

**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

BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF THE CASE

The case was filed April 7, 2009. Remittitur was issued January 21, 2016. On April 27, 2016 a hearing was held to determine whether the trial court lacked subject matter jurisdiction over the Counter – Claim where it awarded \$7,236 in attorney fees and fines. At the hearing Hon. Judge Benjamin Culbertson, presiding entered a bench Form 4 Order R.P.77 denying any relief. On May 17, 2016 a notice of appeal R.P. 331 was filed and served. On May 31, 2016 at a hearing before Hon. Judge Steven John the Court entered a Form 4 Order R.P.77 holding that as of May 17, 2016 “this court does not have jurisdiction”. The HOA Respondent’s attorney [1] agreed with the Court’s bench decision. On June 6, 2016 a “long order” R.P.79 written by the HOA attorney was signed and entered by Hon. Judge Benjamin Culbertson. On June 24, 2016 an amended notice of appeal R.P.333 was filed and served adding the second order. The June 6, 2016 Order R.P.79 made no Findings of Fact nor Conclusions of Law relating to any of the numerous and substantial reasons in fact and in law raised by Jarmuth why the trial court lacks subject matter jurisdiction to grant the HOA any relief for the Counter – Claim, which relief was granted in the September 12, 2012 Final Order R.P.19. The transcript of the hearing R.P.89 perpetuates that the HOA’s attorney was silent and did not offer any opposition to a single argument raised by Jarmuth at the hearing or in Jarmuth’s brief -- that the Court lacked subject matter jurisdiction to grant the HOA any relief in the Counter – Claim.

Because of this all of the arguments Jarmuth raised are before the Court of Appeals not “de nova” but for an initial decision. There was no decision on Jarmuth’s arguments by the Court below for the Court of Appeals to agree or disagree with!

The June 6, 2016 Order R.P.79 (written by the HOA attorney) following the

1 Henrietta U. Golding.

April 27, 2016 hearing was limited to reciting the same defenses raised by the HOA at the hearing.

These are before the Court “de nova” and it will quickly become apparent that there is no basis in fact nor in law to support the HOA’s arguments and the decision of the trial court following the hearing.

In the September 12, 2012 Final Order R.P.19 the trial court awarded the Respondent International Club Homeowners Association (“HOA”) attorney fees it incurred in defending a South Carolina Human Affairs Commission (“SCHA”) discrimination claim made by Appellant Jarmuth despite 42 U.S. Code § 3617 which absolutely prohibits a respondent to a discrimination claim seeking reimbursement for attorney fees incurred and 42 USC § 3631 which defines the act of seeking such reimbursement as a federal crime.[2][The HOA claimed that at least one of the two \$2,500 attorney fee checks is for such purpose and at times has claimed that the other check was for that same purpose. Alternatively the HOA has at times claimed that the second check was incurred to defend a second civil lawsuit (2010CV261072943 Jarmuth v HOA) filed in Magistrate Court which was later merged with this case (2009-CP-26-3596). In either scenario the checks were incurred by the HOA to defend complaints and there are no statutes nor applicable contract provisions which grant the trial court subject matter jurisdiction to grant the HOA this relief.

Evidence exists R.P.209 that the second attorney fee check was actually paid by the HOA for legal services related to a Central Electric above ground utility easement matter which has nothing to do with Jarmuth and for which there is no statutory or contractual authority for the Court to award attorney fees in the Central Electric Matter.

Thirty one months after the HOA paid the first (2009) check R.P.202 and sixteen months after the HOA paid the second (2010) check R.P.208 the HOA filed a Counter-Claim R.P.243 in this case asserting that Jarmuth had violated the Usage Restrictions of the Covenants – but the HOA admits that it never paid any money to file and prosecute the Counter – Claim (just the initial money years earlier to defend the suit against it). The provisions of the Covenant R.Pp.124-126 which allow attorney fees to enforce a violation of the covenants provide only for reimbursement of attorney fees actually incurred explicitly for the purpose of enforcement and in this case there were no such funds expended for that purpose thus there is no contractual authority for the Court to have subject matter jurisdiction to grant the HOA that relief.

The HOA's Counter – Claim R.P.243 never asked for reimbursement of attorney fees spent to defend the SCHAC matter nor for money spent in the Central Electric matter which further deprived the Court of subject matter jurisdiction to grant this relief.[3]

The Covenants which concern usage violations include both prohibitions and the procedures which the HOA must follow BEFORE contractual authority “kicks in” to sue out a usage violation and before the HOA can impose fines or seek reimbursement for court costs. Because the HOA never did any of the mandatory “pre-litigation” steps and never claimed in its Counter – Claim to have done so there is no contract provision which gives the Trial Court subject matter jurisdiction to grant the HOA fines and attorney fees for enforcement. Principal among these pre-litigation provisions R.P.128 which the HOA did not do and never claimed to have done is the requirement to invite (“on the record of the HOA's minutes”) Jarmuth to a Hearing; to hold such a hearing

3 The first time the SCHAC matter was raised was at trial. The Central Electric basis for the second claim was determined by forensic analysis of the HOA's general ledgers, minutes of HOA Board Meetings, and written announcements by the HOA to members.

“on the record”; to make a determination as to whether a violation had actually occurred “on the record”; to determine a fine if any “on the record”; and to send a written notice of the decision “on the record” with an additional demand to cease and desist “on the record”. The complete record of the HOA’s Board Minutes R.Pp.217,232,241 shows HOA non-compliance with the pre-litigation provisions of the contract.

The record of the HOA Board Minutes R.P.232 states that the HOA never held that Jarmuth violated the Usage Restrictions of the Covenant and never imposed any fine.

The Trial Court held R.P.37 Para 12d, P.50 that the Architectural Review Board (“ARB”) is separate and independent of the HOA which is what the HOA asserted at trial. The Counter – Claim R.P.243 and trial testimony was that the ARB, not the HOA, determined that a Usage Restriction Violation occurred and that the ARB imposed a fine. The ARB is a non-party to the proceeding. Neither the Counter – Claim nor trial testimony asserted that the ARB assigned or transferred its claim to the HOA. The Court lacked subject matter jurisdiction to grant the HOA relief which was owed to a third non-party: the ARB.

Both state and federal law prohibit the collection of a transferred debt until notice of the transfer of the debt is provided to the debtor in writing: Federal Fair Debt Collection Practices Act of 1977 (FDCPA 15 USC 159(e)); Section 5 of the Federal Trade Commission Act; and SC Code Annotated 37-2-412. These are preclusive statutes and failure to comply deprived the Court of subject matter jurisdiction to grant any relief for the fines or for the attorney fees.

The Minutes of the ARB R.Pp.217, 291 record that although the ARB decided that a Usage Restriction Violation had occurred, the ARB never imposed any fine, never

incurred any attorney fees, and never pursued any litigation. Since no entity entitled to pursue the Counter – Claim actually imposed any fine or incurred attorney fees to enforce the covenants there is no contract provision available to the Court granting it subject matter jurisdiction to award fines and attorney fees for enforcement.

Prior to Jarmuth's March 11, 2016 Motion to Vacate R.P.291, the objection to Subject Matter Jurisdiction was never raised by motion or pleading at the trial or appellate court levels thus res judicata does not apply and there is no "law of the case". The Court of Appeals has never made a finding as to Subject Matter Jurisdiction in this case. As Hon. Justice Scalia has explained "it is a Court's obligation to dismiss a case whenever it becomes convinced that it has no proper jurisdiction, no matter how late that wisdom may arrive" Wyoming v Oklahoma, 502 U.S.437, 462 (1991).

Unlike any procedural issue which disturbs the validity of a Court's order, subject matter jurisdiction arises from the division of powers set out in the federal and state Constitutions because a court can only exercise subject matter jurisdiction to grant any particular form of relief which the legislature by statute explicitly provides. The passage of time does not eradicate that constitutional division of powers and lack of enabling legislation. The trial court crossed that barrier and proceeded without statutory authority.

It is well settled that a Court can not determine (by order or otherwise) its own subject matter jurisdiction and that subject matter jurisdiction to grant any particular relief arises exclusively from within the four corners of the Complaint.

"In reviewing a ruling on a motion to dismiss a claim, 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" (2004 Kontrick v. Ryan, 540 U.S. 443 (2004))

The HOA asserts that the Court has determined its own subject matter jurisdiction (and that this constitutes the “law of the case”) because the HOA asserts:

(1) That when the Court by consent assigned the case to a Special Referee for trial R.Pp.308, 310 this granted the Special Referee powers (subject matter jurisdiction) that the Court itself previously lacked;^[4]

(2) That when the Court wrote in its Final Order R.P.308 that it had subject matter jurisdiction (without the matter being briefed or contested at trial or previously)^[5] this endowed the trial Court with subject matter jurisdiction it previously lacked; and

(3) That when Jarmuth admitted to Paragraph 53 of the HOA’s Counter – Claim R.P.308 which asserted Venue and Personal Jurisdiction he conferred subject matter jurisdiction on the Court (over matters not plead in the Counter – Claim) R.P.243.^[6]

FACTS

I. Complaints and Counter - Claim

A. The 2009 Complaint.

On April 7, 2009 Appellant Jarmuth filed a Complaint R.P.134 against the Respondent International Club Homeowners Association, Inc. (“HOA”) asking for Declaratory Judgments on various issues. The Complaint (Jarmuth v HOA et al 2009-CP-26-3596) did not challenge any HOA decision on Covenant Usage Restrictions.

On May 12, 2009 the HOA filed an Answer R.P.185 which did not allege that Jarmuth had violated any Covenant Usage Restriction. Paragraph 20, p3 R.P.187 of the

⁴ Including the authority to determine matters and grant relief absent from the Counter – Claim and for which there is no enabling statute nor applicable contract provision.

⁵ The SCHA matter and HOA Board imposing fines and incurring attorney fees having never been raised in any manner prior to trial and no discovery being had on this.

⁶ “53. The Property is located in Horry County, South Carolina, and this Court has jurisdiction over both the Property and the parties to this action” R.P.243.

Answer, asked for generic attorney fees without citing any statute or contract as the authority for this.

“Upon receipt of the 2009 Complaint, the Association filed a claim with its insurance carrier ... which required the payment of a \$2,500.00 deductible. This deductible was paid directly to McNair, the law firm hired to defend the Association ... in the 2009 Case. ... Trial Exhibit 62, Check to McNair).” – HOA March 3, 2016 Memorandum in Opposition to Jarmuth’s Rule 60(b)(2) and (3) Motion for Relief from Judgment.

The HOA check is dated October 15, 2009 R.P.202.

This is exactly what the HOA’s President testified at trial (Transcript p.908 R.P.261)

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

A: All right.

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

A: Yes. ...

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

A: I believe that was our insurance deductible for this lawsuit.”[7]

B. The South Carolina Human Affairs (“SCHA”) Discrimination Complaint.

The HOA mentioned the SCHA Complaint R.P.198 for the first time at trial.

The SCHA matter is not found in any Complaint, Answer, or Counter-Claim. Never the less at trial the HOA demanded repayment of attorney fees it paid defending the discrimination matter.

“on July 21, 2009, Jarmuth filed an application ... for a swing set. ... The Association sent a Notice of Disapproval ... [On August 17, 2009] Jamuth filed a Complaint with the South Carolina Human Affairs Commission (hereinafter "SCHAC") challenging the Association’s denial of his application based on allegedly discriminatory practices.” – HOA March 3, 2016 Memo, p4, op.cit. R.P.277.

It is also what the HOA’s attorneys claimed in their pleadings.

“The Association filed a second claim with its insurance carrier under it director's and officer's insurance policy related to the SCHAC Complaint. Like the 2009 deductible, the \$2500.00 deductible for the SCHAC matter was paid directly to McNair. ... (Defendants' Trial Exhibit 79, Check to McNair)” – – HOA March 3,

⁷ The case under appeal, 2009-CP-26-3596.

This is exactly what the HOA's President testified at trial

(Transcript p.897-8 R.Pp.259-260):

Q: And did Mr. Jarmuth file a claim against the Homeowners Association?

A: Yes, he did.

Q: And his claim was defended by the Homeowners Association; is that correct?

...

Q: And did the Association have to pay two thousand, five hundred dollars to an attorney ... as a result of this complaint with the South Carolina Human Affairs Commission?

A: Yes, we did.

The Swing Set, which was the subject of the SCHAC discrimination complaint, was never built – hence there was no violation of the Covenant usage restrictions “to enforce”. Both checks were paid to “defend” lawsuits against the HOA – not to “enforce” the Covenants. [8]

C. The 2010 Magistrate Complaint

On October 12, 2010 Jarmuth filed a Complaint R.P.219 against the HOA in Magistrate Court, Case No. 2010CV261072943. The case asserted Jarmuth had no financial obligations to the HOA because a different HOA is named in the Covenants.[9] The Complaint did not challenge any HOA decision on Covenant Usage Restrictions.

On November 17, 2010 the HOA filed an Answer R.P.237 to the Magistrate Complaint. The HOA Answer had no Counter-Claim and made no demand for attorney's fees related to the 2010 Complaint. The HOA has never asserted that it paid any attorney fees or court costs other than the two \$2,500 checks. [10] Both attorney fee checks were paid prior to the filing of the 2010 Complaint.

D. The 2011 HOA Covenant Use Restriction Counter – Claim.

8 The first check was paid October 15, 2009 and the second check was paid June 9, 2010.

9 The Covenants name “The Murrells Inlet Golf Plantation Association” (“MIGPA”) as “The Association”. The Defendant is “The International Club Homeowners Association”.

10 All HOA costs of litigation were paid by the HOA's insurance company.

On October 24, 2011 the HOA filed an Amended Answer with Counter-Claim R.P.243 asserting that Jarmuth violated the Covenant Usage Restrictions by laying a line of garden edger bricks along his side property line.[11] The HOA attorney fee checks R.Pp.203, 208 were paid more than two (2) years earlier and more than sixteen (16) months earlier. The money claimed by the HOA was spent to “defend” lawsuits not to “enforce” the covenants.

The HOA October 24, 2011 Counter – Claim cites the Governing Documents as the HOA’s sole authority to recover attorney fees and fines. Counter Claim para 54 p.8 R.P.243; para 70-71 p.10 R.P.245; and para 75 p.11 R.P.246.

The September 12, 2012 Final Order defines the Governing Documents as “the Declaration, including the Bylaws” para 24 p.46 R.P.64. The Final Order points specifically to Bylaws Section 13, Procedure, as the only basis in law or in contract for the HOA to collect attorney fees and fines:

“Declaration Section 13.4 [12] specifically provides that should the Defendant HOA employ legal counsel to enforce the Declaration, Bylaws or its Rules and Regulations the Owner shall pay the attorney fees incurred by the Defendant HOA.” – Final Order p.46 para 24 R.P.64.

Neither the Counter – Claim nor the Final Order cited any authority entitling the HOA to attorney fees for DEFENDING a lawsuit against it and in fact there is no statute nor contract provision entitling the HOA to that relief.

Para’s 54-55 p.8 R.P.243 of the Counter-Claim asserts that unspecified “Governing Documents” constitute a contract between Jarmuth and the HOA.

Para 57 p.9 R.P.244 asserts that “the Architectural Review Board (“ARB”) of the Defendant HOA” has standing to enforce the contract.

11 The Covenants do not prohibit this. There are thousands of these laid in the development. To circumvent the lack of a prohibition the HOA called this “a wall”.
12 Of the Bylaws. The trial court held that Procedural Section 13 of the Bylaws is part of “The Declaration” and that section is where the Court must look for an enabling contract provision from which the Court could draw subject matter jurisdiction..

Para 61 p.9 R.P.244 states that the ARB sent Jarmuth a notice of an alleged violation of the contract – “constructing improvements without approval from the ARB” and that this could subject Jarmuth to fines.

The September 27, 2010 “Violation Notice #1” R.P.211 [13] cited “Section 7.2, Prior Review of All Plans” and stated that

“The Violation Requires: Please submit an application for the exterior modifications ... Failure to take corrective action will result in enforcement”.

The notice did not impose any fine. On September 30, 2010 R.Pp.212-213 Jarmuth did exactly what the “Notice” demanded – he submitted a Modification Request R.Pp.212-213.[14]

Para 62 p9 R.P.244 of the Counter – Claim admitted that the violation the ARB noted was corrected.

Para’s 64-65 p.10 R.P.244 states that the ARB denied permission to install the brick plant edgers and gave Jarmuth 15 days to remove them.

Para 68 p.10 R.P.245 asserts that the bricks remained in place, that this violated the unspecified “Governing Documents” and that “Plaintiff has been fined accordingly”. It does not state who imposed the fine and when. It does not claim any action by the HOA.

The minutes of the December 7, 2010 ARB Meeting R.P.241 was HOA Trial Exhibit #88. Per the minutes, no fine was imposed. It reads

“The foundation still exists on the property as of December 7, 2010 and action will continue until the unapproved modification is brought into compliance”.

Para’s 70 and 71 of the Counter-Claim p.10 R.P.245 refer to unspecified “provisions” of the unspecified “Governing Documents” for the HOA to collect “fines”

13 HOA Exhibit 82 at trial.

14 HOA Exhibit 83 at trial.

and “attorney’s fees that are incurred” to enforce the Governing Documents.

The Counter – Claim never asserts that any attorney fees were ever actually incurred by the HOA under any circumstances.

The Counter – Claim never asserts that the HOA itself never met regarding the violation, that the HOA imposed any fine, nor that the HOA ever complied with a single procedural provision of the Bylaws.[15]

The Counter – Claim never mentions the SCHa matter nor the swing set.

II. HOA Authority to Seek Relief - The Covenant and Bylaws

The September 12, 2012 Final Order R.P.19 stated that a Court can not grant attorney fees – has no subject matter jurisdiction – unless there is an enabling statute or contract provision. In para 24 p.46 R.P.64 the Court wrote:

“‘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).

“A provision contained in restrictive covenants allowing for the recovery of attorney’s fees is enforceable.” Queen’s Grant II Horizontal Property Regime, 368 S.C. at 375, 628 S.E.2d at 920.

In the HOA’s March 3, 2016 Memo the HOA wrote:

“‘The Association is entitled to attorneys’ fees pursuant to Section 8.9 of the Declaration, which provides the following: “[s]hould any person employ counsel to enforce any of the foregoing covenants, conditions, reservations, or restrictions, because of a breach of the same, all costs incurred in the enforcement, including a reasonable fee for counsel shall be paid by the Owner ...’ Section 13.4 of the Bylaws of the Association also provide for attorneys’ fees in enforcing the Declaration: ‘[s]hould the Developer or the Association’” – HOA footnote #1, p.4 R.P.277.

In the Final Order para 24 p.46 R.P.64 the Court wrote that the Court’s discretion as to attorney fees is absent unless and until there is first an enabling statute or contract provisions writing

15 The HOA’s Board Minutes R.P.232 related that the HOA Board never discussed the matter, never held a hearing, and never imposed any fine.

“Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge.” Menne v. Keowee Key Prop. Owners' Ass'n, 368 S.C. 557, 569, 629 S.E.2d 690, 696-97, (2006).

On February 8, 1999 the Developer filed a Covenant concerning the property which forms the complete and exclusive contract between Jarmuth and the HOA. This is the “Governing Documents” referred to by the HOA.

The body of the Covenant R.P.124 stated the rights and obligations of the HOA [16] and of the property owners. The three attachments are as binding as the body: “A” and “B” are descriptions of the affected property and “C” are limiting implementation procedures. While “C” R.P.128 is denominated as “By-Laws of Murrells Inlet Golf Plantation Association, Inc.” [17] it is actually the limiting procedures which must be followed to enforce the Covenants. Together these establish a “due process” structure R.Pp.128-130.

A. Covenant Provisions

The Covenant Usage Restrictions are set out in Section VII “Usage Restrictions”. This section contains no enforcement provisions or procedures. The section equates to an enumeration of crimes in the law. There is no basis for relief or subject matter jurisdiction here.

Covenant Section 6.1 R.P.124 “Obligation of Assessments” is an enabling contract provision – but it applies only when a homeowner has not paid assessments – inapplicable here.

Covenant Section 6.8 R.P.124 “Remedies provides for an action at law by the HOA to collect unpaid assessments – and has no provision for attorney fees or costs of collection.

16 It explicitly assigned all rights to MIGPA, not the Respondent.

17 The “Bylaws” were never formally adopted by the HOA respondent. The Bylaws were filed February 8, 1999 and the HOA was incorporated March 1, 2001.

Covenant Section 8.1 R.P.126 (General Provisions, Enforcement) provides authority for legal action to enforce violations of the Declaration – but has no enabling provision for attorney fees or court costs.

Covenant Section 8.9 R.P.126 “Remedies for Violation of Restrictions” has an enabling provision limited to costs actually incurred in enforcing the Declaration:

"Should any person employ counsel to enforce any of the foregoing covenants, conditions, reservations or restrictions, because of a breach of the same, all costs incurred in such enforcement, including a reasonable fee for counsel shall be paid by the Owner..."

B. Bylaws Provisions

The Bylaws are a part of the Declaration (Part “C” of the Covenants) and are contractual. They are the equivalent of the Rules of Civil or Criminal Procedure.

Procedural Section 13 R.Pp.128-131 of the Bylaws restricts the enforcement authority of the HOA and protects homeowners from arbitrary action by the HOA. Section 13 constitutes preclusive provisions to the contract (covenant). Section 13.2 R.P.128 makes this clear:

Section 13.2 Authority and Enforcement reads:

“Subject to the provisions hereof, upon the violation of the Declaration, ... the Board shall have the power ...”

Bylaws Section 13.3 R.P.128 requires the equivalent of a formal criminal prosecution:

- (a) a criminal charging document / arrest warrant (Requirement for a formal notice of violation);
- (b) a trial (requirement for an invitation to a hearing by the HOA’s Board);
- (c) holding a trial (requirement to hold a formal hearing with a formal record);
- (d) a jury verdict (requirement that a majority of the board agree “on the record” that a violation occurred and agree on a penalty); and
- (e) a record of a conviction (requirement that the decision be formally recorded in the HOA Board’s minutes).

Section 13.3 R.P.129 is PRECLUSIVE of the HOA taking any enforcement action until it has fully complied with the provisions of Section 13.3. Per the Bylaws which the HOA cites as the authority for its Counter-Claim the HOA must satisfy all preclusive procedures of the Bylaws. A Court can NOT grant the HOA any relief (No subject matter jurisdiction) UNTIL the HOA complies. Together the Covenant says the HOA "can" but the Bylaws say "not until".

Preclusive Section 13.3 Procedure reads:

"... the Board shall not impose a fine ,, for violations of the Declaration, By-Laws or any rules and regulations ... unless and until the following procedure is followed:" R.P.128.

MANDATORY STEP #1:

"13.3.1 Written demand to cease and desist from an alleged violation (stating) ...: 13.3.1.1 The alleged violation; 13.3.1.2 The action required to abate the violation; and 13.3.1.3 A time period of not less than ten (10) days during which the violation may be abated without further sanction, ... a statement that any further violation ... may result in the imposition of sanctions after notice and hearing." R.P.129.

MANDATORY STEP #2

"13.3.2 Within two (2) months of such demand ... written notice of a hearing to be held by the Board in executive session. The notice shall contain: 13.3.2.1 The nature of the alleged violation; 13.3.2.2 The time and place of the hearing ...; 13.3.2.3 An invitation to attend the hearing and produce any statement, evidence and witnesses on such Owner's behalf; and 13.3.2.4 The proposed sanction to be imposed." R.P.129

MANDATORY STEP #3:

"13.3.3 The hearing shall be held (by) ... the Board of Directors pursuant to the notice and shall afford the alleged violator a reasonable opportunity to be heard. Prior to the effectiveness of any sanction here under, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting. ... The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed, if any." R.P.129.

Preclusive Section 13.4 Enforcement:

This section is dependent on first performing steps #1 through #3.

STEP #4 – not unless and until Steps #1 through #3 are followed:

“13.4 Enforcement. ... Failure to comply with (The Declaration) ... shall be grounds for imposing fines ... or for instituting an action ... Should the ... Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner.” R.P.130.

III. The Final Order

The ARB is independent of the HOA. The ARB, not the HOA, allegedly imposed a fine.

In para 12d p32 R.P.50 of the September 12, 2012 Final Order the Court held that the ARB, not the HOA Board, imposed [18] the fine.

“The ARB complied with the Bylaws when fining Plaintiff for his violations ... The ARB is granted the right to promulgate rules and regulations and to enforce those regulations under Section 7.2 of the Declaration. ... I find that the ARB's denials of Plaintiff's applications are proper, as are the fines.”.

The Court held that per Section 7.2 of the Covenants, the ARB is parallel to and independent of the HOA.

The Court held that the non-party ARB, not the HOA Defendant, imposed fines under it's independent authority. At trial the December 7, 2010 ARB Minutes R.P.241 was HOA Exhibit 88 – which has no record of the ARB imposing a fine – and no ARB witness testified to the contrary.

The Court held that the purpose of the HOA payment of attorney fees was to defend lawsuits against it. In para 24 p.46 of the Final Order the Court wrote that

“Due to the Plaintiff's contesting the enforceability of the Declaration, including the Bylaws, the Defendant HOA paid \$5,000.00 to the McNair Law Firm.” R.P.64.

In the Final Order the Court specifically included the SCHA Complaint as among the Complaints that the attorney fees were paid to defend. Para 26, p.9 R.P.27; and para 13a, p34 R.P.52.

18 Per the December 7, 2010 ARB Minutes R.P.241 HOA Trial Exhibit 88 no fine was imposed.

IV. The April 27, 2016 Hearing

On April 27, 2016 a hearing was held on Appellant's ("Jarmuth") "Rule 12(b)(1) / Rule 60 Motion to Dismiss Counter Claim For Lack of Subject Matter Jurisdiction" R.P.291 which was filed on March 11, 2016. On April 8, 2016 R.P.304 Respondent's Counsel had filed "Defendant International Club Homeowners Association, Inc.'s Memorandum in Opposition to Plaintiff's Motion to Dismiss Counterclaim" R.P.291 on behalf of the Respondent HOA. While the HOA cited three exhibits, none were actually filed with the Memorandum. At the April 27, 2016 hearing Jarmuth filed eleven (11) exhibits without objection.[19] R.Pp.315-318.

The hearing and this appeal are limited to the question of whether from within the four corners of the HOA's Counterclaim, subject matter jurisdiction arose sufficient to sustain provisions of the trial court's final order relating to the Counterclaim. Stated another way, did the trial court have subject matter jurisdiction to make the particular findings of fact and conclusions of law that it made in the final order relating to the HOA's Counterclaim. At the hearing Jarmuth asserted four general issues, any one of which is fatal to subject matter jurisdiction over the Counterclaim:

(1) The existence of Preclusive Pre-Litigation provisions of the Contract ("the Declaration") R.P.98 which the HOA neither plead nor complied with; and the existence of Statutory Preclusive provisions which, as a matter of law, make the assertion of the demand for attorney fees a crime under both federal and South Carolina law;

(2) The failure of the HOA's attorneys to attach a verification under oath to the Counterclaim R.Pp.100, 104 since it stated a demand to collect a specific sum on Jarmuth's account;

19 The Court decided from the bench that the material in Jarmuth's sub-exhibit #1d would not be addressed at the hearing because it was outside the arguments raised in Jarmuth's Motion. That exhibit is not within the Record on Appeal.

(3) The failure of the HOA to plead or comply with federal and South Carolina statutes requiring notice of the transfer of a debt R.Pp.105, 106 [20]; and the assertion by the HOA of a non-party's claim without pleading how the HOA had the legal capacity to collect on non-party ARB's claim;

(4) Insufficient facts and allegations of law plead R.P.99 in the Counterclaim to create subject matter jurisdiction: (a) the failure to adequately plead the creation of a contract (Covenant) binding both parties; (b) the failure to plead the recording of the Covenant; (c) the failure to adequately plead how the HOA defendant has the right to assert the Counterclaim under that contract; and (d) the failure to properly plead how the deed to Jarmuth's property subjected his property to the Covenants.

The hearing relates to a Complaint Jarmuth filed on April 7, 2009, R.P.134 Jarmuth v International Club Homeowners Association et al, 2009-CP-26-3596 R.P.134.[21] Nothing from the Complaint was argued at the hearing. More specifically, the motion and the hearing relate to the HOA's counter-claim stated in it's Amended Answer filed on October 24, 2011 R.P.243. The Counter-Claim was Jarmuth's Hearing Exhibits #6. The hearing was before Hon. Judge Benjamin H. Culbertson, Circuit Court Judge. At the conclusion of the hearing the Court denied Jarmuth's Motion using a Form 4 Order R.P.77.

The HOA's Counter-Claim began on page 8 of the HOA Answer.

HOA paragraph #51 R.P.243 asserted that Jarmuth is a citizen / resident of the United States and of South Carolina which is irrelevant to subject matter jurisdiction.

Paragraph #52 R.P.243 asserts that Jarmuth owns a lot in the Pebble Creek subdivision which has no probative value as to jurisdiction of any sort.

20 The HOA plead that non-party Architectural Review Board ("ARB") had imposed a fine for violation of property use restrictions of the covenants, and that the HOA was attempting to collect the debt owed the ARB.

21 This appeal arises post-trial in this case

Paragraph #53, R.P.243 of the Counterclaim, upon which the HOA depends in its opposition, asserts that (1) Jarmuth's lot is located in Horry County, an assertion of venue; (2) that "this Court has Jurisdiction over ... the property" which is another allegation of venue; and (3) "this court has jurisdiction over ... the parties in this action" which merely reflects that the Court has personal jurisdiction over Jarmuth – since he filed the Complaint – and over the HOA since the HOA was previously duly served.

On page 3 R.P.306 of the HOA's Memo in Opposition to Jarmuth's Motion, they wrote:

"Jarmuth admitted paragraph 53 establishing that this Court has jurisdiction over the Counterclaim"

citing to the HOA's "Exhibit A, Jarmuth's Reply to the HOA's Amended Answer and Counterclaim" which exhibit the HOA neglected to file with the Court. The actual admission Jarmuth made in his December 20, 2011 "Answer to Amended Answer ..." was that "Plaintiff admits the jurisdictional allegations of paragraph 53" R.P.249 which were allegations of personal jurisdiction and venue (see above). At the April 27, 2016 hearing the HOA's attorney argued this as one of the three reasons she asserted that the trial court had subject matter jurisdiction over the Counterclaim.

On page 3 R.P.306 of the HOA's Response and at the Hearing the HOA's attorney argued that

"the Consolidated Cases were referred with all powers and authority to enter final judgment"

citing to the HOA's "Exhibit B" [22] which the HOA attorney neglected to attach to her Response and did not file with the Court at the hearing. On p.3 R.P.306 of her Response she quoted

"the above ... actions are referred to Ralph P. Stroman who ... shall exercise all powers and authority that a circuit judge ... would have ..."

During the hearing the HOA's attorney argued that the Consent Order of Reference, in and of itself, conferred subject matter jurisdiction on the Special Referee over the entire case.

As the third element of the HOA's argument, they argued on p.3 R.P.306 of the Response and at the hearing that

"The Final Order found 'the above entitled actions were referred ... by Consent Order' and that the 'referral is a referral with finality'".

In the Response p.4 R.P.307 the HOA also cited to the October 17, 2012 Special Referee's Order of Recusal R.P.67 [23] without explaining how this Exhibit had any probative value; the HOA's counsel did not refer to the Order of Recusal at the hearing.

The foundation Complaint was filed on April 7, 2009 R.P.134 (2009-CP-26-3596) by Appellant. On October 24, 2011 the HOA filed an Amended Answer R.P.243 asserting a counter – claim asserting that Jarmuth had placed several dozen garden edger bricks on a side yard property line in violation of usage restrictions of the covenants [24]. On December 20, 2011 Jarmuth answered R.P.248 the Counterclaim. On August 8 to 10, 2012 a bench trial was held before a Special Referee. A final order R.P.29 was entered on September 12, 2012. Following appeal, the case returned to the trial court on January 25, 2016 by Remittitur. On March 11, 2016 R.P.292 Jarmuth's Motion to Vacate the Counterclaim based on a lack of subject matter jurisdiction was filed.

23 Exhibit C to the Response. It was not served or filed with the Response nor filed with the Court on April 27, 2016 at the hearing.

24 It asserted R.P.244 para 60 that the bricks, flush with the dirt, were "a wall". The covenants allow plant bed edging bricks and allow side yard fences and walls – after obtaining ARB permission..

ARGUMENTS

I. Applicable Standards

Appellant met his burden in fact and law in every issue.

Subject Matter Jurisdiction

"The question of subject matter jurisdiction is a question of law for the court."

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App.

2009). "We are free to decide questions of law with no deference to the [circuit] court."

Hammer v Hammer, S.C. Court of Appeals #4980, June 6, 2012.

"A 'court of competent jurisdiction' must be 'competent' not only under the law of its own sovereign, but also by virtue of subject matter jurisdiction under the law of the forum in which New York law is being applied." *Id.* (quoting Barry E. v. Ingraham, 43 N.Y.2d 87, 400 N.Y.S.2d 772, 371 N.E.2d 492 (1977)). Cited in Katzburg v Katzburg, S.C. Court of Appeals No. 5255, June 2, 2014.

"A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4)[, SCRCp]." Gainey v. Gainey, 382 S.C. 414, 424, 675 S.E.2d 792, 797 (Ct. App. 2009). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect" *Id.*

A court, lacking subject matter jurisdiction, cannot enforce its own decrees. It would serve no useful purposes to determine issues submitted to the court since the jurisdiction as to subject matter can be raised at any time, and if the case were remanded to the family court, it would have no authority to carry out its previously ordered mandate. Hallums v. Bowens, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993) cited in Katzburg v. Katzburg, Op. No. 5255 (S.C. Ct. App. filed July 30, 2014) (Shearouse Adv. Sh. No. 30 at 93

Covenant Interpretation.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive

covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor, 32 S.C. at 4, 498 S.E.2d at 864, and Hardy et al v Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006),

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

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

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

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

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

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

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

"... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. - Arcadian Shores Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007.

II. At the April 27, 2016 Hearing the trial court had the authority to rule on the original lack of subject matter jurisdiction to grant relief for the counter – claim.

A. The Court can address a lack of subject matter jurisdiction at any time.

In Wyoming v Oklahoma, 502 U.S.437, 462 (1991), Hon. Justice Scalia explained "it is Court's obligation to dismiss a case whenever it becomes convinced that it has no proper jurisdiction, no matter how late that wisdom may arrive". In Hammer v Hammer, S.C. Court of Appeals #4980, June 6, 2012. the Court wrote "Subject matter jurisdiction can be raised at any time and by any means." This was reiterated in Hallums v. Bowens, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993). In Hammer the court noted that there had not been an actual contested subject matter jurisdiction motion at the trial level and held the Appellate Court could address subject matter jurisdiction anew even if there had been such a contest.

In Normandy Corp. v. S.C. DOT, 380 S.C. 393, 688 S.E.2d 136 (Ct.App. 2010) the Court wrote "Issues involving subject matter jurisdiction may be raised at any time".

In footnote 2 page 4 R.P.307 of the HOA's April 8, 2016 Response, the HOA wrote:

"Jarmuth has waited almost 4 years to bring his Rule 60(b) motion" She repeated this assertion at the hearing, transcript R.P.107 p19, raising the issue of "the promptness of the relief sought, the reasons for any failure to act in seeking the relief"

The fact is that the case was on appeal less than three (3) years and almost immediately after the trial court regained jurisdiction over the case upon the Remittitur Jarmuth promptly filed his Motion to Dismiss R.P.291 the Counter – Claim. There was no dilatory conduct. Also relevant is that the HOA's Attorneys committed extrinsic fraud by suborning perjury of the HOA's prime witness William Freiboth at trial as to

actions of the HOA and ARB, misrepresenting the nature of the two attorney fee checks, and that the attorneys hid evidence. The minutes R.P.232 of the HOA Board where the HOA Board allegedly (per testimony elicited by the HOA Attorneys) held a hearing [25] on the record and supposedly voted that Jarmuth had violated the covenants and voted to impose a fine where uncovered months before Jarmuth's Motion to Vacate -- were introduced into evidence by Jarmuth in the proceedings to vacate; proving that the HOA's attorneys and the HOA lied about everything they said.[26] But whether the Court had subject matter jurisdiction is not dependent on that since the trial court granted relief which was not requested in the Counter – Claim R.P.243 for matters not raised in the Counter Claim without any statutory or contractual authority.

In United States v Houser, 804 F.2d 565, 21 Fed.R.Evid.Serv.1370 US Court of Appeals 9th Circuit Nov 17, 1986 the court held that

“a belated raising of subject matter jurisdiction is not barred by ‘the law of the case’ ... “Stated succinctly, the doctrine of ‘law of the case’ is inapplicable to the question of our (subject matter) jurisdiction” citing Green v. Dep't of Commerce, 618 F.2d 836, 839 n. 9 (D.C.Cir.1980) where the court held “the doctrine of ‘law of the case’ does not apply to the fundamental question of subject matter jurisdiction”

In Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co., 520 F.2d 91, 95 n. 22 (D.C.Cir.1975) the Court held that “the doctrine is discretionary, not mandatory.”

In Crane C. v American Standard, Inc., 603 F.2d 244, 249 the court held that law of case did not preclude reconsideration of whether a plaintiff had a cause of action when reexamination made good sense.

In Lounar Inc v. Smith, 698 F.2d 759, 762 it was held that a court will follow a prior ruling unless it was erroneous, is no longer sound, or would work an injustice.

B. There is no “Law of the Case” on the lack of subject matter jurisdiction

25 HOA Board Meetings May 5, 2010 R.P.204 and November 10, 2010 R.P.232.

26 A hearing on civil contempt committed by the HOA's attorneys and William Freiboth is on hold pending the return of case jurisdiction to the trial court.

for the court to grant any relief for the Counter – Claim.

In the HOA's April 8 2016 Response in Opposing to Jarmuth's Motion to Dismiss, para 5, "Argument, I - Law of the Case", the HOA wrote:

"both the Final Order and the Order of Reference ... (held) that the Special Referee had jurisdiction to render final judgment with respect to the Counterclaim, is the law of the case" R.P.308.

and at the hearing transcript R.P.110 L7

"both the final order and the order of reference found that there was subject matter jurisdiction and those findings are the law of the case and cannot be disturbed" ... Secondly ... the special referee did have subject matter jurisdiction ... Under Rule 53 the Circuit Court can refer claims to the special referee or master-in-equity to make any findings in the case and to enter into a final judgment. As I explained, the order of reference referred both cases without any limitations and the, the special referee in that case was -- had the authority to make any findings in that case pursuant to the order of reference"

On page 6 of that Response "II, Order of Reference" R.P.309 the HOA wrote

"the Order of Reference confers jurisdiction on the Special Referee to enter the Final Order"

At the hearing HOA counsel raised these same defenses, stating (transcript)

"the final order and the order of reference specifically found that Judge Stroman, the special referee, had subject matter jurisdiction over the cases and to enter any final order in the case." R.P.109 L23-P.110 L1.

Neither the trial court nor the appellate court was actually presented with a contest as to subject matter jurisdiction. In 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) the court held

"the law-of-the-case doctrine's presumption against reconsideration of already decided issues is weaker in the area of a court's subject-matter jurisdiction." citing Sophocleus v. Ala. Dep't of Transp., 305 F.Supp.2d 1238, 1245 (M.D.Ala.2004). also holding that "The law-of-the-case doctrine holds that "when a court [actually] decides upon a rule of law, that decision should continue to govern the same issues and "It is elemental that a ... court cannot create jurisdiction where none exists"

citing Wright & Miller # 1350, at 204-05. "For this reason, questions of subject matter jurisdiction are generally exempt from law of the case principles Id. 18 # 4478 at 799 & n. 32.

In Gould Electronics Inc et al v United States of America, USDC-ED-PA, No.99-1130 the Court held that

"Rule 12(g) does not prevent the government from asserting a second challenge to subject matter jurisdiction" and that "Rule 12(g). Fed. R. Civ. P. 1966 Amendment advisory committee's note states: 'It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver, ... the more substantial defenses of ...lack of jurisdiction over the subject matter are expressly preserved against waiver by amendment subdivision (h)(2) and (3).'"

In Deep Keel LLC v Atlantic Private Equity Group LLC et al, Appellate Case 2013-002281 Opinion 53220 June 17, 2015 the Court of Appeals interpreted Normandy writing that an Order of Reference does not endow the master with any greater authority than the circuit court held:

"A master's authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction, which 'may be raised at any time' ... When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court".

In Deep Keel the Court of Appeals ruled that irrespective of the Order of Reference the master "exceeded the scope of the order of reference" and the Court "vacate[d] the finding".

On page 3 of the HOA Response R.P.306 they wrote that

"Jarmuth admitted paragraph 53 (of the Counter-Claim) establishing that this Court has Jurisdiction over the Counter-claim".

This brief has already established supra that paragraph 53 referred to venue and personal jurisdiction. Since Jarmuth brought the suit, there was obvious personal jurisdiction; venue exists because the property lies in Horry County. It has already been noted that a court can not gain subject matter jurisdiction by consent of the parties.

"The lack of subject matter jurisdiction may not be waived, even by

consent of the parties, and should be taken notice of by this Court.”
Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989).

In the HOA’s April 8 2016 Response Opposing Jarmuth’s Motion to Dismiss they wrote:

"both the Final Order and the Order of Reference ... (held) that the Special Referee had jurisdiction to render final judgment with respect to the Counterclaim, is the law of the case" R.P.308.

However, there is not a single word in the trial transcript addressed to the matter nor a single word in either party’s briefs (prior to it being raised by Jarmuth on March 11, 2016 dealing with subject matter jurisdiction. Likewise there is not a single word in the briefs in the April 3, 2013 Appeal of the Final Order nor in the March 4, 2015 Appellate Court’s Order R.P.69 relating to subject matter jurisdiction.

In Holly Hill Lumber Co. v McCoy 210 S.C. 440, 441, 43 S.E. 2d 143, 143 (1947) the Court held that in issue "becomes 'the law of the case' and prevents the re-raising of the issues appealed" only when it is actually placed before the Court of Appeals and actually addressed by the Court.

III. The trial court lacks subject matter jurisdiction to award the Respondent HOA the \$ 2,500 Attorney Fee it paid in 2009 to Defend against a S.C. Human Affairs Commission Housing Discrimination Complaint.

A. The HOA never plead the S.C. Human Affairs Discrimination Complaint in its’ Counter-Claim.

The HOA Respondent did not controvert that the 2009 check was the payment to McNair to defend against the SCHAC Housing Discrimination Complaint (at hearing / asserted it at trial). The HOA Respondent did not plead that there were any violation of the usage restrictions of the Covenants in 2009.

B. There is no contract or law permitting the HOA to recover attorney fees or costs in connection with defending against a Discrimination Claim.

In the Counter – Claim as well as at the trial the HOA never plead what authority it relied upon for the award of attorney fees to defend the SCHA action. The HOA’s assertion that defending the SCHA Complaint was “enforcing the covenants” trial transcript R.P.250 L15, 25 to P.260 L4 does not constitute an enabling statute or contract when there was no violation.

The only authority available to the HOA was the provision in Covenant Section 8.9 “Remedies for Violation of Restrictions” R.P.126.

This authority is not available to the HOA because the money was not spent to enforce and undo an actual violation of the covenants . The section reads “enforce any of the foregoing covenants, conditions, reservations or restrictions, because of a breach of the same” and no swing set was actually built. The phrase “enforce” is the opposite of “defend” which is what the HOA admitted (trial transcript R.P.259 L22 the 2009 \$2,500 check was for.

The HOA’s Counter – Claim R.P.243 did not mention the SCHA matter nor did it demand repayment of fees spent in that matter. The SCHA matter R.P.198 is completely independent from the matter of the “edger bricks” – it is a separate complaint. The trial Court has no subject matter jurisdiction to grant any relief for a claim not raised in the Counter – Claim.

The authority of the Covenant is also absent because it applies only to “costs incurred in such enforcement, including a reasonable fee for counsel” R.P.122 and the HOA did not incur any costs in enforcement – the \$2,500 2009 check was not “incurred in such enforcement”.

Recovery of attorney fees in SC Discrimination complaints is governed by SC

Code Annotated Section 31-21-140 Civil action; damages which provides in Section (1) that costs and fees may be awarded only within the context of an actual discrimination civil case, providing no relief in the context of an SCHAs investigation.

**“(A) A civil action must be commenced within one year” and
“(B) The court ... may award the plaintiff actual damages, and punitive damages, together with court costs and reasonable attorney’s fees in the case of a prevailing party.”**

The 2009 and 2010 causes of action did not assert the “family status discrimination status” alleged in the SCHAs Complaint.

C. Federal and State Law bar the HOA from even seeking to recover attorney fees or costs from an relator to a Housing Discrimination Claim.

The HOA’s demand for attorney fees outside the docket of an actual discrimination claim constitutes retaliation under S.C. Code Annotated Section 31-21-80

"It is unlawful to coerce, intimidate, threaten, or interfere with any person ... on account of his having exercise(d) ... any right granted under this chapter"

It is likewise “unlawful” under federal law. 42 U.S. Code § 3617 - Interference, coercion, or intimidation provides that

“It shall be unlawful to coerce, intimidate, threaten, or interfere with any person ... on account of his having exercised or enjoyed ... any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.”

The retaliation is also a crime pursuant to 42 USC § 3631.Criminal. Subsection (a) includes “family status” within the definition of protected classes. Section (a) defines retaliation as a crime:

“Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with (b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from (1) participating, without discrimination on account of ... familial status ... in any of the activities, services, organizations or facilities ... shall be fined under title 18 or imprisoned not more than one year, or both;”

No court has subject matter jurisdiction to grant relief which is criminal as a matter of law and which as a matter of law the requesting party can not legally request.

The state and federal statutes constitute Statutory Pre-Emption against the HOA even demanding and against the court granting such relief. The 2009 check R.P.202 is a consequence of the SCHAC discrimination claim R.P.198. The act of collecting anything as a consequence of someone being a relator in a housing discrimination suit is a crime thus any order awarding such attorney fees is a nullity because the relief in the order is moot as a matter of law.

D. The Court could not grant attorney fees because the HOA Board never held a hearing as required by the Bylaws.

Attorney fees can not be awarded to enforce a violation by litigation unless and until the HOA followed the procedures mandated by Bylaws Section 13.3 R.P.128, as acknowledged by the HOA Board in its May 5, 2010 meeting R.P.204.[27] See further on. Per the Bylaws, the HOA can not take any action to enforce the covenants unless and until, at a minimum, a hearing is held on the matter, recorded in the official minutes. The Counter – Claim failed to plead compliance and the minutes of the November 10, 2010 HOA Board Meeting R.P.232 prove no hearing ever occurred.[28] Since awarding of fines and attorney fees depends on the authority of the Declaration, the failure of the HOA to follow its mandatory pre-litigation / preclusive procedures deprives the Court of authority to grant relief to any part of the Counter – Claim.

Clearly there was no subject matter jurisdiction for the trial court to grant the HOA the relief of reimbursement of the attorney fees it spent for the SCHA action.

27 Per Minutes of HOA Board meeting R.P.204.

28 HOA Attorneys hid this evidence, which was in their possession. It was separately obtained as “newly discovered evidence” in mid-2015 by independent means.

IV. The trial court lacks subject matter jurisdiction to award the Respondent HOA the \$ 2,500 Attorney Fees it paid in 2010.

As established in “Facts” supra, the HOA has claimed that it paid the second (2010) \$2,500 check R.P.208 to defend the SCHa action. For the reasons stated relative to the 2009 check, the court lacks subject matter jurisdiction to grant the HOA the relief of reimbursement for 2010 check.

At times the HOA has also argued that it paid the 2010 check to enforce the usage restrictions of the covenants. Per the 2010 General Ledger R.P.209, the HOA paid the 2010 check R.P.208 on June 9, 2010 which was more than four months before the Magistrate Complaint R.P.219 was filed on October 12, 2010 so clearly the 2010 check has nothing to do with this case at all. The HOA never claimed that the 2010 check was related to the 2009 Complaint and even if they did so, both checks are unrelated to any violation of the Covenant Usage Restrictions. The first time the HOA took any legal action in this case relating to any violation of usage restrictions was in the HOA’s October 24, 2011 Amended Answer R.P.243 where it first asserted a usage restriction counter – claim. This was sixteen (16) months after the HOA paid the check. The HOA has never plead that the 2010 check was related to legal advice outside of the litigation. As quoted, the HOA has explicitly plead that the 2010 check was paid after a lawsuit was filed against it. There is substantial evidence from the HOA’s 2010 General Ledger R.P.209 – Legal Expenses, from minutes of the HOA Board Meetings R.P.236, and from various “Friday Facts” authored by the HOA that the 2010 check was actually paid to McNair Law for legal advice in connection with a Central Electric Easement Condemnation matter.[29] It is not necessary to know what the HOA really paid the 2010 check for, merely to know that it was paid well before the 2010 Complaint and well

29 All of which were in evidence at trial, most of them as Defense Exhibits. There was approximately 60 pages of testimony in the transcript regarding Central Electric.

before any usage restriction was alleged to have occurred.

The first document in evidence at trial relating to the usage restrictions was Defense #82, a September 27, 2010 letter from the ARB R.P.211 (not from the HOA) asking Jarmuth to submit a Modification Application which would satisfy the ARB. This was almost four (4) months after the 2010 check R.P.208 was paid.

The only authority available to the HOA for attorney fees is Covenant Section 8.9 "Remedies for Violation of Restrictions" R.P.126. As noted, the contract allows recovery only of attorney fees to the extent they are actually incurred to remedy an actual covenant usage restriction.

The HOA Counter Claim R.P.243 did not ask for reimbursement of money spent before litigation. The facts are that the HOA spent no money related to the 2010 Complaint and no money to enforce the usage restrictions. The HOA plead only for reimbursement of money actually incurred as a result of an alleged usage restriction: Para 72 R.P.246 of the HOA's October 24, 2011 Answer asked for "the costs of collections for his continuing violation of the brick wall". Para 74 R.P.246 states: "As a direct and proximate result of the violation Defendant HOA pursuing collection of these fees and costs, Defendant HOA has and will continue to incur attorney's fees and costs." The HOA asked only for reimbursement of actual costs spent enforcing an actual usage violation: Para 75 R.P.246 reads: "the Defendant HOA is entitled to a judgment together with costs and attorney's fees incurred in bringing this action"

The September 12, 2012 Final Order R.P.19 itself admitted that the \$5,000 in attorney fees was spent to defend lawsuits, not to enforce the covenants. Para 24, R.P.64 reads:

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

Immediately after, the Final Order cited the authority relied on by the Court:

“Declaration [30] Section 13.4, specifically provides that should the Defendant HOA employ legal counsel to enforce the Declaration, Bylaws or its Rules and Regulations, the owner shall pay the attorneys fees incurred.” R.P.64 para 24.

The Court noted the limitation on the award of attorney fees, stating R.P.64 para 24

“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).

In Para 24 R.P.69 of the Final Order the Court noted that discretion to determine the amount of attorney fees and costs to award exists **ONLY** when there is an enabling statute of contract:

“Where there is a contract, the award of attorney’s fees is left to the discretion of the trial judge.” Menne v. Keowee Key Prop. Owners’ Ass’n, 368 S.C. 557, 569, 629 S.E.2d 690, 696-97, (2006)

Because no contract exists to award attorney fees not actually incurred to enforce the covenants, no discretion lies with the Court to determine the amount to award.

The Court could not grant attorney fees or grant fines because the HOA Board never held a hearing as required by the Bylaws.

See Section II, Subsection D immediately above.

V. The trial court lacks subject matter jurisdiction to award fines for violation of the usage restrictions of the covenants because the HOA failed to (1) plead standing to sue; (2) plead compliance with and (3) failure to comply with the Pre-litigation provisions of the HOA’s Bylaws.

“Subject matter jurisdiction is achieved based on allegations contained in the (counter) complaint. It is the ... counterclaimant ... who has the burden of alleging facts in the complaint that will establish the court’s subject matter jurisdiction. ... lack of subject matter jurisdiction is never waivable; either the court has it, or it cannot assert it. ... Furthermore, a party can raise lack of subject matter jurisdiction at any time; there are no time restraints on when such an objection can be raised... Whenever it

30 Bylaws, not Covenant Section 13.4 R.P.128. The Court clearly recognized that Declaration consists of both the Covenants and Bylaws.

appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Brown v State, Opinion 25227, January 8, 2001 284 S.C. 407 (1985); 326 S.E.2d 410.

A. Failure to Plead Standing to Sue

SCRCP Rule 8 General Rules of Pleading provides that

(a) Claims for Relief. A pleading which sets forth a ... counterclaim ... shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends ...

A Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction will be granted if the Complaint fails to state the authority entitling the claimant to the relief sought. If that authority includes a limiting or preclusive or pre-litigation provision the claim must state when and how the claimant has satisfied the pre-litigation or limiting clause. For example, that a defendant in a juvenile court is under the maximum age, that the claim in magistrate court is within the maximum jurisdictional limit, in a medical malpractice case that Section 15-79-125 “Notice of Intent to File Suit as prerequisite to filing action” has been satisfied.

The Counter – Claim R.P.243 did not cite any contractual authority to enforce the covenants nor did it cite the existence nor satisfaction of the pre-litigation provisions of Section 13.3 of the Bylaws R.P.128.

Para 56 page 8 R.P.243 of the Counter – Claim quoted the entirety of Section 7.2 R.P.124 of the Covenants demonstrating that prior approval of certain modifications is required. Para 63 page 9 R.P.244 of the Counter – Claim quoted the entirety of Section 7.4 of the Covenants which allows fences with certain restrictions, and failed to state how Jarmuth’s brick line of plant bed edgers constituted a fence or violated the section.[31] What is strikingly missing is any statement of the specific basis of the

31 The reasons that the HOA gave at trial for construing the in-ground bricks as a “fence” and as prohibited are not found in Section 7.4 cited in the Counter-Claim thus

HOA's authority to enforce the violations. The Counter-Claim says there is a violation as determined by non-party ARB R.P.245 para 65. It says the HOA R.P.244 para 57 wants to enforce the covenants. But SCRCF Rule 8 is not satisfied. A Rule 12(b)(1) demand to dismiss for lack of subject matter jurisdiction would be granted because, on the face of the Counter-Claim, the HOA had no authority under an enabling statute or contract. Subject matter jurisdiction is determined by the claim, not the evidence set out in trial nor by the final order.

The Final Order devoted five (5) pages, 28-32 R.Pp.46-50, on the matter of violations. It too cited Covenants Sections 7.2 and 7.4 R.P.124 as to restrictions. The final order made several references to the Procedures of Bylaws Section 13.3 R.P.128. Of particular importance is the fact that in the Final Order the Court spoke only of enforcement by the non-party R.Pp.46-47 ARB, not the HOA. Of equal importance the Final Order never cited any provision of the Covenant nor of the Bylaws giving either the ARB or the HOA authority to enforce the Covenants, to collect fines, and to be reimbursed for attorney fees through litigation.

In this Brief this Appellant has cited various provisions which MIGHT have been depended on for the HOA to have standing to assert the Counter – Claim BUT the HOA did not assert that basis in the Counter – Claim and the Court never cited the contractual basis of its authority in the Final Order.

B. Failure to Plead Compliance with Pre-Litigation Preclusive Provisions.

The Pre-litigation / Preclusive provisions of Section 13.3 R.P.128 have already been enumerated. If the HOA was proceeding under the authority of the Declaration (which includes both the Covenants and Bylaws) the HOA had to plead that the Board itself had held the hearing required by Bylaws Section 13.3 R.P.128 to gain standing to

the decision of the final order did not “map” to the authority cited in the HOA claim.

sue. This pleading is necessary to satisfy a Rule 12(b)(1) motion which assumes that all facts plead in the Complaint are true. The Counter – Claim is completely silent on all elements required by Section 13.3. Having not done so the HOA had no standing to enable the Court to have subject matter jurisdiction to grant the HOA any relief.

C. Failure to Comply with the Pre-Litigation Provisions of the Declaration

“ ("Ranucci II") held that our courts will strictly enforce pre-litigation clauses in contracts and statutes to deprive a court of subject matter jurisdiction over a claim if the pre-litigation clause is not satisfied.” -- Ranucci v. Crain, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) (Shearouse Adv. Sh. No. 29 at 49).

Section 13.3 R.P.128 of the Bylaws begins with the restriction on standing of the HOA to exercise enforcement authority:

“13.3 Procedure. ... the Board shall not impose a fine, suspend voting rights or infringe upon or suspend any other rights of an Owner ... for violations of the Declaration, By-Laws or any rules and regulations for the Association, unless and until the following procedure is followed ...”

The details are laid out in the earlier enumeration of Facts in this Brief. The May 5, 2010 Minutes R.P.204 of the Board of Directors meeting announced that the HOA recognized and affirmed its obligation to hold a hearing as required by Section 13.3. The Minutes of the November 10, 2010 HOA Board meeting R.P.232 confirms that (1) no invitation to a hearing was issued; (2) no hearing was held; (3) the HOA Board never determined on the record that a violation had occurred; (4) the HOA Board never voted to impose any fines; and (5) the HOA Board never sent the mandatory post-hearing letter notice to abate. Failing each and every one of these, the HOA Board had no standing to sue and the Court had no subject matter jurisdiction to grant any relief at all in the Counter – Claim.

VI. The trial court lacks subject matter jurisdiction over the Counter - Claim because the HOA failed to sufficiently plead the existence of a binding contract between the HOA and Appellant.

The Counter – Claim assumed the existence of a binding valid contract between the HOA and Jarmuth; it never established even that the HOA is a party to the contract.

Counter-Claim para 54 R.P.243: “As the owner of the property the Plaintiff is subject to the Governing Documents” and Para 55 “the Governing Documents provide that the Defendant HOA governs the International Club Subdivision”.[32]

The Supreme Court in Player v. Chandler, 299 S.C. at 105, 382 S.E.2d at 894 stated what must be plead when using a covenant as the basis for subject matter jurisdiction:

- (1) That a Covenant exists before the deed was executed.**
- (2) That the Covenant was properly recorded with the correct Recorder of Deeds, citing the book and page.**
- (3) That the deed actually cited the Covenant by Book and Page.**
- (4) That the HOA is a named party in the Covenants.**

In Player the Court held that such phrases as subject to the Governing Documents “are meaningless and unenforceable”.

At the hearing Jarmuth used his Exhibit 1A R.P.315 to explain that the HOA did not plead a word about the formation of a valid contract or that the statute of frauds was satisfied or that a contract involved both Jarmuth and the HOA as proper parties. The HOA was silent about this at the hearing. It was insufficient to plead nothing about when and where the Covenants were recorded, when Jarmuth’s deed was recorded and how the deed subjected the property to the covenants.[33] The failure to properly plead the formation and existence of a binding contract giving the HOA standing to sue for the

32 Article I Definitions Section 1.3 of the Covenants reads: “Association means Murrells Inlet Golf Plantation Association, Inc. (a South Carolina eleemosynary corporation), its successors and assigns.” Such a corporation exists and it is not the HOA respondent.

33 The deed R.P.120 to the subdivision merely says the property is subject to covenants of record, without citing to a deed book and page. In fact no covenant existed when the property was sold by the developer who LATER recorded the covenants.

relief it sought deprives the Court of subject matter jurisdiction to grant the HOA relief for the Counter – Claim.

VII. The trial court lacks subject matter jurisdiction to award the Defendant HOA fines claimed by the non-party Architectural Review Board because (1) The ARB it a non-party and; and (2) the HOA did not comply with federal and state statutory “transfer of debt” notice requirements

The HOA asserted the Debt Belonged to the ARB

As cited previously, the Final Order held [34] that the ARB is independent and separate from the HOA which is what the HOA argued at trial. The HOA wrote in the Counter – Claim

Para 57 R.P.244 “The ARB ... holds the Architectural Review Rights”.
Para 61 “ARB sent notice to the Plaintiff that he violated the Governing Documents”. Para 65 “The ARB also demanded that the brick wall be removed ... or he would be subject to monthly fines”.

The Final Order explicitly held that the rights being litigated are those of the ARB.[35]

The relevant section, Conclusions of Law, 12, is entitled “The ARB’s denials...” and runs from p.28 to p.32 R.Pp.46-50 (five pages).

P.29 R.P.47 “a. The ARB has the authority to regulate improvements”.
P.32 R.P.50 “d. The ARB complied with the Bylaws when fining Plaintiff for his violation ... The ARB is granted the rights ... to enforce these regulations ... The \$50.00 fine levied by the ARB ... as is the \$100.00 monthly fines ... I find that the ARB’s ... fines (are proper)”.

But in Para 75 p.11 R.P.246 of the Counter-Claim the HOA wrote”

“Plaintiff breached the terms of the Governing Documents ... and therefore, the Defendant HOA is entitled to a judgment”

And the Final Order transferred the debt which was both plead and determined to be an ARB claim to the HOA. Final Order:

Para 24 p.46 R.P.64 “Plaintiff is indebted to the Defendant HOA ... the

34 The HOA attorney wrote the Final Order without prior guidance from the Judge.

35 At trial the HOA argued that the ARB is independent to explain away the ARB ignoring Bylaws Section 133.

Defendant HOA paid \$5,000.00 to the McNair Law Firm” P.46 “As to the ARB fines ... Plaintiff owes ... to the Defendant HOA. As stated hereinabove, the ARB has the authority to assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff”.

HOA did not plead its standing to collect the Debt to the ARB or
to Enforce the ARB’s Rights

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

When a third party collects a debt due a second party it is called a transferred debt. The HOA neve plead its’ “capacity” to collect the debt allegedly due the ARB.

Rule 8(a)(2) SCRCF requires that a complaint must contain

“a short and plain statement of the facts showing that the pleader is entitled to the relief plead.”

There is no explanation in the Counter – Claim nor in the final order how the entitlement of the ARB became the entitlement of the HOA. This is fatal and deprives the Court of subject matter jurisdiction to award the HOA any relief. Appellant raised this issue at the hearing.

HOA did not satisfy pre-litigation preclusion provisions relating to enforcement of
transferred debts

At the hearing, Trans p.17 L18 R.P.105 Jarmuth explained:

“The transfer of the rights to collect a debt is governed by the Federal Fair Debt Collection Practices Act of 1977, FDCPA, 15 U.S.C. 459(e). By Section 5 of the Federal Trade Commission Act these are preclusive statutes. They -- basically they say you can’t collect on a transferred debt unless you send notice of the transfer, and they don’t plead that they sent notice of the transfer of the debt from the ARB to the HOA. In addition, South Carolina has its own notice law. South Carolina 37-2-412, which also says you can’t collect on a debt as a transferred debt unless you’ve sent notice of the transfer.”

“South Carolina 37-2-413 addresses attorney’s fees relating to transferred debts and they limit it to no more than 15 percent of the original debt which

would amount here to maybe \$372. Paragraph 44 of the Counter-Claim says, 'As of August 26, 2011, the Plaintiff owes \$1,132,' which would be about \$50, the maximum attorney's fees if the transfer of the debt was viable."

At the hearing the HOA attorney did not oppose and thus conceded the facts and the law. They conceded (and there was no evidence at trial) that the Counter – Claim ignored the issue. They conceded that these statutes limit the authority of the court. The "Long Order" R.P.79 following the hearing (filed June 6, 2016) is silent on the issue of transferred debts and the statutory limit on attorney fees allowed to collect a transferred debt. The issue controls the power of the trial court to grant relief as to both fines and attorney fees. It is a fatal error for the June 6, 2016 Order to ignore the matter. Since there is no conclusion of law on the matter in the June 6, 2016 Order there is no "law of the case". Even if there was, since this is a matter of law the Court of Appeals looks at the issue de nova.

Based on the uncontested facts and the law, the trial court lacked subject matter jurisdiction to grant any relief as to the counter – claim.

VIII. The trial court lacks subject matter jurisdiction to award the amount claimed as due on Plaintiff's account and attorney fees to collect the account because the HOA's attorney failed to attach to the counter-claim either a verification or an authentication under oath.

The Counter-Claim demanded payment of the amount due on Jarmuth's account. Para 72, p.11 of the October 24 Counter-Claims R.P.246 states that

"As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 (\$1,132.00) Dollars (on his account) ... which the Plaintiff has not paid".

Rule 9(i) SCRCP states

"Pleading Special Matters. (i) Verification of Account. In an action on an account the pleader shall attach a verified copy of the account to the pleading, or if the items of the account are set forth in the pleading, it must be verified.

The Counter-Claim has no “verified copy of the account” nor was the “pleading ... verified”.

In Dawkins v Fields, 345 S.C. 23, 545 S.E.2d 515 (Ct. App. 2001, the SC Court of Appeals addressed verifications in the context of a SCRPC Rule 12(b) Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Court stated what elements must be present to qualify as a verification whether in the context of a complaint itself or in a separate statement of accounts. The Court enumerated:

“an affidavit or verified complaint must meet three criteria to be considered by the court: (1) it must be made upon personal knowledge; (2) it must set forth facts admissible in evidence; (3) it must show that the affiant is competent to testify to the matters stated therein.”

In Dawkins v Fields, 580 S.E.2d 433, 354 S.C., the SC. Supreme Court agreed with the above determination. The Supreme Court noted that “Few pleadings will satisfy these requirements, even when verified.” The Supreme Court added that “Allegations made upon information and belief do not meet the “personal knowledge” requirements”. In the case at bar, no affirmation at all was present.

In Dawkins the otherwise well plead complaint was dismissed for lack of subject matter jurisdiction because of the trivial absence of a verification. Our Supreme Court tells us that when suing to collect on an account, which is the core of the HOA Counter – Claim, the absence of a verification is fatal.

In dealing with the Counter-Claim the Final Order focused on the account:

“24. ... as of August 8, 2012, the Plaintiff owes \$2,326.00 ... Plaintiff is indebted to the Defendant HOA in the amount of \$7,326.00” . R.P.65.

The relief is clearly the payment of an amount plead by the HOA.[36]

"For want of a nail the shoe was lost; For want of a shoe the horse was lost; For want of a horse the rider was lost; For want of a rider the

36 The HOA did not introduce Jarmuth’s account as evidence and there was no testimony as to the computation of that amount. The HOA attorney wrote that amount into the Final Order which the HOA attorney wrote without guidance from the Court.

message was lost; For want of a message the battle was lost; For want of a battle the kingdom was lost; And all for the want of a horseshoe nail" - Freidank Bescheidenheit, 1230 AD England

The Court lacks subject matter jurisdiction to grant payment of the amount due on the account, and lacking that, it likewise has no authority to grant attorney fees.

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IX. The trial court lacks subject matter jurisdiction over the counter – claim because the Counter – Claim as plead lacks sufficient specificity to satisfy the “well plead” pleading requirement.

In “VII” above it has been shown that the HOA never plead capacity as required in Cash v Maddox op.cit.. citing Speed op.cit. However the HOA never plead the information necessary to satisfy the second element, satisfaction of the statute of frauds in that it never identified the actual formation of the contract (covenants). The Counter-Claim omitted any information as to how the deeds properly invoked the Declaration. The January 29, 1999 deed R.P.120 to Jarmuth’s vertical predecessor Sunbelt Development predated by ten (10) days the February 9, 1999 execution and recording of the Declaration R.P.124, hence the Declaration was not referenced in the Deed in the manner required by Player v Chandler, op.cit. explained supra and did not identify the parties to the Declaration. perhaps because the HOA is not named in the Covenant nor is it a vertical successor to the actual homeowner association (MIGPA) named therein. The pleading ignored the requirement to show how Jarmuth’s vertical predecessor Sunbelt became a party to the Declaration, again impossible because the Declarant Plantation A.D., the HOA’s vertical predecessor, sold what became Jarmuth’s property ten (10) days before the Declaration existed – without the knowledge or consent of Sunbelt.

The Counter- Claim “did not state with absolute certainty ALL of the essential terms” because they include Section 13.3 R.P.128 of the Bylaws which the HOA ignored

and failed to satisfy and as explained, precludes the HOA of any capacity to sue. Thus it did not satisfy Rule 8(a)(2) SCRPC which requires “a short and plain statement of the facts showing that the pleader is entitled to relief,” and the definition in Cash v Maddox op,cit, of what that pleading should have, but did not, include.

Because the Counter – Claim did not plead not one but many of the mandatory elements of specificity, the Court lacks subject matter jurisdiction to grant the HOA any relief sought in the Counter – Claim.

CONCLUSION

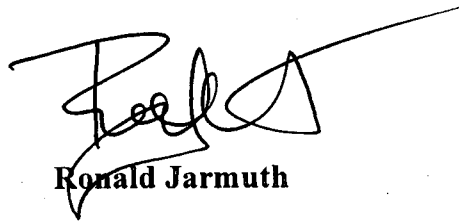
1. The order following the hearing ignored all of the arguments raised by Jarmuth and there are no Findings of Fact nor Conclusions of Law as to Jarmuth’s arguments.
2. The HOA Respondent did not provide any arguments in the HOA briefs nor at the hearing in opposition to a single one of Jarmuth’s arguments and thus conceded every one of them.
3. The trial court did not gain subject matter jurisdiction in any of the manners argued by the HOA – not by consent of the parties nor by its own order.
4. The “law of the case” arguments raised by the HOA as its sole defense is inapplicable because subject matter jurisdiction has never been put before any Court (in this case). There has been no contest and no order following such a contest. The facts cited (consent, an order of reference, and a line in the final order) are at odds with all case law on the matter.
5. The Court lacks subject matter jurisdiction to grant the HOA any relief sought in the Counter – Claim because of the numerous procedural flaws in pleading the Counter – Claim.

6. The Court lacks subject matter jurisdiction to grant the HOA any relief sought in the Counter – Claim as a matter of fact and of law because the HOA lacks capacity; and is precluded from suing because it failed to satisfy the pre-emptive and preclusive provisions of the Declaration it relies on and multiple preclusive provisions of not one but many federal and state statutes as briefed by Jarmuth.

7. Those portions of the September 12, 2012 Final Order granting relief to the HOA relating to the Counter – Claim must be vacated.

I ask for this.

December 15, 2016



Ronald Jarmuth

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CERTIFICATE OF COUNSEL IN FINAL BRIEF

DEC 15 2016

THE STATE OF SOUTH CAROLINA

SC Court of Appeals

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.

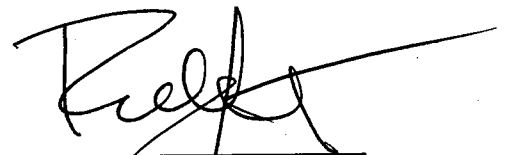
The International Club

Respondent

CERTIFICATE OF COUNSEL

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

December 15, 2016



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