THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Ralph P. Stroman, Special Referee

Unpublished Opinion No. 2015-UP-111
(S.C. Ct.App. filed March 4, 2015)
Case Nos: 2009-CP-26-3596 and
2010-CP-26-11320
Appellate Case No. 2015-001019

Ronald Jarmuth — Petitioner,

v.

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

REPLY TO PETITION FOR A WRIT OF CERTIORARI

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

Other Counsel of Record
Henrietta U. Golding SC Bar #2173
Alicia Thompson SC Bar #7 7056
McNair Law Firm, P.A.
2411 Oak Street; Suite 206
Myrtle Beach, SC 29577
843-444-1107
Attorneys for Respondents

INDEX

Analysis of Issues in The Response

ARGUMENT

0. (Added by Respondent) SPECIAL OR IMPORTANT REASONS EXIST TO JUSTIFY GRANTING THE PETITION

The Supreme Court has never made a decision relating the South Carolina Non-Profit Corporation Act to homeowner associations (HOA's) thus there are novel questions of law (explained in the Petition). The Appellate decision is in conflict with 28 cited prior decisions of the Supreme Court (where there is case law) and on all issues is completely unsupported by (and mis-states) the facts in the record. It conflicts with advisory opinions of the S.C. Attorney General [1] and 11 cited statutes. Since this relates to deeded rights it deprives Petitioner of constitutional rights to property.

The petition is an opportunity to deal with recurring HOA issues which never reach this level because HOA insurers pay all costs to defend and can cost a Plaintiff $100,000 with no provision to recover costs. This case was anything but "ordinary"[2]; the petition states the controlling issues because they inferentially dispose of the remainder. "Ordinary" cases do not include crafting false evidence and perjured testimony nor defaming the plaintiff.

1. THE COVENANTS ARE VOID BECAUSE THEY DID NOT EXIST WHEN PEBBLE CREEK WAS SOLD TO SUNBELT AND WERE FILED BY GRANTOR PLANTATION TEN DAYS AFTER SUNBELT PAID FOR PEBBLE CREEK AND RECEIVED THE DEED

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[1] in areas concerning homeowner associations and the S.C. Non-Profit Cororation Act where the Supreme Court has not yet established case law.

[2] allegations included $584,000 shortage in the golf course assessment account, $16,000 missing in a builder capital contribution account, and $50,000 illegally distributed, kickbacks demanded from contractors, illegal towing on public streets, election vote rigging, fraudulent charges for services, age discrimation by refusing to allow a swing set and calling plant bed edgers a "wall" when previously allowed as plant bed edgers for hundreds of homeowners.

Irrespective of the fact that the covenants had not even been drafted when Pebble Creek was sold and the deed delivered on January 29, 1999, the reference to the Covenants in the deed is fatally flawed. The Response asserts:

> **"By the express language of the Pebble Creek Deed, the Declaration is enforceable, as the grantor and grantee of Pebble Creek intended for the property to be subject to it." Response P. 9.**

The deed refers to the Covenants at R.p. 3735 in Exhibit A to the Deed and reads:

> **"The property is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (the "Declaration") which is recorded in Deed Book _____ at Page ____ of the Real Property records of Horry County."**

The law in South Carolina is that this language does not subject anyone to anything. In Player v. Chandler, 299 S.C. at 105, 382 S.E.2d at 894, the South Carolina Supreme Court held that (Petitioner's Brief Appx P.34)

> **such phrases as "subject to covenants of record" when there are none of record are meaningless and unenforceable – all terms must exist and be in writing at the time the deed is signed. The terms cannot be interpreted to include a "secret purpose or intention on the part of one of the parties, stored away in his mind" Cited in Clardy and Clardy v Bodolosky and United Land-Magnolia, LLC, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009).**

The Response IGNORES the evidence that the body of the deed as signed by grantor Plantation and grantee Sunbelt, acknowledges the delivery of the deed and receipt of the payment January 29, 1999 – and thus concedes Petition Issue #1.

The Response relies on a lie Respondent briefed on Appeal. Respondent repeats the same lie (Resp. P.8):

> **"The Pebble Creek Deed was delivered after the Declaration was filed in the Pebble Creek property's chain of title, thereby subjecting it to the Declaration. No evidence exists in the record to support the finding that the Pebble Creek Deed was delivered on January 29, 1999. In fact, the only evidence of the date of delivery is the date of recording."[3]**

Repeating the evidentiary record cited in the Petition (P.5):

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[3] **February 8, 1999.**

(1) Plantation delivered the deed to Sunbelt on January 29, 1999. :

> "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". R.p. 3733 Deed.

(2) Sunbelt paid Plantation the purchase price on January 29, 1999 at the same time the deed was delivered, R.p. 3733 (per the Deed):

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

(3) 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 when Plantation filed the Covenants R.pp. 3737-3767. Plantation was a "Declarant" of the Covenants. On February 8, 1999 Planation did not pay any "valuable consideration" and did not receive from or deliver anything to Sunbelt.[4]

The claim that Sunbelt consented to the Covenants when the deed was signed and delivered January 29, 1999 is absurd because the Covenants were not written until January 31, 1999, two days after the deed was delivered - R.p. 3765, and lack a signature by Sunbelt concurring to the Covenants.

2. PEBBLE CREEK IS ALTERNATIVELY NOT SUBJECT TO THE COVENANTS BECAUSE THE DECLARANT NEVER FILED AN AMENDMENT ACTUALLY SUBJECTING PEBBLE CREEK TO THE COVENANTS [5]

Respondent never denies that the Covenants have a requirement to subject a specific area to the covenants by separate amendment, as stated by Petitioner. The Response ignores this as separate issue to belittle it, writing (in dealing with Issue #1, Privity) that "Petitioner argues for the first time on appeal that the Declaration does not incorporate by reference" any particular area of the PUD such as Pebble

[4] Respondent never claimed that Plantation ever gave Sunbelt the Covenants or that Sunbelt ever saw or agreed to the Covenants.

[5] No review of this defect is necessary if the covenants do not apply to Pebble Creek.

Creek. Petitioner Brief stated "As a matter of law, based on the actual facts, Pebble Creek is not subject to the Covenants". Appx P. 36. Petitioner's Brief also stated the requirement to use a separate Amendment, noting that in 2004 Horton, the successor Declarant did so for "The Villas" via Covenant Amendment #4 Appx P.13 on December 29, 2004 R.p.3827. There was no separate amendment concerning Pebble Creek and Petitioner's Brief cited that the separate amendment was recognized by the Declarant who Respondent claims subjected all the areas to the covenants "by reference". Respondent does not explain away Amendment #4.

3. 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"

Respondent never denies that the final order never held that Respondent has rights arising from the Covenant. Per the Response IHOA's "rights" arise because it has been conducting HOA type business for years.[6] What Respondent hides from the Supreme Court is that "The Association" named in the covenants EXISTS, does business, and pays taxes: The "Murrells Inlet Golf Plantation Association, Inc." (MIGPA); and the hoa named as "The Association" in the final order, "International Club Association, Inc." (ICA)[7] likewise exists and pays taxes. Respondent has no explanation how those lost their rights. Respondent ignores that the trial court held ICA is "The Association" by virtue of Amendment #1, not Respondent International Club Homeowners Association (IHOA). The Response ignores that the Name used exclusively by IHOA was "The International Club

[6] The identical argument which would be used to support a claim to title on land through continual and adverse non-consensual possession and use.
[7] At trial and in appeal Petitioner disputed that Amendment #1 changed "The Association" from MIGPA to ICA.

Property Owners Association" until March 12, 2009 R.p. 3467 – that IHOA never used MIGPA or ICA as an alternate name. Per the Petition, the IHOA was not allowed [8] to use MIGPA or ICA AND NEVER DID - the entire alternate name argument is bogus.

Respondent reiterates that the basis for it's "rights under the Declaration" is exclusively it's conduct, disregarding that MIGPA and ICA are also doing HOA business and that yet another, "The Villas Homeowners Association", (Villas) does the same business as IHOA: operating an amenity center, providing for garbage collection, cable TV, grounds maintenance, and dues collection. [9]

There is no evidence in the Record that Ken Grover, who incorporated the IHOA R.pp. 3788-3789 was an officer of Plantation [10]. Per the IHOA Bylaws Section 2(a) R.p. 3769 Grover was ineligible to be a member or officer of the IHOA.[11] MIGPA and ICA were incorporated by a homeowner.

4. RESPONDENT IHOA IS NOT ENTITLED TO ATTORNEYS FEES BECAUSE IT NEVER PAID ANYTHING TO ENFORCE THE COVENANTS; BECAUSE THE IHOA NEVER PAID ANY ATTORNEY FEES AT ALL; AND BECAUSE THE IHOA USED FALSE EVIDENCE AND PERJURED TESTIMONY TO CLAIM IT DID.

Respondent p.11 falsely claims Petitioner's Court of Appeals Brief never asserted that Freiboth's trial testimony, that the IHOA paid the $5000 to enforce the covenants [12], was a lie. Petitioner more politely wrote:

> **"The IHOA paid the insurance deductibles ... a year before the edgers were installed ... at a time when the IHOA was not alleging any violation of covenants. No additional money was paid by the IHOA to enforce the covenants". Petitioner's Brief, Appx. P.17.**

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[8] Petitioner cited where using the name of another corporation is illegal.
[9] As noted in the Appellate Brief, Villas sued IHOA and won a settlement.
[10] Plantation sold Pebble Creek to Sunbelt prior to IHOA incorporation.
[11] Only homeowners, not non-owners or assignees of homeowners, are members.
[12] Respondent quotes covenants

> **"As the SR recognized in the final order, the only attorney fees incurred by Respondent was in defending accusations that the Respondent itself violated the covenants and the law. In the final order R.p. 73 Sec. 24 the SR wrote that "Due to the Plaintiff's contesting the enforceability of the Declarations ... the Defendant HOA paid $5,000 to the McNair Law Firm" and not a penny more ,,, The IHOA paid $5000 in insurance deductibles long before the alleged covenant violations ... was allegedly built". Appx. P.49.**

Respondent never denies the allegation that Freiboth and Defense Counsel lied when they represented [13] the checks as the deductibles IN THIS CASE and never denies that the money was actually spent in other cases. [14]

"Enforcing a covenant" means seeking to undo a covenant violation. Respondent never denies that when they paid the checks there were no covenant violations. Respondent's assertions about judicial discretion are irrelevant when Respondent's citations to the Covenants are meaningless absent a violation. There is clearly an abuse of judicial discretion when Respondent has not spent any money in this case – which Respondent never denies.

Regarding the SC Human Affairs Commission Civil Rights Violation [15] no swing set was built hence no violation. While "enforcement" may be "broad" there still must be a violation. The Civil Rights complaint did not challenge the IHOA's "authority" but that the IHOA's discretion was pre-empted because of the ARB member's statement about denying the swing set because he hated children.[16]

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[13] Description in discovery; description to court reporter and court when filing the checks as evidence at trial;' see testimony of Freiboth cited in Petition.
[14] The Petition quotes Freiboth as testifying that the 2009 check was spent as a deductible for this case; in that quote he is quite clear about this.
[15] A request to install a swing set for children was refused when a neighbor on the ARB said he "hates kids" who are "noisy" and he'd never allow it. The neighbor on the Petitioner's other side had a swing set. It was age discrimination against Petitioner's children. The development is not an "adult community".
[16] There is no denial that ARB Member Jay Cartman made the statement.

5. CO-RESPONDENT K.A. DIEHL WAS IMPROPERLY GRANTED LITIGATION PRIVILEGE IN RELATION TO DEFAMATION

Respondent is silent about Diehl's fatal failure to claim litigation privilege and thus has conceded that Diehl waived the privilege.

Respondent claims that Diehl's conduct responded to an official request by the IHOA to distribute the defamatory material but there is no evidence in the Record where the IHOA Board made such a decision.

Respondent falsely claim Resp. P.14 that Petitioner stipulated that nothing in the Diehl letter was defamatory. At trial Petitioner stated that the attached "List of Lawsuits" R.pp. 2452-2454 held the defamatory material:

> **The Court: So tell me what you think is defamatory about the package you handed up. If it's not the letter and the attachments, what is it?**
> **Mr. Jarmuth: The attachments.**
> **The Court: So you've got problems with the List, not the Letter. Is that what you're saying?**
> **Mr. Jarmuth: I have problems with everything attached ...**
> **The Court: All right. So your problem is not with Ms. Golding and the McNair Firm. Your problem is with K.A. Diehl**

The final order has no actual finding of litigation privilege for Co-Defendant Diehl. The Response relies on a false claim that the final order actually made a "finding (Response P.13) that K.A. Diehl is not liable for defamation" but never cites to where in the Record Diehl – not the IHOA – was explicitly granted litigation privilege. Respondent's argument is that contractor Diehl is entitled to inherited privilege. Diehl is not an employee of the IHOA.[17] The response never states what Diehl's "corresponding interest" was – it has none. The Response fails to point to a single document where the Board directed Diehl to republish the defamatory material. Diehl's 2009 contract, R.pp. 3502-3513, has no provision for Diehl to send

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[17] **Respondent never cited any case law where <u>contractors</u> were granted the litigation privilege available to officers or employees of the "host" corporation.**

anything to the homeowners at large.[18]

Respondent's footnote 4 P.13 is wrong. The 2010 Complaint was not filed "upon the dismissal of the SCHA ... Petition". The SCHA decision was December 11, 2009 R.p. 4299; the 2010 Complaint was October 12, 2010 R.p. 76; the IHOA's answer was November 18, 2010 R.p.89 with no covenant violation allegation; the Amended Answer with allegation was on October 24, 2011 R.p.93 two years later.

6. THE VOTING LIST WAS ILLEGALY WITHHELD WHEN REQUESTED JUST PRIOR TO AN HOA BOARD ELECTION.

Petitioner's September 3, 2009 Request R.p. 3486 for the IHOA voting list is the only request at issue here. It followed the IHOA's August 21, 2009 Announcement R.p. 3487-3490 of a Board Election on September 17, 2009. Respondent argues they responded to this request and did not simply ignore it but cite no evidence in the record of a response - none exists. The Appellate decision (Issue 12) never held that (Resp. P. 15) "this issue is not preserved on appeal". The grounds argued and supported by evidence[19] at trial and on appeal are the ones the S.C. Attorney General stated in his December 21, 2011 Opinion R.pp. 3086-3088 – that S.C. Code Ann. 33-31-720 controls and leaves no discretion. Respondent never objected at trial to Plaintiff's Exhibit 361 – the September 3, 2009 records request nor to Petitioner's testimony about it R.pp. 2120, 2286, and on appeal never denied receiving it – asserted for the first time in Response Brief P.16. The law mandates that Respondent provide the list on request prior to an election and Respondent's argument that Petitioner could get it elsewhere is an admission they didn't give it. The final order held that Respondent received the request but holds that Petitioner

[18] Respondent never explains the "corresponding interest" held by the dozens of non-owners who Diehl mailed material to. Diehl prepared its own mailing list.
[19] By Petitioner.

didn't' give a "good faith" reason R.p.51 – which requirement is outside the statute.

7. RESPONDENT ROSEMARY TOTH ILLEGALLY DISTRIBUTED PROFITS OF A SALE OF PROPERTY RIGHTS.

The issue is whether Respondent Toth violated the S.C. Non-Profit Corporation Act S.C. Code Ann. § 33-31-1301 and the IHOA's own Bylaws when she voted for and did not dissent distributing (to homeowners) $50,250 in profits from the sale of an easement. An explicit prohibition in the law and in the Bylaws is not subject to the "Business Judgement" rule and thus "mishandling" is not the issue. Petitioner's Appellate Brief noted the facts and the applicable law and bylaws. No cases were cited because none exists on distributions. The issue is clearly "with merit": the evidence is that the money was the profit from a sale of assets, that the Bylaws R.p. 3779 has an absolute prohibition on any distribution, and that the distribution also violates the law. The Response ignores the prohibition in the Bylaws and falsely claims that

> "nothing in the record reflects that Toth voted in favor of the transaction ... Based on the lack of evidence in the record ... properly dismissed the claim against Toth".

On April 19, 2010 [20] R.p. 3525 Item 10 the IHOA Board unanimously voted for the distribution. Per Item 4 R.p. 3523 Toth was present and voting as IHOA president. At trial and on Appeal Respondent argued that Toth was providing a benefit. [21] The Response argues p.17 that this was "the return of an overcharge" to provide services[22] yet Toth distributed money to hundreds of homeowners who receive no services at all. The documentary evidence cited in the Petition states that Toth's

[20] Minutes of Special Meeting of the IHOA Board
[21] Which admits that she voted for the distribution.
[22] Cable TV and garbage pickup services are provided to some homeowners but all homeowners received cash.

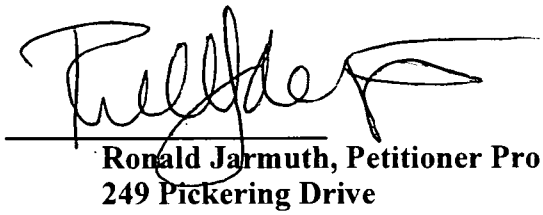
intention was to share the profits, and "providing a benefit" is absent from the documentary evidence. The "benefit" testimony conflicts with the evidence; the alleged "benefits" intention is also prohibited by the Bylaws.

CONCLUSION

The Response ignores the problems with the Court of Appeals Affirmation raised by Petitioner and instead creates and addresses a bogus straw man of inaccurate facts and law. The issues raised are substantive and have never been addressed by the Supreme Court in the context of a homeowners association. The South Carolina Attorney General has dealt with many of the issues through Advisory Opinions (favorable to Petitioner) but a clarifying opinion is needed so there is comparable case law.

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

Respectfully submitted



June 18, 2015

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

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PROOF OF SERVICE

I certify that on June 18, I Served the Reply to Petition 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.

June 18, 2015

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