warrants reversal. Id.

Jarmuth argues that several exhibits and witnesses were not identified in discovery, and accordingly, the Special Referee erred by admitting this evidence. Although the objectionable evidence was not identified by Jarmuth at trial, his Initial Brief argues that the admission of testimony from Chris Sullivan, Maureen Sullivan and Denise Ambuhl, and Respondents' Exhibits 105 through 108 and A through J was improper.⁸ (Jarmuth's Brief, pp. 21-22). The basis of Jarmuth's argument is that the Respondents amended their pre-trial brief served in January 2012 to include additional witnesses and exhibits. (R. pp. 1941-1955). However, the record reflects that

⁸ Jarmuth's objections to Respondents' witnesses and exhibits were vague and lacked specificity. At trial, he generally objected to exhibits and witnesses upon the basis that they were not provided in discovery, however, he did not specifically identify the objectionable evidence. (R. pp. 1936-1955). Because Jarmuth did not specifically object to the admission of this evidence contemporaneously with its admission at trial, the objections are not preserved on appeal. Aldert, 333 S.C. at 312, 509 S.E.2d at 813.

Respondents produced all trial exhibits and identified all witnesses in their responses to Jarmuth's discovery requests. (R. pp. 1941-1955). Because all of the evidence was previously produced, Respondents' amendment of their pre-trial brief before trial does not provide a basis for objecting to the aforementioned evidence. (R. p. 18). Paradoxically, the exhibits objected to are matters of public record, for some of the documents are recorded and others are South Carolina Secretary of State records. (R. pp. 4402-4424). Moreover, Jarmuth made many of the documents exhibits at trial. (R. pp. 3670-3688, 3788-3789). As a result, the Special Referee did not abuse his discretion by allowing the evidence to be admitted.

Jarmuth also argues that the Special Referee abused his discretion by taking Chris Sullivan out of order. The Order Denying Jarmuth's Post-Trial Motions specifically held that this ruling did not prejudice Jarmuth. (R. p. 18). Mr. Sullivan's direct examination was brief and did not limit Jarmuth's ability to present his case. (R. pp. 18, 2148-2169). Accordingly, the Special Referee did not abuse his discretion or commit an error of law by allowing the witness to be taken out of order.

B. The Special Referee Properly Limited the Duration of Trial and Opening and Closing Arguments

Ordinarily, a trial court's rulings on closing arguments will not be disturbed. State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct.App. 2000). In a non-jury action, whether to permit closing argument is in the sound discretion of the trial judge. Clark v. Clark, 293 S.C. 415, 417, 361 S.E.2d 328, 329 (1987).

The decision to limit trial to three days with no opening and closing arguments "was in the sound discretion" of the Special Referee. Jarmuth was given the opportunity to present all of the witnesses he attempted to call. (R. pp. 17-18). He also testified for

over 2 days, and much of his testimony included legal arguments. (R. pp. 1863-2900). A large portion of his exhibits included legal authorities. (R. pp. 2936, 2976, 2978-2980, 2986, 2990). Although he was not given the opportunity to regurgitate his legal analysis in closing argument, he did submit a proposed order and a lengthy brief. (R. pp. 300-562). Accordingly, the limitations on trial did not prejudice his ability to present his a case. Jarmuth was afforded a fair trial.

III. The Findings Of Fact And Legal Conclusions In The Final Order Are Reasonably Supported By The Evidence

In his Initial Brief, Jarmuth asserts that several findings of fact and legal conclusions in the Final Order are unsupported by the evidence presented to the lower court. The record contains ample evidence to support the facts and conclusions of law contained in the Final Order. (R. p. 19).

A. The First Amendment to the Declaration Did Not Waive Association's Rights with Respect to the Whole Community

Jarmuth argues that the Final Order is in error by containing the following language: "I find that the Developer's waiver of certain rights was solely with respect to the Villas Horizontal Property Regime and did not waive applicability of the covenants to the rest of the Community..." (Jarmuth's Brief, pp. 24, 50-51). The evidence reasonably supports the Special Referee's finding that the First Amendment's waiver only affected the Villas Horizontal Property Regime.

South Carolina law is clear that restrictive covenants are voluntary contracts and will be enforced according to their terms. Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 329 S.C. 206, 210, 494 S.E.2d 465, 467 (Ct. App. 1998). The main guide in interpreting restrictive covenants is to ascertain and give legal effect to

the intention of the parties as expressed in the language of the covenants. Cullen, 390 S.C. at 481, 702 S.E.2d at 384. If the Declaration's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the Declaration. Id.

In the Whereas Clauses of the First Amendment, the purpose of the amendment, to add a multi-family parcel to the International Club, is clearly expressed. (R. pp. 4133-4134). Although the multi-family parcel was not identified, the designated builder of the property was named, International Club Villas, LLC.⁹ (R. pp. 4133-4134). Several provisions of the First Amendment waived the Association's rights with respect to the multi-family parcel, which included certain architectural review rights. (R. pp. 4133-4134). These waivers make sense in the context of a multi-family parcel, because the multi-family parcels have their own associations, and individual owners cannot modify the exterior of the regime building. (R. pp. 4089, 4133-4134). Other provisions of the Declaration were deleted, which affected the whole Community. (R. pp. 4133-4134). Construing the First Amendment as a whole, and giving effect to the intent of the parties, the Special Referee did not err by holding that the waiver only applied to the Villas Horizontal Property Regime and not the Community as a whole. See Palmetto Dunes Resort v. Brown, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct.App. 1985).

If the Court finds that the First Amendment is unclear on its face, which Jarmuth asserts in his brief, "parol evidence is admissible to ascertain the true meaning and intent

⁹ For the first time on appeal, Jarmuth argues that the Villas was not subjected to the Declaration. The record is devoid of this argument. Because Jarmuth failed to raise this argument with specificity and the lower court did not issue a ruling, it is not preserved on appeal. Jarmuth also does not have standing to challenge the First Amendment pursuant to the Order Denying his Post-Trial Motions. (R. p. 22).

of the parties.” Cullen, 390 S.C. at 481, 702 S.E.2d at 384. Additional persuasive evidence supports the lower court’s finding. R. Scott Pyle, a principal of the original developer who drafted the First Amendment, testified that the purpose of the First Amendment was to waive rights only under certain circumstances. (R. pp. 1292, 1337-1339, 2750). Likewise, Jeffrey King, Respondents’ expert witness, testified that the waiver of architectural review rights was not with respect to the whole subdivision, but instead, only with respect to the builder of the multi-family parcel being annexed by the First Amendment. (R. pp. 2738-2742).

The evidence establishes that the Association enforced its architectural review rights consistent with the Court’s ruling. (R. pp. 50-51, 2864-2865). The developers and the ARB have continually required applications for all improvements from single family homeowners, including fences and swing-sets, and in fact, Jarmuth applied for several improvements on his property before objecting to the Association’s ability to exercise architectural review rights. (R. pp. 36, 2864-2865). From 2005 to the present, Architectural Guidelines have been enforced against the homeowners. (R. pp. 4175-4188, 4196-4215, 4367-4375). Based on the ample extrinsic evidence in the record, the First Amendment was not intended to waive rights with respect to the whole Community.

Jarmuth also asserts that the Special Referee misapplied the principle that restrictive covenants must be construed in favor of free use of the property by holding that the First Amendment did not waive all architectural review rights. Taylor v. Lindsey, 332 S.C. 1. 4, 498 S.E.2d 862, 864 (1998); Hardy, 369 S.C. at 166, 631 S.E.2d at 542. However, as noted in the Order Denying Jarmuth’s Post-Trial Motions, the rule

of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. *Id.* (R. p. 24).

The Final Order's finding that the Association did not waive its rights with respect to the whole community is reasonably supported by the record.

B. The Association is the Governing Body for the International Club

Another ground asserted for reversing the Final Order is that, under the First Amendment, the governing body for the Community is International Club Association. (Jarmuth's Brief, pp. 24-27). Jarmuth's position is that, pursuant to the First Amendment, "Murrells Inlet Golf Plantation" was deleted and "International Club" was inserted in the Declaration, making the new name "International Club Association" rather than "International Club Home Owners Association".¹⁰ (Jarmuth's Brief, pp. 24-27). Therefore, the Association is not a party to the Declaration and cannot enforce any rights contained therein.

A corporation may be known by several different names in the transaction of business. *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct.App. 1992). Consequently, the misnomer of a corporation generally will not be treated by the courts as material if the identity of the corporation is reasonably clear or can be ascertained by sufficient evidence. *Fletcher Cyclopedia of the Law of Corporations*, 6 *Fletcher Cyc. Corp.* § 2444 (2013). In other words, slight departures from the name used by the corporation, such as the omission of a part of its name or the inclusion of additional words, generally will not affect the validity of contracts or other business

¹⁰ Jarmuth testified that he incorporated "International Club Association". (R. pp. 2008-2016). Part of the relief that he seeks is an order that his association is the entity entitled to enforce the Declaration. (R. pp. 2008-2016). He also seeks a refund of all assessments he and his predecessor in title paid to the Association. (R. pp. 2008-2009).

transactions as long as the identity of the corporation can be reasonably established from the evidence. Id.; see also, Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co., Ltd., Of London, 76 S.C. 76, 56 S.E. 654, 656 (1907).

The Supreme Court of South Carolina addressed the issue of a misnomer in a deed in Sumter Tobacco Warehouse Co., 76 S.C. 76, 56 S.E. at 656. The issue was whether a deed conveying property to a corporation was valid, where the deed named the grantee as “Sumter Tobacco & Cotton Warehouse Co.” instead of the name in the corporate charter, “Sumter Tobacco Warehouse Co.” Id. Like the Declaration, the deed conveying the property was dated before the charter for the corporation was filed with the Secretary of State. Id. In holding that the deed of conveyance was effective the Supreme Court noted the following:

It is the duty of courts to give effect to deeds made in good faith rather than destroy them on technical grounds. A deed to a corporation made before the charter will have effect as soon as the charter is obtained, on the ground that its acceptance should be presumed as soon as the corporation is competent to accept it. The slight change in the name of the corporation can make no difference.

Id.

The record is clear that the Association is the entity entitled to enforce rights under the Declaration. It was incorporated in 2001 by the original developer, and since that time, it has continually acted as the governing organization for the International Club. (R. pp. 21, 1991-2009, 2099, 2106, 4402-4403). Since 2001, the Association collected assessments, held meetings, and provided services to the International Club community members. (R. pp. 21, 1991-2009, 2099, 2106). The evidence supports the

Special Referee's finding that the Association is the proper entity to enforce the terms of the Declaration.

C. Pebble Creek is Subject to the Declaration

The Special Referee did not err by holding that Pebble Creek is subject to the Declaration. Jarmuth's argument on appeal is that no "meeting of the minds" existed that the property was subject to the Declaration. (**Jarmuth's Brief, pp. 27-30**). He also asserts that the Declaration did not exist when the property was conveyed to Sunbelt, because it was not recorded, and as a result, the Declaration does not bind Pebble Creek. (**Jarmuth's Brief, pp. 27-30**). The deed from Plantation A.D. to Sunbelt conveying the Pebble Creek property, is dated January 29, 1999 and recorded on February 8, 1999 at 3:27 p.m. (**R. pp. 3733-3736**). The Declaration was filed two minutes earlier at 3:25 p.m. on February 8, 1999. (**R. p. 4085**).

The Pebble Creek deed was recorded after the Declaration was recorded, and therefore, the Declaration is in Pebble Creek's chain of title. "It is a well established rule of law that a deed is not legally effective until it has been delivered." First Union Nat. Bank of South Carolina v. Shealy, 325 S.C. 351, 355, 479 S.E.2d 846, 847 (Ct.App.1996), citing Johnson v. Johnson, 44 S.C. 364, 22 S.E. 419 (1895); Durham v. Blackard, 313 S.C. 432, 438 S.E.2d 259 (Ct.App.1993). That is, an effective delivery of a conveyance contains two parts: (1) an intention to deliver, and (2) an act evincing a purpose to part with control of the instrument. Shealy, 325 S.C. at 355, 479 S.E.2d at 847 citing Powers v. Rawles, 119 S.C. 134, 112 S.E. 78 (1922). The recording of a deed serves as prima facie evidence of delivery. See Johnson, 44 S.C. 364, 22 S.E. 419. Because Plantation A.D. filed the Declaration at 3:25 p.m. on February 8, 1999, before it

delivered the Pebble Creek deed to Sunbelt Associates at 3:27 p.m. by recording the deed, the Declaration existed at the time the Pebble Creek property was delivered to Sunbelt.

Moreover, even if the Pebble Creek deed was delivered to Sunbelt before the Declaration was recorded, Plantation A.D.'s and Sunbelt's intention that the Declaration run with the land is clear from the Pebble Creek deed that states "[t]he property is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation." (R. pp. 3733-3736). Jarmuth's deed also states that his property is subject to the Declaration. (R. pp. 1993-1995, 4192-4195). The language in the Pebble Creek deed and Jarmuth's deed subjecting the property to the Declaration is controlling. Charping v. J.P. Scurry Co., Inc., 296 S.C. 312, 315, 372 S.E.2d 120, 122 (Ct.App.1988) (holding that a restrictive covenant is enforceable if there is "an indication that the parties intended for the covenant to run with the land").

The Special Referee did not err by holding that Pebble Creek is subject to the Declaration.

D. The Association's Assessments for Cable, Garbage Collection, Maintenance of the Amenity Center, and the Connector Road Association Services are Valid

The Special Referee did not err by holding that the Association has the right to assess Jarmuth for cable and garbage collection services, maintenance of the amenity center, as well as the Connector Road Association dues.

The Declaration, Section 6.1, mandates that assessments must be used for well being of the members, including the provision of services. (R. p. 4100). Section 3.1 of the Declaration further clarifies that those services include cable T.V., garbage collection,

and maintenance of property in and near the International Club. (R. pp. 4093-4094). The Amenity Center consists of 1.56 acres of Common Area owned by the Association. (R. pp. 4137-4140). Under the Declaration, sections 5.3 and 6.2, all Common Area is to be maintained by the Association with assessments collected from owners, including "Recreational Amenities". (R. pp. 4099-4100).

The Connector Road Declaration requires that the Association pay assessments to the Connector Road Association on behalf its members. (R. pp. 4032-4033). The Connector Road Association assessments are used to maintain an adjacent roadway to the International Club. (R. p. 4033).

Jarmuth argues that the assessments are invalid, because the provisions granting the Board with the authority to assess for these services are not covenants that runs with the land. (Jarmuth's Brief, pp. 47-49). "Restrictive covenants differ from contracts in that they 'run with the land' meaning that they are enforceable by and against later grantees." Queen's Grant II Horizontal Property Regime v Greenwood Development Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct.App. 2006). Covenants that "require grantees to pay assessments for the upkeep of a particular parcel of property are held to be real covenants which 'touch and concern' land, and therefore, run with the land." Id. Assessments for maintenance, garbage collection, and cable television clearly "touch and concern" the land, and therefore, run with the land under South Carolina law.

Courts in other jurisdictions have held that covenants requiring payment of assessments for cable television are valid. See D'Elia v. Association of Apt. Owners of Fairway Manor, 2 Haw.App. 347, 349 632 P.2d 296, 297 (Haw.Ct.App. 1981) (assessment for installation and operation of cable television is common expense for

maintenance, repair, rebuilding, and restoration of common elements within meaning of covenant; court has no power to amend declaration to provide fairer basis for assessing common expenses); see also, River Park House Owners Association v. Crumley, 47 A.3d 870, 874 (Pa. Commw. Ct. 2012) (holding that Pennsylvania law did not prohibit an association from entering a bulk cable contract and assessing for cable television services so long as the Board had the authority to assess for that purpose under its governing documents); Ocean Sands Property Owners Association, Inc. v. Munns, 2005 WL 589483 at, *3-4 (N.C.App. 2005) (holding that the association had the authority to assess for cable television services if properly voted upon by the members of the association). These Courts recognize the validity of restrictive covenants granting an association the authority to assess for cable television services and implicitly hold that such covenants touch and concern the land and run with the land.

Based on established jurisprudence, the Special Referee did not err in holding that the Association may assess owners for cable television, garbage collection, and maintenance of property in and near the International Club.

E. The Pebble Creek Roads are Subject to the Declaration

For the first time on appeal, Jarmuth argues that Pebble Creek roads are not subject to the Declaration, because Sunbelt dedicated the property to Horry County in “fee simple”.¹¹ (**Jarmuth’s Brief**, pp. 36-39). As discussed above, the Declaration was filed in 1999 before Pebble Creek was conveyed to Sunbelt. (**R.** pp. 3733-3736, 4085).

¹¹ The record includes resolutions of Horry County accepting the Pebble Creek roads and drainage in the County System, however, the deeds conveying the roads from Sunbelt to Horry County were not admitted as evidence at trial. (**R.** pp. 3629-3630, 3650-3651, 3664-3668). Therefore, no evidence substantiates Jarmuth’s argument that the roads were conveyed “fee simple”.

Therefore, at the time Sunbelt dedicated Pebble Creek roads to Horry County in January 2003, the property was subject to the Declaration. (R. pp. 3629-3630, 3650-3651, 3664-3668).

Although South Carolina has not specifically addressed this issue, American Jurisprudence, Second Edition, explains that “[a]n owner of land subject to a right of way may dedicate what he or she owns, at least where such dedication does not adversely affect the rights of the dominant owner.” 23 Am. Jur. 2d Dedication § 14 (2013); see also, Armiger v. Lewin, 216 Md. 470, 475, 141 A.2d 151, 154 (Ct.App. 1958) (holding that there is no doubt that the owner of a fee has capacity to make a grant of his land, *subject to a dominant easement*).

Sunbelt had the capacity to make a grant of title to the roads to Horry County, *subject to the dominant covenants, the Declaration*. At the time the roads were dedicated, rights were reserved to the Association pursuant to the Declaration, and accordingly, Sunbelt was incapable of conveying those rights to Horry County. Moreover, dedications cannot “adversely affect the rights of the dominant owner”, the Association in this case. See Am. Jur. 2d Dedication § 14.¹² Because Sunbelt dedicated Pebble Creek roads subject to the Declaration in the chain of title of the property, Jarmuth’s argument that Sunbelt’s dedication is not limited by the Declaration is implausible.

¹² Horry County acknowledges that restrictive covenants may encumber dedicated road systems. (R. p. 4366). The County does not interfere with associations’ rights to enforce covenants. (R. p. 4366).

F. Jarmuth's Request for the Membership Information was Properly Denied by the Association

Jarmuth asserts that the lower court erred by holding that one of his three requests for the Association's membership information was properly denied, because he failed to provide a good faith basis for his request under S.C. Code Ann. § 33-31-720. (**Jarmuth's Brief, pp. 39-41**). His argument is that this code provision does not require a good faith reason for inspecting the membership list. (**Jarmuth's Brief, pp. 39-41**). He also asserts that the Final Order is in error for holding that he has access to the membership list on the Association's website. (**Jarmuth's Brief, pp. 39-41**)

The Final Order properly held that the membership list was on the Association's website. (**R. pp. 2545-2546**). At trial, Maureen Sullivan, a former Association board member and a homeowner, and Beckie Abel, a K.A. Diehl property manager, testified that the website for the International Club includes all homeowners' names and addresses. (**R. pp. 2545-2546, 2865-2878**). Beckie Abel also testified that Jarmuth could access members' names and addresses if he simply signed up for the Association's website, however, Jarmuth refused because he did not want owners to be able to access his information. (**R. pp. 2865-2868**).

The Association also properly denied Jarmuth's request for the voter's list in April 2009 for failure to state a good faith reason for his request pursuant to S.C. Code § 33-31-1602. (**R. pp. 4277-4278**). Contrary to Jarmuth's assertions, S.C. Code Ann. § 33-31-720 is irrelevant: it is only applicable where a meeting of the Association has been noticed. S.C. Code Ann. § 33-31-720 ("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 for which

the list was prepared..."). Nothing in the record reflects that a meeting was noticed before Jarmuth made his request. On a different occasion, Jarmuth requested a voter's list before the election without providing a good faith basis for his request, and the list was provided to him. (R. pp. 2865-2868).

Moreover, Jarmuth's request was not for a membership list as defined by the Act, but instead, sought private information, including the owners telephone numbers, account statuses, and email addresses. (R. pp. 2865-2868, 2878, 4651-4654). The Association properly denied his request for private information of the members.

G. Toth is not Liable to the Association for the Refund of Assessments to Members

In his Brief, Jarmuth argues that the Association's payment of \$75.00 to each member of the Association was an unlawful distribution and violated S.C. Code Ann. § 33-31-1301.¹³ (Jarmuth's Brief, pp. 41-43). He asserts that the trial court erred in failing to hold Toth personally liable for voting in favor of the transaction,¹⁴ and by holding that the payment was not a distribution under South Carolina law.

The record clearly reflects that the payment was not a distribution pursuant to the Non-Profit Corporation Act, S.C. Code Ann. § 33-31-140(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:**

¹³ S.C. Code Ann. 33-31-1301 provides: "Except as authorized by Section 33-31-1302, a corporation may not make any distributions."

¹⁴ Jarmuth did not properly plead a claim under the Non-Profit Corporation Act with respect to the \$75.00 payment. He also failed to establish at trial that Ms. Toth voted in favor of the disputed transaction, but instead, referred to the minutes of the 2010 special meeting.(R. pp. 2138-2140). According to the minutes, the Association members voted to grant an easement to Central Electric, but no specific motion was made to refund money to the homeowners. (R. pp. 4306-4308).

- (a) the payment of compensation in a reasonable amount to its members, directors, or officers for services rendered;
- (b) conferring benefits on its members in conformity with its purposes; or
- (c) repayment of debt obligations in the normal and ordinary course of conducting activities.

(Emphasis added). The official comment to S.C. Code Ann. § 33-31-1302, defining distributions that are lawful, specifically states the following: “the return of an overcharge or the providing of services for which members have paid is not a distribution.”

According to the testimony of Maureen Sullivan, a former Board member, the Board considered crediting the owners’ accounts, but instead, decided to pay owners funds directly. (R. p. 2569). Similarly, Mr. Freiboth testified that the funds were returned to the homeowners to confer a benefit. (R. pp. 2785, 2797). The Association’s refund was intended to “confer[] benefits on the members in conformity with its purposes”, not to distribute profits to its members.

As additional sustaining grounds, Toth is not liable to the Association pursuant to S.C. Code Ann. § 33-31-833:

- a) Unless a director complies with the applicable standards for conduct described in Section 33-31-830, a director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.

(Emphasis added). Toth complied with S.C. Code Ann. § 33-31-830, and accordingly, is not liable under § 33-31-833. Under S.C. Code § 33-31-830(a), a director “shall discharge his duties as director...1) in good faith; 2) with the care of an ordinarily prudent person in a like position would exercise under similar circumstances; and 3) in

a manner the director reasonably believes to be in the best interests of the corporation." The board member is "entitled to rely" on "legal counsel" "in discharging his duties." *Id.*

Another Board member and the current Association president, William Freiboth, testified that the Board believed the agreement with Central Electric was in the best interests of the Association, because it conferred benefits on the homeowners. (R. pp. 2753, 2783). In refunding the money, the Board relied on the advice of counsel. (R. pp. 1123, 1214-1215). Because the evidence establishes that Toth acted in good faith, in the best interests of the Association, and relied on the advice of professionals, no error occurred by holding that Toth is not liable.¹⁵

H. The Evidence Reasonably Supports the Finding that the Association did not Defame Jarmuth

Next, Jarmuth asserts that the Special Referee erred by holding the Association is not liable for defamation due to alleged statements made by William Fletcher and Mike Templeton. (Jarmuth's Brief, pp. 32-35). According to Jarmuth, the record reflects that Fletcher called Jarmuth a child molester, and Templeton told homeowners to stay away from Jarmuth. (Jarmuth's Brief, pp. 32-35).

However, nothing contained in the record evidences that Fletcher or Templeton were agents of the Association at the time the alleged statements were made. Furthermore, as the trier of fact, the Special Referee was in a better position to weigh the evidence, and accordingly, deference should be granted to his weighing of the evidence in favor of the Association.

¹⁵ S.C. Code Ann. § 33-31-833 states that "[a] director held liable for an unlawful distribution...is entitled to contribution...from each person who received an unlawful distribution for the amount of the distribution whether or not the person receiving the distribution knew it was made in violation of this chapter." If you accept Jarmuth's argument, he is also liable for the refund he received.

I. K.A. Diehl is Protected by a Qualified Privilege

Jarmuth contends that the Final Order errs by holding that K.A. Diehl's communications to the Association's members on behalf of the Board are protected by a qualified privilege. (Jarmuth's Brief, pp. 32-35). To the extent that this issue is preserved, Jarmuth's argument is without merit.

"Under South Carolina law, communications between servants, business associates, officers, or agents of the same corporation enjoy a qualified privilege." Bell v. Evening Post Publishing Company, 318 S.C. 558, 560, 459 S.E.2d 315, 317 (Ct.App. 1995). (Emphasis added). The elements of this qualified privilege are as follows:

Good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

Prentiss v. Nationwide Insurance Company, 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971). (Emphasis added).

The qualified privilege applies to K.A. Diehl's communications to members about this lawsuit, including Jarmuth's past legal disputes. The representations were made as an agent of the Board at the Board's direction in good faith to the members of the Association by mail to their home addresses. (R. pp. 2550-2555). Because the Board had a duty to inform Association members about the lawsuit, and the members had an interest in the substance of the dispute, as it involved the Community and the Declaration as well as the assessments paid to fund the lawsuit, the communications are protected by a privilege. (R. pp. 27, 69).

J. K.A. Diehl is not Liable for Mishandling Association Funds

Another theory for holding K.A. Diehl liable is that the property manager misappropriated or otherwise failed to account for the Association's funds properly. Jarmuth's brief generally asserts that K.A. Diehl is liable without providing any evidentiary or legal basis. (**Jarmuth's Brief, p. 49**). Contrary to Jarmuth's unsubstantiated generalizations, Beckie Abel, the property manager, testified that independent audits are conducted of the Association's financial records on an annual basis, and the C.P.A. who conducts these audits never found that K.A. Diehl misappropriated, embezzled, or stole funds from the Association. (**R. p. 2869**). Mr. Freiboth, the Association's president, also testified that he reviewed the capital contributions collected by D.R. Horton on behalf of the Association and determined that K.A. Diehl did not steal any funds. (**R. pp. 2778-2779**). The Special Referee did not err by rejecting Jarmuth's argument that K.A. Diehl stole funds. (**R. p. 27**).

K. The Association Properly Reviewed Jarmuth's Applications for Improvements

Jarmuth contends that the Association denied his applications for a fence and swing set and deferred his application for an extension of his palm bed arbitrarily and capriciously. Therefore, the Special Referee erred by finding that the Association's denial of the applications was proper.

"When a covenant provides an architectural review board with broad authority for approval of improvements, the architectural review board's discretion is constrained only by reasonableness and good faith." River Hills Prop. Owners Ass'n, Inc. v. Amato, 326 S.C. 255, 259, 487 S.E.2d 179, 181 (1997)(holding that an association board acted reasonably and in good faith in denying approval of a landowner's plan to build a fence

and pool based upon aesthetic reasons). The courts will uphold an architectural review board's rejection of a homeowner's improvements based on aesthetic considerations when the board's decision is not arbitrary but bears a sufficient relation to the subdivision's general plan of development. Sea Pines Plantation Company v. Wells, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987).

First, the ARB has broad approval rights for all improvements in the International Club under Section 7.2 of the Declaration:

No...structure, fence, sidewalk...shall be commenced...nor shall any exterior addition or change be made until the plans and specifications...shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer..this right of approval shall be transferred to an Architectural Review Board for the Association....Refusal or approval of plans, specifications, and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board deem sufficient....

Also, Section 7.4 of the Declaration specifically prohibits Jarmuth's proposed fence:

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...

(R. pp. 4102-4104). Clearly, under Sections 7.2, the ARB has the authority to prohibit certain structures within the Community based on purely aesthetic grounds. The Declaration also prohibits the erection of fences, like Jarmuth's, pursuant to Section 7.4.

Secondly, Jarmuth's fence and swing set were denied based on aesthetic considerations. (R. pp. 2760-2761, 2765-2766, 4293-4294, 4299-4303). The evidence is that the fence was denied because the proposed location was in the front yard and close to

his property line. (R. pp. 713, 2765-2766, 4340-4349). The swing set was denied because its proposed location was the side yard. (R. pp. 2760-2761, 4293-4294, 4299-4303). Although Jarmuth argues that the record is replete with evidence that the ARB acted arbitrarily and capriciously, he fails to identify any credible evidence in support. Under South Carolina law, absent bad faith, reasonable ARB decisions based on aesthetic considerations must be upheld. Sea Pines Plantation Company, 294 S.C. at 271, 363 S.E.2d at 894.

Next, Jarmuth asserts that the ARB's deferral of his application for a palm bed extension was improper, because the deferral constitutes a denial of his application. (Jarmuth's Brief, pp. 45-47). The record reflects that a quorum of the ARB did not exist to vote on the transaction. (R. pp. 2660-2661). As a result, the ARB had no choice but to defer Jarmuth's application. (R. p. 25). No evidence exists to support Jarmuth's contention that the deferral was effectively a denial. Because the deferral was reasonable, the Final Order should not be set aside.

L. The Association's Fines Comply with § 13.3 of the Bylaws

Jarmuth's Brief asserts that the Special Referee erred by holding that the Association properly fined Jarmuth for unapproved improvements under § 13.3 of the Bylaws.

Jarmuth argues that the fines levied against him for his modifications without ARB approval are invalid under § 13.3, because he was not afforded a hearing. The provision provides:

“Except with respect to failure to pay Assessments, the Board shall not impose a fine, suspending voting rights, or infringe upon or suspend any other rights of an Owner or other occupant of the Subdivision for violations of the

Declaration, By-Laws, or any rules and regulations for the Association, unless and until the following procedure is followed:

1)written demand to cease and desist from an alleged violation...

2)the Board may serve such Owner with written notice of a hearing to be held by the Board in executive session..."

(R. p. 4131). (Emphasis added). Jarmuth is incorrect, because Section 13.3 states that the Board may, but is not required, to hold a hearing before imposing fines. (R. p. 26).

As an additional sustaining ground, § 13.3 of the Bylaws does not require the ARB to hold a hearing before imposing fines. (R. pp. 2757-2760). Under sections 7.2 and 8.1 of the Declaration, the Declarant and the ARB have the authority to adopt architectural guidelines and impose fines for infractions without a hearing.¹⁶ (R. pp. 4102-4103). Jarmuth was fined pursuant to the fine policy adopted by the Declarant, and accordingly, a hearing is unnecessary. (R. pp. 2757, 4175-4188).

A second additional sustaining ground is that Jarmuth waived any right that he had to a hearing. (R. pp. 26, 2767-2768, 4354-4356). He refused to acknowledge the Association's authority to exercise architectural review rights and disputed the necessity of an appeal in his correspondence to the Association.¹⁷ (R. pp. 4354-4356). Then he

¹⁶ Section 7.2 states "[t]he Architectural Review Board shall have the right and authority to establish, amend and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers hereunder." (R. pp. 4102-4103). Under Section 8.1, "[t]he Developer and the Association as the case may be, shall have the right to establish, assess, and collect reasonable fines and penalties for violations of this Declaration, which shall be liens against Units and improvements thereon in the same manner as Assessments as provided herein. Such fines shall not exceed \$50.00 per violation per day." (R. p. 4111).

¹⁷ Jarmuth's letter to the Association, Respondents' Exhibit 87, states: "I reserve my right to take parallel recourse at law or in equity, since by disputing the authority of the

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).

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

prohibit Jarmuth from resigning from the Association; he has the ability to resign from the Association at any time by selling his International Club property. (**R. pp. 22, 4094**). Because there is no merit to this contention, the Final Order should not be disturbed to address it. S.C.A.C.R. Rule 220(c).

B. K.A. Diehl did not Violate Jarmuth's Privacy Rights

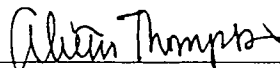
Jarmuth contends that the Final Order should be reversed, because it failed to hold that K.A. Diehl violated his invasion of privacy rights by disclosing his account information and past violations to the ARB. (**Jarmuth's Brief, pp. 44-46**). Invasion of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. Meetze v. The Associated Press, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956). As an arm of the Association, the ARB is entitled to information related to Jarmuth's violations and fines. (**R. pp. 20, 25, 4102-4103**). Accordingly, K.A. Diehl did not "publicize Jarmuth's private affairs" justifying a reversal of the Final Order.

CONCLUSION

For the foregoing reasons, this Court should affirm the Final Order dismissing Jarmuth's claims against the Respondents and awarding judgment against Jarmuth in the amount of \$7,326.00 and granting injunctive relief.

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Respectfully submitted,



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Date: November 18, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No.: 2009-CP-26-3596

Consolidated With

Case No.: 2010-CP-26-11320

Appellate No.: 2013000714

Ronald Jarmuth, ... *Pro Se* Appellant,

v.

The International Club Homeowners
Association, Inc., Rosemary Toth, and

K.A. Diehl & Associates, Inc., ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Briefs of Appellant complies with Rule
211(b) SCACR.

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Myrtle Beach, South Carolina
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Ralph P. Stroman, Special Referee

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

Ronald Jarmuth

Appellant,

v.

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

Respondents.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

1. March 11, 2013 Order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in the Association, may be exercised by a member “

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

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

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

(g) Is cash profits from the sale of an easement an “asset”, “income”, or “profits”

as defined in “The Act” and thus a “distribution” as defined (and prohibited)?

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

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

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

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

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

but none of these services concern the operation HOA property, and by this rubric there are no personal service contracts since anything has

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

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

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

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

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

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

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

3 They are beyond the realm of judicial discretion.

Referee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 International Club Association, Inc. (“ICA”).

5 Final Order R.p. 39 line 15.

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

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

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

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

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

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

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

8 Insurance deductibles.

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

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

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

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

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

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

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

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

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

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

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

11 ICA’s Charter is PI TE 570.

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

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

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

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

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

13 They are indexed to Murrells Inlet Golf Plantation

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

15 Hon. Judge John was provided a copy.

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

June 17, 2009 R.p. 3836 the IHOA bought the “front entrance” from Horton R.p. 3836 for \$5.⁰⁰ and on April 20, 2010 sold an easement to Central Electric for \$ 83,000 a big profit. This money was income, not an overcharge of homeowners.[18] The IHOA did not take a tax deduction for the money it gave to the homeowners.[19] Maureen Sullivan testified at trial that Golding advised them on the sale but not on distributing money. The minutes state that Toth [20] voted for the sale and distribution. At each year’s annual meeting the owners vote to place excess revenue in reserves because the IHOA CPA has stated the only legal use is to credit excesses to future assessments or place the money in the reserves and any other use is taxable income. [21]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 Transcript R,pp. 2127, 2128

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 None of this was impeachment material.

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

to present opening and closing arguments

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

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

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

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

the case and restrained from wasting time by useless repetition”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 By Diehl employee Julie Case.

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

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

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

13.3.3 ... Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting. ... (wit) a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director or other individual who delivered such notice. ... The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed, if any

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

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

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

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

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

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

"association members cannot ordinarily sell their homes as easily as they can sell shares of stock in a business corporation. Association members are more like shareholders in closely held corporations where liquidity is absent, an area where courts increasingly inquire into the substance of business decision"

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

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

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

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

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

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

CONCLUSION

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

July 20, 2013

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Appellant, Pro Se

Ronald Jarmuth

FORM 16
CERTIFICATE OF COUNSEL IN FINAL REPLY BRIEF

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

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

Ronald Jarmuth, Pro Se

Appellant

v.

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

Respondents.

CERTIFICATE OF COUNSEL

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

July 20, 2013

Ronald Jarmuth
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843-314-4355
Appellant, Pro Se

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

Ronald Jarmuth, Appellant,

v.

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

Appellate Case No. 2013-000714

Appeal From Horry County
Ralph P. Stroman, Special Referee
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2015-UP-111
Submitted January 1, 2015 – Filed March 4, 2015

AFFIRMED

Ronald Jarmuth, of Murrells Inlet, pro se.

Henrietta U. Golding and Alicia E. Thompson, both of
McNair Law Firm, PA, of Myrtle Beach, for
Respondents.

PER CURIAM: Ronald Jarmuth appeals the special referee's order dismissing his claims, awarding judgment against him, and granting injunctive relief. On appeal, Jarmuth argues: (1) the special referee denied him a fair trial; (2) the special referee did not address all of his issues; (3) the International Club Homeowners Association, Inc. (the Association) did not have any rights under the declaration of covenants and restrictions; (4) the South Carolina Nonprofit Corporation Act¹ preempted the declaration of covenants and restrictions; (5) K.A. Diehl & Associates, Inc. (K.A. Diehl) and the Association were liable to him for defamation and invasion of privacy; (6) Rosemary Toth and K.A. Diehl were liable to the Association for mishandling Association funds; (7) certain covenant obligations under the declaration of covenants and restrictions were voidable personal service contracts; (8) he was entitled to the approval of various modifications to his unit; (9) Pebble Creek and the Villas were not subject to the declaration of covenants and restrictions; (10) certain waivers of covenants contained within the first amendment to the declaration of covenants and restrictions were general waivers; (11) Horry County owned certain roads within the International Club community free of covenant restrictions; (12) the Association illegally withheld the voter list from him; and (13) the Association was not entitled to attorney's fees. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

As to Issue 1: *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("[A] party may not complain on appeal of error or object to a trial procedure which his own conduct has induced."); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("[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."); Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

As to Issue 2: *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."); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no

¹ See S.C. Code § 33-31-620(a) (2006).

authority other than an evidentiary rule was abandoned), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000); Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

As to Issue 3: *O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (explaining when the relief sought in an action for breach of restrictive covenants is monetary in nature, a claim for breach of the covenants is legal); *id.* (stating "in an action at law, tried without a jury, . . . we will not disturb findings of fact of the [trial court] unless there is no evidence reasonably supporting the [trial court's] findings"); *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.").

As to Issue 4: *Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 382-83 (Ct. App. 2004) (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); S.C. Code Ann. § 33-31-620(a) (2006) ("A member may resign at any time.").

As to Issue 5: *Mellen v. Lane*, 377 S.C. 261, 275, 659 S.E.2d 236, 244 (Ct. App. 2008) (explaining an action in tort for damages is an action at law, and in an action at law decided by a special referee, this court will correct any error of law); *id.* (stating in reviewing an action at law, this court "must affirm the [referee's] factual findings unless there is no evidence reasonably supporting them"); *Murray v. Holnam, Inc.*, 344 S.C. 129, 140-41, 542 S.E.2d 743, 749 (Ct. App. 2001) ("A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable."); *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 396, 665 S.E.2d 222, 227 (Ct. App. 2008) ("Invasion of privacy consists of the public disclosure of private facts about the plaintiff, and the gravamen of the tort is *publicity as opposed to mere publication*. The defendant must intentionally reveal facts which are of no legitimate public interest, as there is no right of privacy in public matters. In addition, *the disclosure must be such as would be highly offensive and likely to cause serious mental injury to a person of ordinary sensibilities*." (emphases added) (quoting *McCormick v. England*, 328 S.C. 627, 640, 494 S.E.2d 431, 437-38 (Ct. App. 1997))).

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.").

As to Issue 7: *Marshland Trust*, 358 S.C. at 661, 596 S.E.2d at 382-83 (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005) ("Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." (quoting *Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987))).

As to Issue 8: *Marshland Trust*, 358 S.C. at 661, 596 S.E.2d at 382-83 (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); *Berger*, 365 S.C. at 239, 616 S.E.2d at 434 ("Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." (quoting *Pelzer*, 292 S.C. at 347, 356 S.E.2d at 414)); *River Hills Prop. Owners Ass'n, Inc. v. Amato*, 326 S.C. 255, 260, 487 S.E.2d 179, 181 (1997) (holding the architectural review board of a subdivision did not act unreasonably in disapproving modifications for aesthetic reasons).

As to Issue 9: *Marshland Trust*, 358 S.C. at 661, 596 S.E.2d at 382-83 (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); S.C. Code Ann. § 30-7-10 (2007) (providing South Carolina is a "race-notice" state); *First Union Nat'l Bank of S.C. v. Shealy*, 325 S.C. 351, 355, 479 S.E.2d 846, 848 (Ct. App. 1996) ("It is a well established rule of law that a deed is not legally effective until it has been delivered."); *Williams v. Lawrence*, 194 S.C. 1, 6, 8 S.E.2d 838, 840 (1940) (explaining the recording of a deed is prima facie evidence of delivery).

As to Issue 10: *Marshland Trust*, 358 S.C. at 661, 596 S.E.2d at 382-83 (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); *Kinard v. Richardson*, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct. App. 2014) ("Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution. [T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." (alteration by court) (citation and internal quotation marks omitted)).

As to Issue 11: *Town of Kingstree v. Chapman*, 405 S.C. 282, 309, 747 S.E.2d 494, 508 (Ct. App. 2013) ("On the matter of dedication, this court makes findings

of fact in accordance with our own view of the preponderance of the evidence, and the evidence must be strict, cogent, and convincing."); *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 418 n.3, 633 S.E.2d 136, 140 n.3 (2006) (explaining an implied easement may arise when the claimant "has been in possession of both the dominant and the alleged servient tenement, and while in this possession he creates the easement, . . . and he afterwards sells a portion of the land over which the alleged easement runs, [expressly] reserving the easement"); *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("[A]n appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance." (citations omitted)); 23 Am. Jur. 2d *Dedication* § 14 (2013) ("An owner of land subject to a right-of-way may dedicate what it owns, at least where such dedication does not adversely affect the rights of the dominant owner."); *Id.* at § 6 (2013) ("A dedicator of land to the public may impose reasonable terms, restrictions, and limitations on which the land is given.").

As to Issue 12: *O'Shea*, 308 S.C. at 14, 416 S.E.2d at 631 (explaining when the relief sought in an action for breach of restrictive covenants is monetary in nature, a claim for breach of the covenants is legal); *id.* (stating in an action at law tried without a jury, "we will not disturb findings of fact of the [trial court] unless there is no evidence reasonably supporting the [trial court's] findings"); S.C. Code Ann. § 33-31-1602(c) (2006) (providing a member of a nonprofit corporation may inspect and copy the membership list "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").

As to Issue 13: *O'Shea*, 308 S.C. at 14, 416 S.E.2d at 631 (explaining when the relief sought in an action for breach of restrictive covenants is monetary in nature, a claim for breach of the covenants is legal); *id.* (stating in an action at law tried without a jury, "we will not disturb findings of fact of the [trial court] unless there is no evidence reasonably supporting the [trial court's] findings"); *Berger*, 365 S.C. at 238-39, 616 S.E.2d at 434 ("[T]he authority to award attorney's fees can come only from a statute or be provided for in the language of a contract." (internal quotation marks omitted)); *id.* at 240, 616 S.E.2d at 434 ("Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." (internal quotation marks omitted)); *id.* at 239, 616 S.E.2d at 434 ("Restrictive covenants are

contractual in nature and bind the parties thereto in the same manner as any other contract.'" (quoting *Pelzer*, 292 S.C. at 347, 356 S.E.2d at 414)).

As to any remaining issues not included in Jarmuth's statement of issues: Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

AFFIRMED.²

HUFF, SHORT, and KONDUROS, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

**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
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
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

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 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 buyer², 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

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. It 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

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, the Respondents and their counsel should be sanctioned.

The assertion that Respondent's August 10, 2010⁵ 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 631⁶. 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

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

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 deductible 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 evidence¹⁰ 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 counsel¹³ 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

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 examination 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

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 Testimony¹⁸ 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

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.

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, 2009²⁰ 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

²⁰ Fourteen (14) days before the Annual Meeting.

²¹ The "Web Site" list with voluntary entries and omission 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 statute²⁴ 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**

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<u>Long v. Georgia Land & Lumber Co.</u> , 82 Ga. 628, 9 S.E. 425 (1889)	3
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<u>McCall v. IKON</u> , 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct. App. 2005)	5
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<u>Snavelly v. AMISUB of S.C., Inc.</u> , 379 S.C. 386, 396, 665 S.E.2d 222, 227 (Ct. App. 2008)	15
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Oct 15, 2009

International Club HOA, Inc.
11740 Hwy 17 Bryant South
Mandeville Ind SC 29578

CHECK NO. 1002498 CHECK DATE 10/15/09 VENDOR NO. MCHVAR

TWO THOUSAND FIVE HUNDRED AND SIXTY-00 DOLLARS

CHECK AMOUNT 2,500.00

PAID TO THE ORDER OF JACQUES LAFITTE, P.A.
JACQUES LAFITTE, P.A.
P.O. Box 11330
Columbia, SC 29211

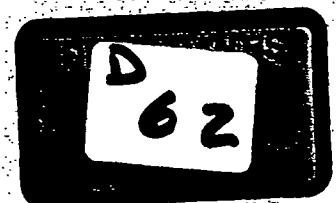
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FDIC

RED.I.C.

FDIC FEDERAL DEPOSIT INSURANCE CORPORATION



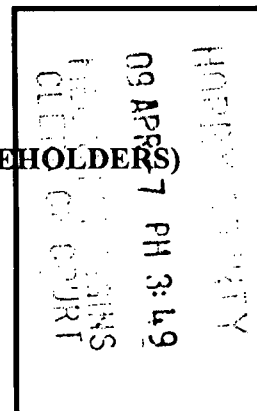
INTERNATIONAL CLUB 004333

RBC Bank

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

[illegible]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26 - <u>3596</u>
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	COMPLAINT
	)	(NON-JURY)
vs.	)	
	)	(DECLARATORY JUDGMENT)
The International Club	)	(AND EQUITABLE RELIEF)
Homeowners Association, Inc.,	)	
	)	(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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asmith@mcnair.net

Attorneys for the Defendants

Myrtle Beach, South Carolina
May 12th, 2009

SEVENTEENTH DEFENSE
AND SECOND COUNTERCLAIM

2009-CP26-3598

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.

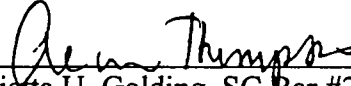
75. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, and therefore, the Defendant HOA is entitled to a judgment in an amount to be determined by this Court, together with costs and attorney's fees incurred in bringing this action as well as an order requiring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

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.

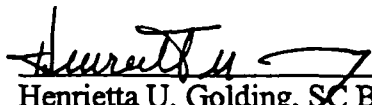
22. The Plaintiff's claims are barred by the doctrine of equitable estoppel.

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.


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P.O. Box 336
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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").

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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.

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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.

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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.

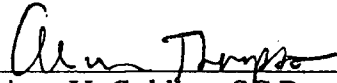
WHEREFORE, having answered the claims of the Plaintiff, the Defendants hereby prays as follows:

- 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

**HOA President William Freiboth at Trial - Direct
Examination by Ms. Golding**

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Page 908

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

5 A: Yes, we did.

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

8 A: All right.

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

11 A: Yes.

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

14 A: October 15th, 2009.

15 Q: And the amount of that check?

16 A: Twenty-five hundred dollars.

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

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

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

23 A: Yes, they are.

24 Q: I want you to go to Exhibit 79.

25 A: All right.

I

1 Q: Defendant's Exhibit 79 is what?

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

4 Q: And who's it payable to?

5 A: McNair Law Firm.

6 Q: And the date of that check?

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

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

13 A: With those two checks, five thousand dollars.

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

18 A: That's correct.

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

22 A: Yes, we are.

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

1 what change to my property resulted?

2 A: I, I believe that -- that's a long question.

3 Could you give that back to me again?

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

6 A: Uh-huh (affirmative response).

7 Q: Sir?

8 A: You, you did file one, yes.

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

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

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

16 A: I don't believe that ---

17 Q: Can I take that ---

18 A: No.

19 Q: --- as a no?

20 A: No. No.

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

25 A: I believe you were challenging our authority to

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

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

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

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

17 A: Not extensively, no.

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

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

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

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

4 Q: Let's go back to this originally captioned case,
5 2009-CP-26-3596. By filing that lawsuit where I
6 alleged that the Board was in violation of the
7 covenants, what violation of the covenant did I
8 commit?

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

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

15 A: For the original, for the original lawsuit.

16 Q: Original lawsuit.

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

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

24 A: A long time ago.

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

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

4 A: I don't recall.

5 MR. JARMUTH: THE COURT IS -- I'D ASK
6 THE COURT, IN ITS
7 DISCRETION, TO READ THAT,
8 AND I'D PROFFER THAT IT
9 DID NOT -- THAT AT THE
10 TIME OF THE ORIGINAL
11 COMPLAINT, THE DEFENDANT
12 DID NOT CITE ANY
13 VIOLATION OF COVENANTS.

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

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

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

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

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

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

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

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

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

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

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

Nov 18, 2013 McNair Response Brief

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).

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

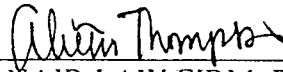
Jarmuth asks that the Final Order be reversed to address unsubstantiated claims. (Jarmuth’s Brief, pp. 30-32, 44-46). Pursuant to South Carolina Appellate Court Rule 220(c), the Court of Appeals “may affirm any ruling, order, decision, or judgment upon any ground(s) appearing on the Record on Appeal.” 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

361

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

L

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. Dighl & 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

M

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 referred 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 Chmielewski – Ms. Chmielewski 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

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(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.' 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:**

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.

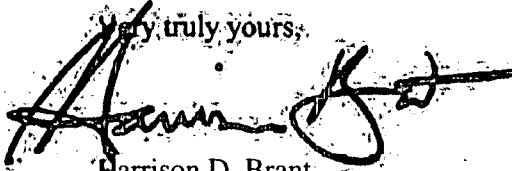
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- (3) **to make and amend bylaws *not inconsistent* with its articles of incorporation or *with the laws of this State* for regulating and managing the affairs of the corporation;**
- (18) **to do all things necessary or convenient, *not inconsistent 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 1994² 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.

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OFFICIAL COMMENT³

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.

The Honorable William G. Herbkersman

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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).

In 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.

The Honorable William G. Herbkersman

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February 3, 2014

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).

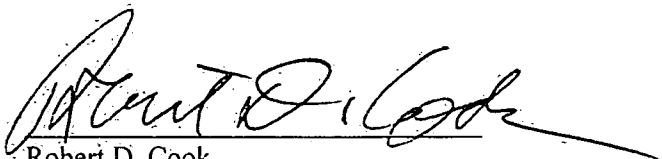
Conclusion: S.C. Code § 33-31-620 and § 33-31-621 regarding resignation and termination apply to a South Carolina nonprofit corporation such as a homeowner's association incorporated pursuant to S.C. Code § 33-31-101 et seq. and registered with the South Carolina Secretary of State's Office. However, 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 Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

Case No.: 2009-CP-26-3596
Consolidated With
Case No.: 2010-CP-26-11320
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.

RESPONDENTS' RETURN TO APPELLANT'S
MOTION FOR REHEARING

The Respondents, The International Club Homeowners Association, Inc. ("Association"), Rosemary Toth ("Toth"), and K.A. Diehl & Associates, Inc. ("K.A. Diehl") (collectively hereinafter referred to as "Respondents"), hereby submit this Return to the Motion for Rehearing of Appellant, Ronald Jarmuth ("Appellant"), dated March 12, 2015.

ARGUMENT

Appellant asks this Court to reconsider its Unpublished Opinion No. 2015-UP-111 filed March 4, 2015 ("Opinion") to "correct errors of fact and of law". In other

words, Appellant is simply seeking an opportunity to have this Court reconsider the merits of his arguments that have already been considered, presented, and ruled upon. It is axiomatic that the purpose of a petition for rehearing is not to have the case tried by the appellate court for the second time. Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Instead, the petition's purpose is to identify facts or arguments that this Court overlooked or misapprehended. Rule 221, SCACR (2014).

Appellant's assignments of error fail to identify any facts or legal arguments that the Court overlooked or misapprehended. Accordingly, Appellant's argument that the Opinion contains "errors of fact and law" should be rejected summarily. The specific grounds for rejecting each of Appellant's arguments are set forth below.

I. Pebble Creek is Subject to the Declaration of Covenants and Restrictions for the International Club ("Declaration").

Appellant's first ground is that the Court incorrectly affirmed the lower court's decision that Pebble Creek is subject to the Declaration.

He argues that the deed from the developer of the International Club, Plantation A.D., LLC, to the builder of Pebble Creek, Sunbelt & Associates, Inc. ("Pebble Creek Deed"), was delivered on January 29, 1999, and therefore, the Pebble Creek section of the International Club community is not subject to the Declaration, which was filed by the developer on February 8, 1999. No evidence exists in the record to support the finding that the Pebble Creek Deed was delivered on January 29, 1999. In fact, the only evidence of the date of delivery is the date of recording, which was the same date that the Declaration was filed, February 8, 1999. See Williams v. Lawrence, 194 S.C. 1, 6, 8 S.E.2d 838, 840 (1940) (explaining that the recording of the deed is prima facie evidence

of delivery). Accordingly, the Court did not overlook facts or law in affirming that Pebble Creek is subject to the Declaration.

II. The Villas Horizontal Property Regime is Subject to the Declaration.

Appellant also argues that the lower court's decision should be reversed, because the Villas is not subject to the Declaration.

Importantly, Appellant does not cite to any holding in the Final Order that the Villas Horizontal Property Regime is subject to the Declaration. Instead, he raises this issue for the first time on appeal with no reference to his submissions to the trial court or any holding in the Final Order. An issue raised for the first time on appeal and was not properly ruled upon by the trial judge, and therefore, this argument is precluded on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Moreover, as held by the lower court in denying Appellant's post-trial motions, Appellant does not have standing to challenge the validity of the First and Fourth Amendments bringing in the Villas Horizontal Property Regime, amendments filed before he owned property in the International Club. The order denying Appellant's post-trial motions was not appealed and is the law of the case. Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993) (holding that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling). (**R. p. 22**). Because the order is the law of the case, Appellant does not have standing to challenge the validity of the First and Fourth Amendments to the Declaration subjecting the Villas Horizontal Property Regime to the Declaration.

Although Appellant's arguments are precluded for these reasons, the record reflects that the First and Fourth Amendments to the Declaration brought the Villas

Horizontal Property Regime into the International Club community. (R. pp. 3824-3825, 4133-4134). Therefore, the evidence presented to the trial judge reasonably supports any implication in the Final Order that the Villas Horizontal Property Regime is subject to the Declaration.

Accordingly, the Court did not misapprehend any facts or law related to the Villas Horizontal Property Regime which warrants a reversal of the lower court's decision.

III. The Association has rights under the Declaration.

Appellant argues that this Court erred by affirming the trial court's decision that the Association has rights under the Declaration, because it failed to apply the legal standard for a quiet title action. Nothing in the record supports the Appellant's legal position that he asserted a quiet title action, nor did the Appellant argue the same in his Brief. This position must be summarily rejected. Rule 221, SCACR (2014).

The Appellant also argues that the Court misapprehended the holding in McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct.App. 2005) by affirming the lower court's decision that the Association has rights under the Declaration. Quite to the contrary, the Court correctly cited IKON for the proposition that "a corporation may be known by several names in the transaction of its general business." 363 S.C. at 652, 611 S.E.2d at 318. The Association's transaction of business under different names does not affect the Association's rights under the Declaration. Appellant's argument is simply another attempt to reargue his preferred construction of the Declaration—an issue that was amply briefed and considered by the Court—which is not proper grounds for a motion for reconsideration.

IV. The Trial Court Properly Awarded Attorney's Fees to the Association.

Appellant assigns error to this Court's affirmance of the judgment against him for attorney's fees, based on an alleged fraud at the trial court level, which is a new argument not preserved on appeal. See Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733.

The lower court properly awarded attorney's fees to the Association for enforcing the Declaration against Appellant. An award of attorney's fees based on restrictive covenants is left to the discretion of the judge and will not be disturbed on appeal absent an abuse of discretion. Seabrook Island Property Owners Association, Inc. v. Berger, 365 S.C. 234, 240, 616 S.E.2d 431, 434 (Ct.App. 2005). Appellant does not set forth any evidence that the trial judge abused his discretion in awarding attorney's fees to the Association. Instead, as raised by the Appellant at trial¹ and in his appellate brief, he contends that \$2,500.00 of the attorney's fees were incurred in defending a claim he filed with the South Carolina Human Affairs Commission regarding the Association's right to deny his application for a swing set.

Assuming this to true, Seabrook Island Property Owners Association, Inc. stands for the proposition that term "enforcement" of the covenants is broader than filing a lawsuit to enforce the covenants. 365 S.C. at 240, 616 S.E.2d at 434. Under this progeny, "enforcement" includes actions taken pre-litigation, which arguably includes defending an administrative action filed in response to the Association's enforcement of the covenants. Therefore, if Appellant's contentions are true, awarding the Association

¹ Appellant cross-examined the Association's president regarding the \$2,500.00 insurance deductible paid for attorney's fees. (R. pp. 2811-2815). The Association's president asserted that the deductible paid to the Human Affairs Commission was incurred in enforcing the Declaration against Appellant. Id.

its attorneys' fees paid in the form of the insurance deductible to defend the administrative action was not an abuse of discretion.

Accordingly, this Court did not misapprehend facts related to the award of attorney's fees to the Association that warrants a reversal of its Opinion.

V. Toth and K.A. Diehl are not liable to the Association for mishandling funds.

Appellant argued, without citing to any persuasive evidence, that Toth and K.A. Diehl mishandled the Association's funds. His main argument is that Toth and K.A. Diehl paid an unauthorized distribution to the Association's members in violation of the South Carolina Non-Profit Corporation Act ("Act"), S.C. Code Ann. § 33-31-140. This argument is a regurgitation of the analysis in his brief and is beyond the scope of a petition for rehearing.

Regardless, the record reflects that the payment of funds to the members was a refund in assessments. (**R. pp. 2566-2573, 2793-2798**). The Appellant has not presented any evidence to contest that the payment was anything but a refund. Because no facts or law support the Appellant's argument that the Association's funds were mishandled, this Court properly affirmed the lower court's decision finding the same. Rule 220(b)(2), SCACR (2014).

VI. K.A. Diehl is protected by the Qualified Privilege.

Appellant's next assignment of error arises from the lower court's ruling that K.A. Diehl's statements regarding the Appellant are protected by a qualified privilege. This assignment of error is another attempt to improperly reargue the grounds set forth in his brief. As the property manager for the Association, K.A. Diehl is an agent of the Association. The record reflects that K.A. Diehl made statements about the Appellant in

good faith as directed by the Association's Board. "A communication made in good faith on any subject matter in which the person communicating has an interest or duty even though it contains matter which, without this privilege, would be actionable. Snively v. AMISUB of S.C., Inc., 379 S.C. 386, 396, 665 S.E.2d 222, 227 (Ct. App. 2008). Appellant is unable to cite to any evidence that K.A. Diehl acted in bad faith or outside the scope of its duties that would imply that the privilege does not extend to K.A. Diehl's actions. Therefore, this Court did not commit error by affirming the lower court's decision that K.A. Diehl's statements were qualifiedly privileged.

VII. The Association Properly Denied Appellant's Request for the Membership List.

Appellant's last assignment of error is related to the Association's proper denial of Appellant's request for the membership list. The main contention is that the list was requested in anticipation of the 2009 Annual Meeting of the Association pursuant to the Act, S.C. Code Ann. § 33-31-720. Accordingly, Appellant asserts that he was not bound by a different provision of the Act, S.C. Code Ann. § 33-31-1602, requiring that a request for the membership list be made in good faith and for a proper purpose, describe with reasonable particularity the purpose, and the records are connected with that purpose.

Appellant is unable to cite to any evidence in the record that reflects that the request was made before the 2009 Annual Meeting and in anticipation of the 2009 election. Nor does any law exist exempting requests for membership lists from S.C. Code Ann. § 33-31-1602. Accordingly, this Court properly applied S.C. Code § 33-31-1602 in affirming that the Association's denial of the membership list request was in conformance with the Act.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Appellant's motion for reconsideration be DENIED.

Respectfully submitted,



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Myrtle Beach, South Carolina
Date: March 23, 2015

**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. Pebble Creek is not subject to the Covenants.

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. The "Villas" (subdivision) is not subject to the Covenants.

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. Respondent HOA has no rights under the Covenants as a Deed.

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. Ikon² 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 covenants³ 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).

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. Golding⁴ 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

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's statements are protected by a qualified privilege".

⁶ Respondent's sole citation is a lie because in Snively this court held that the patient had consented to the release of her medical information; Snively 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, 2011⁸ 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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March 27, 2015

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.

The South Carolina Court of Appeals

Ronald Jarmuth, Appellant,

v.

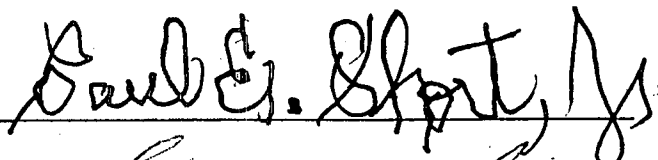
The International Club Homeowners Association, Inc.,
Rosemary Toth, and K.A. Diehl & Associates, Inc.,
Respondents.

Appellate Case No. 2013-000714

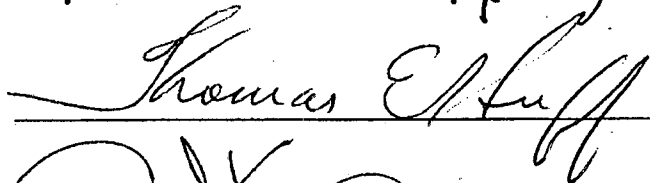
ORDER

Appellant has filed a motion to supplement the record and an amended motion to supplement the record, seeking to provide this court with a supplemental citation pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules. We grant the motions.

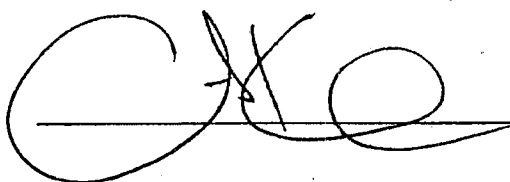
Appellant has also filed a petition for rehearing. After careful consideration of all of Appellant's filings, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



Paul E. Short, Jr. J.



Thomas E. Huff J.



C. H. O. J.

Columbia, South Carolina

FILED

April 24, 2015