**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS**

**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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

**Ralph P. Stroman, Special Referee**

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**Unpublished Opinion No. 2015-UP-111 (S.C. Ct.App. filed March 4, 2015)**

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**Ronald Jarmuth** **Petitioner,**

**v.**

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## CERTIFICATE OF COUNSEL

**Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 24, 2015.**

## QUESTIONS PRESENTED

**1. Did the Court of Appeals err in affirming that the Covenants were valid towards Pebble Creek even though filed without the consent of the Grantee ten days after the Declarant / Grantor had delivered the deed to and received payment from the Grantee?**

**2. Did the Court of Appeals err in affirming that the Covenants were valid towards Pebble Creek even though the Declarant (who did not own Pebble Creek) failed to file the specific subsequent amendment to the covenants required by the covenants to actually subject a subdivision to those covenants?**

**3. Did the Court of Appeals err in affirming that the homeowners owed their duties and obligations under the covenants to Respondent International Club Homeowners Association ("IHOA") instead of to the International Club Association ("ICA") homeowners association named in the covenants because of respondent's conduct amounting to a "prescriptive easement".**

**4. Did the Court of Appeals err in affirming the award of attorneys fees to Respondent IHOA even though the Covenants have no provision for the recovery of the costs of defending a lawsuit and even though Respondent IHOA did not actually pay any costs of litigation?**

**5. Did the Court of Appeals err in affirming Co-Respondent K.A. Diehl's litigation privilege defamation immunity even though (a) Diehl never plead litigation privilege immunity in either a SCRCivP Rule 12(b) motion nor in its Answer;**
**(b) Diehl was not a party to the suit when it defamed Petitioner;**
**(c) Diehl is an independent contractor of the IHOA; and**
**(d) The trial court's final order never actually granted co-respondent K.A. Diehl any immunity at all?**

**6. Did the Court of Appeals err in affirming that Co-Respondent IHOA was not required by S.C. Code Ann. § 33- 31-720 to provide Petitioner a copy of the Member List of Voters after the IHOA had just announced an election?**

**7. Did the Court of Appeals err in affirming that when Co-Respondent Rosemary Toth distributed the cash profits from the sale of an easement she did not violate S.C. Code Ann. § 33-31-1302 and was thus not liable for repayment per S.C. Code Ann. § 33-31-833.**

## STATEMENT OF THE CASE

**Petitioner filed a complaint on April 7, 2009 (2009-CP-26-3596) citing the International Club HOA ("IHOA") and Rosemary Toth ("Toth") HOA President. An Amended Complaint was filed May 15, 2009 adding HOA management company KA Diehl ("Diehl") and Henrietta Golding ("Golding") as defendants after Petitioner was defamed by all defendants. Golding was subsequently dismissed in a Rule 12(b) hearing ("litigation privilege") which was upheld on appeal. Because the first complaint was under appeal, another Complaint was filed by Petitioner October 12, 2010 addressing further issues with the IHOA. It was consolidated with the first case on September 16, 2011.**

**The major issues were applicability of covenants, the identity of the actual Homeowner Association, violations of the South Carolina Non-Profit Corporation Act, and defamation of Petitioner after the first complaint was filed. Declaratory Judgments were sought which were never made.**

**In 2012 the case was placed on the trial roster but for six months no judge would call it to trial. The case was referred to a special referee for a five day trial to take place in August, 2012. Petitioner's appeal cited a host of procedural issues, the least of which was the Special Referee limiting the trial to three days so he could take care of personal business, his failing to actually look at any of the evidence, and without any verbal findings of fact or conclusions of law, his instruction to defense counsel to write a final order which he signed. He also failed to read the deposition transcripts of the testimony of witnesses which the Chief Administrative Judge had ordered to be used as if they had testified at trial (The Special Referee ordered that they NOT be read into the record). Defense exhibits were given Petitioner for the**

first time as the trial began and the Special Referee failed to deal with this.

On March 11, 2013 the Chief Administrative Judge upheld the final order; the Special Referee earlier recused himself instead of dealing with the problems of the trial he presided over and of the final order. On April 3, 2013 Petitioner filed his Notice of Appeal.

On March 4, 2015 the Court of Appeals affirmed the trial court's order, Ronald Jarmuth v International Club Homeowners Association, et al, Op. No. 2015-UP-111 (S.C. Ct.App. filed March 4, 2015. On March 12, 2015 Petitioner filed a Motion for Rehearing which was denied on April 24, 2015. Petitioner seeks a Writ of Certiorari to review that decision.

## ARGUMENT

### 1. THE COURT OF APPEALS SHOULD HAVE HELD THAT COVENANTS FILED BY THE GRANTOR TEN DAYS AFTER THE GRANTEE HAD PAID FOR THE PROPERTY AND RECEIVED THE DEED WERE NOT VALID TOWARDS THE GRANTEE AND THE GRANTEE'S SUCCESSOR (PETITIONER)

This decision [1] is in conflict with all prior decisions of the Supreme Court as well as a thousand years of legal practice regarding the finality of deeds. The Supreme Court decisions are: Robinson v. Estate of Harris, 378 S.C. 140, 144-45, 662 S.E.2d 420, 422 (Ct. App. 2008) aff'd, 390 S.C. 272, 701 S.E.2d 740 (2010); Belk, 266 S.C. at 544-43, 225 S.E.2d at 179; Spence v Spence S.C. #26104; April 10 2006; Jones, 212 S.C. at 422, 48 S.E.2d at 25-26; Epps v. McCallum Realty Co., 139 S.C. 481, 498-99, 138 S.E. 297, 302 (1927); Strother v. Lexington County Recreation Commn., 332 S.C. 54, 64 n.6., 504 S.E.2d 117, 122 n.6 (1998); Cook v. Eller, 298 S.C. 395, 397, 380 S.E.2d 853, 854 (Ct. App. 1989); S.C. Tax Commn. v. Belk, 266 S.C.

[1] Affirmation "Issue #9" App. P. 142.

539, 543, 225 S.E.2d 177, 179 (1976); Jones v. Eichholz, 212 S.C. 411, 422, 48 S.E.2d 21, 25-26 (1948); Kirton v. Howard, 137 S.C. 11, 36, 134 S.E. 859, 868 (1926); Black v. Childs, 14 S.C. 312, 318 (1880); and S.C. Code Ann. § 30-7-10 (Supp. 2004). The decision is also contrary to the two decisions relied on by the Court of Appeals: First Union Nat'l Bank of S.C. v Shealy, 325 S.C. 351 (S.C. App. 1996) and Williams v. Lawrence, 194 S.C. 1, 6, 8 S.E.2d 838, 840

In these cases the Supreme Court has held:

(1) that a deed is effective and final when (a) a Grantee gives the Grantor the purchase price; (b) the Grantor delivers the deed to the Grantee; and (c) the Grantor had actual title to the property; in some cases the Supreme Court has substituted that it is a "bona fide purchase" as the third element.

(2) that a grantor has actual notice of his sale to a grantee when he delivers a deed and receives payment, and the issue of constructive notice through recordation is irrelevant as to the seller.

(3) that to claim to be a "purchaser for value without constructive notice" a grantee must (a) actually pay an agreed consideration and (b) actually receive a deed and (c) not be on prior actual notice.

(4) that a deed or a unilateral alteration to a deed is invalid if the grantor did not have title at the time of delivery or alteration of a deed.

The Court of Appeals clearly ignored the facts and law erring when it held

(1) that Grantor (Plantation A.D.) could alter the January 29, 1999 deed [2] to Petitioner's vertical predecessor Grantee Sunbelt Homes February 8, 1999 ten days after Sunbelt had paid Plantation and received physical possession of the deed

[2] by unilaterally filing a covenant ten days after the sale limiting Sunbelt's right to use the sold property

**App. 142 Issue 9 L.4-6;**

**(2) that Plantation had no notice of Plantation's Friday, January 29, 1999 sale to Sunbelt until Plantation received "constructive notice" when Sunbelt recorded the deed R.p. 3733 Monday February 8, 1999 at 3:27 PM (Deed Book 2117 Page 1401) two minutes after Plantation recorded the unilateral covenants R.p. 3737 at 3:25 P.M. (Deed Book 2117 Page 1353) – that Plantation was a "purchaser ... without notice" per S.C. Code Ann. § 30-7-10. App. 142 Issue 9 L.7-8.**

**(3) that when Planation filed the Covenants ten days after the sale Plantation was a "subsequent creditors ... or purchasers for valuable consideration under S.C. Code Ann. § 30-7-10 (Final Order R.p. 41 L.1-7, App. 142 Issue 9 L.7-8.**

**(4) that on February 8, 1999 Plantation had sufficient title to the property (privity) to alter the January 29, 1999 deed to Sunbelt by unilaterally imposing covenants R.p. 41 L.1-7,**

**The Record on Appeal before the Court of Appeals, as briefed, is clear that the affirmation is in error as to the covenants and facts in all respects.**

**(1) The deed was delivered on January 29, 1999. R.p. 3733 Deed:**

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

**(2) Plantation was paid the purchase price on January 29, 1999, R.p. 3733 (per the Deed):**

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

**(3) When Plantation filed the Covenants on February 8, 1999 Plantation was not a "purchaser of real estate, or ... a subsequent lien creditor on real estate**

for valuable consideration" per SC Code Annotated 30-7-10. Plantation was a "Declarant" of the Covenants, not a purchaser or lien creditor and did not even qualify as a seller / Grantor. On February 8, 1999 Planation did not pay any "valuable consideration" at all nor did Plantation receive from or deliver anything to Sunbelt, certainly not a deed nor even the Covenants. The covenants as filed RoA pp. 3737-3767 are clear about this.

(4) On January 29, 1999 Plantation had actual notice of the sale; R.p. 3733. Per the Deed "this 29th day of January, 1999 ... Plantation A.D., LLC ... Personally appeared before me". Plantation knew of all the details of the sale.

(5) On January 29, 1999 there were no covenants of record; they were filed February 8, 1999 by Plantation R.p. 3737.

(6) On February 8, 1999 Plantation did not have title to the property. In filing the Covenants Plantation neither gave nor received any consideration. Without valid title or any residual rights, Plantation, through the Covenants unilaterally gave itself rights in the property and purported to restrict the true owner's rights in the property. Plantation was not a "subsequent purchaser or creditor" and thus SC Code Annotated 30-7-10 afforded Plantation no rights.

The Supreme Court has held:

> "purchaser had satisfied all of the elements to be considered a bona fide purchaser for value: (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, "i.e., in good faith and with integrity of dealing, without notice of a lien or defect."" Robinson at 146, 662 S.E.2d at 423.

A bona fide title conveys when the buyer satisfies

> "all three conditions - actual payment, acquiring of legal title, and bona fide purchase ...". S.C. Tax Commn op cit; also Jones op. cit.; Kirton. op.cit. ; and Black op.cit.;

**Plantation was on notice of the sale on January 29, 1999:**

> **"There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. Belk, op.cit. ; Jones, op.cit.; Epps, op.cit.**
>
> **"[a]ctual notice means all the facts are disclosed and there is nothing left to investigate. Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him. Generally, actual notice is synonymous with knowledge." "[a]ctual notice may be shown by direct evidence or inferred from factual circumstances." Strother. op.cit.**

**Plantation also had "constructive notice" equivalent to "actual notice":**

> **"We have explained in the context of an action brought under the Tort Claims Act that "[c]onstructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore, this person is presumed to have actual knowledge of the undisclosed facts." Strother, op.cit.**

**On February 8, 1999 Plantation's absence of title disqualified it from the benefit of SC Code Annotated 30-7-10:**

> **"a grantee ordinarily may not claim bona fide purchaser status if his grantor never had title to the property in question." Cook op.cit.**

**The Affirmation of the Court of Appeals as to the validity of the Covenants clearly is contrary to the overwhelming body of Supreme Court decisions.**

## 2. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE COVENANTS ARE INVALID TOWARDS PETITIONER BECAUSE THE DECLARANT NEVER FILED AN AMENDMENT ACTUALLY SUBJECTING PEBBLE CREEK TO THE COVENANTS [3]

**The affirmation [4] of the final order is in conflict with prior decisions of the Supreme Court when the Court of Appeals affirmed the final order's silence on a controlling provision of the Covenants. The Supreme Court has held:**

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[3] No review of this defect is necessary if the covenants do not apply to Pebble Creek.
[4] Affirmation Issue #9 App. P. 142.

> **"The law in this state regarding the construction and interpretation of contracts is well settled." Conner v Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect. Ellie, Inc. v Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Id. (citing Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)). "The "rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902**

**The affirmation (Issue 9 App. 142) is silent on lack of a separate amendment required by the Covenants, The "Declaration" section of the Covenants (R.p. 3740) provides that**

> **"... so much of it [the property] [5] as Developer may, in Developer's sole discretion, ... by subsequent amendment hereto, may be subjected to this Declaration"**

**Covenant Amendment #4 (R.p. 3823) dated December 28, 2004 confirmed that a separate amendment to the covenants was required and that the owner of the property to be subjected to the covenants must concur:**

> **WHEREAS, the Developer now desires to annex certain real property ... into the International Club and subject said real property to the Declaration, including all amendments thereto; and**
>
> **WHEREAS, Seacoast Associates, LLC [6] owns the real property [7] ... and also desires to annex said real property into the International Club and subject same to the Declaration, including all amendments thereto;**

**If the Covenants by itself subjected the various subdivisions to the Covenants then it would not have been necessary to subject The Villas to the Covenants by**

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**[5] Exhibit B to the Covenants, R.p. 3767, includes both Pebble Creek and The Villas subdivisions.**

**[6] In 2004 the Declarant was D.R. Horton, successor to Plantation; Seacoast bought "The Villas" in 2001 and in 2004 agreed R.p. 3825 to the Amendment. Sunbelt never signed a concurrence to subjecting Pebble Creek to the Covenants.**

**[7] "The Villas" is a condominium subdivision not adjacent to Pebble Creek.**

**Amendment 4. The meaning of the Declaration is clear – since no amendment was made subjecting Pebble Creek to the Covenants (with the consent of the property owners) it is not subject to the covenants – if the covenants apply to Pebble Creek at all. The Court of Appeals clearly erred by ignoring this issue on appeal and it's affirmation is contrary to the prior decisions of this Court and the black letter language of the contract (covenant).**

**3. THE COURT OF APPEALS SHOULD HAVE HELD THAT RESPONDENT HOMEOWNERS ASSOCIATION HAS NO RIGHTS UNDER THE COVENANTS BECAUSE ANOTHER HOMEOWNERS ASSOCIATION IS NAMED AS "THE ASSOCIATION" IN THE COVENANTS AND RESPONDENT'S CLAIM IS BASED SOLELY ON A LEGALLY NON-EXISTENT CLAIM OF "PRESCRIPTIVE EASEMENT"**

**This affirmation [8] and order are in conflict with prior decisions of the Supreme Court and substantial constitutional issues [9] are directly involved. The decisions is novel and sets a precedent not recognized by any state which is also contrary to South Carolina law as to prescriptive easements. It extends the theory of prescriptive easements by holding that non-party Respondent IHOA can supplant named grantee to deed / covenant International Club Association, "ICA" without ICA's consent because Respondent IHOA exercised covenant powers deeded to ICA over a period of time which is at least two years less than the statutory period set for prescriptive easements.**

**In a novel decision App. P. 141 Issue 3 the Court of Appeals affirmed the Special Referee's finding that Respondent IHOA replaced the ICA as "The Association" under the covenants through the same conduct that a prescriptive**

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[8] Affirmation Issue #3 App. P. 141.

[9] The HOA, as "The Association", owns riparian rights conveyed to The Association under the covenants. The rights includes the right to collect assessments, enforce covenants, and to impose fines.

**easement through use can be created.**

**The Court of Appeals affirmed the trial court's Conclusion of Law R.p. 37 #1 that the ICA, not Respondent IHOA, is "The Association" named in the covenants. The Covenants R.p. 3740 names "The Murrells Inlet Golf Plantation Association" [10] (MIGPA) as "The Association". In the Final Order R.p. 37 the SR wrote as a Conclusion of Law that Amendment #1 to the Covenants R.p. 3786 modified the Covenants R.p. 3739 to NOW read**

> **"The Developer will cause to be incorporated ... *International Club Association Inc* ... for the purpose of exercising ... the terms of the Declaration ..." (italics and underlining added). [11]**

**The Court of Appeals affirmation that Respondent IHOA, not ICA, is "The Association depends on the trial court's Conclusion of Law that Respondent IHOA became "The Association" by Prescriptive Easement or Adverse Possession. On Page 10 of the final order R.p. 37 the Special Referee wrote as a Conclusion of Law:**

> **"the Defendant HOA has been the only non-profit corporation homeowners association to exercise the powers granted in the Declaration. .. It is the entity that owns the common areas in the community, that collects the assessments and fines, and that ... [maintains] the common facilities ... Finally, it is the entity that enforces covenants and restrictions in the Declaration." [12]**

**This is the sole explanation given by the Special Referee for his determination in favor of Respondent IHOA and the sole basis for the Court of Appeals affirmation.**

**In Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985), the Supreme Court held that "The law in this state regarding the construction and**

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[10] MIGPA is a separate South Carolina Non-Profit Corporation in good standing.
[11] The "International Club Association Inc" a legitimate South Carolina Non-Profit Corporation, merged into MIGPA; R.pp. 3849-3850.
[12] The Covenants do not require "The Association" to own any common areas, nor to levy assessments or fines, to own any common facilities, or to enforce restrictions. At trial it was shown that at least one other HOA, "The Villas HOA", does all these within "The Villas" Condominium area and by the Special Referee's reasoning, equally qualifies as "The Association".

interpretation of contracts is well settled." Using the language of Highlands Property v. Shumaker Land, LLC., 724 S.E.2d 685 S.C. Ct. App. 2012 which cited Conner as it's authority, the trial court's finding that Respondent's claim to be "The Association" depends exclusively on performance and not assignment under the covenants is erroneous; the Court of Appeals writing in Highlands

> "Because the deed does not expressly convey ... ["The Association"] rights ... [Respondent IHOA] does not qualify as a ... ["The Association"] under ... the Covenants. Accordingly, because [respondent IHOA] ... was not [named as "The Association" it] cannot qualify as ["The Association"]..."

The affirmation is contrary to this state's law as to Prescriptive Easements. S.C. Code Ann. § 15-67-210 requires ten years of hostile possession "before the commencement" of a suit. The first meeting of Respondent IHOA's Board was held September 10, 2002 R.p. 3762 which was less than seven (7) years before Petitioner's first complaint was filed April 7, 2009 R.pp. 113-182 and barely more than eight years before Petitioner filed his second complaint October 12, 2010 R.pp. 76-88 explicitly challenged Respondent IHOA's capacity as "The Association". The Affirmation depending on the theory of Prescriptive Easement is novel given that S.C. Code Ann. § 15-67-250 limits the theory's use to land "(1) ... protected by a substantial enclosure; and (2) When it has been usually cultivated or improved".

4. THE COURT OF APPEALS SHOULD HAVE HELD THAT RESPONDENT HOMEOWNERS ASSOCIATION IS NOT ENTITLED TO ATTORNEYS FEES BECAUSE THE COVENANTS HAVE NO PROVISION TO REIMBURSE COST TO DEFEND A SUIT AND BECAUSE RESPONDENTS NEVER PAID ANY ATTORNEYS FEES OR COURT COSTS.

The affirmation [13] and decision are in conflict with prior decisions of the Supreme Court and substantial constitutional issues are directly involved. The

[13] Affirmation Issue # 13 App. P.p. 143-144.

**Supreme Court has held that attorney fees may not be granted unless a specific statute or contract provision explicitly provides for this and then and only then does the trial court have discretion. The affirmation of the Court of Appeals holds that a trial court has discretion [14] to grant attorney fees even when there is no statute or contract provision allowing for an award. The affirmation held this was a "scope of restrictive covenants" question App. 141 Issue #4. The affirmation is novel because it affirmed that when a home owner association defends a suit challenging it's authority this equates to enforcing covenants even when the plaintiff has not violated any restriction on use. The affirmation App. P. 141 is further novel because the Court of Appeals affirmed that when the exclusive evidence of payment of attorney fees are fraudulent documents and perjured testimony (by the Respondent IHOA) - the trial court's award of attorney fees must be permitted to stand:**

> **"Generally, a party may not recover attorney's fees absent a contract or statute. Blumberg v Nealco Inc, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993).**
>
> **"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." Seabrook Island Property Owners Assoc. v. Berger, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct.App. 2005).**

**The Supreme Court has held that discretion exists only when an award is permitted by contract or statute:**

> **Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge. Menne v. Keowee Key Prop. Owners' Ass'n, 368 S.C. 557, 569, 629 S.E.2d 690, 696-97, When an award of attorney's fees is based upon a contract between the parties, the determination of the fees is left to the discretion of the trial court. Seabrook Island Prop. Owners' Ass'n op.cit. citing Baron Data Sys. Inc v Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989)."**

**In O'Shea v. Lesser, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) the Supreme Court**

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[14] **Final Order R.p. 74 Lines 4-13.**

held that an Appellate Court may reverse a trial court's findings of fact when there is no evidence reasonably supporting the trial court's findings. In Berger, 365 S.C. at 240, 616 S.E.2d at 434 the Supreme Court held that when the award of attorney's fees is based on the trial court's assertion of discretion, it may be "disturbed [when] ... an abuse of discretion is shown."

Section 8.9 (Remedies R.pp. 3764-3765) of the Covenants has the exclusive provision for recovery of attorney fees:

> "Section 8.9. Remedies for Violation of Restrictions. ... Should any person employ counsel to enforce any of the foregoing covenants, ... because of a breach of the same, all costs incurred in such enforcement, including a reasonable fee for counsel shall be paid by the Owner"

Respondent IHOA's insurance policy for January 20, 2009 to January 20, 2010 with the "Travelers Casualty and Surety Company of America (Hartford Connecticut)" Policy #104460344 [15] has a provision [16] that only a single $ 2,500 deductible will be required during the policy year.

The September 12, 2010 final order made a single finding of fact R.p. 37:

> "30. The Defendant HOA has paid $5,000.00 to the McNair Law Firm in attorneys fees to seek Plaintiff's compliance with the Declaration".

The final order's Conclusion of Law #24 R.p. 73, however clarified by explaining that the reason Respondent paid the $5,000.00 attorney fees was because of "the Plaintiff's contesting the enforceability of the Declaration." citing a non-existent section of the Declaration "13.4", as authority. [17] In point of fact Respondent IHOA has never paid a single cent in attorney fees or costs to defend or prosecute this suit. Respondent has fraudulently alleged that money paid outside this suit was paid to

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[15] Respondent's Counsel's Bates No's 4082-4083.
[16] Item 4(b).
[17] The last section of the Declaration is Section 8.10, R.p. 3765.

**enforce covenants in this suit.**

**On September 1, 2009 Petitioner filed an age discrimination complaint against Respondent IHOA with the South Carolina Human Affairs Commission. Respondent's Counsel Henrietta Golding / McNair Law Firm ("McNair") was retained to defend this matter R.pp. 4299-4300. At trial then IHOA President William Freiboth testified that $2,500 of the $5,000 was paid McNair in the matter.**

> **Golding Q: And did the Association have to pay two thousand five hundred dollars to an attorney to enforce the covenants as a result of this complaint with the South Carolina Human Affairs Commission?**
> **Freiboth A: Yes, we did.**

**In its August 6, 2011 "Rule 16 Pretrial Brief" Respondent listed**

> **"Exhibit 62 ... HOA Check #2469 dated October 15, 2009 in the amount of $2,500 to McNair representing insurance deductible".**

**Respondent IHOA's 2009 General Ledger page 77 notes that this check is in payment for "Sep 09 legal services". Respondent's 2009 General Ledger notes that this is the ONLY $2,500 check written by Respondent to McNair for legal services in 2009. Per the General Ledger Respondent paid "McCutcheon Mumford Vauight" $2,500 on June 4, 2009 to defend a different case.**

**This case began when Petitioner filed his complaint on April 2, 2009 R.pp. 113-182. Respondent's Counsel McNair answered on May 12. 2009 R.pp. 183-186 without a counter-claim or defense asserting a covenant violation by Petitioner.**

**Respondent's "Rule 16 Pretrial Brief" listed**

> **"Exhibit 79. HOA Check #2737 dated June 10, 2010 in the amount of $2,500 to McNair representing insurance deductible."**

**Like the 2009 check, this check was not related to this case. On October 12, 2010 Petitioner filed a separate complaint R.pp. 76-88 asserting that Respondent is**

not the HOA and that the Covenants do not apply to Pebble Creek [18] On November 18, 2010 McNair answered on behalf of the IHOA R.pp. 89-92 and did not allege any violation of the covenants in the answer nor in any counter-claim. This was five months after McNair was paid the $2,500 June 10, 2010. The 2009 and 2010 cases were consolidated September 16, 2011 at Respondent's request. It was not until October 24, 2011 R.pp. 268-279 that Respondent filed an amended answer in the 2009 suit alleging that Petitioner had violated the covenants. Although the 2010 case was consolidated and closed at Respondent's request, on the same October 24, 2011 R.pp. 93-100 Respondent filed a word for word counter-claim in the now closed 2010 case. Respondent IHOA did not even allege paying McNair any attorney fee related to this case in 2011. Clearly attorney fees paid in 2009 and 2010 could not be to remedy an alleged covenant violation complained about in 2011.

On June 15, 2010 Respondent IHOA distributed an audit by it's CPA Andrew Johnson R.pp. 3986, 3994-3995. In Note 6 "Litigation" he stated that the only $2,500 attorney fee deductible in 2009 was related to a lawsuit against Respondent IHOA by "a subordinate regime" ("The Villas"). It is still a mystery as to what Exhibit 79, the "2010" check, was for. At trial Respondent IHOA's President William Freiboth explained it as follows (direct by McNair's attorney):

> Q: Defendant's Exhibit 79 is what?
> A: That's another check for twenty-five hundred dollars.
> Q: And who's it payable to?
> A: McNair Law Firm.
> Q: And the date of that check?
> A: I'm having a little trouble seeing it, but I think it's August 10th, 2010. [19]
> Q: So how much in attorney's fees has the Homeowner's Association paid to the McNair Law Firm to enforce the covenants with respect to Mr. Jarmuth?
> A: With those two checks, five thousand dollars.

[18] The subdivision where Petitioner lives.
[19] Actually, June 10, 2010 R.p. 4326.

**The final order had a single Finding of Fact R.p. 37 regarding the fees:**

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

**This is clearly erroneous and was based on fraud by Respondents. The final order made on related Conclusion of Law R.p. 73 where the court admitted the award of fees was for costs defending against allegations Respondent lacked capacity, not to seek to remedy alleged covenant violations:**

> **"24. Due to the Plaintiff's contesting the enforceability of the Declaration ... the Defendant HOA has paid $5,000.00 to the McNair Law Firm"**

**In that same Conclusion of Law the Court acknowledged that the Court was depending on the Covenant's language that reimbursement only applied "should Defendant HOA employ legal counsel to enforce the Declaration".** [20]

**The final order went on to explain R.p. 74 that the Court was exercising it's discretion in awarding $5,000.00: "Clearly the $5,000.00 that the Defendant HOA seeks to recover from the Plaintiff is reasonable." The court's exercise of discretion in awarding attorney fees after acknowledging that there is no covenant provision allowing recover of money spent for purposes other than enforcement is a departure from all precedents stated by the Supreme Court.**

**The problems with the dates and purposes of the checks was briefed to the Court of Appeals which affirmed in spite of the fraudulent nature of the evidence and testimony: Petitioner's Brief, July 30, 2013 App. P.p. 49-50; Petitioner's Reply Brief July 30, 2013 App. P.121 L 3-6; Plaintiff's Motion for Rehearing March 12, 2015 #4 App. P.p. 153-157; and Petitioner's Reply on Motion for Rehearing March 27, 2015 App. #6 P.p. 222-224.**

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[20] **The order cited non-existent "Declaration Section 13.4".**

## 5. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE TRIAL COURT ERRED IN AFFIRMING LITIGATION PRIVILEGE FOR CO-RESPONDENT K.A. DIEHL, WHICH NEVER ASSERTED THE PRIVILEGE, WHICH WAS A CONTRACTOR NOT A DEFENDANT AT THE TIME IT DEFAMED PETITIONER AND WHERE THE FINAL ORDER OMITTED DIEHL

**This affirmation [21] and decision [22] are in conflict with prior decisions of the Supreme Court relating to the necessity of pleading an affirmative defense. It is a novel question because**

**(a) the Court of Appeals affirmed litigation privilege for Diehl even though the trial court's final order was silent about immunity for K.A. Diehl ("Diehl"); (b) because no court has ever extended the litigation privilege of a party to an independent contractor; and (c) because Diehl was not a named defendant in the suit and had no expectation of being sued when it admittedly defamed Petitioner. The affirmation App. 141 #5 ignored Diehl's publication of defamatory lies (the briefed issue with undisputed facts). Instead the Affirmation addressed "invasion of privacy" and dealt with Respondent HOA's conduct, not that of co-Respondent Diehl.**

**In Adams v. B&D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989) the Court held that "The failure to plead an affirmative defense is deemed a waiver of the right to assert it; also stated in Whitehad v State, 352 S.C. 215, 574 S.E.2d 200 (2002). In Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994) the Court stated the requirement to plead matters which may prejudice the opposing party by introducing issues which may affect the proof at trial and stated that any immunity privilege must be affirmatively plead. It has been held that failure to plead an immunity constitutes a waiver. Not only did Diehl fail to plead litigation privilege,**

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[21] Affirmation Issue #5 App. P.141.
[22] Final Order # 19 R.pp. 68-69.

at trial Diehl never argued the defense. In Strange v. South Carolina Dept of Highways and Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). this Court held that the burden of establishing a limitation upon liability is upon the entity asserting it as an affirmative defense. In Niver v. South Carolina Dep't of Highways and Public Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct.App.1990), it was held that "[t]he burden of establishing a limitation upon liability ... is upon the ... entity asserting it as an affirmative defense."

Diehl is the independent contract property manager for the Respondent IHOA. On April 7, 2009 Petitioner filed his first complaint R.pp. 113-182. Diehl was not a defendant. On May 28, 2009 R.p. 3177, 3704-3705 Diehl emailed five hundred and seventy one (571) people R.p. 3721 defamatory material relating to Petitioner. On May 28, 2009 Diehl mailed the same defamatory material to six hundred and forty six (646) individuals R.p. 3713. On June 9, 2009 Petitioner amended his complaint adding Diehl as a defendant alleging defamation R.pp. 205-237.

On July 8, 2009 Diehl filed a SCRCivP Rule 12(b)(6) Motion to Dismiss

> "on the grounds that the claim against Defendant K.A. Diehl & Associates fails to state facts sufficient to constitute a cause of action against it and the moving Defendant is a Property Management Company for the Defendant...". [23]

No immunity claim of any sort was explicitly raised in this pleading. The statement that Diehl is a property manager is a statement of capacity not an allegation of immunity and no court has ever recognized this capacity as conveying immunity of any sort. On October 10, 2011 Diehl Answered R.pp. 280-287, again omitting any

[23] This is a perjury. K.A. Diehl has never been a licensed Property Management Company. In South Carolina Property Management is a licensed profession.

**claim of litigation immunity, writing R.p.282, 285**

> **"15. .... it is admitted that a letter was sent ... by the Answering Defendant" and "40. Any and all facts relating to litigation involving the Plaintiff are privileged". [24]**

**The final order R.p. 69 explicitly addressed only Co-Respondent IHOA and it's President Rosemary Toth ("Toth") finding that their statements were privileged. [25] Petitioner does not contest that Co-Respondents IHOA and Toth have litigation privilege under the final order's explanation R.p. 68, 69 that**

> **"Defamatory statements made during the course of a judicial procedure are absolutely privileged" and "Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business".**

**While the defamatory material was an attachment to a letter from the IHOA's attorney to the IHOA, Diehl was not an addressee of that letter and was not at the time a client of the IHOA's attorney. At the time Diehl was not a party to the suit and had no reason to anticipate being joined. Diehl is not an officer or employee of the IHOA and the hundreds of people emailed and mailed to by Diehl are not officers or employees of Diehl.**

**While the final order mentioned "The Defendant HOA" and "The Board" many times relating to defamation it never mentioned Diehl directly or indirectly, summarizing "The Board did not exceed the scope of the privilege".**

**The Court of Appeals clearly erred in holding when it affirmed non-existent litigation privilege for Diehl.**

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**[24] The evidence R.p. 3701 was that Diehl's allegations were outright defamatory lies. At trial Diehl presented no evidence or witness testimony to substantiate it's allegations or to explain it's conduct.**

**[25] Their statements were made after the Complaint against them was filed.**

## 6. THE COURT OF APPEALS SHOULD HAVE HELD THAT RESPONDENT HOA IMPROPERLY DENIED PETITIONER A COPY OF THE MEMBER LIST OF VOTERS AFTER IT HAD ANNOUNCED IT'S ANNUAL ELECTION OF THE BOARD

**This is a "first impressions" question and presents a novel question of law; it is in conflict with advisory opinions of the South Carolina Attorney General. The affirmation [26] ignored the applicable statute, disregarded the language of the statute it relied on, ignored the obvious intent of the legislature, and ignored the controlling facts. The affirmation echoed the final order (R.p. 51 Section 8) which had the same errors.**

**On August 21, 2009 the IHOA announced that the annual meeting and election of board members would be on September 17, 2009 (Minutes R.pp. 3487-3490). On September 3, 2009 referring "to the forthcoming election" Petitioner wrote the IHOA R.p. 3486 citing "SC Code Section 33-31-720 Members' List" demanding to "a. inspect and copy the membership and voting list ... [or] b. given a copy of the same". The letter said "The purpose of this request is to communicate with fellow homeowners regarding ... the forthcoming election" fourteen days away.**

**Both the final order and the affirmation ignored S.C. Code Ann. § 33-31-720 addressing instead S.C. Code Ann. § 33-31-1602. The request satisfied the latter because the request is obviously "made in good faith and for a proper purpose" and the demand described "with reasonable particularity the purpose and the records ... desired". S.C. Code Ann. § 33-31-720 (a) defines what the "Members' list for voting" includes. Subsection 720 (b) states**

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[26] Affirmation Issue # 12 App. P.pp. 143-144.

(b) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting, beginning the day after notice is given of the meeting".

On December 21, 2011 the S.C. Attorney General wrote an advisory opinion [27] which stated (page 2) that S.C. Code Ann. § 33-31-1602 "does not affect (1) the right of a member to inspect records under Section 33-31-720" which controls. The request was made after the meeting was announced and the purpose met the inapplicable standard of Section 1602 (purpose and description). Both statutes were enacted to curtail the discretion of an incumbent board. The affirmation and final order hold that an incumbent board has absolute discretion to refuse requests.[28]

The affirmation and final order also held that a board can impose a condition [29] beyond that of the statute: to waive privacy and sign up for the board's web site, and further to allow substitution of a "social media" list omitting many members, lacking the information specified in the statute, and including many non-members. The statutes conditions and definitions are exclusive and binding.

It is clearly in the interest of millions of South Carolina citizens living in homeowner controlled subdivisions to ratify the Attorney General's advisory opinion with a published opinion of the South Carolina Supreme Court.

## 7. THE COURT OF APPEALS SHOULD HAVE RULED THAT RESPONDENT ROSEMARY TOTH ILLEGALLY DISTRIBUTED PROFITS FROM THE SALE OF AN EASEMENT

This is a "first impressions" question and presents a novel question of law in that there are no directly applicable South Carolina published opinions because this Court has never interpreted the restrictions on "distributions" in the S.C. Non-

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[27] Copy provided the Court of Appeals, as Exhibit N to Petitioner's March 12, 2015 Motion for Rehearing.

[28] Even when the exact wording of the statute is used in the request.

[29] R.p. 51 bottom, to waive privacy rights and log in to restricted access web site.

Profit Corporation Act ("The Act"). The case implicates the constitutional question of pre-emption of law over corporate business judgment. The affirmation [30] of the Court of Appeals ignored the issue as "without merit" [31] The final order and affirmation hold that members of a non-profit corporation have equitable rights in profits from sale of corporate assets, an issue with no case law – which is clearly contrary to the intent of the legislature. The proper interpretation of the Act on the undisputed facts is obvious and the final order and the affirmation are obviously erroneous. The Supreme Court has never clarified the meaning of "distributions", "purposes", or "benefits" in the context of The Act. Given that many HOA's have annual revenues approaching a million dollars there is a need to create applicable case law.

On June 19, 2009 R.p. 3836 the IHOA paid the developer $5.00 for a road and surrounding land over which the homeowners and others already had deeded easements.[32] On April 20, 2010 under threat of condemnation the IHOA sold a power line easement to Central Electric for $83,000.00 and other consideration (Final Order Findings of Facts #23, R.p.35). The final order made another finding of fact (#24, R.p. 35) that

> "Part of the consideration that the Defendant HOA received from Central Electric was distributed to the members."

The profit was $82,995.00. From the findings of facts it is clear that the source of the distribution was the profit. This easement was over the road and unimproved areas. On April 10, 2010 a $50,250.00 distribution was approved by co-Respondent

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[30] Affirmation Issue #6 App. P.pp. 141-142.
[31] There are no provisions in the covenants relating to HOA distributions.
[32] This made the IHOA responsible for maintenance. Each year the IHOA, not the developer, was already spending thousands of dollars to maintain the shoulders and signage.

Rosemary Toth (then IHOA President) at a special meeting of the board R.pp. 3523-3525 where homeowners were not permitted to vote on the matter. Through the 2010 Compiaint Petitioner alleged this was an illegal distribution also prohibited by the IHOA's Bylaws.

The trial court R.p.52 (Conclusions of Law #9) held that this

> "was not a profit distribution but rather for the purpose of passing benefits to the members" and that "The Act permits the Defendant HOA to distribute benefits to it's members in conformity with it's purpose. .S.C. Code Ann. § 33-31-140(1)(6)".

The appellate court (Issue #4, P.3) affirmed seeing this as a question of restrictive covenants which is clearly erroneous. The issue is a question of law and of the IHOA's bylaws – and was never briefed as a covenant issue.

The applicable statutes and Bylaw are:

SECTION 33-31-140. Definitions.
(11) "Distribution" means the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers. The term does not include:
(b) conferring benefits on its members in conformity with its purposes;

SECTION 33-31-301. Purposes.
(a) Every corporation incorporated under this chapter has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation.

ARTICLE 13. PROHIBITED DISTRIBUTIONS
SECTION 33-31-1301. Prohibited distributions.
Except as authorized by Section 33-31-1302, a corporation may not make any distributions.

SECTION 33-31-1302. Authorized distributions.
(b) Corporations may make distributions upon dissolution in conformity with Sections 33-31-1401 through 33-31-1440 of this chapter.

IHOA ARTICLES OF INCORPORATION R.p. 3788-3789
Purpose paragraph 8 "This organization is Homeowners Association".

IHOA BYLAWS pg 41 RP 3779
11.1.2 Condemnation Unimproved area
11.1.2 If the taking or sale in lieu thereof does not involve any improvements

**to the Common Areas, or if there are funds remaining after any such restoration or replacement of such improvements is completed, then the award, proceeds or net funds shall be retained by and for the benefit of the Association.**

**The affirmed final order's Conclusions of Law poses this question to the Supreme Court. Does S.C. Code Ann. § 33-31-140(1)(6) give directors of an HOA non-profit corporation business judgment discretion to distribute profits from a sale as "a benefit" or is it prohibited either by S.C. Code Ann. 33-31-1301 or by the bylaws? Clearly the distribution was illegal.**

## CONCLUSION

**For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.**

**Respectfully submitted**

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**May 14, 2015**

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Supreme Court



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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

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Unpublished Opinion No. 2015-UP-111 (S.C. Ct.App. filed March 4, 2015)

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Ronald Jarmuth, Petitioner

v.

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

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## PROOF OF SERVICE

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I certify that on May 14, 2015 I Served Appellant's Petition to the Supreme Court for Writ of Certiorari to the Court of Appeals on Respondents through Respondent's common counsel, Henrietta Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164 by mailing it to same by first class mail, postage pre-paid.

May 12, 2015

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