

**THE STATE OF SOUTH CAROLINA
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.

CORRECTED RECORD ON APPEAL

VOLUME 10

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IHOA's Asserted Authority

The HOA's February 27, 2008 Landscape Contract PI # 345 with Sunbelt Landscape Services provided that the HOA would spend over \$ 6,000 to maintain the Tournament Drive / International Club Drive area of International Club Drive then owned at the time by DR Horton and owned since April 2010 by the HOA – which area is outside the PUD.

That contract spent almost \$ 9,000 in 2008 to maintain International Club Drive in areas owned by DR Horton or dedicated to Horry County.

The contract provided approximately \$ 27,000 more to maintain shoulders and areas beyond of non – HOA owned roads elsewhere in the PUD – including Golf Course owned property.

Of the contract's \$ 56,000, only \$ 12,000 was used to maintain HOA owned property – the Amenity Center complex grounds. PI #345.

On or about June 25, 2008 the HOA's Building and Grounds Committee (Pete Pizzi and Mike Butryn) made an official presentation to the HOA at a Board of Directors' meeting . PI # 330.

The Board was informed by the Building and Grounds Committee, PI #331, that the HOA was spending 22 % (\$ 14,000) of it's grounds maintenance budget to maintain property owned by DR Horton, 38 % (\$ 25,000) to maintain Golf Course property, 31 % (\$ 20,000) to maintain roads dedicated to the county or otherwise not owned by the HOA, and 2 % (\$ 1,300) to maintain land owned by homeowners. Only 7 % (\$4,600) was being spent to maintain HOA owned "common" property.

On May 12, 2009 the HOA Board held a meeting at which the Board admitted that it is maintaining the "County Right of Way". PI # 355.

It is noted that no where in the PUD is there a single sign alerting the public to any restrictions on parking on roads. This HOA owned Amenity Center parking lots now contains such a warning sign erected this year, over three years after the issue was raised by Plaintiff. There is nothing to tell the public that the streets are in the PUD.

On July 15, 2011 the HOA Board of Directors alerted SOME of the homeowners via a "Friday Facts" e-mail – to those it chooses to send this to, which does not include the Plaintiff – that the HOA intends to tow cars (whether owned by homeowners or the public) without notice or warning and to hold said cars for ransom at some un-stated non-PUD location.

The HOA claimed authority under Covenant sections 7.25 (Parking, which was deleted by Covenant Amendment #1 May 10 2000) and section 7.26. The Board stated that "When the roads are dedicated for public use and county maintenance, the full property

title did not transfer to the county, just some property rights and we can not have a gated community. ... Road right of way remain subject to covenants .. The county does not "own the roads"."

The HOA declared that it may tow a car – without knowing who owns a car – if the car is "parked on the street for more than 4 hours ... This is consistent with state law ... no warning may be placed on the vehicle or delivered ... "

Section 7.26 of the Covenants reads:

"Section 7.26. Junk or Disabled Vehicles. No stripped, partially wrecked, unlicensed or invalidly licensed, disabled or junk motor vehicle, or part thereof, shall be permitted to be parked or kept in the Subdivision. The Association shall have the right to have towed or otherwise removed any vehicle in violation of this Section 7.26,

There is no obligation to report one's license plate numbers to the HOA and the HOA has no way of distinguishing owner vehicles from those of the public who choose to park on the roads dedicated to the PUBLIC at large. If the HOA has no right to tow a public vehicle from a spot it likewise has no authority to tow a homeowner vehicle – as Privy would grant such right upon all vehicles on the property. As a matter of law homeowners have the same rights as those of the general public to park on the streets dedicated to ALL of the PUBLIC. Homeowners are part of the public.

The actual state law does not give a private person any right of action as to a suspected violation PI #250:

SC Code 56-5-2510. Stopping, standing or parking outside of business or residential district. (A) No person shall stop, park, or leave standing a vehicle, whether attended or unattended, upon the roadway outside a business or residential district when it is practicable to stop, park, or leave the vehicle off the roadway. An unobstructed width of the highway opposite a standing vehicle must be left for the free passage of other vehicles

The PUD is a "residential district – PUD". See the road dedication documents. The PUD is zoned residential by the County and is thus a "residential district" – which definition was affirmed in South Carolina Court of Appeals case on writ of Certiorari, Restaurant Row et al v Horry County, No. 24944 May 17, 1999. Thus the statute – which is the ONLY parking limitation statute – does not apply. Horry County has no parking ordinance applicable to unincorporated areas.

Horry County does, however, have a Towing Ordinance, Sec 12.5-123, which governs "Non-Consensual Towing from PRIVATE property". Among other things there have to be signage, which is lacking in the HOA (section a(2)a), and the HOA has to be able to control who may enter the street, which it does not (section a(1)). Further, per part a, the decision to involuntarily tow without notice is limited to a police officer – thus the

HOA's declaration is an intent to commit a crime (grand theft – auto).

Horry County's Land Development Ordinance controls. From the "get go" it is clear that the PUD's streets were to be "dedicated to Horry County" unless designated as a platted private road with a fee – simple deed to a tax – paying HOA. The HOA never owned the streets and no one has ever paid taxes on the streets – including from the moment they were built. Chapter 18, Article 4, Section 2-1.. See Pl # 53 and 254.

The same section states that the area dedicated to the county is NOT the pavement, but the area "measured from lot line to lot line" including shoulders, graded areas, and the utility easement areas. Clearly the County acquired at the least SERVIENT ownership of and easements – the HOA does not own easements either. Per paragraph "B" "the roadway shall be no less than 60 feet in width". The paved area in the HOA is often approximately 25 feet wide. There is a peculiarity here because someone in the Horry County Planning Office allowed many of the streets in Pebble Creek to be 50 feet wide. Plat Book 181 @ 89, Pl # 460.

The county area beyond the curbs is unevenly distributed left and right of the paved road. An example is Bill Fletcher's house – across from Plaintiff's on Pickering Drive, Pl # 38 and #39 – 21 feet which means 4 feet of Plaintiff's grass belongs to Horry County.

21 feet of Plaintiff's neighbor Fletcher's grass belongs to Horry County.

If Fletcher doesn't own it, who does?

No one pays taxes on the shoulders.

Upon pain of "fines" levied by Beckie Abel, an employee of the HOA's management company KA Diehl – a defendant here – homeowners maintain the area from their property line to the curb. Except if you are the Golf Course, or a present or former Board Member living across from the Amenity Center, or are Developer, in which case the HOA maintains the area from the property line to the curb. See Buildings & Grounds presentation earlier. . Pl #330 331

Pl 47 49 Homeowner Curb sides maintained. At right is typical street-side edging and landscaping found in the PUD – several houses away from Plaintiff's on Pickering Drive. The HOA demands prior ARB approval and control over everything between the property line and the curb. At the offices of Defendants's counsel, Plaintiff recently examined hundreds of ARB applications and found dozens of these cases. Pl # 40, 42

Horry County has asserted it's authority per Ordinance Appendix B Zoning Section 1301 Encroachment: "WITHIN PUBLIC RIGHTS OF WAY". The phrase "rights of way" includes "dedicated" streets however one might choose to argue it. The HOA's asserted authority is PRE-EMPTED by Horry County's encroachment law. Clearly the HOA has no authority to permit encroachment where the county might prohibit it,

PL 252 "1301.2. - Encroachments within public rights-of-way. ...
encroachments within any public right-of-way shall be limited.
Encroachments, including but not limited to, untagged vehicles, untagged or

tagged vehicles for sale, landscaping, and structures ...shall not be permitted within the public right-of-way unless an encroachment permit has been issued by the applicable regulatory agency (Horry County or South Carolina Department of Transportation). Unlawful encroachments may be removed from the right-of-way by the county without further notice to the owner. The owner of the encroachment shall be liable for all costs of removal. "

Plaintiff applied for and was issued Encroachment Permit #4691 Pl #629 by the County on July 9, 2008, which covers all landscaping and objects between Plaintiff's property line and the curb so long as the following conditions are met:

"All plants in the Right of Way must be maintained below 3' in height and all items in the Right of Way must be break away. Any item(s) not meeting these criteria will be removed at the owner's expense".

Other homeowners, such as Fletcher across the street from Plaintiff, #38 39, and down the street #40 #42, did not and were selectively "left alone" by the HOA. Fletcher was on the Transition Committee and an ARB Board member – he denied Plaintiff the swing set request, and #40 is John Bianchi, a former board member.

On September 26, 2008 Pl #62 63 "The Villas", a condo development within the PUD, received approval from Horry County Planning to install temporary speed limit and curve signs on International Club Drive in the portion dedicated to the County. Per the HC Planning Commission (and the permit, as in the case of Plaintiff's encroachment permit) it was not necessary to obtain prior agreement of Defendant HOA – clearly showing who exercises dominion over these "dedicated roads". Pl #63

On October 2, 2008 Defendant Rosemary Toth, as President of the HOA, applied for an encroachment permit from the Horry County Planning Commission so as to plant landscaping on International Club Drive. By this act she and the IHOA recognized that the county had more than an easement on the road. A servient easement holder – the road owner – does not need permission from the dominant easement owner – the non-owner user – to do something to the road.

It was signed by Defendant Rosemary Toth in her capacity as IHOA President:

Defendants Toth and IHOA sought to plant trees in the area between the curb and the property line

September 18, 2011 and for a few days more, the PUD was hit by storms. The streets flooded into yards. The HOA recognized that it was Horry County not the HOA with responsibility to deal with the flooding – who were called by the IHOA to clear the storm sewers which had been installed under Pickering Drive by the Developer. If the County merely possessed an easement allowing the public to pass, the county would be the benefiting easement holder and the HOA would be responsible to fix the road (Servient –

Dominant Easement doctrine). The HOA recognized that the County is more than an easement holder – it holds the responsibilities of the owner of the streets in the PUD to maintain the streets.

On September 20, 2011 Diehl, for the IHOA, let homeowners know that the “Horry County Storm Water Department” was taking care of the road flooding problem.

ORDER REQUESTED

Plaintiff has shown with the preponderance of the evidence that it is more likely than not that for many reasons as a matter of fact and law, the PUD Covenants do not control what may be done with the streets and that the IHOA has no dominion over them.

Plaintiff asks the Court to Order that it has made findings of fact and conclusions of law that:

(1) The PUD Covenants do not control what may not or must be done within the roadways in the PUD, with the exception of Madrid Drive; the Covenants do not apply to the “front entrance because that road has never been subjected to the covenants and is outside the PUD.

(2) The IHOA has no authority to regulate or control the road ways in the PUD.

(3) There are no restrictions other than those imposed by County or State regulation on what may or may not be done in the streets in the PUD.

(4) The roadways in the PUD extend from private property line to private property line and valid obligations and restrictions on the use of property begin and end within private lots.

(5) The obligation to maintain the roadways lies with Horry County which owns the road ways with the exception of Madrid Drive and that portion of International Club Drive not yet dedicated to the County.

(6) Any and all provisions of the Covenants, including those of subordinate HOA regimes, which contradict these findings are null and void.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 6 -

**WERE THE ACTS OF THE IHOA BOARD BEFORE
SEPTEMBER 2007 ULTRA VIRES AND
ARE THERE OTHER ULTRA VIRES ACTS
OF THE BOARD SINCE THEN ?**

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that because the IHOA Board was illegally constituted until September 2007 when at least some semblance of an election by homeowners was held, no board member has authority to act and thus all of the acts of the board were "ultra vires"

It was also argued that many of the subsequent acts of the IHOA board members singly or collectively clearly required either (1) a vote of the members; (2) approval by the board as documented in the minutes; or (3) were not within the scope of authority of the board stated in the Bylaws or (4) were directly contrary to mandates in Covenants, Bylaws, or The Act.

Although the Defendant IHOA was incorporated on March L 2001 as a Non Profit Corporation with Members entitled to vote, no election for members of the Board was held until September 29, 2007 and the term of office of that Board did not properly commence until March of 2008.

APPLICABLE LAW AND RELATED COVENANT AND BYLAWS PROVISIONS **

[** Plaintiff asserts that there are no legally effective Bylaws for the IHOA - thus making moot exceptions in law which consider alternatives under Bylaws.]

The Defendant IHOA was incorporated on March 1, 2001. PI # 552 per Secretary of State documents.

SC Code 33-31-701. Annual and regular meetings. PI #223:

(a) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.

Bylaws 3. ANNUAL AND SPECIAL MEETINGS OF MEMBERSHIP PI #548

3(a) The annual members' meeting shall be held ... on the second Saturday in March of each year (or such other date as may be designated by the Board of Directors) ...

The First Annual Meeting of The Association AND the Members Was Required to be Held on March 10, 2001- the Second Saturday of March, 2001. PI #116

Here's what was supposed to happen BEFORE March 10, 2001:

Two directors were to be appointed by the Developer, Plantation AD. until THE MARCH 10 2001 Annual Meeting.

SC Code 33-31-804. Election, designation, and appointment of directors. PI #230

(a) If the corporation has members entitled to vote for directors, all the directors, except the initial directors, must be elected.. at each annual meeting thereafter, unless the articles or bylaws provide some other ... method of election, or provide that some of the directors are appointed by some other person or designated.

Bylaws Part 4 Board of Directors Section 1 Number. PI # 248

Until the first annual meeting of the members, the affairs of the Association shall be managed by a Board of two (2) directors selected by the Developer.

AT THE MARCH 10, 2001 ANNUAL MEETING: (which never took place) three directors were to be appointed, for terms of 1, 2 and 3 years. Thereafter, all directors were required to be elected, beginning with one director in 2002, one director in 2003, and one director in 2004. Bylaws Part 4 Board of Directors Section 1 Number PI #248

“Until the first annual meeting of the members, the affairs of the Association shall be managed by a Board of two (2) directors selected by the Developer. Thereafter, the affairs of the Association shall be managed by a Board of not less than three (3) directors, ...”

Bylaws Part 4 Section 2 Term of Office. PI #248

“At the first annual meeting the Developer shall select approximately one-third (1/3) of the directors for terms of one year each, approximately one third (1/3) of the directors for terms of two years each and approximately one-third (1/3) of the directors for terms of three (3) years each; “

This scheme results in one Board Member whose office ended March 2002 (one year); one Board Member whose office ended March 2003 (two years); and one Board Member whose office ended March 2004 (three years).

Clearly after the second Saturday in March, 2003, two of the Board Members, a majority, were to be elected by the homeowners.

This didn't happen.

Plaintiff asserts that with regard to a non-profit corporation with members SOME of the directors may be "appointed by some other person or designated" - but not all. SC Code 33-31-804 - invalidating the "designate all" provision of the bylaws. " some of the directors are appointed by some other person"

No election was held until September 19, 2007

The so called "First Annual Members Meetings" was held on July 30, 2004 - which was neither in March, nor the anniversary of the Board's appointment on September 3, 2003. PI# 305.

No election was held.

BEGINNING IN 2001 THERE WERE HOMEOWNERS ELIGIBLE TO VOTE

On September 27, 2001 Sunbelt, the builder of the Pebble Creek area of the PUD, sold the house -- that Plaintiff now owns - to Cheryl Tucker Essex in Deed Book 2412 at Page 46. This was only one of many such sales to homeowners of completed houses made at that time. PI #566. Plaintiff's predecessor purchased home September 27, 2001. From Plaintiff's Deed:

“This being the identical property conveyed to the Grantor by Deed of Sunbelt Homes of Myrtle Beach, Inc, recorded September 27, 2001 in Deed Book 2412 at page 0046, Office of the Register of Deeds for Horry County.”

On April 29, 2003 Plantation AD, the Developer, sold the remaining PUD property to DR Horton who sold hundreds of houses – most of which years before the 2007 election. PI #556

Approximately 222 houses were sold in Pebble Creek, where Plaintiff lives, years before the 2007 election.

The 2nd ANNUAL MEETING OF MEMBERS WAS TO BE HELD ON MARCH 9, 2002.

It wasn't.

Bylaws 3. ANNUAL AND SPECIAL MEETINGS OF MEMBERSHIP PI #548

3(a) The annual members' meeting shall be held ... on the second Saturday in March of each year (or such other date as may be designated by the Board of Directors) ...

Per the calendar for 2002 this was to be March 9, 2002. Calendar PI # 117

THE DEVELOPER ILLEGALLY RAN THE BOARD THROUGH AT LEAST SEPTEMBER 19, 2007

Examples:

From the Minutes of Board September 10, 2002. PI #300. all board members were appointed by the Developer.

From the Minutes of Board September 3, 2003. PI #301. On that day the Board minutes tells us that Charles Flynn, the owner of Sunbelt had been magically appointed to the Board without an election or meeting, as was Developer employees Rick Ryan and Ron Peoples and Russ Carson. Also on the board without election was DR Horton's employee Doug Brown.

Per the minutes no existing board member resigned thus no vacancy had been created. DR Horton simply appointed the new board. Upon information and belief Doug Brown, Horton's employee, simply announced the new Board composition.

No Notice of the Meeting to Replace the Directors was given to Owner Members of the HOA: By statute, notice to homeowners of this meeting and it's purpose was required.

SC Code 33-31-705. Notice of meeting. PI #225

(a) A corporation shall give notice consistent with its bylaws of meetings of members in a fair and reasonable manner. ..

From the minutes of the "First Annual Members Meetings" held July 30, 2004 PI # 305: Members were not permitted to vote. The minutes for July 30, 2004 reflect that the Developer lectured homeowners to be meek and not question the Developer Board. He also lied to the homeowners, such as when a homeowner asked about spending money on International Club Drive - which was owned by DR Horton but for which the HOA was spending money maintaining. The HOA so called president, Doug Brown, Horton's employee, lied and said the road was owned by the HOA:

“Several Members questioned the main entrance road condition. Chairman Brown stated that at this time, this roadway areas is owned and maintained by the Association”

He was truthful that the Horton owned road was “maintained by the Association” but not about it’s ownership.

At trial Plaintiff made the unchallenged assertion that in 2011 the federal government fined DR Horton over \$75 million dollars for homeowner fraud in North Carolina, and that other actions are underway in other states against Horton for fraud.

No election was held at the “Second Annual Meeting” on August 19, 2005, still disregarding the provision for the Annual Meeting of Members to be held on the Second Saturday in March.

The "Third Annual Members Meeting" was held on August 16, 2006. No election was held. Pl # 315

On August 8 2007 a Notice of Election to be held September 19, 2007 was mailed. This is un-numbered in Plaintiff’s list of exhibits but was submitted into evidence. It’s authenticity and admissibility was not challenged by Defense Counsel.

The Court is asked to look closely at the second paragraph of that Notice, which reads that the new, 2007 Board will be “appointed by the Developer to act as a Board of Directors”. This explains the statement made to Plaintiff, a statement against interest of a member of the board, of outgoing Developer Board Member – Horton Employee Pat Walsh that Walsh had appointed the new board. This was when Plaintiff asked to see the tally of votes on September 19, 2007 and was refused – with Walsh making that statement.. Pl # 320

The first election was held on September 19, 2007. This was neither the anniversary of the appointment of the September 3, 2003 Board Reorganization nor was it the second Saturday of March. The Court is asked to note that the date of an election is not the date a term of office begins, and the Bylaws provide for one year terms. No director resigned to make way for the 2007 directors.

Plaintiff asks the Court to hold that IHOA Board terms of office begin on the second Saturday of March, per the Bylaws

On November 12, 2007 the board sent a letter to the homeowners. In the second paragraph, it told the homeowners that tne new board had been “appointed”, although this was “based on the number of votes”. This is consistent with the August 8 announcement.

This letter was also not within Plaintiff’s list of exhibits and was submitted in impeachment of the assertions by Toth in her deposition that she had been elected by the homeowners. It was submitted in evidence.

Plaintiff's original suit in 2009 asked that all Board Members then in office who had been "elected / appointed" in 2007 be removed, as well as any who had been "appointed" by the board to fill the rest of the term of a board member "elected / appointed" in 2007 who had resigned. Prior to trial Plaintiff waived as "moot" this demand because there was no relief that the Court could grant, all such terms of office having expired in September, 2010. Likewise the demand that the Court look into election irregularities, moot for the same reason.

What is not moot is the legal effectiveness of the decisions, contracts, and other acts of the 2007 Board through the period September 2009, when two out of three of the 2007 board members or their appointed replacements would no longer be in office.

Plaintiff asserts that it is more likely than not, given the documents of the IHOA itself both before and after the 2007 election, that the 2007 Board had been appointed by Pat Walsh, the Horton employee, who stated in an admission against interest that he saw the 2007 election as nothing more than a suggested beauty contest (not his words).

Plaintiff waives asking the Court to enter an order on the question of whether the 2007 Board was appointed or not and the ultra – vires effect of such appointment in lieu of election. The Court thus does not have to deal with what Plaintiff has earlier "waived" relating to the 2007 election.

IMPORTANT CONSEQUENCE:

If the Board was illegally constituted until at least September 17, 2007 all acts and particularly contracts of prior boards were ultra vires. The practical effect of this is only felt on long term contracts, specifically the October 20, 2003 cable tv contract PI # 302, and the November 20, 2003 "Golf Course Agreement" PI # 558.

The damage was done by the respective developers, Sunbelt and primarily DR Horton, who Plaintiff believes are beyond the statute of limitations and in any event are not parties to this suit; likewise the individual Builder appointed members of the Board.

At trial Plaintiff did not argue the amount of damages that the putative boards effected by virtue of their illegal assumption of office. Plaintiff is also of the belief that the ultra – vires acts of the illegal boards are not recoverable from the IHOA's insurer since they are not "errors or omissions" of officers.

Plaintiff has shown by a preponderance of the evidence and the law that it is more likely than not that no member of the Board of Directors was properly in office prior to September, 2007.

Plaintiff Asks the Court to Enter an Order holding that each and every act of such prior boards was "ultra – vires" and of no legal effect.

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Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	

- DIVISION 7 -

**THAT THE SECTIONS OF THE COVENANTS
MARKED "WAIVED" WERE ACTUALLY DELETED
AND ARE LEGALLY INEFFECTIVE**

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that Amendment # 1 to the Covenants effectively deleted many homeowner restrictions on use and obligations stated in the original covenants. The issue came about because the Board of Directors elected in September, 2007 led by Defendant Rosemary Toth refused to accept that any covenant provision had ever been altered, and insisted on enforcing the unaltered original covenants, except for their asserting that provisions of later amendments which subjected additional areas of the PUD covenants – and added dues paying members – were valid.

Plaintiff has suffered direct damages through the efforts of boards since 2009 to enforce those "waived" covenants. Certain of the changes also impose new burdens on the free use of property – by imposing what amounts to a property transfer tax on sale and resale of lots paid by the home owner at original purchase and by the homeowner seller at resale, when the original provision was to impose that as a one time charge at the original sale – paid by the builder as seller. This also had the effect of transferring a burden from the builder to the buyer at original purchase.

That original payment was called a Capital Contribution in the covenants. Based upon a Builder's Agreement obtained prior to when Plaintiff filed his complaint, it appeared that each Builder was required to pay, into the IHOA accounts, a capital contribution of \$ 1,000. There being over 700 units, the expected reserve was in the range of \$ 700,000.

Pebble Creek Equitable Ownership in the Amenity Center

- A Note -

The same Builder's Agreement indicated that Sunbelt had a binding commitment with his home buyers to provide amenities which would be exclusive to Pebble Creek homeowners. This was verified through information compounded and assembled in discovery over three years. The same Builders Agreement indicated that Plantation AD had a contract with all builders to build for all single family homeowners a very large common complex at G-2 where the golf course club house now stands, but that this was among the many contracts that Plantation defaulted on through 2003 (Plantation and its President R Scott Pyle were the defendants in numerous civil suits over contract breaches). Based on the agreement it appeared that Pebble Creek home owners owned a \$ 220,000 stake in the Amenity Center since the agreement stated that Sunbelt would provide Horton that much money to satisfy Sunbelt's obligations to its own home buyers. Papers provided Plaintiff by DR Horton in 2012, by order of this Court, indicate that Sunbelt did indeed give Horton approximately \$ 220,000. In 2009 Plaintiff subpoenaed the related documents from Sunbelt who admitted their existence but claimed they were "proprietary" or "so numerous" that producing them would be a burden. In 2012 when this Court finally got around to a hearing to enforce the 2009 subpoena, Sunbelt asserted that it had destroyed the documents during the interval. Plaintiff notes that this constitutes Spoilation of Evidence and may rise to the level of Contempt of Court. However, since no document survives which states the "conditions" under which the Sunbelt funds were provided to Horton to build the Amenity Center, no equitable claim can be made to support this contention in the Complaint. However, the Horton documents did relate that approximately \$ 220,000 was given by Sunbelt to Horton to provide amenities for 220 Pebble Creek homeowners, towards the construction of what is now the IHOA Amenity Center, and that Horton, with approximately 500 additional home buyers, contributed approximately \$ 110,000 towards the construction.

This statement is made to explain why Plaintiff at trial did not seek to prove equitable ownership by Pebble Creek homeowners in the Amenity Center and is not asking the Court for related relief.

-- Waived Covenants --

ISSUE: DID THE AMENDMENTS WHICH "WAIVED" PROVISIONS OF THE COVENANTS EQUATE TO DELETING THOSE RESTRICTIONS?

To answer this question the covenants and amendments were presented and the Court was asked to declare the effect of those amendments and what the resulting rights and obligations of the homeowners and association are – as well as the legal validity of certain changes.

On February 8, 1999 Plantation AD, the owner of all the property in the future PUD, filed Covenants concerning the property. PI # 547.

On January 29, 1999, ten days earlier, Plantation sold to Sunbelt (a builder) the lots

which were resold as "Pebble Creek" where Plaintiff lives. PI # 545.

On May 9, 2000, Plantation AD filed Amendment 1 to the Covenants. PI #551.

The document "waived" many of the pre-existing covenant restrictions. The HOA has taken the position that these "waivers" applied solely and exclusively

to the Developer, Plantation AD,
to Sunbelt, a developer and
to International Club Villas, another developer (that day see Amendment #1).

At trial William Freiboth, current IHOA President, made the surprising assertion that none of the restrictions and obligations in the Covenants (other than the mandate to pay assessments) apply to "The Villas". Plaintiff proffers that his search of IHOA documents has not revealed a single covenant violation levied against The Villas nor a single instance where The Villas applied for permission to do something. Until the resolution in favor of The Villas of a lawssuite filed in 2010 (prior to this lawsuit) against the IHOA, The isolation of The Villas was so complete that they received no notices from the IHOA at all, not even invitations to elections.

To this day Defendants have attempted to enforce every single "waived" covenant restriction, to include levying fines and other sanctions for violating "waived" sections of the Covenants.

Amendment #1 changed the name of the PUD and "waived" numerous Covenant sections.

On April 25, 2003 Plantation AD sold it's remaining lots in the PUD to DR Horton. PI # 556. Filed April 29, 2003.

On April 25 2003, Plantation AD and Horton executed Amendment 2 to the Covenants, Filed April 29, 2003. This designated Horton as the successor Developer and assigned Plantation's rights to Horton. PI #555. No prior or subsequent notice was given to existing homeowners of this amendment.

On March 26, 2004 Horton executed Amendment 3 to the Covenants and filed it March 29, 2004. This Amendment deleted, modified, or added numerous covenant provisions. PI #559. No prior or subsequent notice was given to existing homeowners of this amendment.

On December 23, 2004 Horton and Seacoast Associates, another developer, executed Amendment 4 to the Covenants, PI #561, filed December 28, 2004. No prior or subsequent notice was given to existing homeowners of this amendment.

This fourth Amendment made major changes to the assessment provisions (changes 3, 4 and 5) and explicitly banned all multi-family occupants from the Amenity Center

(change 3).. At the time Plaintiff raised this issue, Maureen Sullivan, a homeowner from The Glens who was on the HOA Board, asserted that her unit was a "townhome", thus a "single family unit", and eligible for use of the Amenity Center. In sympathy, Plaintiff notes in the exhibits that Defense Counsel brought to trial that there were many self-serving documents generated by the seller, DR Horton, which asserted that Horton's customers in The Glens could use the Amenity Center. Sullivan testified at trial that it was a salesman who told her this, that she relied on same, and that this was critical to her decision to buy a unit in The Glens. However, the use of the Amenity Center, per the Covenants, turns on whether The Glens was designated "multi-family" to the Planning Commission, which it was, and not on what DR Horton called the units. Horton could have called these units palaces but they were still attached townhouses with it's own common property owned by a sub-association with it's own covenants.

During various elections Rosemary Toth and other board members campaigned to keep homeowners from The Villas off the HOA Board ⁵ under the theory of "how can they decide how to use Amenity Center Money If They Can't Use the Amenity Center". Maureen Sullivan, a Board Member, owned a house in The Glens which is an area which is defined by the Horry County Planning Commission as a "Multi-Family" townhouse development which per the covenants is in the same category as The Villas.

On or about May 17, 2011 this Court signed a consent judgment in case 2009-CP-26-3211 in which the Villas sued the HOA for, among other things, depriving homeowners in The Villas of a vote in IHOA elections and depriving them of representation on the IHOA Board. In the consent decision the IHOA agreed to appoint a Villas homeowner as a non-elective member of the Defendant's HOA Board. As of today there is no Villas IHOA Board Member.

On June 4, 2008, Horton and yet another developer, ADA Ocean Boulevard, signed Amendment 5 to the Covenants, filed June 20, 2008. This granted ADA "Developer Rights" exempting ADA, like all other developers from the beginning, from any building restrictions. Pl #563. Amendment #5 repeated word for word many of the changes of Amendment #4. No prior or subsequent notice was given to existing homeowners of this amendment.

Through the beginning of this lawsuit in 2009 the IHOA website represented that the Covenants consisted only of the basic covenants and Amendment #1. Upon inquiry at the office of co-defendant KA Diehl, requesting covenant documents, these were the only covenant documents known to exist. Amendments # 2 through 5 were found by Plaintiff's search at the recorder of deeds prior to filing this lawsuit.

No Declarant had asked nor been granted consent by any homeowner to impose a covenant change which increased the burden on existing homeowners – particularly the change in capital contributions which shifted payment of this from the builder to the

⁵ Various Villas homeonwers independently found out about the 2007 and later elections and filed the requisite papers to appear on the ballot.

homeowner and made it a recurring expense.

In paragraphs 5 and 7 page 1 of Amendment #3 Pl #559 the Declarant acknowledged that any such change required the consent of existing homeowners. He didn't have it.

Amendment #1 was declared prior to the sale of any house to any individual homeowner. When Amendment #2 was declared in April, 2003, there already were many homeowners – for example Plaintiff's house was conveyed on September 27, 2001, almost two years before Amendment #2. Plantation sold Pebble Creek to Sunbelt prior to the Covenants itself being declared.

MEANING OF THE PHRASE "WAIVER"

On Page 1231 of Black's Legal Dictionary, 1st Edition, the legal meaning of the phrase "Waiver" is stated as follows: Pl #97 and 98--

"WAIVE, v. To abandon or throw away; as when a thief, in his flight, throws aside the stolen goods, in order to facilitate his escape, *he is technically said to waive them.*

In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong.

A person is said to waive a benefit when he renounces or disclaims it, and he is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet"

HOA ARGUMENT THAT WAIVERS APPLY ONLY TO DEVELOPERS

Case law is completely against Defendant's argument.

"[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 et al v Aiken et al, SC

Supreme Court. Opinion No. 26130 Filed June 12, 2006 .

Defendants argue that the use of the word "waive" instead of "delete" has some special implication --- but don't explain how this translates to applying the "waivers" only to Developers. HOWEVER, a not too careful reading of the original covenants immediately puts the lie to that "limited application" argument.

**COVENANT RESTRICTIONS DID NOT APPLY TO DEVELOPER OR BUILDERS –
NO DEVELOPER OR BUILDER WAIVER NEEDED**

In coming to this conclusion we need only look to the original language of Sections 2.2 and 7.2 of the Covenants – Pl 547:

Section 2.2 reads:

"Section 2.2 Plan of Development of Additional Property. ... Developer reserves the right to plan, design, develop, construct, maintain and manage ..., the Multi-Family Areas and any unsold Unit as Developer deems necessary or convenient for its purposes, ... including without limitation the right to change the number, shape, size and density of the unsold Units, ... the Multi-Family Areas, ... and the Additional Property.

The last paragraph of Section 7.2 read:

"Section 7.2 Prior Review of All Plans. Section 7.2 of this Declaration shall not apply to the Developer or to any Designated Builder "

Amendment #5 Pl #563 Para 7 named Kinsale a Designated Builder – for Ballycastle.

Amendment #1 Pl #551 Para 7 named The Villas developer a designated builder.

Amendment #2 Pl #555 Page 2, named Horton as the developer.

Amendment #3 Pl #559 Pages 2 and 3, paragraph 5 named Sunbelt as a designated builder.

These named builders were the only builders in the PUD. As such, per the last paragraph of Section 7.2 of the covenants, the covenant restrictions did not apply to said developers at all and no waiver was needed for any of these builders.

Importance of "Waived" Covenant Provisions to the Case:

Plaintiff argues that he has been illegally harmed by the HOA's insistence on applying an obviously deleted requirement to seek prior Architectural Review Board approval for changes – waived Section 7.2 – and by prohibiting Plaintiff from erecting a Fence despite that the Section, 7.25, has been "waived". The bogus counter – complaint for enforcement and damages is grounded exclusively in the assumption that 7.2 and 7.25 are still effective and, if that is not so, the counter – complaints amount to a frivolous proceeding and an unethical advancement – by Defense Counsel – of that counter – complaint. It is also a violation of the Civil Rule relating to signing a pleading unless the

argument is grounded in substantial law – which is not the situation here.

“WAIVED” PROVISIONS

Amendment #1 to the Covenants, PI #551. May 11, 2000

At the time there were no individual homes sold in the HOA so notice is not an issue.

Page 1. paragraph 4 of the Amendment reads:

Section 3.7 of the Declaration is hereby deleted in its entirety. There shall be no restrictions on property management firms utilized to operate any Multifamily Association created on the Multifamily Parcel.

The Court is asked to declare that this deletion does not create an additional burden on property and is thus deleted, and to further Order That the HOA shall not attempt to enforce Section 3.7.

Amendment #1 contained the following “waivers”:

9. The Declarant hereby waives all easement rights reserved in Article IV, Sections 4.10, Section 4.11, Section 4.12, Section 4.16 and Section 4.17 of the Declaration.

11. The Declarant hereby waives the Architectural Controls set forth in the two numbered Sections 7.2 in Article VII and of Section 7.4, Section 7.25 and Section 7.31 of the Declaration.

12. The Developer hereby waives its rights to enter into and for maintain the Golf Course Easement Area as set forth in Article VII, Section 7.37 (c) of the Declaration.

The Court is asked to consider Black’s interpretation of the word “Waived” and equate that to “deleted”. From the previous argument, it can be seen that developers and builders had absolute exclusion from the provisions of the covenants in creating their homes for sale.

No “waivers” / deletion created an additional burden on property. Since there were no homeowners there was no need to obtain 100% assent – the Declarant was the homeowner – at least for the non-pebble creek area.

Examining them one by 1:

Sections 4.10, Easements for Utilities. Waiver terminated the right of the “Developer, the Association and their respective successors and assigns .. the power to grant and accept easements to and from any private or public authority, agency, public service district, public or private utility or other

person upon, over, under and across ... To the extent possible, all utility lines and facilities serving the Subdivision and located therein shall be located underground. " The PUD was to stay like it was.

It is noted that this waiver explicitly removes from the developer or the association the power to grant easements. Plaintiff interprets this to mean that the IHOA Board has no authority to grant easements, which is germane to the IHOA Board granting Central Electric an Easement in 2010 for overhead utilities.⁶

The Court is asked to declare that the granting by the Board of an easement is an ultra-vires act.

The waived Section 4.11 of the covenants had read:

Section 4.11. Easements for Walks. Trails and Signs.

There is hereby reserved for the benefit of Developer, the Association and their respective successors and assigns the alienable, transferable and perpetual right and easement upon, over and across:

- (i) all portions of the Multi-Family Areas in which Units are not constructed or erected; and
- (ii) all other lands which may remain unimproved for the installation, maintenance and use of sidewalks, jogging trails, bicycle paths, signs of all kinds, lakes, lagoons, swales, ditches, other water courses, drainage ways, and related improvements.

-- May 10 2000 Amendment 1

The Court is asked to declare that waiving this section equated to deleting it.

The next section waived in Amendment #1:

Section 4.12. Easements for Association deleted in Amendment 1.

There is hereby reserved a general right and easement for the benefit of the Association, ..., to enter upon any Unit, or Multi-Family Area or any portion thereof in the performance of their respective duties. ... this easement is to be exercised only during normal business hours and ... only upon advance notice to and with permission of the Owner... Any such entry and performance shall not be deemed a trespass.

In effect this waived section had granted the Association permission to enter property to determine whether there was an ARB violation – or whether work had been done without ARB approval. It was akin to a search without a search warrant or a search authorized without probable cause. Deletion of this section was wise.

⁶ A pre-existing restriction in the original covenants absolutely forbids overhead utilities.

It is noted that Amendment #1 also deleted the requirement to seek ARB approval for anything, thus there was no need to "inspect", reinforcing the interpretation that it was the intent of the developer in Amendment #1 to delete the requirement to seek ARB pre-approval.

This deletion does not impair a homeowner's enjoyment or use of his lot because it eliminates adverse trespassers.

THE COURT is asked to declare that this waiver deleted Section 4.12.

The COURT is asked to declare that any entry into private property by the Association or its KA Diehl representatives to inspect for ARB violations without the consent of the homeowner is a trespass.

The next section waived in Amendment #1:

Section 4.16. Environmental Easement was also "waived".

There is hereby reserved for the benefit of the Developer, the Association an alienable, transferable and perpetual right and easement on ... unimproved portions of the Common Areas, Units and Multi-Family Areas for the purposes of taking any action necessary to effect compliance with environmental rules, regulations and procedures instituted by the Board of Directors or by any governmental entity, such easement to include without limitation the right to implement erosion control procedures and practices, the right to drain standing water and the right to dispense pesticides.

This deletion enhanced the free use of property.

It is clear that this provision was a "helper" section to the enforcement of the requirement to seek pre-approval from the ARB – and the deletion of the helper section buttresses the argument that it was intended to delete a requirement to seek pre-approval from the ARB.

The Court is asked to declare this "waiver" is a deletion.

The next section waived in Amendment #1:

Section 4.17 Pond Water.

This section granted the Association a perpetual equitable interest in the riparian rights in the PUD – ownership of the water in the ponds. It read:

There is hereby reserved for the benefit of Developer, the Association [a] perpetual right and easement: (i) to pump water from lagoons, ponds ... (ii) to drill, install, locate, maintain and use wells, pumping stations, ... (iii) to

spray or locate any treated sewage effluent

The Court has already been asked to deal with this amendment.

The next section waived in Amendment #1:

Sections 7.2 Architectural Review Board, ARB.

The deletion of this section is the most important provision of Amendment #1.

Plaintiff has already explained that “waiver” equates to “delete” AND That no developer or builder was ever required to nor ever actually sought approval of any plans from any ARB.

Not to be overlooked is that deleted section 7.2 was the source of authority for the development, promulgation, and enforcement of architectural rules. The deleted section read in part:

The 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 here-under.

So deleting this section not only deletes the requirement to seek approval, it deletes the authority of the ARB to make and enforce rules.

This does not gut the enforcement of the surviving covenant provisions.

Under the Covenants any homeowner as well as the Association itself can demand that a homeowner, or the golf course, that violates the covenants remedy that – and can enforce a failure to remediate with suit in court. Ultimately, this is the same enforcement mechanism that the Covenants prescribes without deleting 7.2.

So deleting the ARB does not deprive any homeowner of any protection, rights, or obligations that the amended covenant sets out. The amendment merely eliminates a dysfunctional requirement susceptible of corrupt use because of a lack of checks and balances.

Whether or not the Covenants applied to Pebble Creek – and hence subsequent Amendments, the Covenants certainly apply to the Horton sections of the PUD.

In analyzing the deletion it is irrelevant whether the deletion was wise or unwise, functional or dysfunctional. The analysis need look only to several things:

- 1) Did an existing homeowner have notice before or after -
There were no existing homeowners on May 10, 2000 who were entitled to notice.

- 2) Did the elimination of the ARB add burdens to the free use of property?
No --- It actually facilitated the freer use of property.
- 3) Did this deprive some homeowner of any right or did it impose any new obligation?
No.
- 4) Did Plantation AD have the authority to make this deletion and did he properly do so?

Yes – and it should be noted that the only entity whose rights were diminished was the Developer himself, since the Developer ran the ARB for years, the developer was restricting his own powers of control over homes after sale. Without an ARB, no homeowner needed to ask the developer for permission to perform modifications after purchasing a home, which approval could be arbitrarily with-held. It should be noted that there are no known instances where any developer refused to allow any homeowner to make any modification requested directly from the developer prior to the 2007 transition to homeowner control of the PUD.

In making this decision the court should be guided by *Arcadian Shores HOA v Cromer*, 644 SE 2d 778, 373 SC 292, where the Court held that any “regulation” stating a restriction not explicitly stated in the covenants was in fact an attempt to enlarge the covenants and required the procedurally correct amendment of the covenants. The Court further held that any so called “rules” required proper signing, acknowledging, and indexing with the recorder of deeds to place everyone on effective notice of these rules – which procedure is never followed for so called ARB rules.

The Court is asked to declare that

1. Section 7.2 has been deleted and is unenforceable;
2. Any attempt to enforce 7.2 is frivolous and without authority.
3. There is no source of authority to establish, amend and enforce architectural guidelines, rules and regulations,
4. AND TO ENJOIN THE ENFORCEMENT OF SECTION 7.2.

The next section waived in Amendment #1:
Amendment #1 also “waived” Section 7.4. Fences.

This deleted section is found beginning on Page 17 of the Covenants, PL #547.

In examining this section it should be noted that this has absolutely nothing to do with gardens, flower beds, landscaping edging, trees, or palm tree beds, which the Defendant has attempted to use it to control,

Plaintiff introduced into evidence photographs showing that there are literally dozens of fences of wide architectural variation, height, location, and materials throughout the PUD – far more than the 28 that the Defendant admitted through answers to

interrogatories.

In Arcadian Shores v Cromer the Court of Appeals held relating to fences in an HOA which Arcadian Shores sought to control --

“However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts.”

“Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures.” Upheld that the Association thus waived its right to review / approve.

Besides the failure to have a consistent scheme, there is a fatal defect in the wording which the Developer may have recognized when he decided to delete this section. That flaw is that forever more, even when the Developer lacks horizontal privity in the development, the ARB is not allowed to act without the Developer agreeing in every instance. The text reads:

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 and set back from Unit lines at such distance as the Developer and the Architectural Review Board in their sole discretion may require, or except those erected by the Developer in Common Areas. Said fences and patio fences shall be allowed only after obtaining prior written approval of the Developer and Architectural Review Board. Said fences shall be made of materials approved in advance by the Developer and Architectural Review Board ...

Additionally, the section purported to allow the ARB to act selectively and capriciously, without having to relate a decision to a covenant provision or to give an explanation. Further, there was no procedure stated to appeal such a decision, thus making it susceptible to manipulation by hostile neighbors for personal purposes.

Deleting this section enhanced the free use of property. It did not impose a single additional burden on homeowners.

The next section waived in Amendment #1:

Section 7.25. Relating to parking was deleted.

Parking; Certain Vehicles Prohibited From Units.

This section was problematic to start with because the Horry County Planning Commission approval of the Development, and all subsequent approvals, uniformly stated that all roads would be built to Horry County standards, would be public, and would be dedicated to Horry County.

The Requirement for Dedication was in addition to the requirement that all roads be Public.

In unincorporated areas all parking restrictions are pre-empted by state law which in effect says that if you don't block traffic and passing sight lines, all duly registered vehicles can park where they want to, in the South Carolina spirit of hands off government – a message lost to the incumbent HOA Board and its predecessors.

Horry County has promulgated ordinances for the towing of vehicles from private property, making it illegal for private individuals to arbitrarily tow or harass private cars. There are strict provisions as to towing from public streets – it may be done only by police or fire officials.

The streets were never owned by any home owner association and clearly there was no horizontal privity from the start. Individual homeowners always have had at least an easement of necessity to park any number of their vehicles on the public streets in the PUD so long as those cars are legally registered and don't obstruct traffic.

There is yet another impediment to any attempt by an HOA to regulate parking on public streets in the PUD: individuals who don't live in the PUD have an absolute right to park on streets within the PUD, and the HOA would have no legal mechanism to restrict such vehicles. An attempt to restrict identical cars identically parked, one owned by a homeowner and another by an outsider, clearly would reflect a capricious and arbitrary and selective enforcement mechanism.

The deletion of the section was a wise choice. It does not impose an additional burden on the free use of property.

It is also supported by Hardy v Aiken, 631 SE 2d 539. 369 SC 160 Supreme Court 2006 where it was held that ARB rules which purported to impose parking controls not explicitly contained in covenants – or to supplement same – were illegal and void, supporting the lower court's decision upholding the free use of property.

The "waived" section read in part:

... Owner agrees not to park any automobile or other vehicles (including golf carts) or those of such Owner's guests on the streets ... Parking shall only be allowed on designated paved parking areas, ... No travel trailers or mobile homes, campers or other habitable motor vehicles ... shall be used, kept, stored or parked overnight, ... The Association shall have the right to have towed or otherwise removed any vehicle in violation of this Section 7.25, and shall charge the cost thereof to the Owner of the Unit involved, and shall have a lien for such cost against such Unit, enforceable in the same manner as an Assessment as provided herein.

It is noted that it is common in the PUD for travel trailers , boats, and other such

vehicles to be parked for days in driveways or on the streets of the PUD. This was the testimony at trial of Plaintiff's witnesses and in Mr. Astorino's original deposition. It was also Plaintiff's testimony. This was not controverted when Freiboth, Abel, and Sullivan took the stand.

The Court is asked to declare Section 7.4 deleted and unenforceable, and to enjoin any attempt to enforce same.

The next section waived in Amendment #1:

Section 7.31. Prohibition of Open Outdoor Storage was likewise waived. It read

No materials of any kind shall be stored on a Unit other than in an approved enclosed structure, which shall be attached to the principal dwelling. Firewood and bicycles may be stored outside in side or rear yards only, provided they are not visible from any Common Area, easement, street or Recreational Amenity area.

The deletion of this section enhances the free use of property and does not impose any additional burden on any homeowner.

In evaluating this deletion it is not the Court's role to decide the effect this may have on property. This Amendment was properly noticed, witnessed, recorded and indexed. Every homeowner was on notice that this provision was deleted – as was the deletion of all other sections accomplished in Amendment 1. Thus when homeowners bought their units they could not rely on Section 7.31, nor the section on fences, nor the section on ARB.

It also did not add an additional burden on the free use of property.

The Court is asked to declare this section voided and enjoin any attempt at enforcement.

The next section waived in Amendment #1:

Section 7.37 (c) within Section 7.37 Special Restrictions Affecting Golf Fairway Residential Areas. This subsection (c) deleted by Amendment #1 pertained to the "Golf Course Maintenance Easement" which was deleted by this amendment.

It should be noted that at the time of Amendment #1 the same individual who controlled the developer, Plantation AD, also controlled the golf course, Plantation Golf. AD.

The deleted subparagraph read:

There is reserved to the Developer a "Golf Course Maintenance Easement Area" on each Lot ... adjacent to any golf course ... This reserved easement shall permit the Developer ... to go onto any Golf Course ... Area for the

purpose of landscaping or maintaining said area. ... The Developer reserves the right to waive the easement herein reserved in whole or in part in its sole discretion.

The Court is asked to note that in the context of this section, the clear meaning of waive is delete, where he said he might waive the easement in whole or in part.

Deleting this enhanced the free use of homeowner property because it eliminated the possibility that someone might arbitrary tear out a homeowner's landscaping – a possibility that would obstruct sales of golf course side lots.

The Court is asked to note that even with this deletion there remains a prohibition on obstructing the view of golf course side lots onto the golf course. This is enforceable at law by homeowners themselves, the actual injured parties anyway.

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**PROVISIONS IN AND CHANGES TO THE COVENANTS
THE COURT IS ASKED TO INTERPRET BY DECLARATION**

ORIGINAL COVENANTS PL #547

Who owns the rights to the water in the Ponds within the PUD, irrespective of who owns the underlying land, and what use may the owner of the riparian rights make of the water?

Plaintiff argues that the covenants as originally stated gives the riparian rights to all water in all ponds within the PUD to the Association named in the original covenants – The Murrells Inlet Golf Plantation Association.

The relevant section reads:

Section 4.17. Wells and Effluent. There is hereby reserved for the benefit of Developer, the Association and their respective agents, employees, successors and assigns an alienable, transferable and perpetual right and easement:

(i) to pump water from lagoons, ponds and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes;

(ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities and systems within the Common Areas, including within any portion of the Recreational Amenities; or

(iii) to spray or locate any treated sewage effluent within the Common Areas, including within any portion of the Recreational Amenities or upon any

unimproved portions of any Unit, or Multi-Family Area.

Plaintiff asserted at trial that when the Covenants were written, it endowed the named association, MIGPA, with the equitable riparian rights to the water in all the ponds in the PUD.

The Court is asked to Declare that Riparian Rights in the water in the ponds and in the streams in the PUD belonged to MIGPA from the moment the Covenants were declared.

Plaintiff asserted at trial that the developer could not, without the consent of MIGPA, deprive MIGPA of those equitable riparian rights without it's consent.

The Court is asked to declare that no Amendment to Covenants could affect a property right, particularly the riparian rights, without the written consent of the property holder, in this instance it being MIGPA.

Plaintiff asserted at trial that the Developer had no capacity as a matter of law relating to covenants to delete a provision endowing MIGPA with equitable riparian rights.

The Court is asked to declare that Section 4.17. Wells and Effluent survived any attempt by the Developer to delete it by amendment and remains in force.

Plaintiff asserted in court, citing Hardy v Aiken, 631 SE 2d 539,369 SC 160 – 2006 that general provisions for amending covenants can not be used to alter, create, or eliminate specific provisions of covenants related to specific rights or obligations. Or more exactly, that a vote of the members in the majority stated in The Act was required.

Plaintiff asks the Court to Declare that the only way The Association may eliminate, alter or impose provisions of covenants relating to specific equitable rights or uses of property is through the vote of the members as provided in The Act.

How has the notion of Common Areas been affected by Amendment?

The Developer never designated any actual property as Common Areas.

Paragraph #3 of Amendment #1 stated that

3. There is no "Common Area" as such term is defined in the Declaration located in or on the Multifamily Parcel.

Plaintiff interprets this as an attempt by the Developer to prevent a future IHOA Board from transferring the burden of maintaining property belonging to a multi-family sub association to the IHOA in general by accepting ownership of sub-association property and declaring it to be IHOA common areas since it would not be owned by the IHOA.

This has actually happened and Plaintiff believes that this is "illegal" under the

covenants, Amendment #1. DR Horton deeded the parking lot for the Glens to the IHOA, without the IHOA's consent in the minutes, and the IHOA now is maintaining this limited use parking lot aka Madrid Drive at the expense of all homeowners.

At trial William Freiboth testified that in 2012 the current IHOA board discovered what Horton had done. Clearly the IHOA board had no knowledge about this – it wasn't in their minutes. The Horry County Planning Commission plat for the Glens, Pl # 466 specifically required the HOA of The Glens to maintain that "private road" / common area. Freiboth also testified that the current board just recently gave The Glens sub-HOA \$ 10,000 to "reimburse The Glens for maintaining " it's own parking lot, and committed to having all homeowners maintain Madrid Drive / aka The Glens parking lot into the future.

The Court is asked to declare that this action directly violates the provision of the amended covenants, per Amendment #1, which prohibits IHOA common areas "in the multi-family parcel". Madrid Drive, as a common area, is "in the multi-family parcel"

The Court is also asked to Order that if the current IHOA board is unsuccessful in retrieving the \$ 10,000, that the current board be held personally, individually, and collectively responsible to repay the IHOA for the \$ 10,000.

When all was said and done Freiboth and the current board tried to capitalize on the original covenant's definition of common areas. Common Areas were defined in Section 1.6 of the Original Covenants, pg 2 as

Section 1.6. Common Areas shall mean and refer to all *real and personal property owned by the Association* for the common use and enjoyment of the Owners *or designated by the Developer as Common Areas,*

Plaintiff asks that the Court explicitly declare that roads and shoulders are not Common Areas to settle the issue that the roadways are not among the property for which The Association can collect money, through assessments, to maintain.

If one looks at Plat Book 181 Page 89, Pl #460 one sees that all roads in the PUD are marked "public" and are specified to be dedicated for public use on every Planning Commission plat relating to the PUD.

CAPITAL CONTRIBUTIONS IN THE AMENDED COVENANTS:

In accounting terms, Capital expenses is money spent on equipment with a life of more than one year. This is easily seen through IRS rules regarding deductions for business expenses.

The original Covenants refer to Capital Contributions as follows::

Section 3.5 Capital Contribution. The association shall collect a capital

contribution equal to 1/6th of the aggregate annual assessment for each Unit as set forth in Article VI. Each Unit's share of said capital contribution shall be collected and transferred to the Association at the time of the closing of the initial sale of each Unit by the Developer. All sums paid as a capital contribution are in addition to and not in lieu of regular assessments for common expenses.

The Court is asked to declare void this section because of it's ambiguity.

An additional reason for the Court to void this section is because it is not uniform in it's computation and application:

If this is tied to the monthly assessments imposed on homeowners, it becomes speculative and very arbitrary because of the following:

(a) Some homeowners pay less than others in a monthly assessment, for example at one time \$ 70 for single family homeowners and \$ 20 for condo homeowners, and of the \$ 70, much of that is for cable TV and garbage which is not a charge paid to the HOA by condo owners. Thus single family homeowners will have their capital contributions controlled not by the need for capital replacement but by the unrelated charges imposed by the cable and garbage companies.

(b) The assessment increases from year to year, thus a homeowner selling in year one will pay less than a homeowner paying in a following year – supposedly for the same capital replacement cost thus the later homeowners pay a larger share of replacement capital money.

The Court is asked to declare that any scheme which collects uneven rates from the same category of homeowner is void.

CAPITAL CONTRIBUTION AMENDMENT PROVISIONS OBJECTED TO:

Amendment #3, March 29 2004 PI #559:

3. Section 3.5 shall be deleted in its entirety and the following shall be substituted in *its place and stead*:

Section 3.5 Capital Contribution. The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner of a Unit upon the transfer of such Unit either from the Developer or from another Owner. All sums paid as Capital Contributions are in addition to and not in lieu of regular assessments for common expenses.

4. Section 6.7 shall be deleted in its entirety and the following shall be substituted in its place:

Section 6.7 Capital Contribution. The Association shall collect a Capital

Contribution from each Owner of a Unit as provided in Section 3.5 hereof.

The Court is asked to declare that this amendment is void for the following reasons:

- (1) Unequal burden on a particular house unit for the reasons stated. Note that there is a difference between a burden on property and a burden on a particular owner.
- (2) Requiring a subsequent purchaser to pay a sum of money to the HOA imposes an additional burden on the sale because it increases the cost of the housing unit.
- (3) The HOA does not own and has never owned a particular housing unit. It has been held that a covenant may not require a buyer or seller to pay sums to a third party upon the sale of property; All federal mortgage institutions such as FHMA, Fannie Mae, VA, have bans on paying such sums in connection with mortgages issued by or for those agencies, which means that this payment scheme makes it impossible for a buyer to finance a house in the PUD if the requirement is honestly disclosed to the federal agency. In addition, this is not a proper covenant touching and running with the land..
- (4) These changes were made without the approval of or prior or subsequent notice to existing homeowners.
- (5) It violates the Hardy v Aiken⁷ decision in that this change required 100% approval and could not be made in any other fashion. Further, there is a specific amendment provision in section 6.4 which specifically applies to added capital contributions other than the one at original sale.

Additional Ambiguous Burden

Horton imposed an additional burden, on condo buyers but not single family home buyers, in paragraph 5, covenant burden added, Amendment #4 to the Covenants, Pl 561, December 2004 which should be voided because of it's ambiguity and internal wording conflicts:

5. Owners of Units in the Multi-Family Parcel shall pay the amount of One Hundred and Fifty (\$150.00) and no/100 Dollars to the Association at the time a Unit is conveyed from the Developer to a third-party purchaser as a contribution toward the maintenance of the entrance and roads of the International Club PUD.

This is clearly NOT the capital contribution charge because it is for "Maintenance".

Related Problems:

In 2004 DR Horton owned the International Club Drive front entrance off

⁷ Hardy e at v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006

Tournament Drive AND all the roads in the PUD. The International Club Drive front entrance isn't even in the PUD. No roads or entrances were or are "common areas". The County always owned and owns the Pebble Creek entrance – off of McDowell Shortcut Road.

The Court is asked to declare the change numbered "5" in Amendment #4, paragraph 5, void.

In addition --

(1) This is internally ambiguous and doesn't make sense: At the initial sale the developer sells to a second party. The developer never will "convey from the developer to a third party purchaser". This event will literally never occur.

(2) Doesn't apply to single family homeowners – so not uniform in its application.

(3) No prior or subsequent notice to existing condo homeowners.

(4) Violates the Hardy v Aiken decision in that there are specific assessment provisions and the general amendment by developer scheme was used to make Amendment #4..

(5) Condo homeowners now have a fixed, very large additional burden charge. This is in addition to the first month's two months of assessments charge so this makes it more expensive to resell the house.

(6) This is a personal services contract not a proper covenant that runs with the land, and lacks horizontal privity on the part of either party or anyone with an interest in the sale of the real estate.

(7) It is imposed on existing homeowners without their consent or notice.

INTERPRETATION OF UNAMENDED COVENANT PROVISIONS

INTERPRETATION OF COMMON AREA DEFINITION.

Definition:

Section 1.18. Multi-Family Area shall mean and refer to any portion of the Subdivision designated as such by the Developer in which common elements are owned by either the Owners of Units in such Multi-Family Area as tenants-in-common or by the Multi-Family Association composed of such Owners, pursuant to a Horizontal Property Regime or other multi-family legal structure within the Subdivision upon which there shall have been or will be constructed either attached or detached townhouses,

condominium units, apartment units, cooperative units, cluster homes, patio homes or similar multi-family structures.

When Developers applied to the Horry County Planning Commission for subdivision approval, the plats were required to designate whether an area was for single family or multi-family use, the densities, the number of units, and other restrictions such as set backs and percent lot coverage.

We see this in the Planning Commission documents Pl #449, in the Murrells Inlet Golf Plantation approval in 1997, Pl # 450, in the Lantana 1999 approval, Pl # 451, in the 2000 approval of The Villas, Pl #459, and in the 2004 approval of The Glens, Pl #466.

Both the Villas, the Cambridge townhouses, and The Glens own common area through their sub-homeowner associations, the Multi-family associations, which certainly are at worst an "or other multi-family legal structure". The Cambridge recorded the deed to it's common area from Horton on June 12, 2007. Likewise The Glens common area from Horton on December 4, 2007.

The Planning Commission specifically approved The Glens as "Town Houses" not "Town Homes". See Glens approval plat Pl # 466.

The covenants do not refer to nor depend on any sales literature put out by any builder calling an area a "townhome". They simply state an area is either single family home or multi family, with consequential rights and obligations, which determination was perpetuated in Planning Commission documents and related Plats.

The Court is asked to declare that any area of the PUD designated as a multi-family area in a planning commission Plat and which owns common areas through an association other than the one designated in the PUD overall Covenants is a "multi-family" area within the meaning of the Covenants.

Per Arcadian Shores v Cromer, an alternative interpretation is not permitted. The Covenants could have been written to exclude "town homes" from the "mutli-family" definition but did not. When Horton bought out Plantation in 2003, and subsequently made numerous amendments, it had the opportunity to try to alter the covenants in this regard but did not.

Horton's usage when it sold The Glens units, for example, to sometime Board Member Maureen Sullivan on October 4, 2005, does not control.

-- CONFLICT BETWEEN NON-PROFIT CORPORATION ACT AND
COVENANTS OVER CAPACITY OF COVENANTS TO CONTROL AN
ASSOCIATION --

At trial the Defense witness King asserted that it was the "habit" or "practice" of developers in Horry County to write controls over hypothetical, then non-existent non-profit corporations (future home owner associations) into their covenants. Reading the deposition testimony of Toth, Freiboth, and Pyle (the developer / President of Plantation AD) and listening to the trial testimony of King, Sullivan, and Abel it is clear that it is common to assume that documents associated with deeds to land can have anything to do with corporations.

Within South Carolina there is no HOA statute. The legislature has deliberately chosen to leave control over HOA's remain under the Non-Profit Corporation Act, 33-31 of the Code.

The Code expressly states in many places that the governance of a non-profit corporation is explicitly to be derived from The Act, from the Articles of Incorporation, and from the Association's Bylaws. Any other document which attempts to control the operation of a non-profit corporation is pre-empted by law, common law and practice to the contrary.

On February 8, 1999 R Scott Pyle, President of Plantation AD, signed the covenants with purported Bylaws for "The Association" as an Exhibit. Pl # 547

On July 26, 1999 the HOA was incorporated with the Secretary of State. Pl #552.. The Declarant / incorporator was Ken Grover.

SC Section 33-31-206. Bylaws. (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.

Nothing in the Covenants, including the Exhibit purporting to be the HOA's Bylaws, can be considered the Bylaws because they were adopted by someone who was not the incorporator nor, since the HOA did not exist, was Pyle a member of the HOA's board of directors.

Section 3.4 of the Covenants purports to control the Voting rights in the Association.

Covenants provisions must touch and run with the land and control the use of the property. Voting in a non-profit corporation does not touch and run with the land nor does it affect the use of the private property. Since this covenant topic is not part of the Association's Bylaws, but part of a document never adopted by the Association nor it's incorporator, this area of the covenants should be declared null and void since it has nothing to do with land. The default provisions of The Act will apply to The Association, thus this does not leave the IHOA in limbo.

The Covenants reads as follow in this regard:

Section 3.4. Voting Rights. The Association shall have two classes of voting membership:

***Class A.** Class A members shall be all Owners excepting the Developer. Class A members shall be entitled to one vote for each Unit in which they hold the interest required for membership by Section 3.3 above. When more than one person holds such interest or interests in any Unit, the vote attributable to such Unit shall be exercised as such persons mutually determine, but in no event shall more than one vote be cast with respect to any such Unit. The owner of the Golf Course shall have the voting rights of fifty (50) Class A members.*

***Class B.** The sole Class B member shall be the Developer. The Class B member shall be entitled to ten (10) votes for each Unit in which it holds either the interest required for membership under Section 3.3 above or (as to the Additional Property) the right to submit Units to this Declaration. The Class B membership shall cease and become converted to Class A membership upon the occurrence of the first of either of the following two events:*

The statute goes further:

SUBARTICLE B. . TYPES OF MEMBERSHIPS - MEMBERS' RIGHTS AND OBLIGATIONS SECTION 33-31-610. Differences in rights and obligations of members.

All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

Clearly the covenants (which are neither the articles nor bylaws) can NOT establish classes of membership.

The Court is asked to declare that nothing in the Covenants shall control the operation of any homeowners association, specifically to include voting rights and privileges in such a homeowner association..

MEMBERSHIP ISSUE.

The Covenants requires that every homeowner be a member of the named association. This would be a legally valid requirement if the PUD was in a state with a homeowners association act – but the subdivision is in South Carolina. All HOA's in South Carolina are expressly incorporated subject to a specific membership statute -- See Pl # 552 == that being 33-31-202 of the South Carolina Non-Profit Corporation Act. This is pre-emptive of private agreements to the contrary, in areas where it does not provide for provisions to the contrary, such as the section of when the annual meeting shall take place.

The Covenants:

Section 3.3. Membership. 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.

There is no provision in the covenants for resignation. This is not stated as "may be a member" as a scope of eligibility, such as a neighborhood association.

This is pre-empted by law:

ARTICLE 6. MEMBERS AND MEMBERSHIPS

SUBARTICLE A. . ADMISSION OF MEMBERS

SECTION 33-31-601. Admission. (a) The articles or bylaws may establish criteria or procedures for the admission of members.

(b) No person may be admitted as a member without his consent.

SUBARTICLE C. . RESIGNATION AND TERMINATION

SECTION 33-31-620. Resignation. (a) A member may resign at any time.

33-31-601 of the Code states that the articles or bylaws, not some external covenant, controls criteria for membership.

The Court is asked to declare that Section 3.5 of the Covenants is void as a matter of law.

BYLAWS OF THE ASSOCIATION DECLARED IN THE COVENANTS

Turning to Exhibit C of the Covenants, "Bylaws of the Association", Pl #548 --

This purports to be the Bylaws of the Murrells Inlet Golf Plantation Association.

It was recorded at Deed Book 2117 at 1400.

It is NOT indexed to the Murrells Inlet Golf Plantation Association.

It is part of a document indexed to the Murrells Inlet Golf Plantation -- the PUD, exactly as early amendments to the covenants were indexed.

It is NOT indexed to the Defendant International Club Homeowners Association or to ANY homeowners association.

It is not separately signed or verified by anyone.

It is part of a document which violates the statute in that it is not declared by the incorporator or board of directors.

Section 33-31-206. Bylaws. (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.

These Bylaws were never adopted by the membership or board of any HOA.

The Court is asked to Declare that the Bylaws which are at Exhibit C to the Covenants, as found in Deed Book 2117 Pages 1384 through 1400, are null and void as to their effectiveness as the Bylaws of any Association.

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	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 8 -

THAT THE GLENS IS A MULTI-FAMILY AREA

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that the Glens is a multi-family sub-development and as such is bound by the limitations of the two other multi-family areas, those being The Villas and The Cambridge, and eventually The Ballycastle if and when it is built.

The particular practical question is whether homeowners in The Glens are allowed to use the Amenity Center. The homeowners in The Cambridge are not allowed to use the Amenity Center. The builder of The Cambridge and The Glens was DR Horton. A different builder constructed and sold The Villas condominiums. That builder came through with his promise to build a cabana and pool for the Villas purchasers. Horton promised the same for The Cambridge homeowners but never delivered, which is still a source of contention between Cambridge homeowners and DR Horton but which is outside of this litigation.

DR Horton was not the author of The Covenants. Horton, however, inherited the authority of Plantation AD – the title of Developer -- as part of the purchase of the remaining lots from Plantation AD in 2003. Horton could have, but did not, amend the Covenants to alter the requirements for use of the Amenity Center. As recently as 2010 Horton attempted to get the homeowners to allow Cambridge multi-family owners into the Amenity Center so as to resolve the dispute between Horton and the Cambridge. The overwhelming opposition of single family homeowners stifled that attempt.

As Maureen Sullivan, a defense witness who is a member of the board of The Glens' sub-association and former board member of IHOA testified at trial, the lure of the Amenity Center meant for single family homeowners was the critical inducement in getting her and others to buy at The Glens – from Horton.

For purposes of reference the Court is asked to note Pl # 557, the May 16, 2003 agreement between Sunbelt and Horton. That agreement perpetuates that the original concept for homes was that single family homes would all be 1900 square feet or larger (page 4). The Murrells Inlet Golf Plantation Plat approved by the Planning Commission and modified and reapproved as the Lantana Plat reflect homes with lots of one-third of an acre or larger. The 2003 submission by Horton on June 19, 2003 Pl #461 reflected small houses on one – quarter acre lots, or smaller. Pebble Creek homes are as large as 3000 square feet, typical Horton homes are as small as 1200 square feet, or even smaller. Horton changed the look of the PUD.

MULTI FAMILY PER COVENANTS

The Covenants talk about “Areas” as the key to distinctions between ownership rights, not the construction of units within those areas. Thus an argument that The Glens is a “townhome” not a “townhouse” is bogus and inapplicable.

The Covenants defines what it means by a “multi – family area”. PL # 547 Covenants

Section 1.18. Multi-Family Area shall mean and refer to any portion of the Subdivision designated as such by the Developer in which **common elements** are owned by **either** the Owners of Units in such Multi-Family Area as tenants-in-common **or by the Multi-Family Association** composed of such Owners, pursuant to a Horizontal Property Regime **or other multi-family legal structure within the Subdivision** upon which there shall have been or will be constructed **either attached or detached townhouses, condominium units, apartment units, cooperative units, cluster homes, patio homes or similar multi-family structures.**

At Plaintiff's # 007 is a photo placed into evidence at trial of what one of The Glens units looks like. It is a typical townhouse. “A picture is worth a thousand words”. Upon information and belief, it is Maureen Sullivan's unit. At Pl # 011 is another picture of a row of The Glens townhouse units and at Pl # 016 is another set of such units. More such units are at Pl # 109 and # 110..

The Horry County GIS images of the two common areas held in common by all owners of units in The Glens are at Pl # 107 and 108 with their TNS numbers. It can be seen that these common areas are to the rear of either row of The Glens townhouses. Plaintiff's witnesses Mike Butryn and Pete Pizzi testified that IHOA maintains at least one of these areas at the expense of all homeowners.

The full Planning Commission approval Plat for The Glens is Pl # 466 approved May 26, 2003, Plat Book 197 at 171. “Blow ups” of notes from this Plat are at Pl # 128 through 130.

Both the Murrells Inlet Golf Planatation and Lantana PUD's refer to the area on which The Glens was built as "mutli-family", "MF", and has substantially different restrictions for construction there than for the areas designated as "Single Family", "SF".

Section 1.18 refers to Multi – Family associations or subordinate regimes. These are defined in the Covenants as follows:

Section 1.19. Mufti-Family Association or Subordinate Regime shall mean and refer to a corporation or an unincorporated association the shareholders or members of which are all Owners of Units within a Multi-Family Area or within any subordinate property development within the Subdivision, whether submitted to a horizontal property regime or made subject to further or additional restrictions and/or covenants of ownership, use and control.

It was undisputed that The Glens has it's own additional set of covenatnts with restrictions which provide for joint ownership of the two common areas and for membership in a subordinate regime, The Glens Homeowners Association.

Another phrase used in distinguishing single from multi-family areas

Section 1.20. Multi-Family Declaration shall mean and refer to any instrument or document, and any amendments thereto, which is recorded in the office of the Register of Deeds for Horry County with respect to any Multi-Family Area and which creates a townhouse, patio home, cluster home, cooperative regime, or condominium or horizontal property regime for such Multi-Family Area or imposes covenants, conditions, easements and restrictions with respect to such Multi-Family Area.

In the Murrells Inlet Golf Plantation PUD approval The Glens is the area at Phase II. It was is approved as "MF" Use with 14 Units per Acre.

In the Lantana modification The Glens is in area hase G-1 with 9.6 Acres. Phase G-1 is makred as a Multi-Family Phase approved for 192 units.

The May, 2004 DR Horton approval from Horry County Planning is for a "Glens Townhouse" development. In submitting and receiving approval for that the Developer, DR Horton, and The Planning Commission, were both in agreement with what is in The Glens. In the approval document, Plat Book 197 at 171, the notes read"

10. The project name and phase is: The Glens Phase I at International Club. The Type of Development is TOWNHOUSES RESIDENTIAL.

12. The Glens Ph I has 47 TOWNHOUSE Units and an area of 9.74 acres. This Phase has a density of 5.76 Units / Acre.

The original Covenants did not leave homeowners in multi-family areas without amenities. It contemplated that the developer would provide separate facilities – exactly what happened in The Villas and what was promised The Cambridge.

That “separate facilities” concept is found in the Covenants at Section 6.5:

"Section 6.5. Rate of Assessment. Both annual and special Assessments must be fixed at a uniform rate for all Units (whether improved or unimproved) and may be collected on a monthly, quarterly or annual basis, except that the Developer shall have the right, at its sole discretion, to create multi-family associations within the subdivision which will contain separate recreational amenities. In such case the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association. The assessments paid by all Units located in such multi-family associations will not include the costs of maintenance of the recreational amenities

This concept of separation was stated in a later amendment made by DR Horton: Amendment #4 of the Covenants, enacted on December 28, 2004 by the Developer DR Horton

" Pursuant to Section 6.5 of the Declaration, the rate of Assessments for the Units in the Multi-Family Parcel shall not include the cost for maintenance, upkeep and repair of certain recreational amenities located on Common Areas within the International Club Subdivision and the Owners of Units within the Multi-Family Parcel shall not have the right to use said recreational amenities."

All of these documents were submitted uncontested into evidence at trial.

Plaintiff has shown, by the preponderance of the evidence, that The Glens is in a multi-family area and is not entitled to use the Amenities set aside for homes in the Single Family area.

The Court is asked to state findings of fact and conclusions of law that The Glens is located in a multi-family area and is not permitted, under the covenants, to use the Amenity Center set aside for homeowners in the single family areas.

Plaintiff has not plead nor requested any retrospective adjustment and the impact is all prospective.

This issue was amply stated in Plaintiff's complaint. An officer of The Glens HOA was present at trial and had an opportunity to state her case in rebuttal. That case in rebutal came down to buyers in The Glens depending on what DR Horton sales persons stated.

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The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 9 -

THAT THE HTC / "MASTER HOA" CABLE CONTRACT DOES NOT BIND HOMEOWNERS

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that the contract between the "International Club Master HOA" and the Horry Telephone Cooperative" ("HTC") is not binding on homeowners and the Court was asked to declare that no homeowner had any obligation under the HTC / Master Association contract. The Court was NOT asked to void the contract.

At trial Defense Counsel took the testimony of Denise Ambuhl who represented that she is the HTC official knowledgeable about and responsible for the "Business" sector of HTC's operations, including contracts for various services between HTC and homeowner associations in Horry County.

At trial Ambuhl testified that the mission of HTC is was originally to provide telephone services in areas of Horry County where commercial sources did not offer it because it was not profitable to do so, and that later HTC's mission was expanded to include other services which could be offered to HTC's customers using HTC's telephone infrastructure – such as cable tv and internet services.

For purposes of this Brief and in testimony at court, the phrase "Master Association" was used / will be used to refer to the "other" party to the HTC contract which on it's face is the "International Club Master Association". The Defendant will / was continue to be referred to as "IHOA".

The testimony which was adduced by Defense Counsel was that the HTC contract as it exists is typical of many which HTC has in place and that because this practice (in general) has never been challenged this instance of it is acceptable. To put it in the same

“vein” as the King testimony, “habit” trumps common law, case law, ordinance and statute. This is clearly not so.

Under cross examination Ambuhl testified that –

- (1) HTC’s overall business is very profitable;**
- (2) HTC issues “excess capital contribution refunds” each year in the order of magnitude of millions of dollars;**
- (3) Each HTC customer with telephone service receives such an “excess capital contribution refund” each year;**
- (4) HTC separately bills IHOA for cable service in the “neighborhoods” within the PUD;**
- (5) HTC’s bills for the separate neighborhoods commonly reflect different “per house” monthly charges for different neighborhoods;**
- (6) Ambuhl has no actual knowledge of the circumstances of the signing of the Master Association / HTC contract;**
- (7) No competitor cable tv source is permitted to use the infrastructure within the PUD used to deliver cable services;**
- (8) HTC did not install the original cable tv infrastructure in Pebble Creek;**
- (9) HTC did not install nor does it own the “premises” equipment in single family houses in Pebble Creek;**
- (10) The IHOA is a subscriber of telephone service from HTC and thus the IHOA would have received excess capital contribution refunds each year;**
- (11) In the HTC / Master Association contract, the Master Association is free to charge whatever it wants to homeowners, up to the amount that homeowners would pay if they subscribed to cable services from HTC outside of the HTC / Master Association Contract;**
- (12) Homeowners who receive cable services under the HTC / Master Association contract (originated by HTC) are not HTC customeres;**
- (13) The HTC customer under the HTC / Master Association contract is HTC’s counterpart on the HTC / Master Association contract;**
- (14) HTC does not mandate the Master Association to impose any rate increase at all each year;**
- (15) HTC increases its rates in some, but not all years, under the HTC / Master Association contract at the begining of the first billing period beginning in April;**
- (16) The rate increaase that the IHOA imposes each year on January 1st is not mandated by any HTC rate increase and can be any amount that the Master Association chooses and is part of the Master Association’s receipts – it is not a pass through to HTC;**
- (17) For IHOA homeowners to receive digital tv through the HTC / Master Association contract, homeowners must rent a “set top box” at a cost of \$ 10.00 per room per month, or for the six tv’s possible in each Pebble Creek home, an additional cost of \$ 60.00 per month;**
- (18) For IHOA cable to have the functionality of a “digital video recorder” through the HTC / Master Association contract they must pay an additional monthly charge of \$ 5.00 per month;**
- (19) That HTC is aware that the “Dish TV” company is offering high definition**

(all channel) television programming for six room with the equivalent of six set top boxes and Digital Video Recorder service for \$ 19.99, which would cost approximately \$ 95.00 through the HTC / Master Association contract;

(20) That HTC as a provider of cable tv services to end consumers was required to, and did, obtain a cable tv franchise from Horry County;

(21) Homeowners who receive only the cable tv service provided through the HTC / Master Association contract are not HTC customers;

(22) The "Customer" under the HTC / Master Association contract is the other subscribing party to that contract (Ambuhl testified that she considers it to be the IHOA).

At trial Plaintiff argued that the arrangement was akin to a "franchise", not too different from a reseller of cell phone services (called capacity in the business) because the reseller, the "Master Association", bought product in bulk and was free (within limits) to resell it in a specified territory at rates and under such terms as The Master Association chose.

At trial it was not controverted that the Master Association sells cable tv services to consumers (homeowenrs) and does not hold a cable tv franchise from Horry County;

At trial, through additional testimony, it was not controverted that homeonwers in "The Villas" condominium area (which area pays assessments to the IHOA) are not asked to nor do they buy their cable tv service through the IHOA. It was likewise conceded that the same situation exists for homeowenrs in "The Cambridge" condominium area and for the golf course, all of which have separate arrangements to receive their cable tv services.

At trial the testimony of Plaintiff was not controverted that to install cable tv service to homeonwer units the installer would have to disconnect and disable any existing alternative source of tv service (e.g., satellite dish, over – the – air antenna) and that HTC does not in fact install parallel "premises" equipment.

At trial the testimony of Plaintiff was not controverted that the covenants and federal law entitle homeowners to install satellite dishes and over – the – air antennas on any area of their housing unit that they control (by ownership or rental) without any interference by an ARB or otherwise.

It was not controverted that the assessments for the Condo homeowners reflects just a "front door" charge for the contact with KA Diehl, a charge to maintain the roads owned by Horry County which roads were never owned by the HOA, a charge for reserves to repair Horry County roads, and money for IHOA corporate insurance and miscellaneous operating expenses.

At trial the testimony of Plaintiff (supported by the ledgers of IHOA) was not controverted that each month KA Diehl charges the IHOA accounts that are at times more than the amounts paid to HTC. No explanation was given by IHOA witnesses (Freiboth / Toth / Case at deposition; Freiboth at trial) for Plaintiff's unrefuted observation that the destinations of these excesses could not be found in the IHOA's books and these excesses

were not shown as "profit" on the IHOA annual statement.

The HTC / Master Association contract was introduced into evidence. It is dated October 30, 2003 PI # 302 and is between the non-existent "Master HOA" and HTC. More on that later.

Plaintiff's uncontroverted testimony that no "Master HOA" exists in the records of the South Carolina Secretary of State in the records of the Horry County Recorder of Deeds in any capacity.

At trial Plaintiff argued that the Enforcement by IHOA of the contract requires homeowners to pay money to IHOA for a personal service or personal product, not something which directly "touches or runs with the land". Plaintiff testified that this arrangement is little different from a provision in a covenant, perhaps inserted as an inducement for a property seller to reduce the price of land, that says that homeowners must buy their groceries from a particular supermarket owned by the property seller. These cable tv groceries happen to be sold by the Defendant IHOA.

Such a contractual commitment could be part of a contract for sale of land as an inducement for a seller to sell at a particular price, but it is a personal service contract, not a valid covenant. There is considerable case law that such a provision in a covenant is unenforceable.

It has been blithely assumed in Horry County by developers and HTC that they can force homeowners to buy cable tv services from HTC. There is no case law enforcing this strategy.

The HTC / Master HOA contract has no severability clause. Thus if the Court finds that any provision is invalid for any reason, the entire contract is void.

Plaintiff asserted that the contract or contractual relationship which Plaintiff is not seeking to disturb is the attempt by the IHOA to use the covenants as a contract between homeowners and the association.

The testimony of Toth and Freiboth at depositions and of Freiboth at trial is that they consider the HTC / Master Association contract as binding on homeowners. They point to the exhibits in the HTC / Master Association contract when asked to explain what the IHOA does with regards to cable services.

At trial Plaintiff introduced as impeachment evidence the following uncontroverted documents which were authenticated by defense witness Ambuhl:

- (1) The IHOA "welcome" letter dated May 1, 2007 stating that the IHOA is HTC Member # 0254899 further identifying it to IHOA's TID.⁸
- (2) The HTC document titled "Connect on October 21, 2008" which Ambuhl admitted was HTC's Annual Member Meeting Announcement which contained the "President's Letter" from HTC's CEO / CFO O'Neal Miller.
- (3) A letter from O'Neal Miller to Plaintiff dated February 27, 2009.
- (4) The Dish TV \$ 19.99 offer.

Ambuhl agreed that the statement in O'Neal Miller's letter that Plaintiff is not HTC's cable customer through the Contract applies to all IHOA homeowners.

The "welcome" letter states that regarding excess capital contribution "refunds"

"These funds are assigned as capital credit allocations and are disbursed based upon each member's proportional share of member-related revenue".

Plaintiff asserted that "revenues" are what a member pays in a bill, and profit is the difference between revenue and expenses. Plaintiff asserted that there is no provision in the HTC bylaws to divide revenues into "line of business" categories. Although at the start of her cross examination Ambuhl stated she was familiar with HTC's bylaws, upon questioning on this matter she changed her testimony to say that she was unfamiliar with what the HTC Bylaws said regarding computation and refund of excess capital contributions.

The letter also goes on to say that "When these credits are paid, they are issued to the member name on the capital credit account".

The last page of O'Neal Miller's "President's Letter" stated that later in 2008 HTC would distribute "Over \$ 5 million ... [to] 105,000 member [s]".

Plaintiff was not challenged when he testified at trial that he had copied every document relating to HTC in early 2009 (from the inception of the HTC contract in 2003) prior to filing this complaint and had not found entries reflecting the receipt, by the IHOA, of anything from HTC which could be related to such a distribution.

⁸ Per Privacy Order of the South Carolina Supreme Court, the IHOA TID which is on the document is not repeated here.

Case Law Relating to Collection of Money Fees.:

There is no case law to support the notion that homeowners can be forced to pay money to their HOA's for cable tv service because of a provision in their covenants.

Plaintiff noted at trial that rental contract may include a provision, as part of the arms – length contract signed between lessor and lessee, for the tenant to accept and pay for particular specified cable tv services. Such an arrangement has always been seen as a “personal services contract”.

There is, however, case law that covenants MAY NOT force homeowners to pay sums of money under such circumstances, albeit not in South Carolina where this has never been challenged before.

South Carolina has adopted the doctrine that where a case presents a “novel” situation, South Carolina trial courts should look to the decisions of appellate courts in other states for guidance.

South Carolina courts have freely drawn upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997)

At trial Plaintiff focused on the requirement to pay money for something:

MidSouth Golf v. Fairfield Harbourside Condominium Assn., 187 N.C. App 22, 31, 652 S.E.2d 378, 384 (2007), <

In MidSouth,

the declaration of restrictive covenants provided that the homeowners be assessed a license fee for maintenance of recreational amenities owned by the Declarant, regardless of whether or not they used the amenities. MidSouth, 33,. The homeowners had no equitable rights in the amenities. *Id.* at 35.

A Trial Plaintiff followed this line of judicial reasoning where it talks about money.

The court in MidSouth cited the precedent set by the court in Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978). Relying on Raintree, the court in MidSouth voided the homeowner obligation, finding in MidSouth that the supposed homeowner obligation to pay money for goods or services did not run with the land.

In Raintree, a developer created a covenant requiring all lot owners to be members of a country club and pay dues. The court found that a covenant requiring membership in a country club and payment of dues did not run with the land.

"This covenant creates an affirmative duty, a charge or obligation to pay money, i.e., country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The [lot owners] are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land citing Nesbit v. Nesbit, 1 N.C. 490,495, 1 Cam. & Nor. 318, Cam. & Nor. 318 (1801)

"Courts have generally held that covenants to pay money do not touch and concern the land". Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (N.Y. 1938)) cited in Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978).

This should be the law of the case for cable tv payments to the IHOA for cable tv services that homeowners may not choose to use, and by extension to single family home owner involuntary membership in the "PAEC" (Amenity Center).

Plaintiff does not contest the right of the resident IHOA, which ever one that might be, to offer bulk services with a discount which homeowners might voluntarily choose . Plaintiff contests the IHOA's posture and practice that home owners have an enforceable (by the IHOA) obligation under the covenants to accept and pay for same

Provisions Relating to Cable Service In The Covenants

The precedent and practice relating to parallel utilities such as water, sewer and power is that the acceptance and use of utilities mentioned in the Covenants is optional

The covenants do not have any provision actually mandating homeowners to accept cable tv services from the IHOA. The covenants merely permit the IHOA to offer it. Covenants, Pl # 547.

Section 2.1. Plan of Development of the Subdivision. Developer shall have the right, but not the obligation, ... including but not necessarily limited to the following: ... (iii) installation and maintenance of any water, sewer, storm and surface water drainage systems and other utility systems and facilities, to include, but not limited to, T.V. cable and its various attendant services and telephone service to include teletype or computer, telex, news service, or computer, or any such like instrument used in the transmittal, reception, or retrieval of messages, facts, or information;

This clearly provides the option to the developer to install infrastructure as may be required by the Horry County planning commission. It does not impose a burden on

homeowners to use any of this. In Pebble Creek the developer either installed or arranged for the installation of sewer and water services from GSWSA and electric services from Horry Electric. The precedent is that home owners are not forced to accept either, and make their own arrangements with GSWSA and Horry Electric for these utility services.

Section 2.4. Utilities and Related Facilities. Developer, ... may retain ownership of the telephone, master television antennas and/or cable system facilities serving the Subdivision. ... Telephone, master television antennas and/or cable system services shall be provided to the Subdivision pursuant to the terms of agreements between the Association and Developer, its affiliates, successors or assigns.

These phrases in the Covenants states a right for the developer to optionally retain an equitable ownership of certain infrastructure. It is speculative to conclude that the developer intended to offer it to cable tv providers, who have the option of running their own lines by eminent domain.

Plaintiff has presented case law that "all doubts must be resolved in favor of the free use of property".

The phrase "shall be provided" imposes an obligation on the Developer to install the requisite infrastructure which works to the advantage of the developer because it made his property more sale-able. To interpret this any other way would require an interpretation that "The Association" can lawfully, through the Covenants, contract for goods and services for homeowners in perpetuity, which is not a proper covenant running with the land and would violate the Statute of Frauds.

The only covenant provision which actually relates cable or television services to homeowners is --

Section 7.24. Communication System. There shall not be permitted or maintained any type of radio or communications system antenna (other than normal receive-only radio antennae) or satellite dish larger than 24" in diameter

Clearly homeowners are permitted to select how they want to obtain their television service. This does not further state that homeowners shall purchase cable services from the Association. This is the logical text that should be used if it was the intention. Intentions are not good enough when interpreting covenants.

The covenant provisions must be read in light of Arcadian Shores HOA v Cromer, 644 SE 2d 778, 371 SC 292 which provided that

"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.”

In 1999 commercial cable television providers and satellite television providers existed. Cable television franchises all use the phrase, “cable television service shall be provided” in a particular specified area. The provision of franchised cable television does not require the homeowners in the area of the franchise to accept or pay for it. The language of the covenants is exactly the same.

While the covenants provide that the IHOA can offer cable services there is no unambiguous requirement for homeowners to accept it.

Defense witnesses have never been able to cite a single provision entitling the IHOA to include cable tv services, or, for that matter, garbage services, in assessments – which is what the Defendant has done.

The area which controls what the HOA can include in assessments is Article 6 page 14 through 16 which says nothing about homeowners being charged for cable television or garbage collection. The only things that the IHOA can collect for, per the covenants, is maintenance of the common area. To be enforceable, if involuntary charges were contemplated, per Arcadian Shores, they would have to be explicitly mentioned.

They are not.

Returning to the October 30, 2003 HTC / Master Association contract, PI # 302, the second paragraph of the first page of that contract clearly implies that it applies to the entire property described in that paragraph, that it applies to both single family and multi-family units, and that it will be applied in a “roll out basis” to housing units as they are sold. It was admitted at trial that no multi-family unit is subjected to the contract by the IHOA, which is selective and capricious enforcement of a purported covenant provision, which constitutes “waiver and estoppel”.

There is a provision on page 2 of the contract, top paragraph, which can only be read that the receipt of services by home owners is optional. The text reads:

“HOA is responsible for fees based on 100% of the total units activated”.

At trial Plaintiff asserted his technical knowledge regarding infrastructure and premises equipment, however, that expertise is not required to interpret the above quote.

Activation necessarily entails not only an electronic “turn on” somewhere “up stream” from a home (“premises”) but also the physical connection of the cable service to the distribution box on the side of a single family house, well within the real property. As Plaintiff explained, without challenge, a 6-way distribution plate is situated on the side of every single family house (and a counterpart somewhere for condominium units) and a physical connection must be made to each of the 6 jacks from a “splitter” and a physical connection made, with the permission of the homeowner, between the cable feed coaxial

cable (at trial Plaintiff called this "8g) and the splitter. Since entry onto the "courtelage"⁹ of a homeowner lot without the consent of the home owner is a trespass, this physical change is clearly at the option of the home owner.

There are other problems related to the cable tv contract, Pl # 302.

As Plaintiff observed at trial, the contract has no severance clause.

Despite the important and dependent assertion by Doug Brown, who signed for "The International Club Master HOA" ("ICMA") the ICMA is not "the sole owner or sole representative" of any homeowner, which is the dependent representation which ICMA makes to HTC in the contract.

The contract says that the property to which this applies is the "International Club Master HOA". There is no PROPERTY with that name. The defendant is the International Club Homeowners Association and the PUD is the International Club Planned Unit Development or Lantana PUD or Murrells Inlet Golf Plantation PUD.

On Page 4, Section 6, there is the phrase "Promotional Material". There is no need for promotional material for acceptance of a service which is mandatory.

"Owner shall submit for company's review and approval prior to use all proposed advertising and promotional materials for the premises or its dwelling units which refer to the Company's service."

There is a privacy issue here, because the contract provides the ICMA shall provide, at HTC's request, the names, service addresses, telephone numbers, and other account information about homeowners. This information was never provided to the association with any IHOA request to sign nor disclosure of privacy rights allowing the association to release this information to anyone.

Access. The bottom of page 2 provides HTC an easement to enter into private property, for certain purposes which easement the association does not itself hold.

At trial Plaintiff asserted and Denise Ambuhl admitted that any entity which provides cable services to an end user requires a cable franchise from the County. Since the IHOA is the provider to homeowners of cable services, billing and collecting for same, irrespective of how the IHOA obtained it, the IHOA must obtain a franchise to provide cable services over property it does not own. The only franchise providers in Horry County are Time-Warner and HTC. The association, by demanding money for the resale

⁹ "Courtelage" has been used in case law to describe the area private area belonging to a property owner in which he has an expectation of privacy and over which he desires to assert control. It need not be enclosed by a fence or wall. It has been held that to enter a courtelage for a search requires a search warrant and any search in a "courtelage" without a properly obtained search warrant is an illegal entry.

of cable tv services, is an illegal cable service provider.

As is the case for the provision of goods or services by unlicensed vendors, customers may not compel a charge (by a vendor) for services provided without a license where a license (or franchise) is required.

It has likewise generally been held that an individual or company can not be charged for goods or services they have not requested, even if they use the goods or services.

For example, Christmas return address labels you receive from a charity. Or the following scam: paper delivered by company which was not ordered, used by the company, and a bill following soon after -- often at inflated prices. Many businesses check the receiving dock logs against the bill but forget to check their orders.

In this instance, cable tv services are unrequested goods or services.

In Horry County the county council has determined that waste management, in unincorporated areas of Horry County shall be obtained from the county through it's tax imposed for the operation of recycling / waste collection points. Plaintiff testified at trial that he uses the Horry County facility "just around the corner" on McDowell Shortcut Road, which he pays to use through taxes on Plaintiff's property -- and that Plaintiff DOES NOT USE the Waste Management services provided by the IHOA. This none-use was unrefuted. While plaintiff has possession of the garbage receptacle provided by Waste Management, he does not "fill it or put it out".

There is no legitimate economic reason or special benefit to homeowners accruing from participating in the cable tv program. Higher quality (HiDef) programming over a wider range of program sources with more utility (Digital Video Recording) can be obtained at lower cost from Dish-TV.

The representation by the IHOA witnesses that the charges are a pass thru is a fraud and swindle as defined in 18 USC 1341, frauds and swindles. PI # 266.

The requirement by the IHOA that homeowners purchase cable tv services from them, including charging for the services whether desired or not, whether requested or not, is an act in restraint of trade per SC 39-3-10 PI # 263, Agreements affecting Competition.

An assertion by the IHOA that homeowners must buy cable services and waste management services from IHOA also violates SC 39-03-140 PI # 265, agreements to limit competition.

Additional supportive cases:

Engler v. Tenhaaf (1979), 74 Ill. App.3d 799, 803, 393 N.E.2d 1266, 1269; Kessler, at 905), 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 Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.
Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, re-filed May 17, 2007; 2007 S.C. App. LEXIS 98
Clear Lake City Water Authority
Dryden v. Calk, 771 F. Supp. 181 (S.D. Tex. 1991).
Frey v. De Cordova Ben Estate Owners' Ass'n., 632 S.W.2d 877, 880 (Tex. App.--Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ; Holleman v. Mission Trace Homeowners' Ass'n., 556 S.W.2d 632, 635 (Tex.Civ.App.--San Antonio 1977,

At trial the Plaintiff entered into evidence and asked the Court to refer to and consider -- various Federal Communications Commission rules and regulations, and a related court decision by the United States Court of Appeals for the District of Columbia Circuit, Plaintiffs # 258 and # 259, which held that "Exclusivity Arrangements" are null and void and that any contract with such a provision is void in it's entirety. At trial Ambuhl testified that any homeowner is free to choose his source of tv programming, and that the bulk services contract offered by HTC is only one of the choices that a homeowner could make.

RELIEF REQUESTED

Plaintiff asserts that through the preponderance of evidence Plaintiff has presented sufficient fact and invoked appropriate legal authority to support the following ORDER:

THAT

1. No home owner has any obligations under the contract for provision of cable tv services entered into between HTC and the ICMA.
2. The IHOA has no standing or rights to enforce the contract in it's own name.
3. The IHOA lacks a required cable tv franchise from Horry County and is enjoined from offering cable tv services to end users until and unless it obtains a proper cable tv franchise from Horry County permitting it to do so.
4. Home owners in the International Club PUD are free to choose without any interference from the IHOA the source and method of delivery of television programming.
5. Plaintiff is individually entitled to a refund from the IHOA of any money the IHOA had collected from Plaintiff related to the provision of television services reaching back to April 7, 2006, three years prior to the date this complaint was filed.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 10 -

**THAT THE COVENANTS CAN NOT FORCE
HOME OWNERS TO JOIN AND PAY ASSESSMENTS
FOR "THE AMENITY CENTER"
AND
THAT THE IHOA CAN NOT COLLECT MONEY TO
SUPPORT THE AMENITY CENTER AS
INVOLUNTARY ASSESSMENTS**

Plaintiff at trial argued that there is no enforceable provision under the Covenants to compel single family home owners to pay assessments for the Amenity Center.

This proposition in it's fullest form is that:

- (1) There is no enforceable covenant obligation for single family home owners to join the Amenity Center;
- (2) There is no enforceable covenant obligation for single family home owners to pay assessments for the support of the Amenity Center;
- (3) There is no enforceable covenant right for the Defendant IHOA to demand and collect such assessments from single family home owners;
- (4) An agreement to join and / or pay for the Amenity Center is a personal service contract and not a proper covenant under the Restatement of Servitudes.

In Plaintiff's Complaint it was argued that the Pebble Creek builder had a binding obligation to provide certain amenities for the exclusive use of Pebble Creek home owners

and that Amenities as delivered did not satisfy that obligation. The Complaint also argued that Pebble Creek home owners have an equitable interest in The Amenity Center, which would supercede the provision in the Covenants that home owners have no equitable rights in the Common Area. In discovery, as was mentioned at trial, evidentiary problems arose because of the destruction of evidence by the builders after they had been subpoenaed. Another confusing issue in the area of advocacy is that the documents related to the "Builders Agreement" which led to DR Horton building the Amenity Center were likewise destroyed after being subpoenaed. Not among the records of the IHOA prior to trial when said records were examined by Plaintiff in the office of KA Diehl, prior to suit, was the deed for the Amenity Center land which Plaintiff later independently found at the Horry County Recorder of Deeds and provided defendants (in discovery) early in 2009. Because the IHOA can be asserted to be a "third party purchaser" of the Amenity Center lot and because the documents to support an equitable claim by Pebble Creek home owners were kept from Plaintiff, those areas are not being put to the Court for decision.

Because of evidentiary issues, Plaintiff is not challenging the equitable title of the IHOA to the Amenity Center complex, to include the two parking lots. The IHOA is free no matter what to continue to operate that Complex, to (non-compulsively) solicit membership and collect use or (user's choice) membership fees, and to enter into contracts binding the IHOA for the maintenance of that property.

The simple question which is before the court relates to the inclusion of Amenity Center "dues" in the involuntary assessments levied on single family home owners, and the presumption (of the IHOA) that such home owners MUST join the Amenity Center facility.

For Pebble Creek home owners, this question is further simplified if the Covenants do not apply to Pebble Creek by virtue of having been declared ten days after Pebble Creek was sold to Sunbelt by Plantation AD, the declarant of the covenants. Plaintiff asserts that this is true.

The Requirement to Join the Amenity Center Should Be Set Aside Because it is a Personal Services Contract and does not sufficiently Touch and Concern the Land

It has blithely been assumed by developers in Horry County that they can force homeowners to enroll in Amenity Centers run by their HOA's. In Georgetown County, and to our north in North Carolina, the practice has generally been that the offering was a country – club type scenario and that enrollment was voluntary; enrollment offered a lesser price to participate than offered to non-resident members of the clubs.

There is no case law to support the notion that homeowners can be forced to join amenity centers in their developments but there is case law to the contrary, albeit not in South Carolina where this has never been challenged before. South Carolina has adopted the doctrine that where a case presents a "novel" situation, South Carolina trial courts should look to the decisions of appellate courts in other states for guidance.

South Carolina courts have freely drawn upon upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp., 483 SE 2d 757, 764 (SC Ct App 1997)

The case most directly on point is MidSouth Golf v. Fairfield Harbourside Condominium Assn., 187 N.C. App 22, 31, 652 S.E.2d 378, 384 (2007),

In MidSouth,

"the declaration of restrictive covenants provided that the homeowners be assessed a license fee for maintenance of recreational amenities owned by the declarant, regardless of whether or not they used the amenities." MidSouth, 33,. "The homeowners had no equitable rights in the amenities." *Id.* at 35.

The court in MidSouth relied heavily upon the precedent set by the same court in Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978). In MidSouth the Court voided the homeowner obligation, finding in MidSouth that it did not run with the land.

In Raintree, a developer created a covenant requiring all lot owners to be members of a country club and pay dues. The court found that the covenant did not run with the land.

"This covenant creates an affirmative duty, a charge or obligation to pay money, i.e., country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The [lot owners] are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land. Nesbit v. Nesbit, 1 N.C. 490,495, 1 Cam. & Nor. 318, Cam. & Nor. 318 (1801) Courts have generally held that covenants to pay money do not touch and concern the land. Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (N.Y. 1938)). . . We find that the performance by the defendants of this covenant is not connected with the use of their land and does not touch or concern their land to a substantial degree.

-- Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978) at 908-09.

In MidSouth the Court concluded that "the *recreational amenities are not appurtenant to [the land] and therefore the covenant to pay amenity fees does not touch and concern [the land].*" MidSouth at 36, 652 S.E.2d at 388.

This should be the law of the case for both the Amenity Center and Highway 17 dues.

o -Damages- o

IF the Court finds for any reason that Plaintiff was not contractually obliged to join the Amenity Center but money was involuntarily collected from him, the questions of damages arises: how much does the IHOA owe Plaintiff.

Plaintiff has computed this for the period 2007 through 2012, ignoring the prior sums.

At trial Plaintiff cited to the specific documents (ledgers, announcements, budgets, etc) of the IHOA itself as the source of the amounts. Those sources were stated for the record, one by one, at trial. This enumeration was not challenged by Defense Counsel.

Through August of 2012, from January of 2007, the amounts are computed as follows:

	Total Assessment	Amentity Center	Per Year
2006	\$70	\$18	\$216
2007	\$70	\$18	\$216
2008	\$70	\$18	\$216
2009	\$88	\$18	\$216
2010	\$88	\$18	\$216
2011	\$88	\$18	\$216
2012	\$91	\$18	\$144
	\$6,507		\$1,440

Note: \$ 5,940 is the total assessment paid by Plaintiff from 2007 through

The Amenity Center assessments are taken from the following IHOA documents:

2006 From the November 2006 Year End document, \$ 18 per month for 2006. PI # 317.

2007 From the November 2006 Year End document, \$ 18 per month for 2007. PI # 317.

2008 From the December 2, 2007 IHOA letter, no change in assessments for 2008 PI # 342.

2009 There was no change in the amount for the amenity center.

2010 From the November 6, 2009 Budget PI # 364 and the November 20, 2009 Newsletter, PI # 366.

2011 From the November 16, 2010 Budget Letter, Pl # 387 the amenity center charge is unchanged, although overall assessments rose.

2012 From the October 28, 2011 Budget for 2012, Pl # 388, overall assessments rise but the amenity center charge remains at \$ 18.00. Assessments and other charges are carried for nine months through September, 2012.

At trial Plaintiff asked the Court to take judicial notice that Plaintiff has previously moved the court to deposit assessments with the Clerk of Court but the Court at a hearing ruled that because the expense to the court was significantly more then the amounts in question, Plaintiff should – and did – continue paying the assessments under protest.

Defense Counsel did not controvert that every Plaintiff assessment check since early 2009 has been marked “paid under protest” as were any checks for payment of putative fines. Pl # 373..

Since 2006 per the schedule above, Plaintiff has paid \$ 1,440 in Amenity Center charges and \$ 6,780 in overall assessments.

RELIEF

The Court is asked to declare and Order that on the basis of findings of fact and conclusions of law --

- (1)** The Amenity Center located in the International Club PUD at the general vicinity of the intersection of Pickering and International Club drives is owned by the IHOA.
- (2)** No home owner in the International Club PUD is subject to any obligation under the covenants to join the Amenity Center owned by the IHOA, nor any obligation under the covenants to pay money for the support or maintenance of any Amenities. Such a requirement is a personal services contract which must be freely entered in by a homeowner and is not a proper covenant which touches and runs with the land. As a finding of Fact and Conclusion of Law the Court finds that there is no enforceable personal services contract for such a duty or obligation exists.
- (3)** The IHOA is free to operate the aforementioned Amenity Center under a “voluntary membership” basis, or under a “fee for use” basis.
- (4)** This decision does not set aside any restrictions on eligibility for use of the Amenity Center contained in the Covenants for the International Club PUD.
- (5)** The Defendant IHOA has no rights under the Covenants to force any homeowner to pay assessments or dues for membership in, support or maintenance of the Amenity Center, or to involuntarily become a member of the Amenity Center. The Defendant IHOA is enjoined from any act which is contrary to this decision.

(6) The Plaintiff is awarded direct damages in the amount of One Thousand Four Hundred and Fifty Eight Dollars (\$ 1,458.00) which is levied against the IHOA by virtue of involuntary membership in the Amenity Center which will be considered part of an award of Six Thousand Five Hundred and Seven Dollars (\$ 6,507.00) total award for assessments wrongfully collected by the IHOA from Plaintiff or his predecessor for the years 2006 through September of 2012.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 11 -

INJUNCTIVE RELIEF TO ASSURE THAT HOME OWNERS HAVE CONTINUED AND UNCHALLENGED ACCESS TO THE AMENITY CENTER PARKING

Plaintiff at trial and in his Complaint, asserted that Defendant Rosemary Toth, in her capacity as President of the IHOA and Board Member, had ordered the removal of signage for Parking Lots associated with the Amenity Center,¹⁰ had asserted that these two lots both belonged to the Golf Course, and asserted that the use of those lots by home owners was at the discretion and fore bearance of the Golf Course. The Complaint asserted that Toth was alienating IHOA property and that was contrary to the law and the covenants.

Plaintiff at trial and in his Complaint asserted that Toth had made these lots available in particular for the Joe Bernat Golf Acadmeny, whose playing area was across the street from the parking lot which is off Pickering Drive (the other one opening onto the Golf Course entrance road, a private road over which the IHOA holds an easement). The Bernat Academy had no parking lot and as Plaintiff asserted, also lacked business and sales tax permits in South Carolina and Horry County. A photo of the Bernat sign on Pickering Drive across from the parking lot was introduced as Pl # 86.

A photo of the Pool Parking Lot sign that existed on March 22, 2009 that Toth ordered removed is at Pl #68. It was accidentally introduced a second time at Pl # 134. Plaintiff stipulated at trial that the current IHOA Board has in 2012 erected a new set of signs which meets the Horry County towing ordinance – as Plaintiff had demanded be done in his Complaint and in other documents.

¹⁰ The signs had been erected by a former board of directors. This is perpetuated in the Minutes of that decision.

At trial both Plaintiff and Defense Counsel agreed that the two parking lots are the equitable and unalienable property of the IHOA. A deed to the Amenity Center land and the (first) parking lot on Pickering Drive was entered into evidence, Pl # 554, Deed Book 2511 at 967, August 22, 2002. A deed to the second parking lot opening off of the Golf Course private entrance road was entered into evidence, PL #560, Deed Book 2771 at 1490, August 4, 2004.

An extract of the March 24, 2009 Minutes of the Board (in evidence at Pl # 355 was read into the record at trial. At #6 was the

"Issue Statement: Golf course employees are occasionally parking in the pool parking lot and homeowners are occasionally parking in golf course parking lots"

which Plaintiff observed was the Pickering Drive lot. The analysis and action the board took – Plaintiff suggests it was Defendant Toth's statement and decision -- is also in the minutes and there lies the problem. The minutes relate:

"Amenity Center parking actually resides on golf course property. .. The Board will direct K.A. Diehl to remove all "no parking" signs within the pool parking lot. The Board encourages home owners to use discretion (in time and numbers) when parking in Golf Course lots."

Plaintiff also submitted as evidence Horry County GIS photos of the overall complex and the individual lots, together with Plats. Because of the consensus between the two sides, those need not be explored. The photos as Pl # 121, 122, and 123 are informative, because the Bernat academy area to the left of the complex, a field, can be seen to have no parking.

Clearly the Defendant IHOA mitigated the issue of doubts of ownership over the lots and as to the control which the Golf Course could exercise over the lots. There remains, however, the real possibility that a future IHOA officer could repeat the scenario.

Plaintiff thus requests that the Court Order the following relief as a finding of fact and conclusion of law::

- (1) That the two parking lots adjacent to the Amenity Center facility be and are the equitable property of the IHOA;
- (2) That the IHOA is enjoined from removing the existing "no parking / subject to towing" signs completely but is free to alter the locations and text so long as they provide notice to the public that the two lots are private property for use by Amenity Center patrons and that use by others is subject to towing with the text meeting the notice requirements of Horry County towing ordinances.

(3) That the IHOA is enjoined from any act which will restrict the use of the Amenity Center parking by any home owner paying for the use or support of the Amenity Center who is also permitted to use said facility under the covenants.

(4) That the IHOA institute and enforce policies and procedures to insure that neither the golf course nor any so called academy acting with it's permission or accord nor the employees nor customers thereof make use of the parking lots.

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Defendants	)	

- DIVISION 12 -

**INJUNCTIVE RELIEF PROHIBITING
KA DIEHL FROM ENGAGING IN
UNLAWFUL
BUSINESS PRACTICES AND ACTS
IN RESTRAINT OF TRADE**

Plaintiff at trial, and explicitly in his Complaint, alleged that Defendant KA Diehl was engaging in unlawful business practices in restraint of trade; that the Defendant IHOA Board was not acting in good faith in permitting this; that this breached the fiduciary duties both Diehl and the Board had towards the IHOA; that the IHOA had been or would be harmed by this; and that the privacy rights of Plaintiff and the homeowners had been or could be breached by these practices.

The nexus of this revolves around

- (1) The KA Diehl Contractor Program, including
 - (a) Charges payable to Diehl imposed by Diehl on prospective Contractors before they will be allowed to compete for contracts for goods or services offered by IHOA;
 - (b) Requirement for prospective contractors to join Community Association Institures, a homeowenr management trade association;
 - (c) Provisions enabling prospective contractors to know who they will be bidding against;
 - (d) Provisions providing businesses that enroll in this program to have access to the names, addresses and other information relating to homeowners without the informed consent of said homeowenrs;
 - (e) Using communications avenues (such as web sites, newsletters, and emails) paid for by the IHOA to channel advertising from such business participants towards

homeowners, without giving such homeowners an "opt out" method;

- (2) IHOA / KA Diehl contract provisions and Diehl practices regarding discounts and rebates from vendors;
- (3) IHOA / KA Diehl contract provisions relating to non-competition by homeowners who are or were members of the IHOA Board or Committees;
- (4) KA Diehl representations that they were "property managers"
- (5) KA Diehl and the IHOA violating the SC Non Profit Corporation Act by outright refusal to permit inspection and copying of records or refusing to provide the voter list.

At trial Plaintiff besides entering all his exhibits into evidence, he specifically cited to the following documents:

1. Diehl "storefront" signs, Pl #101 and #102 which stated that Diehl is a "Property Manager";
2. Plaintiff July 24, 2008 Request for Voter List; #333;
3. IHOA / Diehl 2008 Contract; # 343;
4. Diehl Contractor Program documents; #348;
5. Plaintiff April 28, 2009 Request to Diehl for voter list; #358;
6. Plaintiff September 3, 2009 Request to Diehl for Voter List; #361;
7. IHOA / Diehl 2009 Contract; # 367;
8. IHOA / Diehl 2010 Contract; # 383;
9. Diehl Vendor Agreement; #397;
10. Diehl Vendor Program "Summary" page; # 398;
11. Diehl's Vendor Certification web page; #399;
12. Community Association Institutes (CAI) "Get A New Member Incentive Program" providing for kickbacks or rewards for signing up new members; #702;

Plaintiff also cited to the following statutes, laws or regulations, whose contents were offered either as evidence or in the alternative, the Court was asked to take judicial notice of said regulatory provisions:

1. SC 16-13-230, Breach of Trust with fraudulent intent # 206;
2. SC 16-13-240, Obtaining signature or property by false pretenses; # 207;
3. SC 33-31-830 General Standards of Conduct; # 235;
4. SC 33-31-842 Standards of Conduct for Officers; # 239;
5. SC 33-31-720 Member List for Voting; # 226;
6. SC 33-31-1602 Inspection of HOA Records; # 245.
7. SC 39-03-10 Agreements Affecting Competition; # 263;
8. SC 39-03-30 Injured Person May Recover Damages; # 264;
9. SC 39-3-140 Agreements to Limit Competition; # 265;
10. SC 40-57-20 License Requirement for Property Management; # 246;
11. SC 40-57-30 Definitions; # 247;
12. SC 40-57-220 Penalties for action without license; # 248;
13. SC 40-57-230 Civil actions; # 249;
14. 18 USC 1341 Frauds and Swindles; # 266;
15. IRS Announcement 2002-18 (34) Cash Rebates; # 267.

DETAILS

1. Under IHOA contracts with KA Diehl, Board members are not permitted to sell goods or services to the HOA until at least three years after leaving office – and this includes competing with Diehl for the HOA management contract!

From the 2009 Contract Page 1 Pl # 367

1.3 The Association acknowledges that during their relationship with the MANAGER each Board Member will acquire knowledge of organizational methods and other information concerning the unique and distinctive elements comprising the MANAGER's business and agrees to maintain this knowledge in a confidential manner. The Board agrees to refrain from hiring, directly or indirectly, any board member(s) who is or was on the board of the ASSOCIATION during the term of this agreement and for two years following the termination of this agreement without first obtaining written consent of MANAGER.

At trial Plaintiff noted the following objectionable aspects, none of which were controverted by Defense Counsel:

- * Board Members in their individual capacities are not parties to any Diehl Contract. Plaintiff's witness Butryn testified he never signed such an agreement.
- * Board Members never signed any "non-compete" agreement. Plaintiff's witness Butryn stated that he was never even informed about this provision.
- * "Proprietary Information" about the HOA is the property of the HOA – not Diehl. Plaintiff's witness Butryn testified extensively that KA Diehl operations have nothing unique about them, and that the flow of knowledge and expertise was from the Buildings and Grounds Committee to KA Diehl, not the other way around. In particular Diehl adopted the contract check lists and specifications that Butryn and another witness, former Buildings and Grounds Committee member Pete Pizzi developed and that Diehl later incorporated into contracts they provided to the IHOA for said services.
- * There is nothing "proprietary" or "special" about how Diehl is organized and operates.
Defense witness Abel testified that she and other Diehl employees hold no licenses at all from any state recognized licensing authorities and that the training they speak of comes almost exclusively from the CAI trade group and not from any educational institution licensed or certified by any state or other licensing institution.
Butryn testified that KA Diehl was unable to provide any suggestions at all regarding PUD maintenance or repair issues.
- * This also prevents a Board member from being employed by a contractor. Since the IHOA / Diehl contracts have provisions for automatic renewal, the non-compete term could

be for many years.

Plaintiff at trial asserted that this is illegal. This conclusion is, of course, for the Court ultimately to make but Defense Counsel asserted absolutely nothing to refute it, not even raising an objection to Plaintiff's assertions.

One directly applicable statute is:

SC Code 39-3-140 Pl # 265. Agreement to limit competition by not dealing with or boycotting those not in agreement shall be conspiracy to defraud.

"If any two or more persons ... shall enter into any ... agreement, ... or understanding to control or limit the trade ... or to limit competition in such trade by refusing to buy from ... any other person ... for the reason that such other person is not a member of or a party to such ... agreement, ... or understanding ... such persons shall be guilty of a conspiracy to defraud and shall be subject to the penalties prescribed in this article.

Also --

SC Code 39-3-10 Pl # 263. Arrangements, contracts, agreements, trusts and combinations adversely affecting competition or price declared against public policy.

"All arrangements, contracts, agreements, trusts or combinations
(a) between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition ... are declared to be against public policy, unlawful and void. "

Issue

Diehl keeps or kept credit card cash rebates for purchases of goods or services made on behalf of the IHOA.

The Diehl 2009 Contract Page 2 Pl # 367 provided:

2.3 Manager discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts by dealing on a volume basis with suppliers, subcontractors, and laborers.
... Manager agrees not to charge any undisclosed fees.

This only requires that the end price to the IHOA be no more than the IHOA would have paid had no such arrangement existed between KA Diehl and vendors. This does not commit Diehl to reduce the end price to the IHOA or to remit such discounts to the IHOA.

Although discovery was sought on Defendant Diehl, throughout the course of this litigation Defense Counsel never produced a single "DIEHL" document in discovery, only

IHOA records (and only on one day, October 3, 2011 for inspection, Plaintiff being prohibited from bringing others to help scan the eight (8) coffin size tubs of documents).

From Page 5 of that contract.

5.3. In addition to the fees outlined in this section for services rendered, Manager may also receive compensation for their role in providing, investment, and financial products, insurance products, or services and other general services to Association pursuant to a direct or indirect affiliation with an organization. These fees are NOT in addition to those presented by the organization, in no way affect the pricing of the product or services, and are included in the overall contracted service by Association. The partnerships created by Manager create a direct benefit to the Association and in no way distort or interfere with the competitive bidding process. All final decisions on products presented rest with the Board of Association.

What Diehl is saying is that it will receive kickbacks or other value consideration from vendors of goods or services that Diehl provides to the IHOA, and that this will not affect the end price of the goods or services. However, it also says that these "kickbacks" are ultimately paid for from the money that the IHOA pays the vendor.

It is also a federal crime.

* Plaintiff at trial testified that Plaintiff inspected IHOA ledgers (many years worth in evidence) explicitly search for Diehl pass throughs of post-purchase rebates from credit card companies or suppliers, Plaintiff never found a single one. The Court is free to look for same.

A credit card refund (quarterly, annually) or supplier rebate or even a manufacturer coupon rebate will show up after the purchase, billing to IHOA, and payment by the IHOA to Diehl. As such it would be a later and separate accounting entry showing a price adjustment and a parallel cash receipt. Plaintiff did not find a single one. In accounting parlance these are reductions in the cost of goods or services to the IHOA, and unearned taxable income to KA Diehl. These and the overpayment for goods and services by businesses with follow on refunds of the excess are notorious tax evasion techniques for small businesses.

Since Plaintiff was unable to get to Diehl's financial records, despite the fact that Diehl is a co-defendant and this was explicitly plead in the complaint, Plaintiff is unable to plead to the Court the extent of the damage to the IHOA.

It was unrefuted and conceded (by Julie Case at her deposition) that Diehl pays some HOA expenses via Diehl credit card and receives cash or other rebates from bank card issuer.

* Per IRS rules, rebates kept by an intermediary are unearned income to the intermediary. See IRS Announcement 2002-18 PI # 267.

*** It is criminally fraudulent for an agent to receive compensation for any business he conducts on behalf of "his master:"**

At trial Plaintiff laid out the details of US v Tesvich, USDC-Georgia (Northern; Criminal) 1:08-CR-201; Home Depot buying agent. 18 USC 1349.

In that criminal action Tesvich was a purchasing agent for Home Depot. His activities did not increase the cost of any goods or services to Home Depot. However, Tesvich received thousands of dollars from vendor, and a new SUV. The US District Court held that this conduct is illegal under federal law, 18 USC 1349. All consideration received by an agent is the property of the master and the agent has an affirmative duty to disclose and either refuse to receive said consideration or to pass it to the master.

The 2008 Contract (Page 5 Pl # 343) and earlier such contracts agreed to remit such rebates to HOA; under Defendant Rosemary Toth, the contracts were revised to remove this provision from later contracts. Again, Plaintiff's Inspection of IHOA Ledgers shows no such "rebates" paid to any IHOA account.

The IHOA / Diehl contracts up to and including 2008 contained the following text:

2. Manger discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts by dealing on a volume basis with suppliers, subcontractors and laborers. Manager agrees not to collect or charge any undisclosed fees, rebates or discounts; and in the event that any such items are paid to Manager, such fees shall be immediately remitted to Association.

This is what was supposed to happen. The 2009 Board (and later) under Toth was not acting in good faith and with obedience to it's duties as a fiduciary to permit the change which removed this prohibition on kickbacks. It can not be said that Toth and her board were unaware of this because Plaintiff made this known prior to filing suit and in the complaint itself.

The 2008 Contract and prior contracts Page 3 Pl # 343 required purchases to be made in "name of HOA" not in Diehl's name. This would have channeled rebates and discounts to the IHOA and would have resulted in invoices naming the IHOA – which would have prevented Diehl from obtaining manufacturer rebates in Diehl's name. This was dropped in the 2009 and later contracts.

Here's the deleted provision from the 2008 contract:

"9. Manger shall purchase out of the funds of Association equipment, tools, goods and supplies, materials and services as shall be reasonably necessary to perform its duties, including the maintenance, upkeep, repair, replacement, refurbishing, preservation and administration of Development. Whenever possible, purchases shall be made in the name of Association. When making purchases, Manager shall make a diligent effort to obtain the best price available."

ISSUE

Diehl requires potential vendors to pay Diehl to be an "Eligible" Vendor.

The 2009 Contract Page 11-12 Pl # 367 requires "open bidding"; it does not restrict bidding to a "closed" list; and does not authorize Diehl to "surcharge" potential bidders: See Paragraph 2, "Outside Vendors". Paragraphs a b and c.

Subparagraph a of the 2009 contract requires a competitive bidding process.

Subparagraph b of the 2009 contract provides for the distribution of requests for proposals to "potential pre-approved" bidders.

Subparagraph c of the 2009 contract provides for Diehl to evaluate bids, check references and recommend action by the Board.

Plaintiff's witness Butryn, at his deposition, testified extensively about his background in contract management for various government entities, mainly school districts, whose requirements for goods and services included all the requirements of the IHOA. He was read the information, from the Diehl vendor package, that Diehl collects about potential vendor, which does not include any references or information about prior work. The information Diehl collected, it was noted, included insurance information and tax number. Butryn declared any recommendations based on such limited information is useless.

The prior contracts had a prohibition on what became the Diehl Vendor Program. Under Defendant Toth, Diehl was permitted to use the Diehl Vendor program in conjunction with IHOA requirements for goods and services.

From the 2008 Contract Pl # 343, Page 5, which prohibited collecting or charging any fees, rebates or discounts:

"2. Manager discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts ... Manager agrees not to collect or charge any undisclosed fees ... and in the event that any such items are paid to manager, such fees shall be immediately remitted to Association"

Which Plaintiff believes requires remitting the \$200 application fee and the annual

“renewal” fee to the IHOA.

The 2009 contract hedged but still did not provide allow any such “undisclosed fees”.

“2.3 ... Manager agrees not to charge any undisclosed fees”.

At trial Plaintiff asserted, and it was not controverted by Defendants Diehl nor Defendant IHOA, that no such disclosure was ever made (about the up front and annual fees).

This practices also violates South Carolina and federal Statutes relating to fraud and Restraint of Trade. See statutes invoked.

The Diehl contractor program requires contractors to pay Diehl before they are allowed to bid on an IHOA contract for goods or services: From the Diehl Contractor Program document labeled “To Contractor, Supplier and Vendors; From Property Management Services Coordinator”¹¹

“Contractors, Suppliers & Vendors who have filled out the attached forms ... and paid the \$ 200 processing fee will be approved and are eligible for payments for goods or services”

Explicitly not within the criteria is a requirement to provide any references or to meet any standard of experience or training. The forms do not even require stating an applicable license. From the Diehl Vendor Package, page 1 Pl # 397

And they are also required to pay an annual fee of \$ 125 – from the Diehl Vendor Certification Program web page, “Step 5: Annual Renewal of \$ 125.00. Don’t be left out. Register Today!” Pl # 399

Issue

Diehl also reveals the names of competing vendors.

Per the Vendor Certification Program web page: (page 1) Pl # 399

“See the other Approved Vendors in your category”.

There is no functional reason vendors should know who else is bidding or doing business with the IHOA.

¹¹ The phrase “Property Management” or “Property Manager” is a restricted phrase and in South Carolina it is illegal for anyone except a licensed realtor or a licensed realtor firm to use such a phrase in any context. See SC 40-57-20, -30, and -220. At the time Diehl’s “Store Front” sign read “Property Management”. Pl #101 and 102.

Issue - Restraint of Trade.

Diehl provides potential vendors who "sign up" the names and contact information of homeowners for the vendors to use for advertising or to solicit services.

Neither KA Diehl nor the IHOA has provided any homeowner a statement of privacy policies, nor asked for permission to release this information to vendors, nor provided an "opt out" method. This disclosure includes the names and information about homeowners, such as Plaintiff, who choose not to sign up to the Diehl / IHOA web site for the explicit reason of not agreeing to such invasions of privacy.

Further, the relationship of Plaintiff and homeowners is with the IHOA – they have no "business relationship" with KA Diehl such as to permit Diehl to use homeowner information for commercial purposes. It violates FTC rules in this regard.

From the KA Diehl Vendor Agreement: PI #397

"The names of any and all owners are available to you upon request at the office of KA Diehl"

- * This violates homeowners common law expectation of privacy.**
- * Homeowners have not signed any Diehl or HOA privacy agreement.**
- * The Diehl / HOA contract does not allow such disclosure.**
- * This violates FTC Regulations (credit) and federal law imposing privacy controls..
Diehl engages in "on-line" assessment collection via credit card or bank
electronic transactions or checks in the mail.**
- * There is no functional reason for such disclosure.**
- * Neither the HOA nor Diehl will give homeowners such a list.**

From the list of exhibits, it is a matter of fact that Plaintiff Jarmuth demanded the voter / homeowner list at least 3 times and was never given same. But vendors are given an equivalent list.

There is no discretion here:

SC Code 33-31-720. Members' list for voting. Pl # 227

(a) a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting ... The list must show the address ... of ... each member ... This list must be prepared on the same basis and be part of the list of members.

(b) The list of members must be available for inspection by any member for the purpose of communication with other member ... A member ... is entitled on written demand to inspect and ... to copy the list ...

The IHOA / KA Diehl refusal has been used to suppress the effectiveness of dissenting protests. It violates the implied covenant of good faith and fair dealing – which was plead in Plaintiff's Complaint. All of the above was stated in testimony at trial

Issue

Diehl requires the IHOA to Join the "Community Association Institute" (CAI) a trade group which lobbies on behalf of management companies.

(2009 Contract Pl # 367 Page 6 para 8.4)

8.4 Manager, through it's involvement with continuing education and commitment to the Community Association Industry is requiring that during the term of this Agreement, Association or Association Board Members shall maintain a membership in the local chapter of CAI (Community Association Institute). Membership will be paid by the Association."

The Court has the minutes of the Board of Directors. There isn't a single reference to any benefit or participation in CAI activities. There is no good faith reason for Toth, when accepting, not dictating, a management contract (which was never competed) would let the management company dictate such a provision.

The management contract provides for the functions that the management company will perform, their authority, and what their compensation is. It is implied that the management company will have the expertise to substitute for board lack of expertise. Given that the IHOA is buying that expertise, a Board / HOA membership in CAI contributes nothing to the Diehl / HOA relationship. The fact that Diehl gets away with this, apparently with the 61 communities it manages, doesn't make it right. Plaintiff asserts that this "requirement" "affects competition" and "limits competition" from those associations that compete with CAI. The IHOA is told that the IHOA must obtain supplemental expertise from Diehl's choice of sources. Plaintiff points out that the Horry – Georgetown Technical Institute and Coastal Carolina University provide courses and other training in the area of community management, which courses qualify towards realtor licensing. Such a decision is properly a discretionary decision by the HOA, not by it's contractor.

It is also a fraudulent requirement because it fails to disclose that HOA membership in CAI gives Diehl "valuable consideration". See CAI Referral Program. PI # 702

It was uncontroverted that the KA Diehl Contractor Program also requires prospective contractors to join CAI. At trial, Diehl's employee Beckie Abel was unable to provide a single credible benefit for such membership to real life vendors of goods or services to home owner associations.

The document states:

- Make ONE phone call
- Send ONE e-mail
- Have ONE conversation

That's all it takes to recruit a member and participate in CAI's Every ONE Counts campaign—and win one or more of these rewards:

- A vacation package including air fare, hotel, rental car and spending money
- A 32-inch flat screen TV
- A gift card for \$500 in gas
- A Sirius or XM satellite radio installation and subscription for one year
- Global Positioning System (GPS)

This conduct is within the scope of fraudulent conduct enumerated in USA v Tesvich (a Home Depot buyer in Georgia).

RELIEF: Declare the mandatory HOA / Board member membership void
Permit "voluntary" direct HOA membership, from year to year, if a Board so chooses.

Plaintiff Requests the Following Relief

1. That the IHOA be enjoined from signing any contract which even purports to allow a management company to keep any rebates, discounts, or other consideration related to the purchase of goods or services to the IHOA.
2. That KA Diehl be enjoined from such practices with any home owner association it manages.
3. That KA Diehl be Ordered to refund to any vendor the "fees" it collected from such vendors.
4. That KA Diehl and the IHOA be required to publish or announce requirements for goods and services, (as to KA Diehl, for any association it provides services to) and to accept bids from any responding prospective vendor; that it not engage in any "prequalification" scheme or program.

5. That KA Diehl and the IHOA be required to liberally distribute homeowner / voter lists to home owners on demand.
6. That KA Diehl and the IHOA be required to issue annual statements of privacy rights to home owners.
7. That KA Diehl be required to pay to the IHOA any discounts, rebates, or other consideration it has received for the period reaching back to 2006 related to the provision of goods or services to the IHOA.
8. That KA Diehl be enjoined from releasing any information about home owners to any other entity.
9. That KA Diehl be enjoined from using any information about home owners to solicit business from home owners.
10. That any provision in any contract between KA Diehl and any home owner association restricting in any way the provision of goods or services to a home owner association by said association's board or committee members be and is null and void.
11. That KA Diehl be enjoined from requiring any prospective vendor or any home owner association to join CAI, and that Diehl be required to refund to the IHOA any membership or other fees which the IHOA has paid to CAI.

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- DIVISION 13 -

ILLEGAL DISTRIBUTION OF PROCEEDS OF ILLEGALLY APPROVED ILLEGAL SALE OF ASSETS

Plaintiff's Complaint alleged the IHOA Board in general and Defendant Rosemary Toth in particular acted in violation of their authority and made decisions in their board capacities that were explicitly in violation of The Act and of the Covenants.

At trial a focus was on a particular act, the unanimous decision in 2010 of the Board of the IHOA to sell to Central Electric an easement to run overhead power over IHOA owned property. The agreement also allowed Central Electric to destroy all landscaping in along most of the length of the front entrance, much of which had recently been recently planted at IHOA expense and all of which had been nurtured for many years at IHOA expense. As Toth, Freiboth, and Sullivan testified at depositions and at trial much of the justification of landscaping was that the impact of this landscaping, all of it including particularly the front entrance, was crucial to maintaining property values.¹²

The nature of the front entrance and the destruction which Central Electric did was undisputed at trial.

At Toth's deposition and in trial testimony by Sullivan and through a Notice of Special Meeting and Minutes of the Special Meeting introduced into evidence whose admissibility was not disputed the fact was likewise undisputed that the Board unanimously agreed not to put the decision to the homeowners for a vote of approval.

¹² This was the justification given for maintaining the front entrance at IHOA expense when owned by Horton.

In like testimony and through the testimony of Astorino, Butryn, and Pete Pizzi Deposition testimony was taken that at the special meeting, several homeowners demanded that a vote of approval or disapproval be taken. The deposition testimony is that at least one homeowner begged for the vote. Sullivan testified that the Board refused to even allow this line of discussion, saying that the announcement for the special meeting did not include a vote so the Board would refuse to even hear these homeowner vote demands.

At trial and through the testimony of Butryn and Sullivan it was undisputed that an official Virginia (state) study had been given to the board and other homeowners by Butryn which stated that the quantification of damages far exceeded the amount that the Board accepted from Central Electric. Sullivan's testimony was that the Board did not even consider having an independent appraisal done by an expert knowledgeable about this topic – or by anyone. Sullivan testified that the Board just accepted the Central Electric offer.

At trial and in deposition testimony of Toth and Sullivan it was put into the record that homeowners demanded that Central Electric be compelled to place the power mains underground. The response in the record was that the Board agreed with Central Electric's contention that this would be too costly – to Central Electric – and sided with Central Electric on "bury the power lines" issue rather than with the homeowners whose interests the Board was supposed to protect.

The Court is asked to note from the numerous pictures put into evidence by Plaintiff and the GIS photos put into evidence by Defense Counsel that before the Central Electric installation at the front entrance, no overhead utilities are present throughout the PUD.

At trial it was conceded by Sullivan that homeowners have no equity interest in the area concerned – or in any Common Area – and that with the installation of the Central Electric power line and the total destruction of the landscaping no individual homeowner gave up anything nor had a provable individual loss.

The related documents, the April 6, 2010 Notice of the Special Meeting (Defense #70), three related "Friday Facts" March 12, 2010, March 19, 2010, and March 26, 2012, the Minutes of the April 19, 2010 Special Meeting Pl # 369 Def # 72 all confirmed that no vote was taken, that all related decisions were made by unanimous vote of the Board, including Toth (and Sullivan), and that the Board also decided to and did distribute much of the cash proceeds to homeowners in the amount of \$ 75 per homeowner. These documents and the testimony was that an additional \$ 10,000 was set aside for "contingencies". Plaintiff asserted that "Contingencies" in the context of the Central Electric destruction of landscaping and the explanation that Central Electric's offer was to provide for restoration was that "contingencies" has to be to restore unforeseen damage which Central Electric was not separately restoring (such as irrigation / sprinkler system damage which would be discovered later).

Plaintiff personally attended and observed all preceding meetings of the IHOA

Board of Directors and the Special Meeting at which the IHOA Board "announced" their decision. Plaintiff did not participate.

An Act of Directors or Officers which directly violates explicit prohibitions or restrictions of the Covenants, the Bylaws, the Articles, or The Act is an ultra – vires act.

An Act of Directors or Officers which is taken when the evidence available indicates that the decision is reckless or contrary to the Association and in particular when the members bring the folly of this to the attention of the Board is an act in violation of the Standards of Conduct.

Plaintiff points out the decision of the Collective Board to distribute proceeds to homeowners gave each director money in their private capacities that they would not have received except for that decision. There was no vote to exclude themselves nor to put into the record anything supportive of their decision except for reference to the offer from Central Electric.

The decision without a vote is prohibited by The Act.
The approval of above ground utilities is prohibited by The Covenants.
The distribution of cash proceeds is prohibited by The Act.

Per 32-31-1202(b) the sale required approval of the home owners. The statute requires approval:

- (1) By the Board AND
- (2) By the Home Owners at a Special Meeting approved by a vote of at least two – thirds of the homeowners attending and voting at the meeting

OR

- (1) By the Board AND
 - (2) By a vote of one half plus 1 of the total number of homeowners entitled to vote.
- whichever is less.

Rosemary Toth personally announced, at the meeting, that no vote would be taken.

However, in this instance a stricter vote standard is required.

SC 32-31-1202(b) has an exception for a stricter vote standard:

"Unless this chapter, the articles, or bylaws, require a greater vote"

From the IHOA Bylaws, Pl # 548, Section 11.1 "Condemnation":

"11.1 Whenever all or any part of the Common Areas or Recreational Amenities of the Subdivision shall be taken by condemnation or eminent domain, or is conveyed in lieu thereof by the Board acting on the agreement of at least seventy-five (75%) percent of the total vote of the Association"

The Bylaws provided strict and explicit restrictions on what might be done with the cash proceeds received from Central Electric:

Alternative #1: Restore the area and put the remaining funds into the reserves for like requirements:

11.1.1 If the taking or sale in lieu thereof involves a portion of the Common Areas on which improvements have been constructed, then unless within sixty (60) days after such taking ... at least seventy-five (75%) percent of the total membership of the Association, shall otherwise agree, the Association shall restore or replace such improvements so taken, to the extent practicable, on the remaining lands ... If such improvements are not to be repaired or restored, the award or proceeds shall be retained by and for the benefit of the Association.

Alternative #2:

Put all the funds into the reserves as a contingency for like requirements:

From Plaintiff's # 369, Minutes of Special Meeting April 19, 2010. Bottom of second page. "Breakdown of remaining funds \$ 80,000.00"

" \$ 50,250 Funds to be distributed to 670 homeowners at the rate of \$ 75.00 per unit owner.¹³

\$ 15,000 Funds for potential Master Association landscaping projects (TBD)

\$ 10,000 Funds to be deposited in money market account for contingent expenses¹⁴

\$ 4,750 Funds for tax liability (\$2,186 quoted by CPA – balance as cushion)"

The Court was asked to take judicial notice that this is exactly what was stated in the Meeting Announcement.

Plaintiff, Butryn, Pizzi, and Astorino testified that they did not request this

¹³ Plaintiff asserted that the explanation he heard was that these were new projects outside of the impact area.

¹⁴ Plaintiff asserted that the explanation he heard was that this was for contingencies in the impacted area discovered later or somehow not mitigated by Central Electric.

distribution.

At trial Plaintiff introduced into evidence Pl # 395 from the 2011 IHOA General Ledger that the IHOA Board had used the \$ 10,000 contingency fund to pay a judgment against it won by The Villas HOA sub-association which was unrelated to the Central Electric landscaping destruction and restoration.

At trial Plaintiff argued that the \$ 10,000 was a restricted account. It was undisputed by Sullivan that the \$ 10,000 was the same \$ 10,000 received from Central Electric. Sullivan testified that the Board could use the \$ 10,000 in any manner it deemed.

The Court approved settlement in The Villas v IHOA was entered into evidence to relate the \$ 10,000 to the judgment against the IHOA; the ledger statement itself says this was the purpose of the payment. This document was added at trial as an impeachment document related to the testimony of Sullivan. It's authenticity was not disputed.

Plaintiff has earlier in this Brief addressed the individual and joint liability of Directors and Officers for the illegal distribution of assets SC 33-31-833, and the nature of prohibited distributions SC 33-31-1301 and in particular the Sale of Assets not used in the normal course of business, SC 33-31-1202. Plaintiff had asked the Court to make general rulings which would later be applicable to specific instances.

This is the primary instance with exemplary and provable direct damages to the IHOA.

Plaintiff asks the Court to enter an Order which states that Plaintiff through the preponderance of the evidence enables the Court to make findings of fact and conclusions of law that:

- (1) The IHOA Board was prohibited by the Covenants from approving above ground utilities.
- (2) The landscaping at the front entrance were assets not used in the normal course of business by the IHOA.
- (3) The IHOA owned the front entrance at the time of the events in question.
- (4) The IHOA Board was prohibited by law and the Bylaws from making the transaction with Central Electric without the appropriate consensual vote of the homeowners.
- (5) The Board unanimously decided not to have a vote of home owners.
- (6) A demand for a vote was made by home owners.
- (7) The Board acted recklessly in failing to obtain an independent estimate of the value of the effects of the Central Electric / IHOA decision.
- (8) The Board unanimously decided to distribute \$ 50, 250 to homeowners out of the proceeds from Central Electric.
- (9) The home owners who received that distribution had no equitable or legal right to any portion of that distribution and the Board was aware of this.
- (10) The \$ 10,000 in contingency funds received from Central Electric was a

restricted fund to be used for landscaping purposes.

(11) The Board unanimously decided to distribute the \$ 10,000 in partial settlement of an unrelated money judgment against the IHOA.

(12) The use of the \$ 10,000 to pay the judgment to The Villas HOA was a prohibited use of the proceeds from Central Electric.

(13) The members of the board are individually and collectively responsible for the damages to the IHOA.

(14) The direct damage to the IHOA is \$ 60,250.

(15) As a judgment is entered against the board members at the time, in 2010, specifically including Rosemary Toth and Maureen Sullivan, to repay \$ 60,250 to the IHOA.

(16) As provided by SC 33-31-851, the insurance company for the HOA is enjoined from reimbursing or otherwise providing the funds to satisfy this judgment against the Board members themselves.

(17) Any excess money remaining from the proceeds received from Central Electric shall be treated as restricted funds to be used for the restoration of landscaping damage.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	

- DIVISION 14 -

GOLF COURSE ASSESSMENTS MUST BE AT THE RATE SET IN THE COVENANTS

-

“AGREEMENT SHOULD BE VOIDED BECAUSE OF CONFLICTS OF INTEREST AND LACK OF AUTHORITY

Plaintiff's Complaint and Plaintiff's trial testimony alleged that the basis for the rate of assessments for the Golf Course, whichever one that might be, was inflexibly set by the Covenants on a basis inflexibly binding it to the rate of assessments for single family homeowners. The Court was requested to interpret the Covenants and to declare that such is the obligation of the Golf Course.

The Court was also asked to declare that it was an ultra – vires act to alter that in any way without amending the covenants, and that such was never legally consummated.

Some of the details were addressed when the Court was asked to declare whether certain types of acts of the Board were Ultra Vires. To recount:

1. The IHOA Board never authorized the Golf Course Agreement as it was signed by Doug Brown.
2. The IHOA Board itself was illegally in office and had no power to act.
3. There was clearly self dealing and a conflict of interest.

4. The Golf Course never performed as required under the Agreement.

5. The stated reason for the agreement, to obtain a one-half acre parking lot for the Amenity Center, was fraudulent because the developer had the obligation (not the IHOA) to provide so much parking as was required to obtain a Certificate of Occupancy or other permits to use the facilities.

6. The Golf Course never deeded the 1/3 acre contemplated by the Board as the explicitly required additional parking area; it received 1/4 acre instead.

a 2003 Golf Course Agreement between the IHOA (as signed by Doug Brown, putative board president), DR Horton, the Developer, and the Golf Course, should be set aside and voided

The rate of assessment for the Golf Course is stated in Covenants Section 6.5.

The requirement to amend bylaws to alter the basis of assessment is stated in statute, SC 33-31-1021 and the requirement to put it to a vote is stated in SC 33-31-1003..

The entitlement to amend the bylaws by action of the developer excludes any amendment which alters or changes any owner's rights or obligations. Covenants Section 8.5(a) and such amendment is valid only upon the written consent of a majority of the existing homeowners (does not state voting weight).

The board's decision to exchange only the unpaid golf course assessments remaining in 2003 (and no more) for one – third acre was stated in the Minutes of the Board, November 20, 2003.

The documents related to the deed for the one-quarter acre filed with Horry County stated that the land was valued at \$ 5,000, thus it is not an act in good faith to trade this for what the Golf Course agreement itself on page 1 said was a \$ 51,000 debt through August 31, 2003, increasing at \$ 1,750 per month in the remainder of 2003.

The Bylaws at Part I (f) and Part IV Section 4 prohibit any compensation of any kind to directors.

Brown personally received a free golf course membership through at least 2007.

DR Horton received reduced price golf course memberships for his home buyer customers, free rounds of golf, free use of golf course clubhouse area for a sales office, and a very reduced rental rate for the clubhouse for sales events.

The golf course received the value of the IHOA maintaining, in perpetuity, areas of golf course private property.

The IHOA lost \$ 370,366 in actual assessments not paid which the covenants required to be paid, plus \$ 213,404 in non-compounded interest (per the covenants) for a total loss to date of \$ 583,770.

The numbers are from Plaintiff's computation worksheet Pl # 389 supported by IHOA General Ledgers at Pl #390 through #394 plus #705 through #707.

At trial Plaintiff provided uncontroverted testimony that the non-payment or under-payment by the golf course in every year since the inception of the PUD and the conflict of interest when the agreement was made was hidden from home owners by the Boards – all boards – through the present one until after Plaintiff filed his Rule 16 statement January 17, 2012 that he intended to prove this at trial before expected home owner observers.

Plaintiff asserts that because this was hidden from the home owners, statutes of limitations are not tolled.

Plaintiff asks the court to determine that Plaintiff through the preponderance of the evidence has placed sufficient facts and grounds in law before the court for the Court to Order as follows:

- 1. That the rate of assessment of the golf course be and always has been that specified in Section 6.5 of the Covenants, it being fifty times the rate of assessments charged to a single family home owner entitled to use the Amenities of the Association.**
- 2. That the agreement between the golf course, the IHOA, and DR Horton signed on or about November 3, 2003 ("The Agreement") be and is void and was never of force or effect.**

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et al	)	
Defendants	)	
	)	

- DIVISION 15 -

SPENDING ASSESSMENT MONEY TO MAINTAIN LAND NOT OWNED BY IHOA

INCLUDING PRIVATE PROPERTY AND PUBLIC STREETS

Plaintiff's Complaint and Plaintiff's trial testimony alleged that the IHOA was collecting assessments and using them for purposes not permitted by the Covenants.

Specifically, Plaintiff complained that the IHOA was and still is spending large amounts of money coerced from homeowners through assessments which were and are still used to

- (1) Maintain private streets and private rights of way not owned by the IHOA;
- (2) Maintain and improve golf course property;
- (3) Maintain some private home owner property adjacent to the streets;
- (4) Maintain the shoulders of streets owned by Horry County; and
- (5) Purchase water from the golf course which the Association owns for purposes of irrigating the aboves stated areas, and for the irrigation of a limited area owned by the IHOA around the Amenity Center.

In the Comlaint, in deposition testimony and at trial it was not controverted that the experts to the IHOA on this issue was the (then) Buildings and Grounds Committee and

that the members of that group, particularly Mike Butryn, who testified at trial, was professionally expert in this regard and known to be so by The Board.

It was likewise uncontroverted that in 2008 the Buildings and Grounds committee made a formal presentation to the IHOA Board, chaired by Defendant Toth, apprising the board that most of the landscaping budget was used to maintain areas not owned by the IHOA – and requested that these areas no longer be maintained at IHOA expense or that the owners be billed for such maintenance as provided for by the covenants if the owners were derelict in maintaining these areas.

It was likewise uncontroverted that the 2008 and there after of the Board was to continue to maintain the same areas at IHOA expense and not to seek reimbursement.

At trial Defense Counsel presented as an expert witness Christopher Sullivan. His only claim to expertise was that he had been in the irrigation business for many years. He stated he was familiar with the infrastructure used by the IHOA to irrigate the areas it is irrigating.

His testimony focused on an assertion which is not controverted that it is cheaper to buy water from the golf course than to install a separate IHOA owned well.

He stated that he knows it to be a fact that the Golf Course is drawing water from the various retention ponds around the PUD, which Plaintiff does not dispute.

He stated that he was unaware that the Association owns riparian rights in the retention ponds and had done no calculations in preparation for his testimony to address any alternative other than “buy golf course water Or drill your own well”. He had no actual data on the capacities of the two large ponds which are adjacent to the main areas maintained – the large lake along side The Villas and adjacent to International Club Drive (the “front entrance”) and the large lake to the right of Pickering Drive as one enters Pebble Creek from the Amenity Center.

Photos and Plats were cited to the Court to see that these are lakes, not small retention ponds. Sullivan stated that he could not even estimate the depth of the lakes so as to determine their capability to provide water but admitted that it more likely than not would be sufficient to irrigate the principal IHOA owned common area – the Amenity Center.

At trial Sullivan admitted that he does not read any technical or learned journal related to golf course or home owner assoication maintenance and was unfamiliar with a publication from Clemson University’s Extension Service titled “Irrigation Systems”. While this was not among Plaintiff’s Rule 16 exhibits distributed to the Defendant pre –

trial,¹⁵ it was introduced into evidence as impeachment evidence. The authenticity of this was not controverted.

From page 1 of the Clemson document it was noted that the kind of grass which the IHOA maintains requires one (1") to one and a quarter inch (1 – 1/4 ") of water per week, preferably all at once, once a week. Sullivan's testimony is that the IHOA was watering with this amount several times a week.

The August 22, 2002 deed from Plantation Golf AD to the IHOA for the Amenity Center, Pl # 554 Deed Book 2511 at 967, stated that the Amenity Center land totalled 1.56 acres. From the GIS photos of the area at Pl #123 it can be seen that the retention pond immediately adjacent to the Amenity Center is one – third the size of the entire uncovered Amenity Center area (uncovered meaning areas of grass) and that by the Clemson computation even a three foot deep pond, which this is at least per Sullivan's testimony, would carry the Amenity Center area for between thirty six and twenty four weeks. The small lake on the other side of the golf course drive is at least as deep and as large as the entire Amenity Center area, without even discounting the "covered" area of the lot.

Looking at Defense Map 2 a GIS photo of the area and comparing it to Plaintiff's #460 Plat Book 181 at 89, one can see that proceeding just "up" Pickering Drive from the Amenity Center area there is a very large LAKE to the right of Pickering which even goes further and to the rear of the first four houses on Pickering drive in Pebble Creek.

Sullivan admitted that by his observation, which was not controverted, this other lake is at least several feet deep and from the documents it may be concluded that this lake is approximately three times the size of the Amenity Center complex, not discounting for "covered" land.

Plaintiff has already demonstrated that by the Covenants the Association holds the Riparian rights to the water in these lakes and ponds.

Clearly there is no need to drill for the water to irrigate IHOA property – water that the Association owns can be readily pumped in sufficient quantities from lakes and ponds nearby that the IHOA with little more cost than a one time pump cost, tied into existing irrigation piping, and that the IHOA should be receiving payment from the Golf Course for water the golf course draws from the lakes and ponds, not the other way around.

At trial Sullivan testified that he was completely unaware of the program that the Grand Strand Water and Sewer Authority ("GSWSA") has to provide free, treated water to golf courses and associated areas for irrigation purposes. Plaintiff proffered that GSWSA bears the total cost of bringing the treated water to the point where it can be accessed by the golf course or homeowners association.

¹⁵ Every one of Defense Counsel's exhibits were given to Plaintiff in the courtroom moments before the trial began. The day prior to the trial an ambiguous list of these documents, but not the documents themselves, were provided Plaintiff by Defense Counsel.

Sullivan stated that he was unaware that the Indian Wells PUD (which is nearby) found that retention ponds and lakes in the community were sufficient to provide satisfactory irrigation using the Clemson standards, and that this resulted in satisfactory greens and lawns.

In trial, Butryn testified that the Buildings and Grounds committee informed the IHOA Board (in 2008 under Toth) that almost all the irrigation and grounds maintenance was done on land that is not owned by the IHOA – not the Common Area – and recommended that this cease and desist to the extent that it was not reimbursed by the property owner, including the shoulders of the roads. Butryn testified that at the time Toth, on behalf of the Board stated that the IHOA would continue it's current (at the time) practices which Plaintiff testified and Sullivan and Butryn agreed continue to this day.

**Assessments May Only Be Imposed to Maintain the Common Area
Anything Not Owned by the Association is NOT the Common Area**

Covenants Article I Definitions

Section 1.2. Assessment shall mean and refer to an Owner's share of the Association's charges for Common Expenses and funding of reserves

From the covenants it is clear that roads and areas open to the public are not common areas:

Section 1.6. Common Areas shall mean and refer to all real and personal property now or hereafter owned by the Association for the common use and enjoyment of the Owners or designated by the Developer as Common Areas, together with any improvements thereon. Such areas are intended to be devoted to the common use and enjoyment of the members of the Association as herein defined, and are not dedicated for use by the general public; and the general public shall thereby have no easement of use or enjoyment therein.

PAST BOARD KNOWLEDGE OF THE ISSUE

In Toth's deposition testimony she admitted that she had been a member of the "Transition Committee" prior to being elected to the Board in September, 2007. At the deposition she admitted that the appointed authority was the director controlled board then in place. She admitted that the transition committee was in place from November 16, 2006 until the September 2007 election.

At the Toth deposition she was presented with what is Plaintiff's Exhibit 3 to that deposition, a letter from another member of the Transition Committee, Reggie Corfield, to her by name.

It read is part:

"Dear Rosemary

I know you are having a meeting today and as promised, I am giving below my comments on Tracy Fisher's¹⁶ response. There were many questions addressed to her but I do not believe she answered all of them. .. I wonder if she is saying something on their [Horton's] behalf? If this is indeed the position DRH is taking then I believe the HOA is under no obligation to maintain them and I would respond as follows: ...

I take the position that if DRH does not convey the common areas and the Amenity Center at or prior to transition, we should not use Association funds to maintain them. I do not believe we are obligate to do so either and here is why?

The definition of common areas is found in Article 1 sec 1.6 which says "Common areas shall mean and refer to all real and personal property now or hereafter owned by th Association for the common use ... Key word is OWNED. What we do not "own" is not common area all though DRH "allows" us to use it. ...

[underlining and Capitalization by Reggie Corfield in the original]

Then go to Art. III sec 3.1 ... "Association shall maintain and keep inn good repair all portions of the common areas. Landscaping, maintenance, ponds, water courses, Insurance and on and on which is our entire POA budget of approximately 400 thousand dollars a year.

Common area is defined as what HOA owns and so we are clearly under no obligation to maintain what we do not own. Yes, we may not have access to the Amenity Center but why should be [sic] pay for the upkeep of DRH's property? ...

Thanks. Reggie

DAMAGE TO THE ASSOCIATION

Butryn and Pete Pizzi testified at trial that they were the IHOA's undisputed experts on buildings and grounds issues. They testified as to how on the behalf of the IHOA with the pre-knowledge and consent of the IHOA Board in 2008 visited the Horry County Engineering Department and Planning Commission to obtain detailed plats and other official documents mapping the drainage system, at least of Pebble Creek, and the official record of ownership of lands in the PUD then maintained, or which might be maintained, by the IHOA. They testified as to having bought at Butryn's personal expense a "survey wheel" to relate what is on the ground to what is on the plats and descriptions.

¹⁶ Tracy Fisher is an attorney in the law firm of Wilcox Buyck. She is also Plaintiff's attorney of record on real estate matters relating to the PUD. In the conversation referred to, Fisher represented the builder, DR Horton, and not the IHOA.

This was all uncontroverted at trial as was Butryn's knowledge and expertise in this area.

At trial it was not disputed that in 2008 Butryn and Pete Pizzi wrote the specifications that since that time have been used for all Landscaping / Buildings and Maintenance contracts, and that KA Diehl at the time had nothing comparable and was given this for Diehl's later use.

At trial Sullivan (a member of The Glens board and a former member of the IHOA board) testified that the IHOA is maintaining one of the two tracts which are The Glens' common areas.

In the Deposition of Butryn and of Pete Pizzi both identified the Buildings and Grounds Presentation they wrote, along with Mike Templeton, another member of their Committee, which was presented to the Board at an official meeting on June 25, 2008, Pl #330. At # 331 is the "Cost Breakout" numbers that Plaintiff took from the presentation, which Butryn identified as the numbers in his presentation.

Butryn at trial stated that the area labelled "Common HOA Area" actually included nothing more than the shoulders of the County owned roads and that the IHOA owned and maintained area consisted only of the Amenity Center complex. This was undisputed.

From that chart at Pl # 331 the Court was asked to note that if only the IHOA owned Amenity center was considered, only 7.55 percent of the landscaping budget was spent on what was actually Common Areas – owned by the IHOA. Thus only \$ 4,908 out of \$ 65,000 was being spent to maintain the Common Areas – and thus home owners are being improperly assessed for purposes that the covenants do not give The Asssoiaiton the authority to levy assessments for.

Put another way, the IHOA Board under Toth was mis-appropriating \$ 60,000 out of \$ 65,000 in that area of the budget.

At trial Butryn testified that although his numbers calculated on the basis of acreage indicated that the IHOA was spending \$ 24,390 a year to maintain golf course property, because that area was more labor intensive it was certain that the per hour cost was actually far more.

Butryn testified that the advice of the Committee was to either cease and desist from doing any maintenance on anything but the IHOA owned Common Area or to maintain only such additional area as the IHOA will be reimbursed to maintain.

At trial the Court was asked to refer to the 2008 General Ledger for the Golf Course Pl #707, which documents that in 2008 the Golf Course only paid \$ 13,872 but was receiving landscaping services on it's property in the amount of at least \$ 24,390.

The Court is asked to note that a property owner is supposed to receive no direct services to his property by reason of payment of assessments and this represented a mis-

application of money which should have been used for other IHOA purposes.

From PI # 389 the Court is asked to note that in 2008, the Golf Course was required to pay \$ 42,000, not the \$ 13,872 actually paid and was not entitled to receive the \$ 24,390 (or more) of services.

At trial the Court was asked to take judicial notice that per IRS regulations, a non-profit home owner assoication is not permitted to provide goods or services to property owners.

As was admitted at trial by current Board President Freiboth, these practices and consequent damages continue to this day. The damages thus far exceed the \$50,000 (or more) from 2008.

Plaintiff asserts that the facts are sufficient to show that the 2008 Board, presided over by Defendant Rosemary Toth, did not act in good faith or otherwise as required by The Act.

RELIEF REQUESTED

Plaintiff asserts that he has by the preponderance of the evidence provided facts and applicable citations of law entitling him to the following relief:

1. That Defendant Rosemary Toth be and is required to pay to the IHOA the sum of One Dollar (\$ 1.00) as a token of the consequential damages her misconduct caused the IHOA in 2008. The Court further finds that her conduct with regard to use of IHOA landscaping money was intentional and that she acted against the beset advice available to her in her capacity as Board Member and IHOA President.
2. That because of SC 33-31-851, the indemnificatin of board members or officers, Toth may not be indemnified for this award and that she is personally liable for the cost of her defense in this litigation.
3. That it is unlawful for the IHOA to spend assessment funds on areas not owned by the IHOA which are not also declared to be Common Areas within the PUD.
4. That the IHOA is enjoined from collecting in the form of assessments any funds for, and is likewise enjoined from expending any IHOA funds for any purpose at all upon lands which are not (a) in the PUD; (b) owned by the IHOA; and (c) declared to be Common Areas.

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	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	

- DIVISION 16 -

**DEFENDANT IHOA AND
DEFENDANT ROSEMARY TOTH
ILLEGALLY DENIED PLAINTIFF
PERMISSION TO ERECT
SWING SET**

Plaintiff's "3596" Complaint alleged that various provisions of the Covenants had been deleted; that such were being enforced by the Defendant none the less; and that additional restrictions on the free use of property were being imposed by the Defendants which were not to be found in the Covenants. It also complained about the violation of the implied covenant of good faith and fair dealing.

Plaintiff's "11320" Complaint added the specific issues that the IHOA was interfering with Plaintiff's use of property and harassing Plaintiff by demanding that Plaintiff conform to the then non-existent Covenant Section 7.2, the ARB requirement. This Complaint further complained about IHOA disregard for the procedural rules in the IHOA's purported Bylaws.

In paragraph 19 of the 11320 Complaint Plaintiff raised the issue of Prior Review of plans by the ARB.

In paragraph 20 of the 11320 Complaint Plaintiff raised the issue of the IHOA ignoring procedural mandates of it's purported Bylaws, and attempting to use those Bylaws as ostensible authority for restrictions on the free use of property not to be found in the Covenants.

In paragraph 21 of the 11320 Complaint Plaintiff raised the issue that ARB rules were being used to extend the limitations on property in ways not explicitly stated in the covenants.

In paragraph 22 of the 11320 Complaint plaintiff plead that

"The actions of Defendant constitute harassment and tortuous interference with" Plaintiff's lawful use of his property.

With regard to the swing set, Plaintiff's trial testimony alleged that the Defendants violated the implied covenant of good faith and fair dealing (which was asserted in the 3596 complaint).

What Happened

On July 21, 2009, months after Plaintiff filed the 3596 complaint, Plaintiff filed an ARB Request to install a swing set Plaintiff # 601.

In that application it recounted that Cartman, Plaintiff's neighbor on that side who was a member of the ARB, objected to anything near his house which might bring with it the noise of children playing. Plaintiff's application stated alternatives which Plaintiff offered to install at Plaintiff's expense, such as a fence or hedge to buffer the noise (which was hypothetical) and to hide the view. Maureen Sullivan, at trial, testified that she saw Plaintiff at the pool with three very well behaved little foster girls. At the time Sullivan was a member of the Board so the Board clearly knew Plaintiff had foster children for whom this was to be used. The application perpetuates that Cartman had stated that he bought his house with the understanding that Pebble Creek is a retirement community devoid of children. While there are restricted communities limiting residence to persons over a certain age, the PUD is not one of them.

The application pointed out that "The Architectural Guidelines have no restriction on where a swing set may be placed". It went on to quote the only provision -- securely anchoring them.

The application contained a photo of a swing set at 109 Pickering, down the street, of another at 105 Keswick, in Pebble Creek, of another next door (on the side away from Cartman) at the Paar residence. A manufacturer's photo of the one proposed was included showing it smaller than any of the others. An architectural drawing from the manufacturer was included showing the safe footprint requirement to be 10 feet by 32 feet, stating that this could only be found where Plaintiff intended to set it up. A survey plat was included which showed the swing set would be far back from the front of Plaintiff's house, in fact midway along the side of Plaintiff's house. Another photo showed there was insufficient room at the rear for a swing set. A last photo showed the very large expanse available where Plaintiff proposed to put it -- AND that this was no wheres near the front of Plaintiff's house.

On August 5, 2009 Pl #602 the IHOA, through KA Diehl, denied the request. Cartman had participated in the ARB decision making – had not been required to leave the room at that time. The ARB would not allow Plaintiff to hear or observe the decision making. This was violative of the The Act's requirement for open meetings and, if any hypothetical privacy was involved, it related to Plaintiff and thus it was Plaintiff's to assert, which he did not.

The letter was actually sent by Defendant KA Diehl's employee Julie Case. The reason she gave was as follows:

"The installation of a swing set on the side of a home which is visible on the street ... is prohibited". "This application must be denied based on the location of the swing set".

There is no such restriction in the covenants Pl #547 nor were there in the ARB Guidelines at the time, Pl #600.

The ARB guidelines at the time are at Pl #600. Per it's own title, these are just "guidelines" and not "rules". If the IHOA wanted to call them "rules" they should have written so. Per case law, this doesn't matter because covenant restrictions will not be extended by rules or by construction or implication.

Swing sets in the Guidelines are address at "L Recreational Equipment #2 Swing sets" on page 4 of the guidelines.

It Reads: " Swing sets must be approved by the ARB and if approved must be securely anchored per hurricane specifications".

Plaintiff's neighbor, Jay Cartman, was at the time on the ARB. When Plaintiff, as a good neighbor, informed Cartman that Plaintiff intended to place a swing set on the side yard Cartman responded by stating that he hates kids and hates their noise and as an ARB member he will make sure that Plaintiff's swing set never gets built. Cartman was allowed to participate at the ARB meeting considering Plaintiff's swing set. The ARB always has stated that it will not allow anyone in the room while it deliberates who does not participate in the deliberation at hand.

The Court is asked to note that Plaintiff offered to erect a palm tree bed or a fence to screen the swing set from Cartman. This was ignored by the ARB.

Interrogatories in Discovery

Turning to Defendant's answers to interrogatories, Pl # 605 and 604, one finds that the IHOA authorized the construction of seventeen swing sets. One of them Sobczyk, is in a side yard at the identical location where Plaintiff desired to place his swing set.

At trial Pete Pizzi testified that Mr. Sobczyk is his son – in – law, that Pizzi has visited both the Sobczyk house and that of Plaintiff, that the Sobczyk is identical to that of

Plaintiff; that Pizzi is aware of where Plaintiff would have erected Plaintiff's swing set, that Sobczyk's is in the side yard in the exact location where Plaintiff's would have been set up.

Plaintiff testified that the photos of Sobczyk's house were shot by Plaintiff standing in the road way, thus the Sobczyk swing set is visible from the road. Plaintiff also testified that at the time a neighbor on the other side, Paar, had a swing set which had no landscaping nor fence to obstruct the view from Plaintiff's yard or kitchen window or from the street. Pizzi testified that the Sobczyk lot also had limited space in the rear making it impossible or unsafe to install a swing set there.

Cartman's wife is a diabetic. Prior to this incident she had told Plaintiff that she is a diabetic and had shown him the disposable injector she uses. Right after this many of these needles started showing up in Plaintiff's yard. At the time Plaintiff had several foster children and the swing set was for their use. Plaintiff saw Cartman walk by the areas where these needles were found – said strolls occurring immediately before the needles were thrown into the yard, where they had not been prior to the strolls. This was a hazard to the foster children. Police reports were made. Horry County police responded. They took the injectors into custody, hopefully to be fingerprinted. These are reflected in a number of police reports. A picture of one such injectable is at Pl #620.

Plaintiff's SC Human Rights Complaint

Another neighbor, Fletcher, a friend of Cartman's, who lives across Pickering from Plaintiff, also was on the ARB at the time. Since this denial with the participation of Cartman followed Cartman's statement that he will have the swing set denied because he hates kids and their noise, and because there is nothing in the covenants nor the ARB guidelines to support the denial, Plaintiff filed a Human Rights Complaint.

The Human Rights Complaint is at Pl # 614.

In response to this on November 16, 2009 Defendant Toth wrote the Human Affairs office, Pl # 603, She wrote,

"The ARB has never approved a swing set in any location other than the back yard".

Her response to the Human Rights Commission had another statement in it that implied that Plaintiff had re-applied for the Swing Set to another ARB panel which did not include Cartman or Fletcher – and that the denial could not have been influenced by Cartman's anti – children bias.

It was a lie.

Plaintiff never submitted a second Swing Set Application.

Toth also wrote that the disapproval came from the ARB and not from the IHOA,

skirting the issue as to who has the authority to enforce the covenants and whether the ARB is in fact a servant of the IHOA Board.

Plaintiff asks the Court to conclude that it is more likely than not that the Human Rights Commission did not enforce the civil rights complaint because of Toth's lie, not because the discrimination was unfounded.

PHOTOS

At trial Plaintiff introduced photos to put a face on what was going on.

At Pl # 610 is the Swing Set Plaintiff wanted to install. Plaintiff had already bought it and the pieces are sitting inside Plaintiff's garage. Plaintiff bought it because similar swing sets are to be found around the PUD and there was no reason to be found in the covenants why Plaintiff should not install it where he planned to.

This is not nearly as large as the one sold in Sam's Club or the one's commonly found along the Grand Strand.

From the manufacturer's photo it can be seen that it requires a safe area around the swing set of 15' x 26' so that a child coming off a swing will not bang into a house, tree or fence. At Plaintiff's house such an area is only found on the left or right side of Plaintiff's house. Plaintiff's rear yard does not have that much space – the developer sited the house placing the uncovered areas on the left or right.

The Court can see that safe area at Plaintiff's # 613, the safe area sketch provided by the manufacturer.

The Court was asked then to look at another swing set found around the PUD. This one is found at 1212 Hargate Street. It is the Sobczyk house. Plaintiff asserted and it was not controverted that it is the same model as Plaintiff's and 1212 Hargate has the same lot size / placement issues as Plaintiff – the large safe areas is on the right side of that house – exactly where Plaintiff proposed to place his swing set. Plaintiff # 611 / 612. The swingset Sobczyk installed, however, is much larger than that of Plaintiff. Instead of the straight slide it has a curved slide and is three levels, one level higher than Plaintiff's swing set.

The Court was next asked to look at several more swing sets around the neighborhood – as shown to the ARB in the swing set application Pl # 601. On the third physical page numbered "2" are pictures of swing sets at 109 Pickering Drive which is bigger than Plaintiff's proposed swing set. There also is another one shown which is at 105 Keswick. It also is bigger. Turning the page one sees an all-metal one at 249 Pickering – across the Cul De Sac from Plaintiff's house and with no landscaping to block it from being seen, in all it's glory, from Plaintiff's dining room window – and from two other houses on the Cul De Sac. If the Cul De Sac is Pickering Drive, this playset can be seen from the road. At 239 Pickering is another one similar to Plaintiff's.

The Court was asked to note, specifically, that the ARB / IHOA approved a swing set larger than that proposed by Plaintiff on the same side yard for the same type of house that Plaintiff lives in.

The Court was next reminded that through Amendment #1 (May 10, 2000, PI ## 551) to the Covenants, the Developer deleted the requirement to seek ARB approval at all, Section 7.2. The existence of this was known to the IHOA because it was the sole Amendment to the Covenants on it's web site, In addition, Plaintiff mentioned this deletion in the Application.

Section 7.2 of Covenants as it had existed is at PI 547.

The play set was fully within the setback and building line requirement of Section 7.11, which are set out in PI #609, the accessory structure restrictions imposed by Horry County when it approved the PUD. The Open Storage restriction, Section 7.31, was "waived". There are no further Covenant provisions which, by speculative enlargement, could possibly apply.

The court is asked to recall the Harrogate approval in the side yard. .

CASE LAW

At Trial Defense Counsel failed to cite any cases contrary to those cited by Plaintiff, nor did Defense Counsel contest the asserted meaning of the cited cases.

Arcadian Shores Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007. The Court ruled that enforceable controls over use of property have nothing to do with rules – the must be explicitly and unambiguously stated in the Covenants.

The lower court wrote:

- (1) the 1985 Regulations were not valid because they were not properly signed, acknowledged, or indexed;
- (2) the 1965 Declaration does not prohibit Cromer's motor home;
- (3) the Association abandoned its right to approve of fencing;

The SC Court of Appeals wrote:

:

We concur ...that any "regulation" mentioning "motor homes (RV's), campers, or travel trailers" necessarily constitutes a change to the original 1965 restrictions and that such a change would require a document signed and acknowledged by the majority of lot owners. Further, we recognize the master ruled the 1985 Regulations were invalid because they were improperly signed, acknowledged, and indexed

... 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.

Relating to this, in 1999 swing sets were common.

The Arcadian covenants challenged stated

7. ... Lot owners will comply with such reasonable regulations as the Developer may make

The Appellate Court wrote:

This provision gives the Developer the power to enact regulations with respect to the [specified prohibitions] parking or storage of commercial vehicles, boats, or machinery.

The Appellate Court that stated –

if the grantor had wanted to restrict mobile homes, he could have done so."
Id. at 5, 498 S.E.2d at 86

"However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts."

"Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

Upheld that the Association thus waived its right to review / approve. The Court is reminded of the extensive variation in swing sets throughout the PUD and the large number of them. The Defendant admitted to at least 17 it had approved in Defendants' Response to Interrogatories Pl 604 Pl 605.

By this reasoning, Plaintiff is likewise permitted to have other items in his yard which were in wide spread use in 1999 when the Covenants were drawn and which are not mentioned in the restrictions – such as model garden trains.

"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).

Cited in 4575 - Santoro v. Schulthess, SCCA # 4575 Filed July 1, 2009

"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. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980):

**"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.**

In another case, Hardy et al v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006 the South Carolina Supreme Court held that the applicable

"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).

"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).

And from Arcadian Shores –

"However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts."

"Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

Upheld that the Association thus waived its right to review / approve.

The Court is reminded of the Sobczyk swing set on Harrogate, and the swing set across the street from Plaintiff "which is visible on the street". Plaintiff took the Harrogate pictures from the street so obviously Harrogate is visible too. As a matter of fact, every picture Plaintiff took of swing sets was taken from the street.

From Arcadian Shores ---

... 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.

The Court is reminded that the over-arching rule of construction for covenants is that ambiguity must be resolved in favor of the free use of property and this section is clearly very ambiguous and lends itself to selective and capricious application – and misuse by vindictive neighbors.

Given the Harrogate approval, the lack of a specific covenant or ARB guideline restriction, the large number of prior approvals, the wide variation in the individual swing sets, the Court is asked to direct the IHOA to cease and desist from interfering with Plaintiff's swing set and to declare that it is a lawful installation and to rule that the denial was selective, capricious, and a denial of Plaintiff's lawful use of his property..

RELIEF REQUESTED

Plaintiff has presented applicable statutes and case law and the preponderance of the evidence to demonstrate he is entitled to the following Order of Court:

- (1) That the Defendants IHOA, Rosemary Toth, and KA Diehl, acting in concert together, willfully acted to deprive Plaintiff of the free use of property by using standard and regulations that they knew or should have known either did not exist or were inapplicable.
- (2) That Defendant Rosemary Toth, in her answer to the South Carolina Human Affairs Commission, acted willfully and unlawfully to obstruct the Plaintiff's lawful resort to relief from that Commission.
- (3) That there are no restrictions on the placement of swing sets within the PUD other than the Horry County set back requirements.
- (4) That the Defendants are enjoined from any action directly or through others acting on their behalf or in concert with them from enforcing any restriction on swing sets and from imposing any restriction on the free use of property not explicitly stated as a restriction on use in a section of the Covenants not "waived" or "deleted".
- (5) That Defendant Toth is ordered to provide Plaintiff a written apology for the action of the IHOA.
- (6) That Defendant Toth is ordered to write to the South Carolina Human Affairs Commission relating that in conjunction with Jarmuth's prior Human Affairs complaint
 - (a) Jarmuth did not submit a second swing set application and as such no such re-application was denied by another ARB panel which did not include Cartman or Fletcher;
 - (b) The IHOA has approved another swing set for another house in the PUD of

the same model as Jarmuth's in the same side yard location as that requested.

(7) Payment by the Defendants of Punitive damages in an amount that the Court deems appropriate.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	

- DIVISION 17 -

**DEFENDANT IHOA's DENIAL OF PLAINTIFF's FENCE
WAS ARBITRARY, CAPRICIOUS,
NOT BASED ON A COVENANT RESTRICTION
AND INTENTIONALLY MEANT TO INJURE PLAINTIFF**

Plaintiff's "11320" Complaint alleged the IHOA unlawfully and knowingly imposed fines for supposed violation of non-existent covenant provisions and non-existent architectural review board rules. It also asserted a claim of interference with allowed uses of Plaintiff's property. There is no provision in the Covenants, Bylaws, or ARB Guidelines related to landscape edging and never has been.

At trial Defense Counsel called current IHOA board president Freiboth to the stand as their witness. She also called a Diehl employee, Beckie Abel. Plaintiff called Michael Butryn, Pete Pizzi and Louis Astorino to give related testimony as to the facts they know. Under questioning witnesses testified as follows:

1. Freiboth --That he was knowledgeable about the Covenants (Pl # 547) and all their amendments, as well as the putative Bylaws (Exhibit C to the Covenants, Pl # 548) for the IHOA and in particular Section 13 relating to Procedures; and that he likewise was knowledgeable about the July 1, 2010 ARB Guidelines in force in 2010 (Pl #371).. Also, that he was the President of the IHOA Board when events surrounding Plaintiff's "Fence or Wall" occurred.

2. Freiboth testified that the ARB is parallel to the IHOA Board and not a committee of the IHOA which Plaintiff controverted. This issue is addressed separately (supra) in this Brief.

3. Freiboth testified that it was his belief that if Plaintiff was dis-satisfied with the ARB decision at issue here it was Plaintiff's burden to appeal that to the IHOA Board – and he further testified that Plaintiff did not do so.

4. Freiboth testified that if Plaintiff had filed an “appeal”, then the IHOA Board would have investigated the situation and drawn some conclusions about how the situation should be handled. Freiboth testified that since Plaintiff did not file an “appeal” of the ARB decision, the IHOA board took the ARB's decision as final and considered the “fine” upheld.

5. Freiboth testified that the contractor, Defendant KA Diehl, was allowed by covenants and bylaws and ARB Guidelines to impose fines when Diehl on it's own decided that a violation of covenants had occurred, and that Diehl, on it's own, was empowered to issue “cease and desist” letters as well.

6. Freiboth testified that the Diehl violation letter was considered dispositive of an alleged violation and the burden was on the home owner to prove a violation had not occurred.

7. Beckie Abel, another Defense witness, was also called to testify and she testified that her employer, KA Diehl, gets paid a certain sum of money to issue violation letters, and that payment is made whether or not the alleged violation is a violation; Abel also testified that Diehl gets paid for a Diehl employee periodically to scour the neighborhood looking for violations and as such, many violations do not begin with a complaint from another homeowner.

8. Plaintiff's witness Louis Astorino testified that he believes KA Diehl employees trespass in his yard because they have accused him of violations which are only visible from his back yard, the area beyond that being occupied by a lake.

9. Both Astorino and Pete Pizzi testified about violation letters from Diehl regarding either non-existent violations or situations approved by Diehl or by Toth or by the Developer, often with readily available correspondence to prove it. Witnesses testified as to problems with Diehl continuing to demand payment for fines after they had been paid.

10. Witnesses testified about fines being imposed by the ARB or by Diehl at the onset of a violation incident. Astorino testified that his voting rights had been suspended prior to a hearing before the IHOA Board.

11. After convoluted examination, Freiboth conceded that the items that the IHOA was calling a “wall” were actually flower bed edgers, but that somehow Plaintiff could hypothetically have used them as part of a wall.

12. In testimony, Freiboth conceded that the edgers about which the IHOA was complaining could not contribute to the support of a fence in any way.

13. In testimony Freiboth conceded that Plaintiff had applied for the erection of a vinyl fence supported by fence posts – not a wall – and that the implication of this was that there would be “air space” between the fence and the landscape edgers.

14. Freiboth testified that he had personally seen what was actually installed and Freiboth testified that despite this and the language of the application, the IHOA was asserting that Plaintiff had intended to build a wall and that the edgers were a wall.

15. Butryn testified that in the course of his business he had drawn specifications for and supervised the erection of fences and walls for school districts, and that no wall was installed and what was installed was useless in the context of either a fence or a wall.

16. Freiboth was unable to explain and did not controvert that the minutes of the meetings of the board of directors of the IHOA include not a single instance of the Board hearing an appeal of a covenant violation and that the do not include a single instance of the imposition by the Board of a fine or a suspension of rights.

17. Abel testified that numerous fines had been imposed by Diehl and collected from homeowners by Diehl over the years and numerous letters had been written for which Diehl had been paid.

18. Freiboth admitted at trial that Plaintiff had not erected the fence that had been applied for – not a post nor a panel, and that Plaintiff had not put in the requisite paver base material that Butryn testified must be laid in the earth – at least twice the width of the wall and at some depth – underneath where a wall is to be erected.

19. Freiboth conceded that he was aware that the IHOA had approved the identical landscape edgerse for use elsewhere in Plaintiff's lot and elsewhere in the neighborhood and that in fact such landscape edgers were common throughout the neighborhood.

At trial Plaintiff testified that

(1) The fence and edgers were related to the invasion of Plaintiff's property by Cartman following the swing set issue, in particular following Plaintiff's use of Cartman's statement about children in Plaintiff's Human Affairs Commission complaint. After the Complaint Cartman proceeded to pound stakes into that portion of Plaintiff's irrigation and sprinkler system located near their common property line. Plaintiff testified that Cartman further put up “no trespassing” signs facing Plaintiff's house – well into Plaintiff's property. Plaintiff testified that this destroyed the functionality of that section of the system.

(2) That Cartman repeatedly sprinkled used hypodermic needles previously used by Cartman's wife for her diabetic condition and that this endangered the foster children who lived with Plaintiff. Plaintiff testified that there are numerous police reports

filed by the Horry County Police where they collected the evidence and filed reports of these incidents.

(3) Plaintiff's complaint asserts that Cartman was behaving erratically and making threats to Plaintiff's wife.

(4) That the Horry County Police suggested to Plaintiff that the resolution of this problem required that Plaintiff hire a licensed surveyor to resurvey the line, to install property stakes and that the surveyor install additional iron pipes on the boundary. Plaintiff testified that he was told that to resolve the issue and avoid a physical confrontation Plaintiff should then immediately pull a string line between the surveyor stakes and install a garden bed with edgers along side but barely into Plaintiff's property, which should resolve the issue of intent related to Cartman pounding stakes into Plaintiff's irrigation system. The Horry County police had been shown the photos of Cartman actually pounding such stakes into Plaintiff's irrigation system and other signs Cartman had installed on Plaintiff's property. A picture showed Cartman with a saw in hand emerging from a hedge largely on Plaintiff's property. These pictures are in evidence.

(5) Plaintiff testified that the ARB submission which was made with the notation that it preserved Plaintiff's objections and reservations about the IHOA's authority and the existence of any requirement for application or the existence of fence restrictions, included a request to erect a fence and another request to install the landscape edgers which were installed, and that the illustration had two lines – one for the fence which was disapproved and one for the edgers which was approved.

(6) Plaintiff testified that the IHOA has also approved those same edgers on the portion of the property line leading from the curb (actually, across the county right of way over which Plaintiff has an encroachment permit) in conjunction with a flower bed in plain view of the road, and that the edgers in the rear which are called a "wall" can not even be seen from the road.

**THE COVENANT PROVISIONS REQUIRING
PRIOR ARB APPROVAL AND
REGULATING FENCES DO NOT EXIST AND ARE NOT LEGALLY ENFORCEABLE**

The HOA asserts Plaintiff violated the provisions in the Covenant Pl # 547 which require prior HOA Architectural Review Board approval of all changes, and the covenant provision regulating fences. It attempts to enforce a non-existent covenant restriction on Fences.

Plaintiff asked the Court to declare that these provisions are unenforceable because:

- * They have been deleted.
- * They have been "waived" by inconsistent enforcement

Plaintiff also preserved his objection that the Defendant IHOA is not the homeowners' association for the Planned Unit Development and thus lacks standing in the matter.

In Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, refiled May 17, 2007; 2007 S.C. App. LEXIS 98; the SC Court of Appeals upheld the lower court decision that homeowner association regulations are unenforceable and invalid unless they are "properly signed, acknowledged, (and) or indexed". In that same case the Court of Appeals noted that

"Waiver has been defined as the intentional relinquishment of a known right. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993). ... However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. citing Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993).

In upholding the Arcadian judgment finding that the homeowners association waived its control over fences and other issues, the Court noted that

"the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

This Court is invited to examine the numerous pictures of fences throughout the neighborhood which have been expressly permitted by the HOA which fences:

- are over four feet high;
- are adjacent to a street;
- are between adjacent properties;
- are sometimes not within the approved list but never – the – less the IHOA has chosen to waive enforcement of the putative fence provision in the covenants;
- are approved projects similar to the so called "wall" which definition of plaintiff's

lawn edging Plaintiff objects to.

At trial Plaintiff asked the Court to look at the evidentiary pictures of fences and walls within the PUD which have been either approved or permitted to remain. As all photos were taken by Plaintiff from the street it is seen that all fences are visible from the street.

- Pl # 2 8 foot high plastic fence on Pickering Drive.**
- Pl # 3 8 foot high plastic fence on Pickering Drive.**
- Pl # 4 112 Worchester Court. Completely surrounds the sides and rear of the back yard and one side is against the street.**
- Pl # 5 Right side of 120 Seville - GSWSA 8 foot high wood fence.**
- Pl # 6 Same fence visible from GIA – fence is clearly a nuisance to Harrigan at 120 Seville Drive.**
- Pl # 8, # 9, # 10 Fences adjoining street at 165, 170, and 174 Seville These stand astride the lot property line.**
- Pl # 12 Similar fences at 184 Seville.**
- Pl # 13 Similar fences at 164 Seville. The court is asked to note that these are neighbors or close to Defendant Toth.**
- Pl # 14 Fence at 186 Seville viewed from GIS. Note fence is facing Dunham Court.**
- Pl # 15 Fence at 166 Seville.**

At trial Plaintiff testified about the background: how Cartman campaigned to deny Plaintiff the installation of a swing set in the area where the IHOA later said Plaintiff built a wall without prior ARB approval. While the matter with the Human Affairs Commission was pending, as has been related, Cartman is alleged to have been dropping used hypodermic needles on Plaintiff's yard. Pl # 620. This was perpetuated in Horry County Police reports, who came numerous times to investigate and took possession of each needle.

Carman proceeded to install stakes and no trespassing signs on Plaintiff's side of their common lot line --- destroying Plaintiff's sprinkler system in that area. On September 3, 2010 Plaintiff took a picture of Cartman pounding a stake into Plaintiff's sprinkler system on Plaintiff's side of the common lot line. Pl #621. At this time Cartman was still a member of IHOA's ARB.

Cartman also cut his own hedges, Pl #622 on September 3, 2010, and falsely accused Plaintiff's wife of doing so. Cartman later sued Plaintiff's wife in magistrate court over this but was thrown out of court for having no plausible case on a motion for summary judgment made on Jarmuth's behalf by Jarmuth's counsel of record in the case.¹⁷

At Pl #623 are several of Cartman's stakes driven into Plaintiff's sprinkler line. Cartman topped these with "No Trespassing" signs. Plaintiff ultimately complained about

¹⁷ **Cartman actually filed two such Magistrate Court Complaints, both of which were defended by Counsel and both of which never got beyond Carman's presentaiton of his putative grounds.**

this violation of the "no sign" covenant and Cartman was ordered to remove said signs and stakes.

Plaintiff discussed this trespass with the Horry County Police and rather than have Cartman arrested for vandalism, malicious destruction of property, and trespass Plaintiff took the suggestion of the Police and had his common property line professionally surveyed – an unnecessary expense.

Thereafter Cartman proceeded to try to move the survey stakes. However, at the foot of each Plaintiff had paid the surveyor to drive 2 foot steel pins at the survey points where the stakes were also placed. At Pl # 624 is a survey stake that Carman was seen, by Plaintiff, moving numerous times. Plaintiff reset this each time it was moved -- to the location of the steel pin. At Pl # 625 are several pictures to show the Court the problem that the IHOA ARB official, Cartman was causing as he drove even more, larger stakes into Plaintiff's sprinkler system across the line now marked by the survey. At this point the Police suggested installing landscaping edging along the property line, exactly as the HOA had previously approved elsewhere as edging on Plaintiff's property, and as was in widespread use around the PUD.

The September 7, 2010 Complaint that Plaintiff sent the IHOA about Cartman is at Pl #626.

There is no provision in the ARB Guidelines or Covenants relating to landscaping edging. As will be reiterated, the Covenant provision relating to Prior ARB approval was "waived" as was the provision relating to "fences and walls".

On September 27, 2010 the ARB / IHOA / Defendant KA Diehl sent Plaintiff a "Violation Notice". Pl # 627. Per the letter, without a hearing or Board action, Defendant KA Diehl, acting ultra-vires, imposed a \$ 50 fine on Plaintiff. There is no covenant provision permitting a contractor to impose a fine – ever. There is no covenant provision permitting any fine of any sort by the IHOA except with the record of the board by vote recorded in the minutes of a board of directors meeting. There is no such record. This was simply Defendant KA Diehl making money for itself, because KA Diehl gets \$ 10 or more dollars per violation letter, whether they are valid or not. Again, this occurred after Plaintiff "turned Cartman in".

The letter stated that the ARB Guidelines was the source of authority.

The ARB guidelines are not the source of authority for anything. They are not even rules, although ARB rules are not able to extend the covenants.

The letter cited Section 7.2 asserting that Prior Approval of the ARB is required prior to ANY modification to the property can be done. It ignored the issue that there is no Section 7.2 any longer.

On May 5, 2010, which was several months before, at a Board Meeting, Pl # 370,

page 3 Section VI New Business para C New Violation Policy the Board announced that as of May 1, 2010 it was announced that no fine will be imposed prior to a final hearing. This is in accord with a provision, long ignored, in the purported IHOA Bylaws . Pl # 548, Bylaws page 45 Deed Book 2117 Page 1399. "The Board shall not impose a fine, suspend voting rights or infringe upon or suspend any rights of an owner unless and until the following procedures are followed" which procedures are notice and a hearing. The IHOA did not follow it's own procedure. The enforcement procedure has no provision for KA Diehl to do anything but send the notice. For Defendants it's all about the money, not covenants or rules.

The ARB Guidelines which supposedly were in effect are Pl #371.

On page numbered 2 of the document, actually the third page, Section II, Paragraph E, it lists "Items which need no approval". So KA Diehl's letter that everything needs approval is contradicted by their ARB Guidelines. More items which do not need approval were separately announced at other board meetings and homeowner correspondence from Diehl.

The Guidelines regarding landscaping are in Section L, physical page 4 numbered 3.

That section talks about not destroying large trees or bushes and doing all sorts of lawn and garden maintenance, all without ARB application or approval. There is no guidance on flower bed maintenance.

On page numbered 5 Section S is the section on Fences. Through bylaws the IHOA can not resurrect restrictions which had been clearly deleted such deletion being a clear statement that the deleted behavior is now permitted. There is nothing in this section to even suggest that this applies to lawn edging, for which there are no guidelines.

The letter cites the bylaws section on authority for enforcement, Section 13.2, proving that the author, KA Diehl employee Julie Case read the bylaws, but it ignores the section following, 13.2, Procedure, of which Diehl and the IHOA is in violation.

The Court is asked to examine section 13.2 of the Bylaws.

The Court is asked to note that in the IHOA's counter-claim it calls what Plaintiff installed a "wall". Not a fence, not landscaping. A wall.

At this point it will help if the Court Takes notice of exactly what the IHOA is calling a wall installed without obedience to the deleted 7.2 ARB Prior Approval and the deleted covenant section on fences.

The photo at Pl #21 has the view of Plaintiff's yard from Pickering Drive. The Court is asked to note the landscape edging around the tree bed to the left, the palm tree bed to the right, and around the planting bed in the front of the house. Looking along the right side of the house the IHOA claims that Plaintiff built a wall. An invisible wall.

The photo at Pl #22 is a direct on view of the supposed right end of the wall. Note the existing edging around the hedges surrounding the power box. Note the edging around the flower beds to the left and right of the power box, which have also been approved by the IHOA as edging. Then look to the left of the left hand flower bed at the same edging blocks. These are now, according to the IHOA, a wall. The photo at Pl #23 is the flower bed with edging approved by the IHOA. At #24 is a larger picture. At #25 is the same edgers approved for one of Plaintiff's Palm beds. Note that although Plaintiff has an encroachment permit from Horry County, the Palm bed is set back to the property line. This illustrates the issue of lawns which do not belong to homeowners but which extend onto the county streets.

At Photo # 26 the "wall" can be seen to the left, dividing Plaintiff's lot from Cartman's. The edgers are entirely on Plaintiff's lot. Per the suggestion of the Horry County Police this placed a line down which could not be moved without difficulty and which now protects Plaintiff's sprinkler system which has not yet been repaired. The supposed wall is from the left edge of the picture to the center. As the Court can see, it is landscaping edgers and not a wall.

If the IHOA had not interfered, a second line of edgers would have been laid and the middle area filled in as a flower bed. There has never been covenant controls over flower beds. From Pl # 27 the same edgers can be seen dividing Plaintiff's lot from his other neighbor. Somehow for eight or more years this has not been a wall.

Photo Pl #28 shows the existing flower bed which Plaintiff wants to extend. These flower beds were approved. Pl #40 and #42 show longstanding edging in other nearby homeowner's yards – across the cul de sac, which the IHOA is not calling a wall. The one at #42 belongs to John Bianchi, a former board member. Plaintiff's palm beds were modeled on his., including the edgers.

On September 29, 2010 Plaintiff paid the \$50 putative ARB "fine" which the letter said had been added to Plaintiff's "Association account in accordance with the ARB Guidelines".

The July 2010 ARB Guidelines are at Pl #371.

The July 2010 ARB Guidelines contradict the IHOA purported Bylaws, Pl 548, because the bylaws state in Section 13.3 the following:

13.3.1 A Written Demand to cease and correct the issue within ten days. No fine is provided for.

13.3.2 The Board, not the ARB, serves the homeowner with notice of a hearing the Board schedules. The homeowner does not request same. A potential fine is to be mentioned as a potential sanction if the board does not rule in the homeowner's favor at the hearing.

13.3.3 A hearing and a decision.

On September 30, 2010, the next day, Plaintiff submitted a complete ARB Application package to KA Diehl, the IHOA's contractor. Pl #629. On page 1 it contained the stipulation that it did not waive any objections to the IHOA being the association or to the validity of some or all of the covenants or rules.

On page 4 of the submission Plaintiff checked the box "lawn edging" as well as "fence".

Page 5 was a plat of Plaintiff's lot overlaid with what was desired: It showed three things:

1. Flower beds around the power box. This was seen in the pictures on either side of the power box. Pl # 24.
2. Brick edging along the property line, as suggested by the Horry County Police, all the way from the curb to Plaintiff's rear property line. This to quickly take care of Cartman's destruction of Plaintiff's sprinkler system.
3. A vinyl fence running from behind the power box all the way back to Plaintiff's rear property line.

Page 6 and Page 7 were pictures of the Vinyl Fence, typical of the fences shown in pictures of fence around the neighborhood. Both sides were "good" sides.

Page 8 thru 11 was Plaintiff's encroachment permit from Horry County to place landscaping in the area between the curb and the property line.

Page 1 related that the Horry County Police advised installing first a string line and then edging all the way along the common property line between Cartman and Plaintiff, from front pin to rear survey pin. The ARB application called for a line of edgers AND a fence, not one or the other, not the edgers up front and the fence in the back.

It is noted that vinyl fence posts embedded in concrete, Pg 6 of the application, and these support the panels, pg 7 of the application. Brick edgers are not a part of a vinyl fence. Their function was to place a mark on the ground where Cartman would thus not be able to destroy irrigation systems any further. They are not part of a fence system. They are several inches below such a fence. Vinyl fences are suspended several inches above the ground.

On October 8, 2010 Pl # 631 KA Diehl's Julie Case wrote Plaintiff on behalf of the IHOA, not of the ARB, stating that Plaintiff's request to install a flower bed and edging had been approved. The edging requested was all the way from the curb to the rear property line. This edging, which they approved, they now call a wall.

The same day Julie Case of Diehl for the IHOA wrote Plaintiff another letter, for which they earned another \$10 or more, stating that they had disapproved Plaintiff's request for a vinyl fence with a brick foundation. Actually, this is the same "edgers" that they had separately approved. As was shown by the pictures previously placed into evidence these are the same edgers which separate Plaintiff's property from the other neighbor's lot, and which surround all of Plaintiff's planting beds – and which are in common use through out the neighborhood.

On October 11, 2010, PI # 633, Plaintiff demanded the putative appeal mentioned in the ARB Guidelines which is the same review that the Board is supposed to automatically schedule without being asked. This pointed out that Section 7.4, fences, of the covenants had been deleted as had the ARB application Section 7.2. The letter noted other infirmities, such as Bob Berman being both an ARB member and a board member, while the Covenants state a person can hold only one office at a time.

THE ABOVE DOCUMENT IS THE APPEAL THAT FREIBOTH TESTIFIED AT COURT THAT PLAINTIFF NEVER MADE.

At trial Plaintiff pointed out, and it was not controverted, that this procedure does NOT require a home owner to make an appeal but rather puts the burden on the IHOA board to schedule such an appeal, independently, to serve the notice of the hearing, to conduct the hearing "on the record of the minutes of the board" and to enter a decision "on the record" – and that no fine or suspension of rights may be made until this has all been completed AND there has been a finding on the record that a violation has occurred.

At trial Freiboth, when confronted with the document which was titled "Appeal", still claimed this was not an "appeal" because on an inner page Freiboth claimed that Plaintiff had explicitly "waived" his right to an appeal. Freiboth was instructed to read the text which did not say a waiver of an appeal but instead the text put the IHOA on notice of Plaintiff's intent to litigate this – in parallel – in court. For approximately twenty minutes Freiboth had been testifying under oath that Plaintiff had not filed anything that could be taken as an appeal and that the IHOA board had expected Plaintiff to appeal.

On October 20, 2010, based on the postmark on the envelope attached to the IHOA letter dated October 14, 2010, PI # 634 (envelope pg 2), the IHOA answered with the 6 day back dated letter through Beckie Abel of Diehl. She acknowledged receiving the letter of October 11, 2010 which was titled "Putative Appeal of October 8 2010 Disapproval of Fence". Her letter stated that

"Unless you successfully appeal the ARB decision, you must remove the brick fence foundation..."

She disregarded that the letter she referred to was an appeal. Plaintiff can not physically drag the requisite people into an appeal room. So the IHOA has refused to hold the appeal hearing – but they continue to impose an illegal fine for disregard of two non-existent covenant sections by erecting a fence that does not exist.

But that is not the end of it. On October 24, 2010, PI # 635, Plaintiff wrote the IHOA and reminded them of their refusal to follow section 13.3 of the Bylaws and their refusal to hold an appeal. There was never a response from the IHOA to this.

Plaintiff asks the Court to consider this a willful and malicious evasion of the IHOA Board's obligations and obstruction of Plaintiff's rights.

The Court is invited to draw the conclusion that Defendant has imposed a frivolous fine and frivolously and maliciously violated the implied covenant of good faith and fair dealing. Defendant is attempting Prior Restraint for which they have no legal basis to request.

On February 8, 1999 Plantation filed Covenants. # 547.
On May 9, 2000, Plantation AD filed Amendment 1 to the Covenants. The document "waived" the ARB Requirement and all fence restrictions. # 551.

Plaintiff invited the Court to take judicial notice of Black's Legal Dictionary, First Edition, Page 1231 from which it is clear that a "waiver" equates to deletion: PI #97 & 98.

On Page 1231 of Black's Legal Dictionary, 1st Edition, the legal meaning of the phrase "Waiver" is stated as follows:

"WAIVE, v. To abandon or throw away; as when a thief, in his flight,

throws aside the stolen goods, in order to facilitate his escape, *he is technically said to waive them.*

In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong.

A person is said to waive a benefit when he renounces or disclaims it, and he is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet"

The waiver of fence restrictions is more defining than if there had been no fence restrictions in the first place. It is an explicit act by the developer showing that it was his desire that there not be any fence restrictions. If that was not his desire, he could have modified the fence provision. He waived the complete restriction.

Likewise the requirement to seek prior approval from an Architectural Review Board. By "Waiving" this requirement instead of modifying it the developer conclusively showed his intention that homeowners should be free to use their property.

The absence of a fence restriction coupled with numerous instances where fences have been installed implicates the Arcadian Court Decision. By allowing fences in side yards and elsewhere the Defendant HOA has "waived" its right to regulate these – if that right existed at all.

In Anderson v. Buonforte, Opinion No. 3998, SC Court of Appeals filed June 13, 2005 the Court wrote

"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." citing See Hamilton v. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) ().

In Penny Creek v Fenwich Tarragon; 375 S.C. 267; 651 S.E.2d 617 the SC Court of Appeals held that

"restrictions on the use of property are historically disfavored. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). "Thus, to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain unmistakable implication." Rhodes v. Palmetto Pathway Homes, Inc., 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991). "Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property" Hardy, 369 S.C. at 166, 631 S.E.2d at 542".

In Cimino v Dill (1982) 108 Ill. APp. 3d 782, 785, 439 N.E.2d 980 the Illinois Court

of Appeals held noted that

doubts and ambiguities in the covenants should be resolved in favor of natural rights and against restrictions (Engler v. Tenhaaf (1979), 74 Ill. App.3d 799, 803, 393 N.E.2d 1266, 1269; Kessler, at 905),

“A waiver is a voluntary and intentional abandonment or relinquishment of a known right.” Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992).

On March 18, 2011 Defendant responded to certain Interrogatories posed by Plaintiff (on February 16, 2011). Quoted below is Interrogatory #16 and Defendant's Answer:

16. Identify by name, lot address and date any instance where a homeowner has been permitted to erect a fence situated between his lot and an adjacent lot.

ANSWER: Listed below are the dates, names and addresses where fences have been permitted:

1. February 4, 2004 - Diskin - 505 Crawley Place
2. September 1, 2004 - Bernardo - 182 Pickering Drive
3. September 22, 2004 - Cipriani - 186 Seville Drive
4. September 28, 2004 - Tempelton - 826 Castlebridge Court
5. October 15, 2004 - Buller - 513 Dunham Court
6. February 2, 2005 - Lattig - 208 Whitchurch Street
7. March 8, 2005 - Small - 166 Seville
8. June 13, 2005 - Wronka - 170 Seville
9. August 5, 2005 - Anthony - 831 Castlebridge Court
10. August 16, 2005 - Bergman - 405 Moat Court
11. September 8, 2005 - Sweeney - 704 Hawick Street
12. January 17, 2006 - Sciarretta - 1020 Knightsbridge Court
13. March 3, 2006 - Dougherty - 280 Pickering Drive
14. March 6, 2006 - McCray - 805 Castlebridge Court
15. March 6, 2006 - Sconyers - 253 Whitchurch Street
16. March 13, 2006 - Hamden - 230 Pickering Court
17. May 3, 2006 - Walker - 849 Castlebridge
18. May 3, 2006 - Zielenski - 1019 Knightsbridge Court
19. July 11, 2006 - Boudreau - 105 Keswick Court
20. October 13, 2006 - Russell - 139 Wicklow
21. October 13, 2007 - Weibel - 252 Marbella
22. April 9, 2007 - Proctor - 174 Seville -
23. June 27, 2007 - Pappas - 501 Turret Court
24. July 3, 2007 - Benjamin - 627 Locke Court
25. August 28, 2007 - Antioho - 1108 Preston Place
26. December 21, 2007 - Rearick - 1112 Worchester Court

- 27. January 18, 2008 - Crawford - 521 Tamarindo Court
- 28. September 22, 2010 - Kinsey - 236 Whitchurch

The waiver did not eliminate the enforcement of the remaining restrictions. Individual homeowners or the HOA could come forward and "counsel" homeowners – after the fact – about actual violations. If a homeowner or the HOA sincerely believed a violation of the covenants existed after the fact, it could sue to enforce the covenants.

IHOA ARGUMENT THAT WAIVERS APPLY ONLY TO DEVELOPERS

Case law is completely against Defendant's argument.

"[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 et al v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006 .

Defendants argue that the use of the word "waive" instead of "delete" has some special implication --- but don't explain how this translates to applying the "waivers" only to Developers. HOWEVER, a not too careful reading of the original covenants immediately puts the lie to that "limited application" argument:

COVENANT RESTRICTIONS DID NOT APPLY TO DEVELOPER

In coming to this conclusion we need only look to the original language of Sections 2.2 and 7.2:

Section 2.2 reads:

"Section 2.2 Plan of Development of Additional Property. ... Developer reserves the right to plan, design, develop, construct, maintain and manage ..., the Multi-Family Areas and any unsold Unit as Developer deems necessary or convenient for its purposes, ... including without limitation the right to change the number, shape, size and density of the unsold Units, ... the Multi-Family Areas, ... and the Additional Property.

Unsold units incorporate single family lots on which houses have not yet been constructed.

The last paragraph of Section 7.2 read: **"Section 7.2 Prior Review of All Plans. Section 7.2 of this Declaration shall not apply to the Developer or to any Designated Builder "**

Importance of "Waived" Covenant Provisions to the Case:

Plaintiff argues that he has been illegally harmed by the HOA's insistence on applying an obviously deleted requirement to seek prior Architectural Review Board approval for changes – waived Section 7.2 – and by prohibiting Plaintiff from erecting a Fence despite that the Section, 7.4, has been "waived". The bogus counter – complaint for enforcement and damages is grounded exclusively in the assumption that 7.2 and 7.4 are still effective and, if that is not so, the counter – complaints amount to a frivolous proceeding and an unethical advancement – by Defense Counsel – of that counter – complaint. It is also a violation of the Civil Rule relating to signing a pleading unless the argument is grounded in substantial law – which is not the situation here.

RELIEF REQUESTED

1. **Return of Plaintiff's \$ 50 plus interest.**
2. **An order enjoining the Defendants, all of them, from attempting to enforce Sections 7.2 and 7.4 against anyone.**
3. **Court Costs plus all other costs because Plaintiff's suit against the IHOA and other Defendants is in fact a suit to enforce provisions of the covenants and such suits are entitled to complete costs, not just court costs.**
4. **A written apology published to every homeowner for the actions against Plaintiff, stating that the ARB application process and the fence restriction do not exist.**
5. **Punitive damages in an amount to be set by the court.**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 19 -

**DEFENDANT's COUNTER-CLAIMs
ARE BASELESS
AND
VIOLATE THE SOUTH CAROLINA FRIVOLOUS
CIVIL PROCEEDINGS SANCTIONS ACT**

On October 24, 2011 in the case numbered 2009-CP-26-3596, two of the three Defendants – The International Club HOA (“IHOA”) and Rosemary Toth (“Toth”) filed their “Amended Answer to Complaint and First Amendment to Complaint and Counter-Claim”.

Their prior Answer to the Amended Complaint in this caption was filed on June 19, 2009. The significant differences were that in this amended answer these defendants had abandoned their omnibus counter – claim that they were entitled to attorneys fees, said claim made without any substantiation or basis, and that had substituted a replacement counter – claim that the defendants were entitled to attorneys fees and fines because

“ the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.”

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.

Jarmuth's Case No 2010-CP-26-11320 began as a Magistrate Court complaint with the IHOA as the single defendant. It's case number in that Court was 2010-CV-26-1072943, The IHOA filed it's Answer to that Complaint, while still in the Magistrate

Court, on November 16, 2010. The IHOA was represented in that case by McNair, the same law firm that represents all Defendants in the "3596" case, and by the same attorneys.

The Defendant IHOA, through counsel, secured the transfer of the Magistrate Court to the Circuit Court over the objections of Plaintiff. This transfer was NOT an Appeal.

The Answer of the Defendant in the 2010 Magistrate Court case had no counter – claim.

Upon transfer to this Court the Magistrate case was renumbered 2010-CP-26-11320 and later consolidated – at the request of the Defendants.

On October 24, 2011 the Defendant IHOA filed it's "Amended Answer to the Complaint and Counter – Claim".

In the 2010 case the Defendant's Counter Claim is contained in paragraphs numbered 22 through 47. In the 2009 case the Defendants' Counter – Claim is contained in paragraphs 50 through 75. In the Counter – Claims in both cases, the "Relief" requested was identical in paragraphs "b" through "e" ("a" being differentiated in that the 2010 case asked for the dismissal of the Complaint and in the 2009 case it asked for the dismissal of the Amended Complaint").

On January 17, 2012 when the consolidated cases were originally scheduled for trial, the Hon. Judge Stephen John ruled from the bench that Defendant Toth would not receive any money from the counter – claim.

At court and in this Brief the two Counter – Claims were and are addressed together, because they are one and the same cause of action, because they are posed exactly the same, and because the same infirmities relate to both.

Counter – Claim Failed to State Date of Tort

In the Counter – Claim(s) the Defendants failed to state the date ("time") of the supposed tort, contrary to the procedure set out in SC Rule of Civil Procedure Rule 9(f) and should thus be denied..

Co – Defendant KA Diehl Has No Cause of Action

The Court is asked to note that while the Counter – Claim was stated in the combined answer of both Rosemary Toth and the IHOA. KA Diehl filed it's own answer with no counter – claim.

Bearing of "No Wall / No Fence" on Counter - Claim

There are two elements to the Counter – Claim, both of which are false.

The first of these is that there is an actionable tort at this time which the Defendants label as failure to seek the prior approval of the Architectural Review Board, ("ARB"), or of "the Defendant HOA" ("IHOA").

The second prong of their counter – claim is that a restricted "brick wall" was constructed by Plaintiff.

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.

Prior Approval

At trial Plaintiff proved that there is no requirement (Section 7.2) to seek prior ARB approval of anything.

At trial Plaintiff proved that per the Procedures 13.2 of the Bylaws, no fine is owed if a violation has been abated prior to a hearing before the board.

The Procedures 13.2, which is part of the putative Bylaws at Pl # 548 which appears as Exhibit C to the Covenants, lays out a step by step escalation which terminates in imposition of fines and sanctions. It does not begin with that.

At Plaintiff's # 627 is the "Violation Letter" written and sent by Defendant KA Diehl on September 27, 2010. It starts out saying that Plaintiff had been fined by the contractor without hearing or decision by the IHOA Board or by the ARB.

Please be advised the following covenant violation has been noted at your residence for which a \$50 fine has been added to your association account in accordance with the ARB Guidelines:

The Court is reminded of the numerous cases which Plaintiff has here to fore cited to which specifically reject the notion that rules, particularly those which change with the season and which are ambiguous at best, can supplement covenants.

This initial and illegal fine is an element of what the Defendant claims it is entitled to.

At trial Defense Counsel led Freiboth through an iteration of what the Defense is demanding:

First, \$ 2,500, the deductible for when the IHOA answered the Human Affairs Commission Complaint.

Plaintiff at trial led Freiboth through an admission that the IHOA was not the complainant in the Human Affairs Complaint, that this was not a civil action, and that at

the conclusion of the Human Affairs Complaint, although the IHOA prevailed on the basis of what Toth wrote – the Commission assuming she was telling the truth – no change on Plaintiff's property occurred. Freiboth admitted that at no place in the entire Human Affairs correspondence did the IHOA demand that Plaintiff do anything and that Plaintiff was not compelled to do anything.

The Court was asked to note that a key element in obtaining attorneys fees under the covenants is the a violation be restored to it's prior condition or otherwise Abated.

The Court is asked to FIND that the demand for the \$ 2,500 stated by Defense in court is frivolous.

Secondly, Defense Counsel led Freiboth through a demand for an additional \$ 2,500 deductible because the Defense had to defend against Plaintiff's 2010 Magistrate claim that he was improperly refused permission to extend Plaintiff's Palm Tree Bed. At trial Freiboth conceded that Plaintiff never actually did anything, except sue, after the November, 2010 denial of the Palm Tree bed extension request, and Freiboth was unable to point to a single alleged violation of covenants in that regard. A successful suit to enforce covenants must, again, result in mitigation or removal. There was nothing to mitigate or remove.

The Court is asked to FIND that the demand for the second \$ 2,500 stated by Defense in Court is frivolous.

Thirdly, Defense Counsel led Freiboth through a demand for a third \$ 2,500, that being to assert the Counter – Claim relating to the none – existent Brick Wall.

The Court is requested to take judicial notice of Defense's contention that the violation was erection of a "brick wall" stated in the September 27, 2010 Violation Letter, PI #627. It reads that Plaintiff had altered a "landscape bed with curbing" and had installed a "brick/stone addition to your side yard"

Please submit an application for the exterior modification of the landscape bed with curbing as well as the brick/stone addition to your side yard.

The violation alleged in the letter is not what is alleged in the complaint. In the Complaint the Defendants claim that Plaintiff never filed an ARB application prior to installing a "brick wall". One can not in good conscience be accused of failing to submit an application for something never built. In the complaint the IHOA Counter – Plaintiff does not allege failure to submit an ARB application for the landscape bed with curbing or for a "brick / stone addition". The Defendant plead with extreme specificity and is bound to that specificity.

At trial Plaintiff led Defense Witness Freiboth through a lengthy examination of the IHOA's putative bylaws focusing on the Procedures Section, 13.2 of the Bylaws.

At trial, Freiboth ultimately admitted that the Procedures of Bylaws Section 13.3 begins with the absolute prohibition against what KA Diehl did – a contractor imposing a fine when the contractor alleges a violation has been observed.

He admitted that the IHOA considers the Bylaws binding on them.

He admitted that Section 13.2 begins:

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

Section 13.2.1.3 provides that the IHOA must first serve a demand letter which includes that no sanction will be imposed if the alleged violation is abated within ten (10) days. “Abated without ... sanction”.

Defendants conceded that Plaintiff filed a “putative” ARB Application relating to what was on the ground and what was further intended on September 30, 2010, PI # 629, which was three (3) days after the Violation letter was signed, and the day that said violation letter was received.

This abated within ten days the alleged failure to submit an ARB violation.

The Defendants are thus not entitled to any recourse relating to submitting or not submitting an ARB application.

Second Prong – Brick Wall

At trial Plaintiff entered into evidence numerous photos of Plaintiff's lot which proved conclusively that no “brick wall” had been erected and that what was erected, by the preponderance of the evidence, could not be confused for a brick wall. Plaintiff attaches by reference the prior proof that what was erected was not a “brick wall” and that no reasonable person could construe it as such.

Plaintiff attaches in way of reference all the exhibits and photos that related to the refusal of Defendant to permit the erection of the requested Fence.

At trial, Freiboth conceded that the Procedures lays the entire burden on the IHOA to schedule an appeal on a continuing alleged violation, and that the home owner alleged to have a continuing violation is not, in the procedures, required to request such an appeal hearing before the IHOA Board.

Plaintiff entered into evidence the IHOA's disapproval of Plaintiff's fence which was dated October 8, 2010, PI #632. No where in that letter is there any reference to having

to file an "appeal".

Plaintiff entered into evidence his letter to the IHOA Board of Directors on October 11, 2010, PI # 633, which states on the subject line of page 1 that this is an "appeal" of the "disapproval of fence"

At trial Freiboth first asserted that the Board expected Plaintiff to file an appeal with the IHOA Board and, he repeated this several times under oath, that Plaintiff never filed such an appeal. The Court is reminded that there is no requirement for the putative violator to file such an appeal. The Bylaws that the IHOA purportedly use enjoins them from any further action until the BOARD itself independently schedules a hearing, invites the homeowner, holds a hearing, and finds an actual CONTINUING violation has occurred.

In this instance there was no continuing violation.

No invitation to or hearing or finding took place.

No sanctions were entered into the minutes of the board as is required by Procedures 13.3.3.

There are no sanctions against Plaintiff lawfully imposed.

The allegation in the Counter Claim that the IHOA has lawfully imposed a sanction which is actionable at court is false and frivolous.

At trial, after Freiboth was through repeatedly stating under oath that no appeal was made by Plaintiff, he was presented Plaintiff's October 11, 2010 to read.

He clearly was familiar with it because he now frivolously stated that on the last page of the letter Plaintiff had "waived" any appeal. Disregarding this, procedurally, the Procedures of 13.3 do not consider such an eventuality but provide a very strict step by step procedure which includes holding that appeal hearing with or without the violator.

At trial the Court was asked to note that the plain language of the text in question, which Freiboth was required by Plaintiff to read, doesn't waive an appeal. Instead it puts the Defendants on notice that their action will subject them to law suit to enforce Plaintiff's rights.

4. I reserve my right to take parallel recourse at law or in equity, since by disputing the authority of the HOA in this matter I am disputing the necessity of an "Appeal".

Plaintiff entered into evidence PI # 634 which is the IHOA's response to Plaintiff's October 11th 2010 Appeal. The IHOA response was mailed October 21, 2010, exactly ten days after Plaintiff mailed his appeal, to fraudulently make it look that Plaintiff had been

given timely notice to file an appeal. The IHOA letter mailed October 21, 2010, as evidence by the postmark to the IHOA envelope which is page 1 of the exhibit, and the letter at page 1 being mis-dated October 14, 2010, now stated that fines and sanctions will continue "Unless you successfully appeal the ARB decision"

Unless you successfully appeal the ARB decision, you must remove the brick fence foundation already installed and restore the sod to its previous condition. Restoration is necessary to avoid fines for an ARB violation.

Plaintiff at trial next introduced into evidence Plaintiff's letter of reply to the IHOA Board dated October 23, 2010, PI # 635.

Freiboth was required to examine this document and to read from it.

This letter put the IHOA on unmistakable notice about it's burden under it's own procedural rules. This letter and the prior letter of appeal were omitted by Defense when it enumerated the correspondence relating to the alleged violation.

Paragraph 2a of Plaintiff's October 23, 2010 letter placed the IHOA on unmistakable notice that the prior October 11, 2010 letter was an "appeal".

These documents alone prove by the preponderance of the evidence that the counter – claim is frivolous in the extreme, and fraudulent as well.

Plaintiff will leave it to the Court to characterize the testimony of Freiboth and the attempt of Defense Counsel to assert, through Freiboth, fraudulent claims for an additional \$ 5,000 related to the Human Affairs Complaint and the Palm Tree Complaint in Magistrate Court.

**THE SPECIFIC ALLEGATIONS OF THE
COUNTER CLAIM ARE FALSE**

In addressing the Counter Claim(s) paragraph by paragraph, the first number is the paragraph number in the 2009 "3596" Complaint and the second number is paragraph number in the 2010 "11320" Complaint. Both are word – for – word identical text.

56/28. "Section 7.2 of the Declaration provides:" This is the requirement to seek "Prior Review of All Plans."

This was deleted on May 10, 2000 through Amendment #1 to the Covenants.

59/31. 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."

The Court is asked to take judicial notice that on August 5, 2009, the IHOA / ARB Denied Plaintiff's application for a swing set. The Defendant implied that all prior applications were approved. The Court is asked to consider the Defendant's assertion as meant to deceive and "disingenuous".

60/32. Upon information and belief, the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.

The Court is asked to take judicial notice that at all times in BOTH counter – claims in both cases, Defense Counsel meticulously chose and used the phrase "Brick Wall". The Court is asked to conclude that the party on whose behalf a pleading is filed, the IHOA Defendant, is responsible for the contents of the pleading. The phrase "or on whose behalf it is filed" is used in this context.

The Court is asked to note the prior discussion which points out that an ARB application is not required for something hypothetical – not actually built.

62/34. Thereafter, the Plaintiff applied to the Architectural Review Board for approval of the brick wall and a fence, as well as a flower bed and edging.

The Court is asked to take judicial notice that Plaintiff's "application", September 30, 2010, Pl #629, never used the phrase "brick wall".

63/35. Pursuant to Section 7.4 of the Declaration:

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

The Court is asked to take judicial notice that Section 7.4 explicitly mentioned both "fences or walls" and the deletion of this through Amendment #1, May 10 2000, explicitly removed any controls on both fences and walls.

It is thus irrelevant whether what was constructed was a fence or a wall. Neither were or are subject to any restrictions on use.

Clearly through the pendency of Plaintiff's pre-existing complaint filed in 2009 Defense Counsel was aware that the requirement to apply to the ARB as well as the restrictions on fences or walls were all deleted.

An attempt to enforce a non-existent covenant provision after notice of the deletion (and without even discussion of same in the counter – claim) is at the least frivolous.

64/36. The Architectural Review Board approved the Plaintiffs request for the flower bed and edging and denied the Plaintiffs 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.

In this paragraph Defense Counsel added a non – existent non-fact to the statement of facts supporting her claim for relief. Defense Counsel asserted, fraudulently, that the ARB denied a request for a "wall". That is NOT what the Denial letter said was denied. Here is what the IHOA letter of October 8, 2010 said was denied:

Install 6ft vinyl fence with a brick foundation to side yard.

Rather, they denied a brick foundation to a fence, not a "wall" and the areas where the denial applied as the "side yard" not the front of the house.

The denial letter further is at odds with facts and law, because that letter also gave as it's reason for denial:

"This request has been denied due to its direct conflict with the covenants."

There is no conflict with the covenants. The IHOA's actions conflict with the covenants in that the IHOA is asserting powers it does not have. The IHOA is only empowered to advocate for actual violations of covenants and when the covenant provision under which it purports to act ceases to exist, acting under such a deleted provision is itself ultra – vires.

65/37. 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.

The Court is asked to note that under the IHOA's purported bylaws which includes Section 13.3, neither the contractor, defendant Diehl, nor the IHOA's ARB committee, has any authority to threaten anything, and that fines and sanctions do not begin to run until after the property notice and held IHOA Board hearing on the minutes of the Board of Directors.

Once again, "brick wall" is alleged.

67/38. 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.

1. The violation notice never spoke of a "brick wall". Once again Defense counsel inserted a phrase which she asserted was in a document where it was, in fact, not used.

2. The text implies that Plaintiff dallied and went beyond the ten (10) days in which a violator is allowed to act before sanctions begin to run. She used the phrase "several weeks".

In point of fact the violation letter was dated September 29, 2010, Pl #627, and the receipt for the fine is dated September 30, 2010, Pl # 630, THE NEXT DAY. The Court is left to it's own discretion as to how to characterize Defense Counsel's mis-statement of material facts.

3. The allegation of Defense Counsel in this paragraph is that instead of mitigating, Plaintiff acted recklessly and "threatened to sue". The actual documents show that an action at law was not mentioned until the Plaintiff's letter to the IHOA reminding it that the IHOA Board was remiss in it's procedural obligations and that it had ignored Plaintiff's "appeal" leaving Plaintiff no recourse except an action at law. No threat was made. Plaintiff used the phrase:

"I reserve my right".

68/39. Although the Plaintiffs 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.

Again Defense Counsel uses the phrase "brick wall".

The IHOA's ostensible Bylaws Article 13.3.2 allows a violation to continue for up to "two (2) months of such demand,"

Further, there does not exist a letter where Plaintiff "refused to remove" anything. Plaintiff instead demanded that the IHOA follow it's own procedures and that it take note of the covenants as they are amended.

72/44. ... 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.

"Brick wall" again. Also, since the hearing mandated in the Bylaws had neither been noticed or held and no action on the minutes entered, no enforceable debt exists. Plaintiff's repeated references to the Procedures in his two letters, the last one even quoting the procedures in their entirety, put the IHOA Defendant AND it's counsel on notice of this.

The Defense assertion of deb in paragaphs 72/44 in and of itself is fraudulent and frivolous.

74/46. 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.

No home owner can control the irresponsible act of the IHOA Board and of it's counsel. If Defense Counsel and the IHOA Board decided to launch a frivolous, unfounded, and false counter - claim, they need to look only to themselves to find who instigated the expense. There is no "direct and proximate" path from what Plaintiff did to the IHOA counter - suing.

At trial Beckie Abel an employee of KA Diehl who was a Defense witness was directed by Plaintiff to discuss the Community Association Institutes classes. Under oath she indicated that she had extensive training from this purported source of applicable knowledge, one area of which, Plaintiff recalls, was applicable law and procedures. Abel testified at trial that she has been engaged in home owner association management for many years and Diehl has been present since the first Board meeting of record, September 10, 2002.

Clearly the IHOA Board had the paid expertise to point the IHOA board to it's own procedures, especially after Plaintiff pointed them out, in writing.

75/47. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, ...

Plaintiff refers the Court to the prior discussion regarding the Covenants, and court decisions relating that home owner association rules and bylaws do not extend or alter restrictions in the covenants, and that the Covenants must be strictly construed in favor of the free use of property, and that doubts and ambiguity will likewise be so resolved.

The Court is asked to conclude that the IHOA Board and it's Defense Counsel were aware that no terms of the Covenants or even the ARB Guidelines at the time were breached. To recall, the Guidelines off.

**Plaintiff's Claim That Defendant and Defense Counsel
Violated the South Carolina Frivolous Civil Proceedings Sanctions Act**

When Plaintiff addressed the Counter Claim he explicitly invoked SC 15-36-10 et seq, and in particular subsections 10 and 100 of that act, Pl #200, 201, and 202.

Plaintiff asserts that sufficient facts are before the Court for it to determine what certain Counter Claims of Defendant IHOA and it's Counsel are Frivolous.

Plaintiff asks the Court to perform the analysis set out in the statute, and to conclude that the Counter – Claims that Plaintiff in the brief supra asserted are frivolous are in fact frivolous. Plaintiff then asks the Court to determine, per the statute, appropriate

“sanction(s) which the court considers just, equitable, and proper under the circumstances.”

RELIEF

Plaintiff through the preponderance of the evidence has proved that there are sufficient facts and basis in law for the Court to enter the following relief.

- (1) Denial with prejudice of each and every counter - claim of the Defendants.**
- (2) A finding that the Defendants IHOA and KA Diehl acted maliciously, purposely, and without authority to interfere with Plaintiff's lawful use of property.**
- (3) A finding that the Defendants, both the IHOA and KA Diehl, acted fraudulently towards Plaintiff and knowingly violated the rules of procedure they stated were applicable to their actions.**

(4) A finding that the IHOA Defendant and it's Counsel of Record acted in violation of the South Carolina Frivolous Civil Procedures Act, and appropriate sanctions as determined by the Court.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	

- DIVISION 20 -

DEFAMATION

From the Evidence of Record and the Testimony of the Witnesses, the following underlying facts are undisputed:

Sometime between April 13, 2009 (when Plaintiff's Complaint was served) and May 8, 2009 (the date at the bottom right of the McNair printout from Westlaw of a Jarmuth v Reynolds case description), per the testimony of Defense witness Maureen Sullivan, the IHOA Board met and unanimously agreed to the course of action relating directly to Plaintiff about which Plaintiff has asserted Defamation claims.

In the testimony of Julie Case (a KA Diehl employee) she admitted that she received direction, as part of her official duties, to take part in the matter. Case admitted to preparing a package of material and a list of home owner addresses and to providing same to a "mail house". Evidence was later collected and put into evidence, without dispute, that "Carolina Mail House" was the contractor employed to copy and print the mailing passed to it from Defendant's employee Julie Case, including custom color printing, to assemble the material, to insert same into oversize envelopes, to print custom mailing labels, to affix these individually to said oversize envelopes, to sort these by zip code, and for Carolina Mail House to take them to the post office for mailing. It was also learned and undisputed that the person at Carolina Mail House who did this was Angela Goodman. It was learned that because of what said Goodman did in connection with this at the Murrells Inlet Post Office, said post office lost it's authority to accept bulk mail, all such bulk mail now having to be delivered (for mailing) to the Myrtle Beach main post office.

All the aforesaid was stated under oath by Plaintiff at trial.

The deposition testimony of Rosemary Toth was that she concurred in the matter.

The deposition testimony of both Toth and Defense witness Maureen Sullivan, who was a Board Member and present through this, was that the Board made the related decisions in secret and purposely kept all record of this out of the minutes of the board.

Until ordered to by the Court in 2012, despite discovery demands made early in 2009, the Defendants never gave up the name of either Carolina Mail House or Angela Goodman. They specifically failed to answer the question of what entity owned the postage license / imprint used on the oversize envelopes.

The testimony of Sullivan and Toth was that neither bothered to do anything to verify anything contained in the letter(s) and email(s) and web page(s) created relating to the alleged character and behavior of Plaintiff.

The testimony of Toth was that she was familiar with the contents.

The testimony of Sullivan was that she held the matter in so little regard that she didn't bother to read much of it, which Plaintiff disputed.

In her deposition, Case admitted to the creation of web pages at the behest of the IHOA Board and the direction of her employer and that she was the one with access to the web site to be able to post material about Plaintiff – the same material she had mailed – on the web site.

In testimony at trial Sullivan stated that the intent of the IHOA Board was to provide as much information as possible about the “3596” complaint Plaintiff had filed against the IHOA in early April, 2009. Under oath and under repeated opportunities offered for her to amend her testimony, Sullivan swore that the web site then, and since, contained the 3596 case Complaint, the IHOA's Answer, and the subsequent Amended Complaint and Amended Answer(s).

Sullivan admitted at trial that the email sent to as many home owners as they had email addresses for included a link to the material that the IHOA Board had directed be placed on it's web site so that homeowners would see the various attachments. Sullivan stated that part of the IHOA Board's determination was that as new home owners bought into the PUD, who would not have received the original material by mail, those new home owners would also see the material the IHOA Board had prepared relating to Plaintiff. Sullivan boasted that over the period from 2009 through the present, the IHOA Board “pushed” home owners to the material on the web site.

One example of the “push” is seen on page 3 of Plaintiff's #526, where clicking on the inviting and self evident phrase “CLICK HERE” took home owners to the web page on page 4 of that exhibit.

After numerous repeated professions of knowledge about the web site, Sullivan was shown page 4, which has a date of May 28, 2009. That date is significant because it perpetuates the contents of the web site at the time AND shows that on that date the web

site had been fully assembled, and that material, such as the "Click Here", had been assembled ahead of time so that the link destination would be known and the link would work. This was a lot of technical work. The material which was sent in writing also had to be uploaded to the web site and converted to Adobe Acrobat files.

It is unclear how much KA Diehl was paid for this because that information is not apparent from the HOA 2009 General Ledger.

Page 4 of the document shows that at the time the web page did not contain Plaintiff's Complaint nor the Defendant's Answer.

Plaintiff testified that with the assistance of other home owners (who have "signed up" to the IHOA web site), Plaintiff verified that as recently as the day before trial, August 7, 2012, the IHOA web site still was exactly as it was on May 28, 2009 – the 2010 Complaint not there, no amended complaints, no amended answers, not a single document that actually came from the 2009 or 2010 cases.

Sullivan was unable to cite a single piece of information that home owners would get about the Actual case at bar from what the IHOA put on it's web site with the assistance of Diehl.

In deposition, Case testified that the IHOA does not actually "have" a web site, but that the material is carried on the KA Diehl web server.

In her deposition, Toth conceded that the IHOA is the "owner of record" of the web site address www.internationalclubhoa.com. Plaintiff's Exhibit # 532 documents that as of May 31, 2009, three days after the defamatory email and defamatory web site material, Defendant Toth admitted that it correctly identified her as the "administrator" and "technical contact" for that web site. She identified the address for the owner of the web site as that of her personal residence in the PUD.

Because Plaintiff's evidence set had fragmented the documents contained in the mailing and email and web site into individual exhibits, Plaintiff filed with the court a unified copy of what Defendants mailed – regarding Plaintiff – and this was accepted by the Defendant as authentic. It is not among Plaintiff's list of exhibits filed before trial but was assigned a separate number by the Court Reporter and was accepted into evidence.

At trial Plaintiff put into evidence Pl # 522, material he received directly from Angela Goodman the proprietor of Carolina Mail House pursuant to a subpoena duces tecum and also pursuant to a FOIA request Plaintiff submitted to the US Postal Service – after he was unable to get this material directly from the IHOA or Diehl defendants. The authenticity of the material was uncontroverted.

The material shows page 3, PS Form 3600-R1 "Total Pieces" that 646 copies of the mailing were presented to the Murrells Inlet Post Office for mailing in 8 trays.

The Court is asked to take this as the definitive count of how many copies of the mail relating to Plaintiff the IHOA and KA Diehl, jointly and separately, republished as separate defamations relating to Plaintiff.

On May 24, 2012, pursuant to an Order entered by Hon Judge Stephen John on January 17, 2012 that the IHOA and Diehl must finally provide Plaintiff the list and count of home owners to whom they sent the defamatory email, the IHOA provided Plaintiff (on a CD) a document with their "Bates" numbers 4406 through 4430. It took 25 pages to report to whom the IHOA sent defamatory emails relating to Plaintiff.

IHOA Bates numbered page 4406 was put into evidence as Plaintiff's # 525. It affirms that Julie Case, by name, as an employee of Defendant KA Diehl, attempted to send 577 emails to home owners, of which 354 were successful.

During the trial Defense Counsel objected to the admission of the document that Defense Counsel, itself, had provided Plaintiff by Order of Court only a little over two months earlier. This was clearly a document kept in the normal course of business, and is the automatically generated report "given: to the sender after KA Diehl's facilities are used to generate an "email blast".

It states that:

The Sender was Julie Case.

It was sent from a KA Diehl email address, julie.case@kadiehl.com.

It verifies Plaintiff's assertion in his complaint that "hitting the reply button to the defamatory email brings up Julie Case's email address as the sender". Pl # 526 page 2.

That it was sent to PUD property owners.

That the contents was "litigation details" on the subject line, the same as the package put into evidence and as admitted by Case at her deposition.

There is nothing privilege about it, particularly since it was previously provided by Defense Counsel to Plaintiff to use in evidence at trial, and since it bears the McNair Bates identification at the bottom right.

Plaintiff asks the Court to take the number 354 as the definitive number of emails sent relating to Plaintiff.

From page 4 of Plaintiff's # 526 it may be seen, and this was not controverted, that the IHOA / KA Diehl web site contains the following:

- No actual document from this case.
- A letter from Henrietta Golding
- A separate document titled "Jarmuth associated List of Lawsuits"

The following four (4) separate documents:

- Jarmuth v Cox
- Jarmuth v Frinzi

- Jarmuth v Reynolds
- Jarmuth v Weiss

At trial Plaintiff placed into evidence a complete copy of what was mailed by Carolina Mail House which included the complete text of the "Jarmuth v Frinzi" attachment. Plaintiff asked the Court to take the opportunity to note that on page 2 of the document, bottom of the left column, the mailing repeated unproven allegations that Plaintiff is a child molester and had engaged in various sexual misconduct involving a child. Plaintiff pointed to the rule of pleading relating that a defamation plaintiff can describe the defamation in general terms without having to repeat it.

The Court is asked to note that Plaintiff's Amendment #1 to the 3596 Complaint states the accusation in paragraph 108 of the Amended Complaint.

The Court is asked to note that both on the web site and in paper form (in the mass mailing), the Defendants IHOA and KA Diehl republished a defamatory restatement relating to Plaintiff and that this republishing was not done by a party to the case from which it was taken, that the republishing was made out of the courtroom. The court is also asked to note that what was published was a selective "cut" of the document, just the first two pages, and that the publisher chose to omit the balance of the document for self-serving purposes.. Plaintiff asks the Court to take judicial notice that the decision of which Defendants have extracted two pages consists of thirty five pages.

In testimony Toth, Case, and Sullivan testified that they made no effort to obtain any clarifying information from Plaintiff prior to or after publishing the material about Plaintiff.

In testimony Plaintiff stated that through the Defendants refusing to provide Plaintiff the "list of voters" they denied Plaintiff the opportunity to provide contradictory information.

In his trial testimony, Plaintiff's witness Louis Astorino testified that a home owner, John Marzetti, who Astorino pointed to in the Court room, and William Fletcher, a neighbor across the street from Plaintiff who (Fletcher) at the time was an IHOA appointed member of an IHOA committee, both told Astorino that "Jarmuth is a Pedophile". Astorino further elaborated that this was after the IHOA letter about Plaintiff was mailed and that he had not heard any statement from any home owner relating to Plaintiff prior to the mailing.

Defense did not call Marzetti to contradict Astorino.

At trial Sullivan stated that one of the considerations the IHOA Board took into account was that, at the time, no home owner had any idea who Plaintiff was and they collectively decided to give the home owners the IHOA Board's desired characterization of Plaintiff.

Plaintiff does not controvert that is exactly what they did.

Sullivan also testified that through the present it is the intention of the IHOA, at every opportunity, to continue to "push" home owners, particularly new ones, towards the web site material relating to Plaintiff.

At trial Butryn, Pete Pizzi, Jane Pizzi, Astorino and Plaintiff all acknowledged receiving the mail package from the IHOA. The copy filed with the court has Plaintiff's name and address on the envelope which is also of record.

Butryn, the two Pizzi's, and Plaintiff all acknowledged receiving the email from Case relating to Plaintiff. The copy filed with the court has Plaintiff's email address on the printed image of the Case's email.

At trial Sullivan testified that she, as a member of the IHOA board, knew that Plaintiff was a foster parent, relating that she had seen Plaintiff "at the pool with three wonderfully behaved foster children".

Plaintiff is asked the Court to take judicial notice that accusations of misconduct relating to children can have an adverse effect on status as a licensed foster parent, and that neighbors are on occasion interviewed relating to licensing as part of background checks. The material published or republished by Defendants clearly had the potential to harm Plaintiff's reputation.

At trial Plaintiff's witness Astorino testimony relating to Marzetti and Fletcher is evidence that the material from Defendants more likely than not had a detrimental impact on Plaintiff's Reputation. When Fletcher made his comment it was an admission against interest because he held the capacity of officer or employee of the IHOA (an ARB committee member).

At trial Plaintiff introduced into evidence a set of emails addressed to him, stating that these were only some of the many that followed the IHOA publications by mail, by email, and by website.

Some of those emails were introduced into evidence at Pl # 518.

From the top of the page it can be seen that the original Julie Case email was transmitted at 12:58 on May 28, 2009.

Plaintiff read the salient defamatory points of these into the record at trial to show that there was in fact a predictably negative impact on Plaintiff's reputation. As Sullivan and Plaintiff both testified, Plaintiff did not know any of these people and, to the best of Plaintiff's knowledge, had never met them (or would not know them if he saw them, and the other way around).

Comments included that Plaintiff had caused these home owners pain and suffering,

that Plaintiff had a mental condition and needed to be institutionalized or medicated, that they had the impression from the material that frivolous and un-successful pro se law suits consumed Plaintiff's life.

Particularly troubling was the treat of one individual, Aine Hukazaelie, whom Plaintiff knows he has never met, to bring a mob to Plaintiff's house "to take action against him in person". Plaintiff was called a "bully" with the contents of the IHOA material clearly the source of their perception.

Of record are the Horry County Police Reports which were filed by the Horry County Police PI # 530 which (the second) perpetuates that Plaintiff was receiving threatening phone calls as well and that Plaintiff was fearful for his safety.

At trial Butryn testified that the IHOA Board took active steps to try to isolate Plaintiff. Butryn testified that he was told to "fire" Pete Pizzi as a member of the Buildings and Grounds Committee for the sole reason that Pete Pizzi was seen going into Plaintiff's house holding papers. Astorino testified that he was told by Fletcher that he, Astorino, should have nothing to do with Plaintiff.

At trial Plaintiff entered into evidence as related to Defamation all his exhibits numbered between 500 and 539.

At trial Plaintiff noted that the elements of proof of Defamation (PI # 519) included that the Defendants communicated a defamatory statement, relating that the material mentioned so far fits that requirement. Plaintiff stipulated that the List of Cases, which was not an abstract of cases but which composed specifically for the purpose of defamation has additional defamatory content as judged by it's intent to harm the reputation of Plaintiff in the Community.

Plaintiff testified that he had proved far beyond the preponderance of the evidence that the material was communicated to hundreds of persons other than the writer or Plaintiff == third persons.

Plaintiff put into evidence that since Plaintiff's name was on the document, the recipients knew that Plaintiff was the subject of the communications.

From the material addressed in this brief so far, and addressed more completely at trial, it is clear that Plaintiff's reputation was damaged.

Plaintiff asked the Court to take judicial notice of the definition of Defamation at Black's First Edition, PI # 528 and of Black's First Edition Definition of Conspiracy, PI # 527.

Plaintiff alleges that through the testimony of Abel, Case, Sullivan and Toth, there clearly was a conspiracy between the IHOA Board and KA Diehl to injure Plaintiff by Defamation.

At trial Plaintiff noted that the letter from McNair was, on its face, a private communication between McNair (Defense Counsel) and the IHOA Board. However, a copy was also provided (Pl # 523 page 5) Beckie Abel, an employee of KA Diehl. At the time KA Diehl was not a party defendant and McNair had no related attorney – client relationship with Diehl or Abel. This was not controverted at trial. Abel was a Defense witness at trial.

Plaintiff asserted that he took the inclusion of the letter from Golding as a token which would lend credibility to the rest of the material. Plaintiff did not allege that what Golding said on the five pages of her letter was actionable and specifically stated that he was not making such an allegation.

Plaintiff's witnesses Astorino, Butryn and Pete Pizzi testified that the fact that the other material was attached to the McNair material led them to believe that everything in the remaining material must be true. They also testified that they were unable to independently verify the truth of the matter because the material from the IHOA did not suggest how they could go about doing this.

All these witnesses testified that the following statement in the McNair letter was critical to the way they perceived what followed:

"I have discovered that he has been a Plaintiff in at least (13) thirteen different claims / lawsuits (not counting this lawsuit) and it appears that he was pro se in each one. It also appears that he was not ultimately successful in any of the thirteen (13) lawsuits."

Plaintiff's witnesses testified that the implication was that each of the items on the attached "List of Lawsuits", which list is a separate items on the IHOA web site and a separate enclosure in the mailing, was in fact a civil complaint, that Plaintiff was pro se in each, and that he was ultimately unsuccessful in each.

This was a lie.

The Defendants acted recklessly in failing to do anything to verify any of it.

Their reckless disregard as well as the content of the List of Lawsuits, which was more than a list of lawsuits, injured Plaintiff in and of itself.

At Plaintiff's # 517 is a letter written by Butryn which he authenticated. It is mis-dated May 27 2008 when it was written 2009, because it states it was perpetuating what happened in April, 2009. Butryn authenticated it. At trial he even testified that it was on speaker phone so it was heard by many others in Butryn's presence. They were identified as "George and Adele".

It perpetuates that the phone call from Board Member Mike Templeton reflected a decision by Board Member at the time Bill Jacques to fire Pete Pizzi because he was seen associating with Plaintiff.

The List of Lawsuits

Plaintiff placed the List of Lawsuits into evidence as Pl # 515, and then proceeded to show the defamatory nature of the material and the fact that it is not true.

In a Defamation Suit it is not sufficient for the Publisher to aver that the statements are all true; the burden is on the publisher to prove it is true.

Defense Counsel made no attempt to prove anything was true. Defense Counsel did not controvert anything that Plaintiff testified to.

Plaintiff at trial pointed out that the Defendants had three contentions about every item on the List:

- (1) That Plaintiff was Pro Se; and
- (2) That Plaintiff was unsuccessful.
- (3) That each item was in fact a civil suit as a home owner would envision it.

The implication of this was that Plaintiff advocates issues that are so devoid of merit, attorneys will not take the case. Another implication is that numbers matter so the numbers cited by Defendants in their list was a material element. Except not each one was a civil case, or a court case at all.

The first case was titled "Jarmuth v Waters and Frinzi" with a Civil Action number 1:04cv63. It was asserted that the list of cases was what was to be found on Westlaw, which the Court can confirm is a rather complete list of cases. This case began in Pennsylvania in the Middle District federal court. Plaintiff testified that he was represented by the Pennsylvania Deputy District Attorney for Washington County in this matter. The Pennsylvania wire tap statute should have been a clue.

This case was transferred to the United States District Court for the Northern District of West Virginia, where Schwerha did not practice.

The summary written by Defendants did not indicate that the case never went to trial but instead that the case was dismissed on the basis of Statute of Limitations issues without ever hearing the evidence or going to trial.

The second case on the "List of Cases" bore a caption where a defendant was listed as "Dr. Brian Krolczyk in his capacity as Acting Director of Clinical Services for Valley Community Mental ..."

The implication was that Plaintiff had some sort of mental health situation, was treated by a mental health facility, and disliked the diagnosis or treatment by the Psychologist or Psychiatrist on duty.

This was all untrue.

First, Plaintiff was represented by attorney Pamela Follickman.

Second, it is notable that in this case, the author did not write an explanation. Plaintiff points out that if the author could find the case the author could find the description. In fact Krolczyk was never a licensed psychologist or psychiatrist in any state. He could not legally use the term "Dr.". In the litigation the caption did not include the phrase "Dr. Brian Krolczyk". That was an invention of the author of the List of Case.

Plaintiff never was a client of Krolczyk nor of the facility.

Krolczyk had falsely represented himself to be a licensed psychologist and was admitted based on his representation as to licensure and experience an expert witness on another matter. At trial he was opposed by several licensed experts of many years standing. The crux of the Krolczyk case was that Krolczyk perjured himself regarding his credentials and about other matters. In deposition testimony taken as part of discovery in this case, Krolczyk implicated the judge in the case as having come to an arrangement with Krolczyk to "fix" cases for a certain lawyer by using Krolczyk in cases – where the judge knew of Krolczyk's true situation and appointed him as the court appointed expert, through which Krolczyk received substantial sums of money. This became public and the judge in question was shortly thereafter no longer on the bench. Upon information and belief, to this day that particular attorney / former judge has not been practicing law.

The matter came before the West Virginia Board of Examiners of Psychologists,, Pl # 507. It noted that it had a peculiar situation because it's options were limited, since Krolczyk was not licensed. It found that he had perjured himself, had none of the training or experience he claimed, and barred him for many years from even applying for a license. The publication of the Order in the Official West Virginia State Register is the only instance Plaintiff is aware of that such a decision has been included in the State Register, the official record of West Virginia state decisions.

The civil court had limited jurisdiction over Krolczyk and the matter was resolved, with Plaintiff successful, before the West Virginia Board of Examiners of Psychologists.

Also in evidence was Pl #506. "4 Most" was, in West Virginia, the payment intermediary for West Virginia Medicare / Medicaid as well as for most health insurers paying mental health benefits in West Virginia. It terminated the payment of any claims, upon information and belief, forever, because Krolczyk was not a licensed provider and they found he had submitted claims for payment despite his unlicensed status, which is a crime.

The third item on the List was "Jarmuth v Tara Patterson, Esquire". No case caption was given, which should have alerted questions among people who are familiar with these things, but the target audience was home owners who had no such knowledge.

Plaintiff's witnesses testified that they recognized the "Esquire" as meaning lawyer and assumed that Patterson had done some legal work for Plaintiff, of which Plaintiff was dis-satisfied, and that Plaintiff had thereafter sued his attorney.

Nothing could be further from the truth.

Plaintiff never sued Patterson. There was no such case.

At trial Plaintiff introduced the docket of Case Number 1 on the List of Cases. It could plainly be seen that Tara Patterson is listed as an interested party, and that she was a Pennsylvania Deputy Attorney General. During discovery she had sat in on the deposition, in Pennsylvania (held by order of the federal court) of a particular Pennsylvania State Police Sergeant. At the deposition the particular State Police Sergeant admitted under oath that he had come into possession of incriminating evidence against James Frinzi and K. Waters, and that he, the State Police Officer, had been asked by the FBI to provide it to them and that he, the State Police Officer, had destroyed that evidence. Supporting testimony had been gathered earlier in a deposition from another State Police Officer who had direct knowledge of this – she was present in all aspects of the matter.

The entire case was supposed to be "under seal" and Tara Patterson petitioned the Court for a copy of the deposition transcript of the Pennsylvania State Police Sergeant, which she needed to prosecute that individual criminally.

She was never a defendant. Plaintiff never sued her. The facts would also have been known if the Memorandum order, the rest of it, were made public by the Defendants. See Pl # 512, the docket of the case.

The Fourth case on the List of Cases was "Jarmuth v Janet Reno, US attorney General". That was not the caption but the author took editorial license to add the "US Attorney General" to the caption for impact value.

Plaintiff put into evidence a print out from the US Department of Justice of Freedom of Information Cases, PL # 505. 1996 DOJ FOIA Cases. The case is listed on the second page as "Jarmuth v Reno" – no US Attorney General in the caption.

At trial Plaintiff testified that under federal law, FOIA cases are filed naming the custodian of records, Jarmuth also testified that the case did not end with a verdict against Plaintiff but in an agreement for Plaintiff to get access to the sought files, and a waiver of fees by the DOJ.

Plaintiff testified that this was in fact a "sting" operation to deal with a dishonest DOJ contracting officer who colluded with the major contractor with the DOJ who was defrauding both the DOJ and vendors. Plaintiff testified that after the records were copied by a team of attorneys, it was proven that the contractor, with the knowledge and collusion of the contracting officer, was "selling" the DOJ non-existent Word Perfect licenses (which he had not bought for resale) and non-existent Oracle data base licenses. The contractor

had also sold the DOJ the software the DOJ used for scheduling and managing civil and criminal cases – without paying the author, and this resulted in bankrupting the firm. Plaintiff testified that ultimately the US Bankruptcy Court for the District of Columbia ordered the DOJ to pay the bankruptcy estate the proper licensing fees for that software. There were other issues such as mis-representing hardware and pricing violations.

But no case description was provided by Defendants.

Case number 6 was Jarmuth v McLemore which had a noticeably peculiar item as part of it's case number "MISC:." Plaintiff introduced as evidence Pl #500 which was the 1993 DOJ FOIA list. The second item on page 2 of that list is this case – added without an explanation. She was the custodian of records. Plaintiff received the records he desired.

Again, this was not an ordinary "civil suit" as home owners would understand it.

Case No. 8 was "Jarmuth v Verizon", The Defendants write their own version of what went on. This description did not come from the final order and the author is fully responsible for what they wrote.

Plaintiff put into evidence what is readily found to home owners – and certainly to board members, if the "googled" this case. Pl # 536. Khuri v Verizon West Virginia, which refers to the "Jarmuth v Verizon" decision. The Khuri case clearly states that what happened in "Jarmuth v Verizon" is that:

1. This was not a civil suit. It was a Public Utilities complaint.
2. It was about DSL service.
3. The Jarmuth matter was "dismissed" because the WV Public Utilities Commission lacks jurisdiction over DSL service.

Plaintiff asserts he has the actual four page Order. On Page 2 Paragraph 4 the Order recites a finding that DSL service is subject to federal, not state, regulation, and thus the Commission lacked jurisdiction.

This was not a civil case as home owners would understand it.

Plaintiff had a valid cause of action.

The "case" was not denied on the merits.

The complaint never asserted that Jarmuth was given a party line. Defendant's choice of text was an absolute deception.

The purported "finding" was not the "finding" of the Commission.

The Tenth case on the list is, again, the Court should not be surprised, "Jarmuth v Frinzi" – the same case as #1 on the list.

When Plaintiff questioned his witnesses Astorino, Butryn, and Pete Pizzi, all testified that they thought this was another case. The Defendants left out "Kathleen Waters" – they manipulated the caption.

The description written by the Defendants themselves indicated that:

1. Jarmuth alleged that a co-employee at the FBI defamed him.
2. Jarmuth alleged that the defamation by his FBI co-employees led to Jarmuth being fired by the FBI.
3. Frinzi was an FBI employee.
4. Jarmuth was fired from a federal job because he falsely accused FBI co-employees of defaming him.
5. The document attached was a decision of the Court of Appeals.

And by implication, Plaintiff was again pro se.

Plaintiff's witnesses testified that what they read on the summary sheet was what they relied on. This summary "separate case" and the description, they testified, was important to how they viewed Plaintiff and if they had not known Plaintiff they likely would have believed what was alleged.

Plaintiff put into evidence his federal personnel file PI # 511. From it the Court was asked to note that in almost forty years of government service (including military time) Plaintiff has never been "terminated" and instead at the time in question was receiving cash bonuses for superior service.

Plaintiff testified that at the time Plaintiff's supervisor was the Deputy Director of the FBI for white collar crime, and that later this same person became Deputy Director of Homeland Security and after 9/11, this same individual brought Plaintiff over to Homeland Security for certain purposes – which Plaintiff testified at trial included the systems which are used to identify individual who need greater scrutiny at airports and in applying for certain licenses and certifications to work certain places.

Plaintiff also testified that he was placed under the FBI's charter by a direct request from Janet Reno to the Assistant Secretary of the Army for Financial Management (after the supposed Jarmuth v Reno case).

At trial Plaintiff testified as follows:

1. Frinzi was never a federal employee of any kind.
2. Plaintiff never made any allegation against any FBI employee.
3. Plaintiff has never been terminated from any position with the federal government.
4. The document provided by the Defendants was NOT a decision of the Court of Appeals.
5. At the Court of Appeals Plaintiff was represented by attorney Ern Reynolds.

Case No. 11, Jarmuth v Reynolds. Plaintiff put into evidence PI # 502, an involuntary Chapter 7 Bankruptcy Petition involving Oxana Turetsky about which more

was said later. On Page 3 it can be seen that Ern Reynolds was the attorney of record for Plaintiff.

The germane part which was left out is that The bankruptcy case was In Re Oxana Turetsky, and that Plaintiff petitioned the Bankruptcy Court to hold that her debt to Plaintiff was an intentional tort which could not be discharged in Bankruptcy. Turetsky was represented by various attorneys. The Court held in Plaintiff's favor. This was upheld by the USCA District of Columbia Circuit. Plaintiff won an important victory here. The matter the Defendants cited to was an interlocutory matter, not a separate case, where the entire creditor's committee, including Sears Roebuck, two stock brokerage houses, and others were united in demanding that the selection elected by the Creditor's Committee be seated as Chapter 7 Trustee – and Plaintiff did not request that he be the one.

Case No 12, "Jarmuth v Weiss". Plaintiff put into evidence the parallel case before the same court which was "Weiss v Jarmuth", Pl #503. In this matter Plaintiff was represented by the Assistant United States Attorney. Jarmuth prevailed and it was upheld by the USCA-4th.

The Defendants here wrote an untruth, that "the Appellate Court confirmed the jury verdict". This parallel case never went to the jury, which had been seated. It was dismissed on procedural grounds. The implication was that a jury had ruled against Jarmuth – a serious matter and one which carries weight for a homeowner. This never happened. Perhaps the trial court felt it was enough that Weiss was "fired for cause" by the federal government.

Which brings us back to the "Frinzi" case. Plaintiff's witnesses, Butryn in particular, testified about how hard it is to terminate a federal employee of long time standing. The implication of the Frinzi case, as was stated by Pete Pizzi and Butryn and Astorino, was that Plaintiff must have done something so terrible that a federal agency was able to terminate a long time employee. This was absolutely defamatory in implication and false.

Which brings us finally to Jarmuth v Turetsky. This case started out in the Circuit Court for Prince George's County, Maryland. It alleged that Turetsky had forged a power of attorney and used it to get Charles Schwab to move certain stocks and money from Plaintiff's account to hers, and thereafter she "made off with the goods".

Through today there is a warrant for her arrest issued by the USDC-MD.

The case was moved to the USDC for the District of Columbia where the crime took place. She was represented by counsel. Plaintiff was represented by Ern Reynolds. A multi – day jury trial resulted. Plaintiff's # 501, entered January 11, 1994, was a judgment on the verdict in the amount of \$ 153,000. So Jarmuth was represented by counsel and Jarmuth prevailed. Turetsky filed for bankruptcy – and the judgment was never the less upheld as subject to collection.

Defense counsel and any one with access to the internet and willing to pay for the use of the US Party Case Index (PACER) could plainly find the list of cases involving Turetsky. Pl # 510.

This is a particularly "wild" description. The Court is asked to look to the Judgment on the Verdict in case # 92-2164 (Pl #501) to see the case number. One then finds it in the Case index and sees that this case was filed on September 23 1992, # 20 on the list. So Plaintiff and Turetsky were already "removed" to federal court – where Plaintiff wanted to be, removed at Plaintiff's behest and motion. The case was there through at least January 11, 1994 when the verdict in Plaintiff's favor came in, and remained in the Circuit through the Bankruptcy proceeding.

The Turetsky case 93-7054 is #26 on the Party Case index and was filed on April 13, 1993, in the middle of Jarmuth's DC federal case. It is nonsensical to state that Jarmuth was protesting the removal of his case to the federal court when he put it there before. The fact of the matter was that Turetsky had "removed" the case from Prince George's County in Maryland to the USDC-MD trial court although it was already moved to the federal trial court in DC, a year earlier. When the federal Maryland trial court "kicked it back" to state court, it accidentally wrote language which seemed to "dismiss" Plaintiff's claims in federal court in DC – which it could not do to a parallel trial court with prior jurisdiction. Upon information and belief, Turetsky appealed the rejection of her "removal" which was denied.

-- Conclusion --

At trial Plaintiff carried his burden of proving with a preponderance of the evidence facts and law sufficient to prove the elements of defamation.

The Defendants communicated a statement which was defamatory and injurious to Plaintiff's reputation.

The statements were communicated to hundreds of people – other than Plaintiff (a third party).

The communications clearly referred to Plaintiff by name. The recipients of the communication could clearly identify Plaintiff as the person about whom the matter was about.

The communications injured Plaintiff's reputation.

Relief

The defamatory material was sent by US mail to 646 recipients. This is 646 separate defamation publications.

The defamatory material was emailed successfully to 354 recipients which email

redirected each one to the same material as in the postage mailing, at Defendants' web site – as if this was part of each email.

In addition, the defamatory material was and still is posted on the Defendants' web site to which Sullivan testified the HOA 'pushes' new home owners so they can see the same material – and learn about Plaintiff.

Plaintiff asserts that it is not unusual for a single defamation containing even some of this material – such as the allegation of being fired from the FBI for cause – to result in an award of thousands of dollars.

Plaintiff believes that it is not unreasonable to ask for an award of \$ 1,000 per publication, and for the Court to find that there have been at least 646 + 354 + 1 publication, and to award direct damages in the amount of 1001 defamations at \$ 1,000 each, an award of \$ 1,001,000 (one million, one thousand dollars);

And to further order that

- (1) the Defendants immediately remove all material related to Plaintiff from any web site under their ownership, access or control;**
- (2) the Defendants send a letter of apology to every individual to whom they emailed or mailed the material relating to Plaintiff.**

By:

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

**FORM 16
CERTIFICATE OF COUNSEL IN RECORD ON APPEAL**

**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 Record on Appeal complies with Rule 210 SCACR and contains all material proposed to be included by any of the parties and not any other material.

July 27, 2013



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

**IN THE STATE OF SOUTH CAROLINA
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,

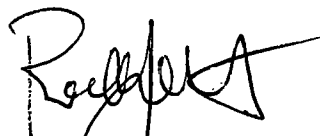
v.

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

PROOF OF SERVICE

I certify that on July 11, 2013 I hand served Appellant's Record On Appeal on Respondents through Respondent's common counsel, Henrietta Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164; and that on July 27, 2013 I served Appellant's corrections to the Record on Appeal on Respondent's common counsel by United States Priority Mail, postage prepaid, sent to the same address.

July 27, 2013


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