PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 2018-UP-275 (S.C. Ct.App. filed June 27, 2018
Rehearing Denied August 16, 2018)
(Appeal No. 2016-001063)

Ronald Jarmuth .....**Petitioner**

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 16, 2018.

QUESTIONS PRESENTED

1. Were Jarmuth's Constitutional Due Process Rights violated when the Special Referee invented claims on behalf of the HOA in his final order which was never litigated, when he awarded relief to the HOA for the non-existent claims, and when he failed to enforce pre-litigation provisions of the contract?

2. Did the court's exercise of jurisdiction over the attorney fee and HOA fine matters violate established precedent and law and was it an abuse of judicial authority?

3. Was the failure to void the award of attorney costs and fines an abuse of judicial discretion?

4. Is the Court of Appeals reliance on and affirmation of the legally void "long order" entered after Jarmuth filed his appeal reversible appellate error?

Statement of the Case

1. Homeowner Association Discrimination Investigation Legal Costs.

The Special Referee ("SR") acted against precedent and denied Jarmuth his due process rights to notice of certain claims, an opportunity to defend against these "secret" claims,[1] and right to have discovery. The SR granted relief for these "secret" claims without statutory or contractual authority. This was an abuse of judicial (non-) authority. The Respondent Homeowners Association ("HOA") never plead these "secret" claims. Jarmuth had no opportunity pre-trial to plead a preliminary 12(b) objection.

On September 10, 2012 SR Ralph Stroman entered a Final Order in the

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1 (1) Attorney fees to represent the HOA before the S.C. Human Affairs Commission ("SCHAC") on an investigation of Jarmuth's report that the HOA had committed family status discrimination; (2) Attorney fee deductible for the HOA as defendant in the underlying civil suit.

underlying civil case in which he made twenty five (25) conclusions of law unrelated to any claim or cause of action stated in the complaint or counter – claim. These were unrelated to any transaction which was in support of a plead claim.

This was an abuse of Jarmuth's 14th Amendment due process rights. It was an abuse of judicial discretion. The SR actually had no discretion at all in the matter since there was no related claim nor legal authority for the relief. He held that Jarmuth owed the HOA two thousand five hundred dollars ($2,500) to reimburse the HOA for its voluntary retention of an attorney in the SCHA matter. The SCHA matter never resulted in a civil claim in any court. Jarmuth never erected the swing set which the HOA refused to allow for Jarmuth's children. If there had been a related civil case the HOA would have had no basis to recover attorney costs. As a matter of law only a prevailing complainant in an actual discrimination civil case had standing to recover attorney fees. Without standing there was no subject matter jurisdiction over the SCHA "non-claim". Irrespective, there was no authority for the SR to grant the HOA its SCHA attorney costs.

When Jarmuth questioned the SR's conduct and the basis for the SR's assertion of unplead claims on behalf of the HOA, the SR recused himself. In pleadings related to the Rule 12 / Rule 60 SCRCP hearing and on appeal the HOA asserted that the recusal conferred subject matter jurisdiction on and legitimized the award of HOA SCHA costs. The Hearing Judge and the Panel bought into this nonsense.

On March 11, 2016 Jarmuth demanded the court set aside this award asserting a Rule 12 lack of subject matter jurisdiction and a Rule 60 (Order is Void) lack of authority to award SCHA attorney costs and case defense costs.

On April 27, 2016 Hon. Judge Ralph Culbertson presided at a hearing on Jarmuth's motion. The HOA's brief in opposition and the HOA's appellate brief admitted that the SCHA related check had nothing to do with the civil case.

Judge Culbertson and the Appellate Panel abused their discretion by affirming these awards despite the law being clear that without a claim and without authority the award was clearly legally erroneous. It was clear that there was no subject matter jurisdiction over these claims nor standing nor authority. There was no discretion because there was only one outcome allowed by the law and it was disregarded by the SR thus this was an abuse of judicial discretion at all levels.

The HOA claimed in its hearing and appellate briefs and in trial testimony that its 2010 check Ap.p.350 to McNair Law was its deductible for the September 1, 2009 SCHA matter.[2] The only evidence of the purpose of that check was the HOA's 2010 General Ledger (Ap. p.361 which stated it was written for McNair legal services related to a Central Electric easement matter. In the hearing and on appeal the HOA has never disputed Jarmuth's assertion that the 2010 General Ledger shows that this check was the second of six checks to McNair Law in "matter 051490, McNair – easement exp".[3] It was an abuse of Jarmuth's due process rights to ignore this evidence. It was likewise an abuse of those courts discretion as well. Neither the order following the hearing nor the appellate opinion mentioned this. The 2010 check as "evidence of loss" relating to SCHA legal costs was no evidence at all because it related to a Central Electric Easement matter with

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2 Without any supporting evidence of the actual purpose of the check
3 The six checks were April 3, 2010 ($889.50); June 9, 2010 ($2,500) – the one they claim was the SCHA deductible; November 17, 2010 ($ 913.90); November 30, 2010 ($325.00); December 1, 2010 ($562.95); and December 17, 2010 ($275).

no connection to Jarmuth or to any plead claim in the case.

The 2009 check itself Ap.p.354 was the only evidence of payment of HOA case legal costs (deductible). The case was filed by Jarmuth on April 7, 2009. The 2009 HOA General Ledger – Legal Costs Ap.p.355 says however that the check was for September 2009 legal services. The ledger also says that on June 4 2009 the HOA paid a lawsuit deductible to McCutcheon Law – which was for a suit filed by The Villas HOA against the HOA Case 2009CP2603211 filed on March 30, 2009. This was a week before Jarmuth filed his complaint on April 7, 2009. That check does not demonstrate any arguable loss.[4] Per the HOA's insurance policy the deductible for the Villas lawsuit meant that the HOA paid no deductible toward the Complaint Jarmuth filed a week after the Villas case was filed. Without a loss there is no injury and no relief the court can grant. Without an injury there was no subject matter jurisdiction of the (unplead) claimed nor authority to grant reimbursement.

2. <u>HOA 2009 case related attorney costs.</u>

The court ordered reimbursement of the $2,500 (2009) HOA check without due process: (a) The HOA never stated a related cause of action (claim; (b) there was no authority for the court to grant such relief; (c) the 2009 check had nothing to do with the civil case thus the HOA had no cognizable injury for which relief could be sought; and (d) the HOA had no standing to request relief in this matter.

The special referee, the hearing judge, and the court of appeals were

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4 The record included the HOA's insurance policy which provides for a single deductible; and an earlier payment of $2,500 to McCutcheon Law relating to a successful suit against the HOA by The Villas Homeowners Association. The court was shown that any later claims in 2009 brought no HOA deductible ergo no SCHA or 2009 case legal expenses.

required to vacate the relief as a matter of an error of law. They lacked discretion at all which put it beyond an abuse of discretion. The law is clear on the matter.

a. No claim.

The trial court awarded the HOA attorney fees the HOA alleged it paid in 2009 to DEFEND Jarmuth's April 7, 2009 lawsuit. In its May 12, 2009 Answer Ap.pp339-340 as an "Eighth Defense and Counter-Claim" the HOA asked for "attorney fees, costs and expenses associated with the defense of this action" as relief. This is not a claim and does not state a cause of action. It does not state an injury. It did not state any basis of an entitlement for the demand (standing). A demand for "relief" is not a "claim". Only a proper claim can implicate subject matter jurisdiction. There was no claim at all hence no subject matter jurisdiction.

b. No authority. The "eighth defense / counter-claim" did not cite any statute or contract entitling the HOA to any relief. There is no authority for such a recovery in common law, statute or contract to defend a civil suit.[5] In "Defenses" One through Seven the HOA never stated an injury and never characterized the $2,500 paid in 2009 as an "injury".

At all times the HOA has alleged it spent this money as its deductible to "defend" the 2009 case. The only contract authority supporting attorney fee reimbursement is (1) the HOA's Bylaws, Section 13.3 (in evidence) which relates to money spent to "enforce" against a violation of the covenants, or (2) the covenants which permits recovery when assessments are not paid. No assessment was late.

c. No loss / 2009 check unrelated to the civil case.

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5 The HOA never alleged that the complaint was made in bad faith or that it was frivolous.

The evidence [6] before the trial court, the hearing court, and the court of appeals shows that the HOA never paid anything in connection with the case (not at the trial level nor at the appellate level).

In Discovery Jarmuth demanded the HOA's case related insurance policy and financial documents. The HOA provided its' insurance policy but nothing to show it ever paid anything related to the case. The two checks to McNair were produced for the first time at trial. There is no invoice or authorization for payment to show that either check had anything to do with the case.

As stated supra, the HOA's insurance policy proves that the HOA paid nothing towards this case and there was no loss to recover. The HOA claims that on October 13, 2009, six months after they were sued, four months after the deductible was paid for "The Villas" litigation, and after the HOA filed extensive pleadings authored by McNair, that the HOA belatedly paid McNair Law $2,500 "to defend the 2009 lawsuit". The "2009" check has nothing to do with this case. This was obvious to the hearing judge and the appellate panel.

The trial, hearing, and appellate courts abused their discretion by failing to note that not only was there no claim for the 2009 money, but no standing and no authority. They further abused their discretion by ignoring the evidence of "no expense at all".

d. No standing.

Without a loss and without a basis to demand recovery the HOA had no standing to demand repayment of the 2009 check. The lack of standing brought with it a lack of subject matter jurisdiction to adjudicate the check non-claims.

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6 The HOA's own documents.

3. Award of "fines" never actually imposed by HOA for "building" a permitted never-actually-built fence.

a. The HOA never stated a cognizable cause of action / claim in their Answer / counter-claim entitling the HOA to any fine.

On October 24, 2011 the HOA amended its Answer and added a "Second Counter-Claim" Ap.pp. 395-399. It related to an alleged violation of a contract (land covenant) where there was no injury plead. The HOA never alleged it actually incurred any costs related to this alleged violation. The HOA alleged that Jarmuth erected a "fence or wall" without the HOA's permission. In para 63 of the HOA Answer (Ap.p.396) they cited a provision of the covenants which permits fences, so long as the fence:

> **"does not obstruct the view of any streams or other bodies of water, golf courses or recreation amenity ... or which interferes with the playing of golf or any nearby golf course...."**

The HOA plead (para 68) that "the brick wall is a continuing violation of the Governing Documents" which is a conclusion not an allegation of a cause of action.

The HOA never plead how the alleged "wall" violated any of the restrictive provisions of the covenant which otherwise allows fences or walls. In point of fact Jarmuth's lot is not adjacent to the golf course, to any bodies of water, nor to any amenities.

The HOA never plead how it or anyone else was injured by the alleged construction of the fence / wall. They never plead any damages.

In the HOA'se prayer for relief (para c. Ap.p.398) the HOA asked "for an order requiring Plaintiff to ... remove the brick wall". This is not before the Supreme Court because no "fence or wall" was ever built and there is no allegation one remains.

In para 65 Ap.p. 397 the HOA plead that

> **"The Architectural Review Board also demanded that the brick wall be removed ... or he would be subject to monthly fines in the amount of One Hundred and 00/100 ($100.00) Dollars"**

without citing the authority for such action and without asserting that such a fine had actually been imposed. In para 72 Ap.p. 398 the HOA plead that "the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 ($1,132,00) dollars ... for his continuing violation". They never plead the authority for such a fine nor by whom and when such a fine was imposed.

This is at best a claim at law for violation of an alleged contractual provision requiring someone NOT to do something, where violation of the obligation creates no damages to the complaining party. The HOA failed to plead a contractual provision imposing consequential punitive damages and there is none.

b. HOA never plead a source of authority to demand fines.

(1) The HOA never plead that it had the authority to impose fines. It plead instead that it was entitled to go to court to collect unpaid debts authorized by the covenants:

> **"71. ... the Governing Documents further provide that if the Plaintiff does not pay the assessments, fines or other related charges Plaintiff is responsible for all costs of collection..." Ap. P. 397.**

The counter-claim thus never provided the court a source of authority to award the HOA the fines it demanded.

(2) Pre-litigation provisions of the contract (HOA Bylaws) prohibited the HOA from imposing a fine and prohibited them from going to court to collect a fine.

The HOA did not plead or show compliance with the "pre-litigation"

provisions which exist.[7] In fact they ignored the pre-litigation provisions of the Bylaws relating to fines. The Bylaws is part of the Covenants because it is Exhibit C of the Covenants Ap.pp 280-282. Jarmuth mentioned the non-compliance with the preclusive provisions at the trial, at the hearing, and before the Court of Appeals. The relevant portion is Section 13.3, Procedure. The pertinent parts read:

> **13.3 Procedure.**
> **Except with respect to the failure to pay Assessments, the Board shall not impose a fine, ... for violations of the Declaration, By-Laws or any rules and regulations for the Association, unless and until the following procedure is followed:**
>
> **13.3.1 Written demand to cease and desist**
>
> **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 ...**
> **13.3.2.4 The proposed sanction to be imposed.**
>
> **13.3.3 The hearing shall be held in executive session of the Board ... 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.**

The HOA never presented any evidence or testimony that it complied with even one of mandatory steps. – because they ignored them all.

On May 5, 2010 the HOA Board held a meeting at which it clarified that the interpretation of Section 13.3, Procedure. In Board Meeting Minutes, Section VI New Business, C. New Violation Policy Ap.p. 358: it is written "She shared the progressive steps in detail. The final notice will be a hearing scheduled". This clarification was made before the alleged covenant violation, before the counter-claim was filed, before the trial was held, and prior to the Rule 12 / Rule 60 hearing.

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7 If they had disclosed the existence of these "administrative pre-litigation" provisions they would have had to admit they had not complied with them.

Also in evidence at all judicial levels was the minutes of the HOA Board Meeting of November 10, 2010 Ap.pp. 384-388 where (per the HOA) the HOA Board "determined" that Jarmuth had violated the covenants and where the HOA Board allegedly imposed a continuing fine. The Minutes was Jarmuth's impeachment evidence (the burden was on the HOA to plead compliance with Section 13.3 to show that it had satisfied the pre-litigation / suit preclusion provisions of the contract).[8]

This is a matter of clear contract law. Since the only authority available to the HOA to impose a fine is Bylaws Section 13.3 and since the HOA is precluded from imposing a fine without a hearing and since they failed to do so, there was no contract authority to impose a fine OR to sue to collect the non-existent contract created debt styled as a "fine".

c. There was no subject matter jurisdiction over the "fines because there was no relief the Court could grant as to the fines.

To put it another way, there was no cognizable injury which could be remedied by the intervention of the court, and this is a component of subject matter jurisdiction over a claim.

The counter – claim also failed to affirmatively plead that Jarmuth had actually violated the covenants in any way. Instead, in para 60 Ap.p., 396 the HOA plead:

"Upon information and belief the Plaintiff constructed a brick wall..."

At the trial the HOA presented no evidence and no first hand witness to testify that a "wall" had actually been built. William Freiboth, HOA President (at

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8 At trial Jarmuth put into evidence the minutes of every HOA Board 2010 and 2011 meeting – at none of them was a violation determined nor a fine imposed.

the time) who testified, never even implied that he had witnessed such a wall and never named anyone who had. In impeachment Jarmuth provided his Exhibit #623 (p. 3894 of the exhibits related to the trial) which was a photo of the area in question. It showed a lawn with the grass undisturbed except as to some prohibited signs and stakes erected by Jarmuth's neighbor on the neighbor's property. The neighbor ("Cartman") was an Architectural Review Board member.

The "fine" was clearly predicated upon a "usage violation". The HOA never pointed to any evidence or produced first hand testimony that a usage violation (that a "wall" or "fence" was ever built) actually occurred. This included at the post-trial Rules 12 / 60 hearing.

d. The HOA had no standing to demand that Jarmuth pay the "fines". Ignoring that there was no evidence of a violation, with no enforceable contract provision available to the HOA to demand "fines" the HOA lacked standing to go into court to demand fines. This is a component of subject matter jurisdiction over a claim.

4. <u>The mystery of why the Special Referee ("SR") awarded "fines" and attorney fees</u>.

It was clearly an abuse of judicial discretion for the SR to award attorney fees when the facts and the law are so clearly against this. It likewise a mystery why the Motions Judge and Court of Appeals ignored the unambiguous facts and law.

As to the SR, it is useful to note that he never bothered to read the complaint, answer and counter-claim. They remained locked in the Clerk of Court's office before, during and after the trial. Likewise he never read the trial exhibits. They were locked in the courtroom when the trial was not in session (and he did not have access to the room). Immediately after the trial the Exhibits were removed from the

courthouse by an employee of Defense Counsel (without the knowledge or permission of the Clerk of Court) and stayed out of the courthouse until months after the SR wrote his final order. When Jarmuth requested copies of the sign out log relating to the case documents the Clerk of Court responded that none existed because no one ever signed the case file out or examined it (it was stored in the Clerk of Court's personal office because of early issues with document integrity). That was when the Clerk of Court discovered the exhibits were missing from the Courthouse.

5. Orders following the April 27, 2016 Rule 12 / Rule 60 Hearing.

On April 27, 2016 a hearing was held to determine whether the trial court lacked subject matter jurisdiction and / or the authority to grant attorney fees and fines. Central was whether any claim at all was made for the attorney fees and whether authority existed for the award of fines. Hon. Judge Benjamin Culbertson, presided because the SR had recused himself. The Order of Reference which he consented to (Ap.pp. 167-170) ordered that "Ralph P. Stroman ... shall exercise all the powers ... to ... hearing pre-trial and post-trial motions".

At the close of the hearing Judge Culbertson entered a bench Form 4 Order Ap.pp. 229-230 denying any relief. It made no findings of fact nor conclusions of law.

On May 17, 2016 Jarmuth filed a notice of appeal Ap.pp. 483-484.

On May 31, 2016 at a hearing before the Chief Administrative Judge Hon. Judge Steven John the Court entered a Form 4 Order holding that as of May 17, 2016 "this court does not have jurisdiction". The HOA's attorney [9] concurred.

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9 Henrietta U. Golding.

On June 6, 2016 Judge Culbertson entered a "long order" Ap.pp. 231-240 which stated findings of fact and conclusions of law.

On June 24, 2016 Jarmuth filed an amended notice of appeal Ap.pp. 485-486. adding the second order as a matter of sound discretion even though the Court lacked jurisdiction over the case to enter such an order.

Jarmuth plead this scenario in his appellate brief Ap.p. 10.

6. Appellate Affirmation of a void order.

The Court of Appeals ignored the legitimate April 27, 2016 Form 4 Order and Affirmed the void [10] June 6, 2016 Order. The Panel cited conclusions of law in the second order rather than analyzing the matter de novo because of the absence of a record of the reasoning of the hearing court in the "bare" Form 4 Order.

On August 16, 2018 the Court denied reconsideration holding that "the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded".

ARGUMENT

1. Jarmuth's Constitutional Due Process Rights were violated when the Special Referee invented claims on behalf of the HOA in his final order which claims were never litigated; when he awarded relief to the HOA for the non-existent claims; and when he did not enforce pre-litigation provisions of the contract.

In Allgeyer v. Louisiana, 165 U.S. 578 (1897) the U.S. Supreme Court held that the 14th Amendment to the U.S. Constitution applied to civil litigation relating to contracts. It has defined procedural due process to include (1) Notice of the proposed action and the grounds asserted for it; (2) The opportunity to present

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10 The trial court lost jurisdiction to enter Orders on May 17, 2016.

reasons for the proposed action not to be taken; and (3) The right to know the opposing evidence. These rights transcend rules and statutes. Any application of an otherwise constitutional rule or statute which interferes with these rights is an unconstitutional interpretation / application and is itself a violation of due process. Because the SR, not the HOA, formulated the attorney fee claims, and assumed on the HOA's behalf the right to "fines" which does not exist, it was the Court (the SR) that violated Jarmuth's due process rights in these regards.

When the motion judge and the panel failed to even minimally question whether those due process rights were denied, they too violated Jarmuth's due process rights. The requirement to put Jarmuth on sufficient notice of these claims through a properly plead claim was ignored. The decision of the panel is against precedent. The precedential cases include:

> **Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.".**
> **"Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007)**
> **"The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, ... and the right to meaningful judicial review.") Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 353, 354 (2008)**
> **An interested party must be given notice "reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (2002) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Murdock v. Murdock, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999)).**

2. The court's exercise of jurisdiction over the attorney fee and HOA fine matters violate established precedent and law and was an abuse of judicial authority.

a. The court(s) erred in asserting that authority to process this case (action) implied subject matter jurisdiction over the disputed claims.

To reiterate, neither the 2012 Order following the trial nor the 2018 Affirmation addressed jurisdiction. The "Long Order" following the hearing based its assertion of authority to deal with the attorney fee issue (no claim plead) and fines issue (no authority plead) on assertions of venue made in the counter-claim Long Order para #9 Ap.p.234. The HOA plead that Jarmuth lived in a house located in Horry County and that the HOA's covenants applied to the property.[11] The Long Order held that when Jarmuth admitted (A.p.234 #10) that the house he lives in is in Horry County, which is in admission of venue, that Jarmuth "established that this Court has jurisdiction over the counter-claim". This is counter to precedent. The correct analysis concludes that the court never gained subject matter jurisdiction over or authority to determine the claims.

The U.S. Supreme Court in Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), held that to invoke the power, or subject matter jurisdiction over a claim, the plaintiff must first state in a plead claim that he suffered a concrete and particularized "injury in fact," that the injury is fairly traceable to the defendant's conduct, and that the relief sought will redress the harm. As Justice Antonin Scalia explained in Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), asserting standing in a plead claim is "an indispensable part of the plaintiff's case" requiring that the plaintiff support (in a claim stated in a complaint) each element of standing

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11 Counter-claim para's #52-55, #2 and #24.

"with the manner and degree of evidence required at the successive stages of the litigation." The Court went on to hold that the failure to "state a claim" implicates a lack of subject matter jurisdiction. In Allstate Ins. Co. v. Global Med. Billing, Inc., 2013 U.S. App. LEXIS 7277 (6th Cir. April 8, 2013) the court held that a failure to state a claim deprives a court of subject matter jurisdiction over the (unplead) claim citing also

> McGlone v. Bell, 681 F.3d 718, 728 (6th Cir. 2012) (citing Prime Media, Inc. v. City of Brentwood, 485 F.3d 343, 348 (6th Cir. 2007)) ... (and) Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 795 n.2 (5th Cir. 2011); see also Murray v. U.S. Dep't of Treasury, 681 F.3d 744, 748 (6th Cir. 2012).

In the above cases the courts have noted that the failure to show standing in a plead claim is jurisdictional. The courts have also held that the failure to plead "aggrievement" in a claim is also jurisdictional and aggrievement was never plead viz the attorney costs or the fine.

> "The requirement that a (plaintiff plead in a claim that he is) ... an aggrieved party is jurisdictional- Dolomite Products Co., Inc. v. Town of Ballston, 151 AD3d 1328 [3d Dept 2017] ("Aggrievement is a ... necessary component to invoke this Court's jurisdiction ... [I]f a party is not aggrieved, then this Court does not have jurisdiction" -- Leeds v. Leeds, 60 NY2d 641 [1983]

In Jones v. Bock 549 U.S. 199 the Court clarified that subject matter jurisdiction is claim, not action, based holding that

> "dismissal of an entire action (will not occur) if a single claim fails to meet the pertinent standards".

The decision explored in detail the distinction between an "action" and a "claim" adding

> "More generally, statutory references to an 'action' have not typically been read to mean that every claim included in the action must meet the pertinent requirement before the 'action' may proceed ... if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad".

The S.C. Supreme Court stated the precedent in State v Conyers (June 9,

1997) #24630 citing the U.S. Supreme Court in Whitmore v. Arkansas, 495 U.S. 149, 1 10 S.Ct. 1717, 109 L.Ed.2d 135 (1990) noting that to "'invoke jurisdiction' of a court over a claim one must plead a proper claim".

Jones also clarified the lack of jurisdiction by the court in instant case over the "fines" issue holding that where administrative remedies or procedures are stated in the contract or statute, the trial court lacks subject matter jurisdiction until the administrative procedures mandated in the authority upon which a plaintiff is proceeding is exhausted and plead.

The S.C. Supreme Court recognizes this precedent. In Ranucci v. Crain, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014) the court upheld dismissal of the case 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."**

Rule 8(a)(1) SCRCP Claims for Relief recognizes the dependence of subject matter jurisdiction over a claim on a properly plead claim:

> **"(a) Claims for Relief. ... (must state a) cause of action, whether an original claim, counterclaim ...**
> **(1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends,"**

The Hearing Judge and the Panel confused initiation of an action with implication of the authority of a court over a claim. Rule 3(a) SCRCP Commencement of Action recognizes this distinction: "A civil action is commenced when the summons and complaint are filed".

b. The court and the panel erred when it asserted that statutory jurisdiction is the same as subject matter jurisdiction. The panel wrote

> "("[S]ubject[-]matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong" ... "The [c]ircuit [c]ourt shall be a general trial court with original jurisdiction in civil . . . case" Ap.p.101.

which was word for word what the Long Order stated at paras #17-19, Ap.p. 238. This, however, is properly read as authority over the "case".

This determination is against the precedents of this Supreme Court, which has held that subject matter jurisdiction over claims is not implicated when the court possesses the power to hear and determine cases of the general class to which the proceedings in question belong. See State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (2008); Johnston v. S.C. Dep't of Lab., Licensing, and Reg., S.C. Real Estate Appraisers Bd., 365 S.C. 293, 617 S.E.2d 363 (2005); and Fryer v. S.C. L. Enforcement Div., 369 S.C. 395, 631 S.E.2d 918 (2006).

3. The failure to void the award of attorney costs and fines was an abuse of judicial discretion.

In his (Ap.p. 236) void June 5, 2016 Long Order [12] Judge Culbertson defined an abuse of discretion:

> 7. "An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support." Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817 (2013).

a. Hearing Court and Appellate Panel disregarded judicial precedent by mis-applying "law of the case". "Law of the Case" did not control the matter of "jurisdiction" or "lack of authority" at the hearing. A Factual Error.

Judge Culbertson erroneously held that subject matter jurisdiction over the

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12 Signed May 31, 2016 filed June 5, 2016.

claims had been decided in the final order and affirmed in the April 4, 2013 Order of the Court of Appeals following the 2013 Appeal Ap.pp236-237. This was a controlling factual error and voided his entire "Law of the Case" analysis – which the Court of Appeals also depended on. The word "jurisdiction" never appears in the 2013 Affirmation nor in the 2012 Final Order. The word "authority" never appears in the 2013 Affirmation and it appears twice in the final order – both in connection with the authority of the HOA's Architectural Review Board, not in connection with the Board itself.

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

Judge Culbertson said his hands were tied because the issues of jurisdiction and authority had been litigated and decided previously at the Court of Appeals or was decided in the final order and not appealed. See his "long" Order "Law of Case" para's 3,4,5 and 7 Ap.pp.236-237.

> **7. Because the findings in the Final Order were affirmed on appeal, they became the law of the case once the remittitur was issued.**

Culbertson misread the doctrine as did the Court of Appeals. Even if the issues had been litigated, this did not bind the court later. 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 in the first place.

b. The trial court had no discretion in the first place to award attorney fees and "fines". It could not even hear the non-claims.

The court lacked the power to grant this specific relief because there was no related claim properly before the Court, because there was no enforceable statute or contract provision, and because the HOA lacked standing to invoke the courts' authority. Lacking any of this the court could not even look to the facts to determine if relief was merited.

This is a definition of a void judgment.[13] As to the attorney fees the HOA never stated a proper claim; as to the fines the HOA never stated any contract authority and if properly plead, still never satisfied the mandatory administrative pre-litigation steps.

> **"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 court that lacks subject matter jurisdiction lacks constitutional or statutory authority to hear the case ... 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)**

With an absence of jurisdiction over a claim

> **"the trial 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.'" Beach v. Director of Revenue, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996).**

c. The hearing judge and the court of appeals ignored their mandatory obligation "de novo" to determine if the handling of the claims was void due to flaws in bringing the claim. "No claim presented, no authority, no standing, no injury thus no jurisdiction". Both courts "sat on their hands".

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13 There are other reasons at law why a judgment may be void "from its' inception".,

d Abuse of judicial discretion by failing to conduct de novo review. The hearing court and the court of appeals abused their discretion when they chose not to examine the issues of lack of jurisdiction and lack of authority over the claims at issue here.

The affirmation of the Court of Appeals did not reflect any review of the case but proclaimed instead the absolute discretion the hearing court had to reject a Rule 12 or Rule 60 motion, the position taken in the "long order" as well. They suggested that the issue of lack of a claim or failure to comply with pre-litigation clauses should have been raised when the counter-claim(s) were filed. This ignored that no claim was made at all to which a pre-litigation objection could be filed. Jarmuth was never on notice that the demands would be made. The checks and the assertion that a fine was imposed was not made available / stated until the end of the last day of the trial. There was no discovery on these. The courts ignored that no check nor supporting check disbursement documents [14] nor relevant HOA Board Minutes became available (triggering the motion) until Jarmuth obtained the ledgers and minutes by subterfuge well after the trial had ended.[15]

In Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 495-96, 450 S.E.2d 616, 619 (Ct. App. 1994) the U.S. Supreme 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 duty of the hearing court and the court of appeals should have begun with a de novo determination of whether the issue of

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14 When the motion was filed a subpoena duces tecum was served demanding supporting financial and insurance documents related to the civil case and to the checks. The HOA refused to comply.

15 Jarmuth obtained these directly from an unknowing management company employee in the management company office with a routine in-person request.

the attorney checks and fines was actually litigated, not whether there was a judgment in a final order. The choice of both to decline such an examination ("Long Order" Ap.pp 235-236; C/A Affirmation Ap.p101) goes against clear precedent set by the U.S. Supreme Court.

> **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).**
> **There is no discretion in matters of subject matter jurisdiction. Gonzales v. Thaler, 132 S. Ct. 641, 648 (2012)**

In Auburn Reg'l Med. Ctr., 133 S. Ct. at 824 the court held there is no discretion in determining the subject matter jurisdiction over a claim. The Court held that the decision must be a strict application of the law to the facts of the case as presented in a claim.

If there was judicial discretion in a determination of jurisdiction over a claim, a court could "create its own jurisdiction" over a claim by choosing to abstain from a claim based examination. This is exactly what the Court of Appeals and the hearing court did. "It is elementary that a ... court cannot create jurisdiction where none exists." 5A Wright & Miller § 1350, at 204-05.

The U.S. Supreme Court made it clear that a non-discretionary de novo review is mandated at 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)**

The Court of Appeals acted against precedent and either had no discretion to abstain from a de novo consideration or abused discretion by failing to do so.

Ignoring the impossibility of raising Rule 12 and Rule 60 motions earlier, the Courts reasoned against precedent when they held that the motion was untimely before the Courts:

> **"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).**

See also Bolden 21 F.3d at 31 holding that

> **(Even prior subject matter decisions) "does not, however, foreclose challenges to subject matter jurisdiction based on entirely independent grounds."**

4. The Court of Appeals reliance on and affirmation of the legally void "long order" entered after Jarmuth filed his appeal is reversible appellate error.

The only valid order before the Panel was the April 27, 2016 "Form 4 Order" which the Panel ignored. The June 6, 2016 "Long Order" which the Panel affirmed is void on its' face.

The Form 4 Order was immediately appealable even though the Form 4 Order anticipated a "formal order" within ten (10) days. May 7, 2016 came and went without a formal order. Jarmuth timely appealed the April 27, 2016 Form 4 Order on May 17, 2016. Thereafter the lower court lost jurisdiction to enter a formal order. This is settled law. The Court of Appeals acted against clear precedent.

> **A writing signed by the judge and filed with the clerk is a final judgment even if it is anticipated that a more complete order will be substituted in the future. - Buckingham v. Buckingham, 134 NC App 82 (1999)**
> **The filing of a notice of appeal "is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control" -- Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) cited in United States v. Hitchmon, 587 F.2d 1357 (CA5 1979). Cf. Ruby v. Secretary of United States Navy, 365 F.2d 385, 389 (CA9 1966).**

> **"After a party gives notice of appeal, the trial judge is functus officio and any judgment entered thereafter is void." Romulus v. Romulus, 216 N.C. App. 28 (2011)**

The Form 4 Order made no findings of fact nor conclusions of law from which the Panel could discern the reasoning of the hearing judge.

The affirmation likewise made no findings of fact. The affirmation explained that it conformed to Rule 220(b) SCACR which reads that

> **"In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."**

Without any indication of the reasoning behind the Form 4 Order there could be no determination of whether the hearing judge abused his discretion by misinterpreting controlling law. Clearly the panel depended on the Long Order because instead of performing a de novo analysis it wrote that

> **"Our standard of review ... is limited to determining whether there was an abuse of discretion."; "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." - Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 384, 559 S.E.2d 348, 351 (Ct. App. 2001); "A question of subject matter jurisdiction is a question of law for the court." - Metts v. Mims, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009) {underlining added}**

The reasons for the Panel's decision that no abuse of discretion occurred – that the hearing judge properly applied the law based on a correct reading of the facts – is missing from the panel's affirmation. It clearly depended on the Long Order which made such an analysis.

Likewise the panel agreed with the Long Order that Jarmuth should have raised the defenses of lack of subject matter jurisdiction and lack of authority in an answer to the HOA's 2011 Counter-Claim, ignoring that a major issue is that there

being no claim asserted, Jarmuth would not be on notice of the non-existent claim and thus would not be required to file a 12(b) motion nor an answer, since "none was required" or "permitted". The failure of the panel to address this issue is further evidence of the panel's dependence on the Long Order which did not address this discrepancy, a "point" that the panel overlooked when it failed to conduct either a de novo review or apparently to actually read the case documents. The affirmation reads:

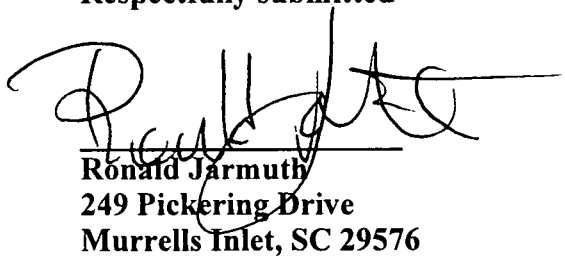
> **Rule 12(b), SCRCP ("Every defense . . . to a cause of action in any pleading . . . shall be asserted in the responsive pleading thereto if one is required ... the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . .); ... A motion making any of these defenses shall be made before pleading if a further pleading is permitted." Rule 7(a), SCRCP There shall be . . . a reply to a counterclaim denominated as such ...**

Clearly the panel unlawfully relied on the void "Long Order" and failed to do its duty per Rule 220(b) SCRAP. The panel's procedural error denied Jarmuth his due process right to a fair appeal.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari reversing the affirmation of the Court of Appeals and voiding the award of attorney fees and "fines".

Respectfully submitted



September 7, 2018

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Unpublished Opinion No. 2018-UP-275 (S.C. Ct.App.)
(Appeal No. 2016-001063)

Ronald Jarmuth, Petitioner

v.

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

PROOF OF SERVICE

I certify that on September 7, 2018 I Served Appellant's Petition to the Supreme Court for Writ of Certiorari to the Court of Appeals on Respondents through Respondent's common counsel, Henrietta Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164 by mailing it to same by first class mail, postage pre-paid.

September 7, 2018

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