

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

Appeal No. 2016-001063

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

Benjamin H. Culbertson, Circuit Court Judge

CASE NUMBER 2009-CP-26-3596

Ronald Jarmuth

Appellant,

v.

The International Club

Respondent

REPLY BRIEF OF APPELLANT

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DEC 15 2016

SC Court of Appeals

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ARGUMENT

1. The Respondents admit that the court lacked subject matter jurisdiction to grant relief for claims it asserted for the first time during the trial and where there is no enforceable contract provision relating to a claim.

a. Respondents do not controvert the law is clear that subject matter jurisdiction arises from within the four corners of a complaint:

“... this Court must base its decision solely on the allegations set forth on the face of the complaint.” Flateau v. Harrelson, 632-33, 494 S.E.2d at 433.(Ct. App. 2003

"A court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct" Kontrick v. Ryan, 540 U.S. 443; (2004)

Respondent offered no authority or argument to the contrary in Respondent's April 8, 2016 Response in Opposition to Appellant's March 11, 2016 Motion to Dismiss for Lack of Subject Matter Jurisdiction, nor at the April 27, 2016 hearing on the matter.

In Respondent's Response and during the hearing Respondent did not deny that the matter of Appellant's housing discrimination complaint and any claim for attorney fees to defend same are absent from a counter – claim and from any and all pre-trial pleadings.

Respondent likewise did not controvert or deny that Respondent's Counter – Claim relating to fines for an alleged covenant violation did not cite an enabling contract (covenant) provision allowing Respondent to sue for said fines.

Respondent likewise did not controvert that the (not cited) covenant provision allowing suits for collection of fines (for use violations) was inapplicable because it contained pre-litigation claim preclusion provisions which Respondent admitted it did not satisfy.

b. Respondents did not controvert (and provided no authority to the contrary) that interlocutory procedural orders (or pleadings) can not create subject

matter jurisdiction.

**"It is elemental that a ... court cannot create jurisdiction where none exists"
Christianson v. Colt Indus. Operating Corp. 392 F.Supp.2d 1295, 30 NDLR P
181 (Cite as: 392 F.Supp.2d 1295) 486 U.S. 800, 816, 108 S.Ct. 2166, 100
L.Ed.2d 811 (1988) citing Wright & Miller # 1350, at 204-05.**

Respondent's sole argument unsupported by any authority (stated in its' Response to Appellant's Motion to Dismiss and at the hearing) was that subject matter jurisdiction existed (as to attorney fees to defend against Appellant's South Carolina Human Affairs housing discrimination complaint, and to collect usage violation [1] fines was that:

- (1) Orders of Reference to a Special Referee [2] automatically confers subject matter jurisdiction on anything, whether in the complaint or not;
- (2) Orders of Recusal by a Special Referee [3] after a trial has ended likewise retroactive confers subject matter jurisdiction on all matters in the final order; and
- (3) An admission of venue in an answer [4] confers subject matter jurisdiction by a party's "litigation conduct".

Respondent never cited anything in the record to demonstrate that the question of subject matter jurisdiction has (previous to this appeal and to the underlying motion) actually been questioned or litigated.

2. The appeal is about attorney fees the Respondent spent defending a housing discrimination complaint and about "covenant violation fines" that the HOA Board never imposed and which the HOA's bylaws prohibited it from trying to collect.

Simply put –

- a. The trial court lacked the authority to grant the HOA Respondent

1 Respondent did not controvert that the HOA Board never actually held that a covenant usage violation occurred nor did it controvert that the HOA Board never actually imposed any related fine.

2 June 13, 2012 Order of Reference.

3 October 20, 2012 Order of Recusal.

4 December 12, 2012 Appellant's Answer to Counter-Claim admitting Venue.

attorney fees –

(1) there is no statute or contract provision allowing the respondent to collect attorney fees to defend a housing discrimination matter and no claim for such reimbursement was stated in a counter - claim. The Respondent has admitted that it spent the attorney fees to defend a housing discrimination claim [5] AND that neither the discrimination matter nor any request for related attorney fees were ever mentioned in Respondent's counter – claim nor in any pre-trial HOA pleading;[6]

(2) when Respondent has admitted that Respondent spent the attorney fees defending a housing discrimination complaint which Appellant filed with the South Carolina Human Affairs Commission; and which Respondent has admitted were spent [7] years before any covenant use violation was alleged to have occurred; [8]

(3) where any demand for reimbursing attorney fees (or any costs at all) spent defending a housing discrimination claim constitutes criminal retaliation per 42 U.S. Code § 3617 Interference, coercion, or intimidation; 42 U.S. Code § 3631.Criminal and thus reimbursement is prohibited as a matter of law.

b. The trial court lacked the authority to grant the HOA Respondent covenant violation fines for an alleged usage violation --

(1) there is no contract provision or statute allowing the HOA to collect alleged covenant violation fines on Appellant's HOA account. Respondent has admitted that the HOA's Bylaws contain a pre-litigation claim preclusion clause [9] which

5 Responded March 3, 2016 Memo P5 Lines 3-6; P7 top.

6 Appellant's housing discrimination complaint was filed August 26, 2009 three months after Respondent filed it's answer to the Complaint.

7 Respondent gave Appellant copies of the two attorneys checks for the first time during the trial; they were not offered as impeachment evidence.

8 The swing set for Appellant's foster children was never actually constructed, hence no covenant violation could have occurred.

9 HOA Bylaws Section 13.3 states that the HOA can not impose any fines or take any

deprives Respondent of any contractual basis to sue for the fine. The Respondent has admitted that it did not comply with the pre-litigation claims preclusion clause of the bylaws in that it has admitted that it never actually held the required adversary Board meeting [10]

(2) Respondent has admitted that the counter – claim to collect “unpaid fines” on Appellant’s account required an authentication or affirmation [11] of actual personal knowledge under oath as a part of the counter – claim and Respondent has admitted that no authentication or affirmation of the account by anyone was filed as a part of the counter – claim;

(3) Respondent has admitted that the HOA Board never actually determined that a covenant usage violation occurred and never actually imposed a fine; [12] and that without this there is no contractual authority for Respondent to sue for fines and attorney fees – depriving the court of subject matter jurisdiction.

(4) Respondent has admitted that its’ counter – claim stated that the alleged fines belong to a legal entity other than Respondent [13] ; that federal and state debt transfer laws [14] require a notice of transfer of debt; and that no transfer of the alleged account was ever made from the ARB to the HOA Respondent.

action restrictive action until it holds an adversary hearing which the HOA has admitted never occurred.

10 It admitted that it not only never held any hearing on the matter, but that it also never gave the required notice of the adversary hearing as required by Bylaws Section 13.3.

11 Rule 9(i) SCRPC.

12 Bylaws Section 13.3 Pre-litigation claims preclusion clause requires that the minutes of the Board record sending a notice of a hearing; holding a hearing; recording the results of the hearing; and sending the homeowner a notice of the result..

13 The Architectural Review Board which the final order held is a separate legal entity created by the covenants independent of the HOA and of the HOA’s Board of Directors.

14 S.C. Code Annotated Section 37-2-412 Notice of Transfer of Debt; S.C. Code Annotated Section 15-7-413 Attorney Fees to collect transferred debt; 15 U. S. Code § 159(e) Federal Fair Debt Collection Practices Act of 1977; Federal Trade Commission Act Section V.

3. Respondents never denied or disputed Appellant's Assertions of Flaws in Subject Matter Jurisdiction

At the March 27, 2013 hearing the attorney for Respondent did not object to, challenge; deny, or contradict any point raised by Appellant at the hearing.

Counter - Claim Flaw	Hearing Transcript Pages	
	Jarmuth At Hearing	HOA at Hearing
SC Human Discrimination Claim not in HOA Counter-Claim	P7:12-21; P8:5-9; P12:18-21; Pl Ex 8	silent
Counter - Claim lacks authentication of amount owed on account (fines)	P7:1-3; P11:15-16, 19-25; P12:20-23	silent
Counter - Claim failure to plead existence of contract between HOA and Jarmuth	P7:12-13; P13:5-25; Pl Ex 1a	silent
Pre-litigation Claim Preclusion Provisions in Contract forbid law suit	P6:18-20; P8:15-16, 24; P9:3, 18-22; Pl Ex 9 (Bylaws Sec 13); Pl Ex 10 (5/5/2010 HOA Board Minutes)	silent
HOA Board never determined a covenant violation occurred	P8:19; P10:1-5; Pl Ex 11 (11/10/2010 Board Minutes)	silent
HOA Board never imposed a fine	P8:19; P10:8-13; P17:15; Pl Ex 11 (11/10/2010 Board Minutes)	silent
Debt Transfer Claim Preclusion statute violated	P17:15-25; P18:1-3; P19:7-13	silent
Debt Transfer Statute Attorney Fee Limit Exceeded	P16:10-13; P18:11-15; P19:7-9	
HOA has no standing to demand covenant violation fines	P7:6-13; P10:22-25; P11:10-11; P12:8-9; P15:7-12; P17:10-13; P19:3-4; Pl Ex 1b	silent

RESPONDENT'S ERRONEOUS ARGUMENT

4. The Well Plead issue before the Court is simply that the attorney fees and fines Granted for the Counter – Claim were not before the trial court.

Appellant's statement of these issues in his March 11, 2016 Motion to Vacate and during the hearing preserved the issues for appeal. These issues have also been stated in Appellant's Brief.

The ACTUAL central issues on appeal are:

- a. The reimbursement of attorney fees has nothing to do with the counter – claim actually stated. It is as if the Respondent asked for “A” and the Court gave it “B”.
- b. There is no contract or statutory provision enabling the court to award “fines” (and thus to be reimbursed for attorney fees) for violating the usage restriction provisions of the covenant.

At the hearing both the Court and Respondent's counsel agreed that these were the issues. From the hearing transcript, RoA P.91:

“MS. THOMPSON: ... Mr. Jarmuth moved to dismiss based on a lack of subject matter jurisdiction, challenging the judgment that was entered ... for attorney's fees, costs and fines. ... I just ask that the motion this morning be limited to the arguments in the motion that was made and filed. ...

THE COURT: All right ... you are limited to whatever you allege in your motion as the grounds for the motion.”

Appellant made it clear that the court lacked subject matter jurisdiction over the relief granted because there were "conclusions of law in the final order without supporting claims." - Transcript RoA P.94.

In the June 16, 2016 “Long Order” RoA P.81 following the hearing the Court defined the counter claim as

“seeking damages related to fines incurred, .. and attorneys' fees and costs as a result of Jarmuth's breach of the Declaration.” [underlining added].

Appellant specifically pointed out the award of attorney fees NOT spent to

enforce the covenants had no supporting claim – attorney fees for any other purpose was not before the court. Appellant preserved the issue by stating (Transcript RoA P.100 L12 that):

“The claim was -- the attorney fees was claimed as quote, fines and costs to collect the fines.”

The Appellate Panel should note that the Respondent and the trial court relied on a provision of the contract Section 8.1 Enforcement RoA P.126 which allows attorney fees and fines (subject to compliance with pre-litigation constraints) as the authority to demand both. The American rule of law is that while you can sue to force compliance with deed restrictions, you can't recover attorney fees (and consequential fines) unless the deed specifically allows for this. The provision they relied on is extremely limited. Unless you “dot all the “i’s” and “cross all the t’s” the enabling provision does not exist. Appellant amply pointed out that Respondent did not plead compliance in the counter – claim and in fact did not satisfy the limitations. There is no contract provision allowing the fines or attorney fees actually awarded. It is not necessary for Appellant to demonstrate that the attorney fees were actually spent to defend the discrimination claim or to fight Central Electric's easement condemnation threat – it is only necessary to show that the attorney fees were not spent TO UNDO AN ACTUAL USE VIOLATION – and Appellant has proved that. The enabling contract provision was “not available” and no attorney fees can be awarded.

The March 11, 2016 Motion to Vacate RoA P.291 does not question whether the Court had subject matter jurisdiction to determine if a covenant usage violation occurred. Respondent did not argue at trial that a usage violation occurred – it argued that the HOA Board determined a violation occurred and that the Court should accept that determination. The motion to vacate argues instead that the only thing that can

trigger attorney fees and fines is for the HOA (Respondent) Board to satisfy Bylaws Section 13.3 RoA P.128, which in turn triggers the right to impose fines and seek attorney fees. The evidence and Appellant's argument in the Motion to Vacate, and at the hearing, was that the clause was never triggered. In Respondent's Memo in Opposition and at the Hearing Respondent did not claim compliance nor point to any evidence of compliance. Appellant, through the minutes of the HOA Board, proves non-compliance and thus no claim before the trial court and no subject matter jurisdiction.

From the

March 11, 2016 Motion to Vacate:

"Absent pleading compliance with the predicate procedures of the Bylaws, the IHOA Counter –Plaintiff is precluded by its own Bylaws from filing a claim to mitigate damages, to collect fines, and for consequential attorney fees, and the Court lacks subject matter jurisdiction" (RoA P.294)

"The trial court lacks subject matter jurisdiction over the IHOA Defendant's Counter – Complaint (to mitigate a violation; to collect a fine; and for attorney fees to mitigate the violation and collect the fines);" (RoA P.299)

(Counter-Claim) "Paragraph 65 alleges only the possibility of fines and does not allege that the IHOA's Board actually imposed such a fine. Both paragraph 65 of the Counter – Claim and Section 13.3.1.3 of the predicate Bylaws provide only the possibility of a fine. ... it never alleges that any of the predicate requirements after the initial notice had been satisfied." (RoA P.294)

From the hearing transcript, RoA P.97:

"Because the pre-litigation clause in the by-laws 13.3 says that the HOA may not impose a fine, may not deprive me of any rights under the covenants and may not go to trial or try to collect fines, whatever, or anything else until and unless they've satisfied all the provisions of 13.3. It operates the same way as an arbitration clause in a contract. It operates the same way as the requirement to pre- file a notice with the, with the Attorney General if you're suing the state or the municipality if you're suing a municipality or if you're a franchise holder, to notify the franchise granter."

In Allstate Ins. Co. v. Global Med. Billing, Inc., 2013 U.S. App. LEXIS 7277 (6th Cir.

April 8, 2013) the court held that if a plaintiff has failed to satisfy all pre-litigation

provisions of an agreement not only does the plaintiff lack standing, but the court also

lacks subject matter jurisdiction, citing Harold H. Huggins Realty, Inc. v. FNC, Inc., 634

F.3d 787, 795 n.2 (5th Cir. 2011). The court also held that a determination of subject matter jurisdiction does not operate as a merits adjudication and does not bar re-litigation of the issue citing Pratt v. Ventas, Inc., 365 F.3d 514, 523 (6th Cir. 2004).

In Brosnan v. Dry Cleaning Station Inc., 2008 U.S. Dist. LEXIS 44678 (N.D. Cal. 2008) a case involving a franchise agreement the court determined that the Plaintiff failed to comply with a pre-litigation clause. The court granted defendants' motion to dismiss, stating that failing to comply pursuant to a contract that makes mediation a condition precedent to filing a law-suit warranted dismissal for lack of subject matter jurisdiction. Similarly in Tattoo Art, Inc. v. TAT International, LLC. 711 F. Supp. 2d 645 (E.D. Va. 2010) the contract "provided the parties would submit the dispute to mediation . . . prior to filing any action to enforce this Agreement." The court dismissed "for lack of subject matter jurisdiction". In DeValk Lincoln Mercury, Inc v Ford Motor Co 811 F.2d 326 (7th Cir. 1986) concerning a car dealership, the court enforced a pre-litigation clause by summary judgement against the plaintiff. The Seventh Circuit affirmed this order.

The South Carolina Supreme Court is of the same opinion. In Ranucci v. Crain, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014) the court upheld dismissal of the case at the trial court level for lack of subject matter jurisdiction for failure to comply with "the pre-litigation process" (a notice requirement.) It held where there is a multi-step procedure specified, the court has no subject matter jurisdiction to entertain a case where the precursor steps were ignored, writing that a court

can not "accept a case (at the) last step, filing suit ... unless all provisions of (the pre-litigation procedures) ... are utilized."

At the hearing Appellant plead this issue to the Court stating

(there are) "conclusions of law in the final order without supporting claims." and "that pre-litigation contract provisions that is in the by-laws of the HOA

itself which preclude going to court until those pre-litigation provisions are satisfied. These are mandatory on the HOA." - Transcript RoA P.94

The evidence is that the required adversary hearing was never held and more than that, the HOA Board never actually determined there was a covenant violation and never voted to impose fines. The covenant which Respondent states is the exclusive authority for the counter – claim prohibited the HOA Respondent from asserting a counter – claim. From the trial transcript, HOA President William Freiboth testifying that the pre-litigation hearing provision is mandatory:

“an appeal is, is dependent on there being a violation, period, not, not on someone saying they want an appeal or not.” RoA P.268 at 21.

“We would call a Board meeting if you said, even if you said you wouldn't fix it, ... we would call a Board meeting in a case where we were afforded the opportunity to do that, and we would make sure, first of all, that we understood the facts and that we, we were doing -- we were behaving properly.” RoA P.271 at 12

“We would discuss it first to decide -- we wouldn't just do anything automatically in that case. ... we would discuss the particulars and decide what to do before -- we would discuss it before moving.” – RoA P.270 at 11

RESPONDENT STATED A BOGUS ISSUE ON APPEAL

- 5. The Trial Court Erred as a Matter of Law in failing to vacate the provision awarding fines and attorney fees for alleged violations of covenant usage restrictions.**

This is the inescapable conclusion that must be reached because the very contract provision the Respondent relies on as the basis for its' cause of action denies the Respondent standing to assert the counter – claim and because the contract provision explicitly bars Respondent from suing for fines and attorney fees because of failure to satisfy the pre-litigation contract provisions. To the extent that a court fails to do its' duty it is an abuse of the rule of law. It is not an abuse of discretion because the phrase “abuse of discretion” implies discretion which is not present because the facts presented to the court prove a lack of subject matter jurisdiction. That’s what is going on here.

Appellant, not Respondent, gets to state the issues on appeal. Even if that was not so, issue #2 is not what Respondent states in the Response Brief.

Page “v” of Respondent’s Brief incorrectly states that the second issue is --

“Did the circuit court abuse its discretion in finding that the Special Referee had jurisdiction to enter into the Final Order in Civil Action Nos. 2009-CP-26-3596 and 2010-CP-26-11320 awarding a judgment in favor of the Association?”

Respondent takes up this phony issue at Response Brief p.14 “II No Abuse of Discretion”.

This is a trick question. There is no problem with any part of the case up until October 24, 2011. The distinction between the power of the “regular” judge versus that of a “special referee” was never raised by Appellant – it is a bogus issue raised by Respondent in their Memo opposing the Motion to Vacate RoA P.304, at the hearing, and in the Response Brief. Respondent argued in the Memo and at the hearing that the June 13, 2012 Order of Reference RoA P.13 conveyed subject matter jurisdiction even where it may be lacking and Appellant argued that an Order of Reference is jurisdictionally neutral.

Most of the case at trial was Appellant’s claims stated in the complaint(s). Appellant conceded that the judge, whether a Special Referee or a Circuit Judge, had jurisdiction to determine Appellant’s claims – no matter in whose favor the outcome was.

Respondent’s Brief is silent about and concedes the real issues – that there are unsatisfied pre-litigation clauses and that Respondent never spent a single cent on attorney fees to enforce the covenants and Respondent blatantly lied about fees (spent years before there was a usage violation) being spent to enforce the covenants. Instead Respondent wastes the court’s time addressing the irrelevant issues of the transfer of the

magistrate complaint to circuit court, consolidation of cases, referral to a special referee RoA P.13, and the special referee's recusal RoA P.67. [15]

It is useful to note that the Special Referee was very sick during the trial and ended the trial early "for personal business", and that there were a "boatload" of issues to be decided. The Respondent's attorney wrote every word of the forty eight (48) page final order and her employee removed the exhibits from the courthouse immediately after the trial, denying the Special Referee the opportunity to "fact check" the final order. The final order RoA Pp.19-66 as written by Respondent's Counsel falsely asserted that the two checks RoA Pp. 202,208 were to "enforce the covenants"; this false representation seem reasonable – when the checks and general ledgers RoA Pp. 203,209 were not available for the Special Referee to simply look at the dates.

Respondent's Brief (pp 2, 3) lies to the Appellate Panel about those dates and purposes. Here's a chart of the discrepancies:

Event	Date	Note	HOA Brief
Counter-Claim #1 RoA Pp. 185-188	5/12/2009	No allegation of covenant violation or basis for atty fee demand	
SCHA Discrimination Claim RoA P,198	8/17/2009	SCHA Mails to HOA; asserts Swing set IS PERMITTED	Falsely states the discrimination claim argued covenant is illegal P2
Atty Fee Check #1 RoA P.202	10/15/2009	Ledger says for SCHA Legal Matter – Paid to defend SCHA Discrimination Claim RoA P.203	Falsely states Paid Before SCHA Claim P2
SCHA Decision	12/11/2009	SCHA Matter not in any Complaint or Counter Claim	

15 He recused himself when it was asked how his order could comment on deposition testimony and evidence which remained locked by the clerk of court during the whole trial or which was removed from the courthouse by Respondent's employee when the trial was over, thus unavailable to read. There was no transcript for him to use.

Attorney Fee Check #2 RoA P.208	6/9/2010	Ledger says for Central Electric Easement RoA P.209 Condemnation Threat - Paid 4 Months <i>Before</i> 2d Complaint	Falsely says Paid to Defend 2nd Complaint P2
Magistrate Complaint RoA pp.219, 231	10/12/2010	Filed 10 months <i>after</i> SCHA Decision – no mention of SCHA matters	Falsely says filed <i>just</i> after SCHA Decision P2
		Not a word about Swing Set of SCHA Matter in Complaint #2	Falsely says complaint #2 challenged swing set denial P3
Counter-Claim #2 RoA P.247	10/24/2011	Asserts Covenant Violation; Demands Atty Fees actually incurred to correct violation	Demands attorney fees actually incurred to correct violation
		No demand for declaratory judgement in counter - claim	Falsely Says HOA C-Claim includes Declaratory Judgment demand P3
		Demand was simply for attorney fees	Falsely says claim is for attorney fees to enforce covenant P3
Post-Trial Order	4/3/2013	Order found Magistrate Complaint properly transferred to Circuit Court; silent about jurisdiction over claims	Falsely claims court found subject matter jurisdiction over claims P5

SUBJECT MATTER JURISDICTION

6. There is no discretion where subject matter jurisdiction is concerned.

a. Subject Matter Jurisdiction Never RAISED Before Court - Can Be Raised at Any Time.

The issue of subject matter jurisdiction over the counter - claim was never briefed or argued prior to the May 18, 2016 hearing. Respondent has not cited to a page number or phrase in any motion or brief where this allegedly was argued.

During the hearing (Transcript, RoA P.93 L14) the Court observed that

“THE COURT: ... The court can dismiss it for lack of jurisdiction at any time, the day after the judgment or a hundred years after the judgment”

In Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 495-96, 450 S.E.2d 616, 619

(Ct. App. 1994) the Court held that a matter was never before the court – and never actually decided – unless and

“until issues actually and necessarily litigated and determined” ...

“The law of the case ... applies only to issues actually addressed and decided at a previous stage of the litigation.” citing Koppers Co., Inc. by Beazer East, Inc. v. Certain Underwriters at Lloyd's London, 993 F. Supp. 358, 364 (W.D PA 1999)

“ This (prior subject matter jurisdiction decision) determination does not, however, foreclose challenges to subject matter jurisdiction based on entirely independent grounds. The law of the case doctrine applies only to issues expressly decided by a court in prior rulings.” citing See Bolden 21 F.3d at 31.

“It is well-settled that issues relating to subject matter jurisdiction may be raised at any time.” Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995); GNOC Corp. v. Estate of Rhyne, 312 S.C. 86, 439 S.E.2d 274 (1994); State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971).

“A court that lacks subject matter jurisdiction lacks constitutional or statutory authority to hear the case ... If, at any point ... the court is held to lack subject matter jurisdiction all of its orders will be nullified and the parties' efforts will have gone for naught. Chicot County Drainage Dist. v Baxter State Bank, 308 U.S. 371, 376 (1940)

b. The Trial Court had no discretion regarding – Subject Matter Jurisdiction and Must Dismiss if Subject Matter Jurisdiction is found lacking.

In Respondent’s “Statement of the Issues on Appeal, p. v, Respondent identified the second issue as

“Did the circuit court abuse its discretion in finding that the Special Referee had jurisdiction to enter into the Final Order in Civil Action Nos. 2009-CP-26-3596 and 2010-CP-26-11320 awarding a judgment in favor of the Association?”

This was repeated in the Response Brief, p14 as “II. No Abuse of Discretion”. There are four (4) pages devoted to this bogus issue. It was followed by two (2) pages arguing against a claim which Appellant did not state to the trial court nor to the Appellate Court on this appeal, that bogus issue being that “The Referral was Proper”.

There is no discretion in matters of subject matter jurisdiction. This was stated by the Court in Gonzales v. Thaler, 132 S. Ct. 641, 648 (2012). In Henderson, 131 S. Ct.

at 1202–02 the Court held that dismissal is mandatory no matter what the amount of work by courts and parties that went into a case before a lack of subject matter jurisdiction was raised. In Henderson the court stated “many months of work on the part of the attorneys and the court may be wasted if jurisdiction is found to be lacking” and

“Because of these ‘drastic’ jurisdictional procedures, litigants may be ‘disturbingly disarm[ed]’” citing Auburn Reg’l Med. Ctr., 133 S. Ct. at 824.

The U.S. Supreme Court has held that the question of “abuse of discretion” is inapplicable to decisions relating to subject matter jurisdiction. The court held that the decision is strictly a matter applying the law to the facts of the case.

If a court could create subject matter jurisdiction by asserting “discretion” to rule or not rule on the issue this is nothing more than saying that a court has discretion to create subject matter jurisdiction. But the Courts have universally held that is not true. “It is elementary that a ... court cannot create jurisdiction where none exists.” 5A Wright & Miller § 1350, at 204-05.

“When the absence of subject-matter jurisdiction is noticed by, or pointed out to, the trial court, that court has no jurisdiction to entertain further motions or pleadings in the case. It can do nothing but dismiss the action forthwith. ... Any other action taken by a court lacking subject matter jurisdiction is null and void.” op cit. (quoting Beach v. Director of Revenue, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996)).

“It is well-settled that courts must determine as a threshold matter whether they have jurisdiction to decide the issues presented. Pub. Access Shoreline Hawai’i v. Hawai’i County Planning Comm’n, 79 Hawai’i 425, 431, 903 P.2d 1246, 1252 (1995).

c. Failure to Comply with a mandatory provision of the statute or contract which enables the claim deprives the court of subject matter jurisdiction.

The U.S. Supreme Court held that clauses in statutes or contracts that provide the basis for a claim affect subject matter jurisdiction; distinguishing these from “processing metrics” derived from rules of court. The court stated that a case only

presents a controversy which the court can grant relief on when there is an applicable statute or contract provision and subject matter jurisdiction derives from complying with the complete enabling statute or contract provision. It stated that procedures for raising a subject-matter jurisdiction incorporates the lack of standing. - Bowles v. Russell 189 551 U.S. 205 (2007).

The U.S. Supreme Court has applied this to the appellate and trial court levels:

Appellate courts have a sua sponte obligation to dismiss a case if standing was lacking in the court below, even if it is satisfied in the appellate court. -- Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998).

Moreover, all courts - trial and appellate - have a sua sponte obligation to ensure that standing is satisfied in the case before the court. - Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam)

"When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction." State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025; When, 82 Yale L.J. 1363, 1384 (1973)).

"The failure (of a party) to take any action required by law or contract within the time prescribed deprives a court of subject matter jurisdiction over the matter" Skinner v Westinghouse Electric Corporation, 716 S.E. 2d 443 (S.C. 2011) Supreme Court of SC #27037 Sep 6 2011.

"A court lacks subject matter jurisdiction over a claim when the plaintiff 'failed to exhaust' required administrative requirements." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011)

a challenge to subject matter jurisdiction based on lack of standing is timely even if the challenge occurs for the first time on appeal. - Belitskus v. Pizzingrilli, 343 F.3d 632, 639 (3d Cir. 2003).

Litigants can thus challenge standing at all stages of the litigation. - Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994).

Litigants cannot consent to standing or waive the defense of lack of standing. - United States v. Hays, 515 U.S. 737, 742 (1995).

Standing is a highly fact-specific doctrine where cases are "more or less determined by the specific circumstances of individual situations." - United States ex rel. Chapman v. Fed. Power Comm'n, 345 U.S. 153, 156 (1953).

The litigant must "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be

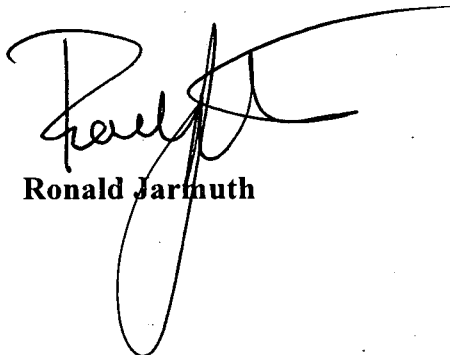
redressed by a favorable judicial decision.” - Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

“Standing has been defined as “whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter.” Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002). “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” Estate of Apple v. Commercial Courier Express, Inc., 168 N.C. App. 175, 177, 607 S.E.2d 14, 16, disc. review denied, 359 N.C. 632, 613 S.E.2d 688 (2005).

(Continued on Next Page)

CONCLUSION

1. The trial court lacked subject matter jurisdiction to award attorney fees sought by Respondent
2. The trial court lacked subject matter jurisdiction to award fines for violation of alleged covenant usage restrictions.
3. Appellant preserved the issues on appeal through the Motion to Vacate and through argument and evidence at the hearing.
4. The attorney fees actually awarded was not to enforce the covenants and thus was never before the court as a claim. and the court had no authority to grant that relief.
5. Respondent's issues of discretion and the sufficiency of the pre-trial referral of the case to the Special Referee are irrelevant.
6. Respondent's Memo opposing the Motion to Vacate and at the Hearing on same, Respondent never controverted that the trial court lacked subject matter jurisdiction to award attorney fees for the actual purposes the fees were spent.
7. Respondent's Memo opposing the Motion to Vacate and at the Hearing on same, Respondent never controverted that the Respondent failed to comply with the pre-litigation provisions of the contract which was the basis for the counter – claim..
8. The provisions of the September 10, 2012 final order relating to award of attorney fees and award of usage violation fines must be vacated.



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FORM 16

CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal No. 2016-001063

RECEIVED

DEC 15 2016

APPEAL FROM HORRY COUNTY

SC Court of Appeals

Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

CASE NUMBER 2009-CP-26-3596

Ronald Jarmuth

Appellant,

v.

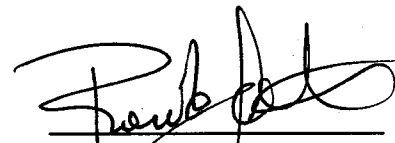
The International Club

Respondent

CERTIFICATE OF COUNSEL

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

December 15, 2016



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