THE STATE OF SOUTH CAROLINA
In the Supreme Court

Petition for Writ of Certiorari
To The Court of Appeals
(Appeal No. 2016-001063))

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Ronald Jarmuth ..... ~~Appellant~~, Petitioner

v.

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

APPENDIX VOLUME 1

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Appeal No. 2016-001063

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Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

CASE NUMBER 2009-CP-26-3596

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Ronald Jarmuth — Appellant,

v.

The International Club — Respondent

BRIEF OF APPELLANT

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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

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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.

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2 Charge are pending against the HOA for illegal retaliation: US HUD No. 04-16-4810-8.

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 SCHA 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

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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

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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 <u>this lawsuit</u>."[7]**

B. <u>The South Carolina Human Affairs ("SCHA") Discrimination Complaint</u>.

> **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 <u>July 21, 2009</u>, Jarmuth filed an application ... for a swing set. ... The Association sent a Notice of Disapproved ... [On <u>August 17, 2009</u>] 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,**

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

2016 Memo, p5, op.cit. R.P.278.

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.

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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.

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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"

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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

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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.

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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.

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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;

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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.

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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 ..."**

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22 The June 13, 2012 Consent Order of Reference R.P.13 to the Special Referee.

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.

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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 at 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 dism'd); 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 F2d 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 F2d 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

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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 SCHA 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 SCHA 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 injuries, 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.

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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

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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**

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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

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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 SCRCP 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. <u>Failure to Plead Compliance with Pre-Litigation Preclusive Provisions</u>.

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

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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

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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

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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) SCRCP 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 SCRCP 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**

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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 omited 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) SCRCP 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.

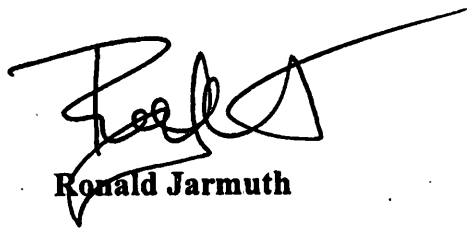
4. The "law of the case" arguments raised by the HOA as its sole defense is inapplicable because subject matter jurisdiction has never been put before any Court (in this case). There has been no contest and no order following such a contest. The facts cited (consent, an order of reference, and a line 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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Appellant, Pro Se

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2009-CP-26-3596
Consolidated With
Case No.: 2010-CP-26-11320
Appellate No.: 2016-001063

Ronald Jarmuth, ... *Pro Se* Appellant,

v.

The International Club Homeowners
Association, Inc., ... Respondent.

FINAL BRIEF OF RESPONDENT THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. Are Jarmuth's Issues on Appeal preserved?

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

STATEMENT OF THE CASE

Civil Action Nos. 2009-CP-26-3596 (hereinafter "**2009 Case**") and 2010-CP-26-11320 (hereinafter "**2010 Case**") (hereinafter collectively referred to as "**Consolidated Cases**") arise out of a dispute between the Appellant, Ronald Jarmuth ("**Jarmuth**") and the Respondent, International Club Homeowners Association, Inc. ("**Association**") regarding the Association's authority to govern the International Club community pursuant to the Declaration of Covenants and Restrictions for the International Club filed in Deed Book 2117 at Page 1353 in the Horry County Register of Deed's Office on February 8, 1999 ("**Declaration**"). **(R. pp. 356-451; 219-231; 335-336; 337-339)**. The Consolidated Cases were tried by a Special Referee in August, 2012. **(R. pp. 19-66)**. The Final Order awarding a judgment to the Association on its counterclaims in the amount of $7,326.00 was affirmed on appeal in 2015. **(R. pp. 19-66; 69-74)**. Jarmuth now seeks to appeal the 2016 order entered by the circuit court denying his Motion to Dismiss counterclaims in the Consolidated Cases filed after the remittitur was issued.

Jarmuth owns a home in the International Club Community located in Murrells Inlet, South Carolina. **(R. pp. 19-66)**. The Association, the governing body for the International Club, was created by the Association's Articles of Incorporation and the Declaration. **(Id.)**. The Declaration grants the Association architectural review and enforcement rights, including the right to fine members of the Association for violation the Declaration and to seek attorneys' fees and costs in connection with the enforcement of the Declaration. [1] **(Id.)**.

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[1] Section 8.9 provides that the Association is entitled to attorneys' fees incurred in enforcing the Declaration: "[s]hould any person employ counsel to enforce any of the foregoing covenants, conditions, reservations, or restrictions, because of a breach of the

On April 7, 2009, Jarmuth commenced Civil Action No. 2009-CP-26-3596 seeking an order that the Declaration is unenforceable and/or that the Association breached the Declaration. **(R. pp. 360-392)**. The Association filed an Answer on May 13, 2009 and asserted a counterclaim for attorneys' fees and costs. **(R. pp. 185-188; 274-290)**. The defense of the Association was covered under its director's and officer's insurance; the Association paid a $2,500.00 deductible in connection with defending the 2009 Case. **(R. p. 279)**.

While the 2009 Case was pending, Jarmuth filed a complaint with the South Carolina Human Affairs Commission (hereinafter "**SCHAC**") alleging that the Association discriminated against him in connection with denying his application for a swing set. **(R. pp. 198-201)**. The Association filed a response and paid an additional $2,500 deductible in defending the matter; SCHAC determined that there was not cause. **(R. pp. 202-203)**. Because he was unsuccessful in the SCHAC matter, Jarmuth filed the 2010 Case in Magistrate's Court on October 12, 2010 challenging the Association's authority to enforce the architectural restrictions in the Declaration against his International Club property and the denial of his swing set and fence applications. **(R. pp. 219-231)**. The Association filed an Answer to the Complaint in the 2010 Case on November 17, 2010. **(R. pp. 237-240)**. Thereafter, the Magistrate's Court transferred the 2010 Case to circuit court by order dated November 30, 2010 and filed on December 1, 2010. **(R. pp. 335-336)**. Upon the transfer of the 2010 Case, it was consolidated with

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same, all costs incurred in the enforcement, including a reasonable fee for counsel shall be paid by the Owner of such Unit or Units in breach thereof." **(R. p. 124)**. Moreover, the Bylaws of the Association, § 13.4, echoes § 8.9 of the Declaration: "[s]hould the Developer or 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 Owner." **(R. p. 130)**.

the 2009 Case by order dated August 29, 2011 and filed September 16, 2011. **(R. pp. 337-339).**

The Association filed motions to amend the Answers in the 2009 Case and the 2010 Case to assert counterclaims against Jarmuth on August 26, 2011 **(R. pp. 419; 420-421)**, and the Court granted the motions by Order filed on October 11, 2011. **(R. pp. 340-342)**. The Association's Amended Answers and Counterclaims in the Consolidated Cases were filed on October 24, 2011 seeking a declaratory judgment that Jarmuth is subject to the Declaration pursuant to S.C. Code Ann. 15-53-10 *et seq.* and seeking damages related to fines incurred, injunctive relief, and attorneys' fees and costs to enforce the Declaration against Jarmuth. **(R. pp. 422-433; 434-441).**

Allegations in the amended counterclaims establishing subject matter jurisdiction include the following:

- "Plaintiff's International Club property is subject, without qualification to the Declaration . . . and the HOA's Bylaws, as amended (collectively referred to as 'Governing Documents')." ¶ 2;
- "...the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at International Club ("Property"). ¶ 24;
- "The Property is located in Horry County, South Carolina, and this Court has jurisdiction over the Property and the parties to this action." ¶¶ 52-3;
- "Plaintiff is subject to the Governing Documents." ¶ 54;
- "Provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision." ¶ 55;
- "The Plaintiff, as current owner of the Property, continues to incur fines, fees, and additional related charges throughout the pendency of this case during his continued ownership of the Property." ¶ 73;
- "Plaintiff breach the terms of the Governing Documents and the Architectural Guidelines, and therefore, the Defendant HOA is entitled to a judgment in amount to be determined by this Court, together with costs and attorneys' fees incurred in bringing this action as well as order requiring Plaintiff to comply with the Governing Documents and the Architectural Guidelines..." ¶ 75.

(**R. pp. 422-433**). Jarmuth admitted paragraph 53 of the Association's Answer and Counterclaim in the 2009 Case asserting that the lower court had jurisdiction. (**R. pp. 442-433, ¶ 2**).

Jarmuth and the Association agreed to refer the Consolidated Cases to Special Referee Ralph Stroman on June 15, 2012. (**R. pp. 13-15**). The Consent Order referred the cases to the Special Referee with all power and authority to enter final judgment as provided for in Rule 53(b):

> IT IS ORDERED that the above entitled actions are referred to Ralph P. Stroman who, pursuant to Rule 53(b) SCRCP, shall exercise all power and authority that a circuit judge sitting without a jury would have, including but not limited to, hearing pre-trial and post-trial motions, making findings of fact and conclusions of law, directing entry of final judgment in these actions under Rule 53(b) SCRCP, and issuing any and all Orders necessary.

(**Id.**).

The Consolidated Cases were tried from August 8, 2012 through August 10, 2012 by the Special Referee who entered into the Final Order awarding the Association attorneys' fees, costs, and fines in the amount of $7,326.00. (**R. pp. 19-66**). The Final Order included a finding that "[t]he above entitled actions were referred to the undersigned, as Special Referee, by Consent Order" and that the "referral" to Judge Stroman "is a referral with finality". (**Id.**, p. 1, ¶ 1).

After the Final Order was entered, the Special Referee recused himself from hearing the post-trial motions as a result of the Plaintiff's accusations that he was biased by Order of Recusal dated and filed on October 12, 2012. (**R. pp. 67-68**). As a result, the Consolidated Cases came before the circuit court pursuant to the Order of Recusal. (**Id.**) Jarmuth filed post-trial motions seeking a new trial and to set aside the Final Order

based on lack of subject matter jurisdiction on September 19, 2012. **(R. pp. 460-544; 557-683).**

After circuit court reviewed the entire record and the parties' briefs, Jarmuth's Post-Trial Motions were denied by a written Order filed on March 11, 2013. **(R. pp. 343-355).** The circuit court ruled that the Magistrate properly transferred the case to the circuit court and that the Special Referee had jurisdiction to enter into the Final Order. **(R. pp. 347-348; ¶¶ 10-12).** Jarmuth timely filed an appeal of the Final Order on April 3, 2013, however, he failed to appeal the Order Denying the Post-Trial Motions finding that the lower court had subject matter jurisdiction. **(R. p. 331).**

The South Carolina Court of Appeals denied Jarmuth's appeal and affirmed the Final Order in the Unpublished Opinion No. 2015-UP-111 (hereinafter "Unpublished Opinion"). **(R. pp. 69-74).** Jarmuth filed a petition for Rehearing on March 12, 2015 and Contempt Motions on March 17, 2015 against Freiboth and the undersigned attorneys, whom represent the Respondent. The petition for rehearing sets forth grounds that the trial court improperly awarded the attorneys' fees to the Association in connection with the SCHAC matter. Jarmuth also filed a Motion for Contempt and an Amended Motion to Contempt against William Freiboth, the former president of the Association, and the undersigned attorneys on March 13, 2016. Jarmuth's petition for rehearing was denied by the South Carolina Court of Appeals on April 24, 2015. **(R. p. 75).**

On May 12, 2015, Jarmuth filed a Petition for Writ for Certiorari with the South Carolina Supreme Court appealing the Unpublished Opinion and specifically asserting that the award of $2,500.00 in attorney's fees incurred in connection with the SCHAC

matter and confirming the Declaration was improper. **(R. p. 76).** The Supreme Court denied Jarmuth's Petition for Writ **(R. p. 76)**; the remittitur was issued on January 21, 2016. Upon the issuance of the remittitur, Jarmuth filed his Rule 60(b)(2) and (3) Motion dated January 22, 2016, the amended Rule 60(b) Motion dated February 1, 2016, and Rule 12(b)(1) and Rule 60(b) Motion to Dismiss the Association's counterclaim dated March 11, 2016. **(R. pp. 291-298).**

The trial court held a hearing on Jarmuth's Motion to Dismiss the Counterclaims on April 27, 2016. At the hearing, Jarmuth contended that the trial court and Special Referee did not have subject matter jurisdiction to award fines, attorneys' fees, and costs for the following reasons:

- the Association failed to sufficiently plead a cause of action under Rule 8, SCRCP;
- the Association failed to verify the Counterclaim under Rule 9, SCRCP;
- the ARB was the only entity that had standing to bring the counterclaims;
- the Association violated Section 13.3 of the Bylaws by failing to provide Jarmuth with a hearing before the counterclaims were filed.

(R. pp. 291-298; 89-119). The formal order denying Jarmuth Rules 12(b)(1) and 60(b) Motion to Dismiss the Counterclaims was filed on June 6, 2016. **(R. pp. 77-88).** The order found that the Special Referee had subject matter jurisdiction to enter in to the Final Order pursuant to the Order of Reference entered into by the parties. **(Id.).** The order further held that Final Order and Order of Reference finding that the Special Referee had subject matter jurisdiction constitute the law of the case and cannot be disturbed. Jarmuth filed the amended notice of appeal on June 24, 2016. **(Id.).**

STANDARD OF REVIEW

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court." Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Therefore, this Court's standard of review is limited to determining whether there was an abuse of discretion. Southeastern Hous. Found. v. Smith, 380 S.C. 621, 670 S.E.2d 680, 687 (Ct. App. 2008). "An abuse of discretion arises when the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support." Id. citing Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

ANALYSIS

I. Issues On Appeal Are Not Preserved

Jarmuth's appeal should be dismissed, because many of the Issues on Appeal were not timely raised with specificity and ruled upon by the trial court. Several Issues on Appeal are also abandoned due to Jarmuth's failure to cite to legal authority. Furthermore, Jarmuth's Issues on Appeal are barred by the law of the case doctrine.

A. Jarmuth Failed to Timely Raise the Issues to the Trial Court with Specificity

The first step in preserving an issue for appellate review is to actually raise it to the lower court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731,733 (1998). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have raised to and ruled upon by the trial [court] to be preserved for appellate review." Id. The specific grounds for an objection must be stated, and the lower court must rule upon the issue for it to be preserved for review. Id. Furthermore, a party cannot make an objection to a ruling after the trial judge had an opportunity to address it; objections must

be contemporaneous with the ruling at issue. State v. Aldert, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999).

Jarmuth raises legal issues for the first time on appeal without providing the lower court with an opportunity to rule. Jarmuth argues at length in his appellate brief that the Association was barred from collecting the $2,500.00 deductibles paid in 2009 and 2010 for lack of subject matter jurisdiction, because he asserts that they were paid in connection with the SCHAC matter.[2] **(Jarmuth's Final Brief pp. 27-32).** This issue was not raised at the April 27, 2016 hearing or in his Motion to Dismiss, and the trial court did not have the opportunity to rule on it. Because Jarmuth failed to raise this issue timely, and no ruling exists, it was not preserved on appeal. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. To the extent that the issue was before the circuit court, Jarmuth failed to raise it with specificity and contemporaneously with the denial of his Motion to Dismiss and failed to obtain a ruling from the Court; accordingly, the issue is not preserved. Id.

Jarmuth also raises that the counterclaims were not sufficiently pled under Rules 8 and 9, SCRCP, in order to confer subject matter jurisdiction on the circuit court. Jarmuth's failure to raise these arguments before the Final Order was entered also affects the preservation of these issues. See Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143,

[2] Contrary to Jarmuth's unsubstantiated assertions in his appellate brief, the 2009 $2,500 deductible was paid in connection with defending the 2009 Case asserting that Jarmuth was not subject to the Declaration. The 2010 $2,500 deductible was paid in connection with defending the SCHAC matter, which contained the same allegations as the 2010 Case, namely, that the Association discriminated Jarmuth by denying his application for a swing set and that the Declaration was not enforceable against his International Club property. Because Jarmuth posited that the Declaration was not enforceable against him in all of the proceedings, those fees were incurred in connection with enforcing the Declaration against him.

723 S.E.2d 835 (Ct. App. 2012) (holding that the appellant waived his argument regarding a Court order finding that the claims were sufficiently pled under Rule 8 to confer jurisdiction on the lower court); Godfrey v. Heller, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (holding when theory of unjust enrichment was first raised in judge's order, appellant should have challenged this basis for recovery by a Rule 59 motion to preserve the issue for appeal). By failing to timely file a Rule 12(b) Motion based on a deficiency in the pleading under Rules 8 and 9, SCRCP, Jarmuth waived his arguments that the counterclaims were not pled with specificity or verified.

Due to Jarmuth's untimely objections to the above issues, they were not preserved and should not be considered on the merits in this appeal.

B. Jarmuth's Short Conclusory Arguments Without Authority are Abandoned

Jarmuth abandoned his arguments on appeal by failing to provide any legal authority in support. See Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App. 1993) (holding that short conclusory arguments are abandoned on appeal). The following issues are not supported by any legal authority and should be considered abandoned: 1) The Special Referee did not have subject matter jurisdiction to award the $2,500 in attorneys' fees paid in 2010; 2) The Special Referee did not have subject matter jurisdiction to award fines, because the Association lacked standing; 3) The Special Referee did not have subject matter jurisdiction to award fines because the Association failed to hold a hearing before imposing fines; 4) The Special Referee did not have subject matter jurisdiction to award fines, because the Association's architectural review board was not a party to the litigation; 5) the Association's failure to verify the counterclaim for fines and attorneys' fees divested the lower court of subject matter

jurisdiction. "[W]here an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal." Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004). Jarmuth's failure to provide a legal analysis supporting these arguments constitutes an abandonment of the arguments on appeal.

C. Jarmuth's Appeal is barred by the Law of the Case Doctrine

Because Jarmuth failed to appeal the findings in the Order Referring the Case to the Special Referee, the Final Order, and the March, 2013 Order denying Post-Trial Motions finding that the Special Referee had subject matter jurisdiction to award fines and attorneys' fees, his appeal is barred by the law of the case doctrine. Jarmuth's issues are also barred by the Unpublished Opinion which specifically addressed some of the issues asserted in the appellate brief.

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge the ruling. See Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. Id. Upon the issuance of the remittitur, an appealed order becomes the law of the case and the findings contained in the order govern the case. Holly Hill Lumber Co. v. McCoy, 210 S.C. 440, 442, 43 S.E.2d 143, 143 (1947) (appellate court's decision, from which "there was no petition for rehearing," becomes "the law of the case" and prevents the re-raising of the issue appealed). As a result, the lower court cannot make findings in separate order that are inconsistent with the findings in an order affirmed on appeal after the remittitur has issued. Id. If an appellant does not challenge an issue on appeal that has been ruled upon in the appealed order, that ruling becomes the law of the case and cannot be disturbed.

See, e.g., Bone v. United States Food Serv., 399 S.C. 566, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so"); McEachern v. Wilson, 154 S.C. 201, 151 S.E. 472 (1930) (an order "which is the law of the case" cannot be challenged). "A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." Austin v. Specialty Transp. Servs., 358 S.C. 298, 302, 594 S.E.2d 867, 878 (Ct. App. 2004). Likewise, "[a]n unappealed order that is appealable becomes the law of the case". McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181 (Ct. App. 2004) (unappealed order dismissing parties with prejudice is the law of the case).

The following issues were previously ruled upon by the trial court in the Consent Order of Reference, the Final Order, and/or the 2013 Order Denying Jarmuth's Post-Trial Motions that was never appealed: 1) the Special Referee had subject matter jurisdiction to award the judgment against Jarmuth for attorneys' fees and costs (**R. pp. 13-18; 19-66; 343-359**); 2) Jarmuth waived his right to a hearing under the Bylaws and the Association's Declaration (**R. pp. 19-66; 343-359**); 3) The Association properly brought the counterclaims rather than the Association's architectural review board, which is not a separate legal entity (**Id.**); and 4) the award of attorney's fees in the amount of $5,000.00 in enforcing the Declaration against Jarmuth was proper. (**Id.**). Because these orders were affirmed on appeal by the Unpublished Opinion, Jarmuth should not be permitted to raise the same issues again by a second appeal. To allow him to raise these issues again under the guise of a lack of subject matter jurisdiction argument is an undue burden and expense to the Association.

Similarly, Jarmuth has raised many of these issues to the Court of Appeals in the 2013 appeal. Specifically, he objected to the Association's collection of the $2,500.00 deductible in defending the SCHAC matter and enforcing the Declaration against him in the 2013 appellate brief, motion for rehearing, and Petition for Writ of Certiorari to the Supreme Court. **(Jarmuth's Final Brief in Appellate Case No. 2013-000614 dated July 22, 2015; Appellant's Motion for Rehearing in Appellate Case No. 2013-000614 dated March 12, 2015).** In those filings, Jarmuth argued that the Association misrepresented the nature of the services performed in connection with incurring the fees.

The Association argued that the Special Referee, in his sound discretion, concluded that defending Petitioner's SCHAC complaint filed while the 2009 Case was pending was undertaken to enforce the Declaration against him under Seabrook Island Prop. Owners' Assn v. Berger, 365 S.C. 234, 240, 616, S.E.2d 431, 434 (Ct. App. 2005). Berger stands for the proposition that the term "enforcement" of the covenants is broader than filing a lawsuit. See Id. Under this progeny, "enforcement" includes legal action taken pre-litigation. The Association argued that because the administrative proceeding was filed while the 2009 case was pending, and before the 2010 case seeking similar relief, the trial judge did not abuse his discretion in awarding the attorneys' fees incurred. This Court and the Supreme Court did not disturb the Final Order based upon the grounds that the attorneys' fee award was improper.

Likewise, Jarmuth raises several issues that were previously addressed by this Court in the Unpublished Opinion by characterizing them as affecting the subject matter jurisdiction of the Special Referee to hear the counterclaims. More specifically, Jarmuth argued at length at the 2012 trial and on appeal that the architectural review board, rather

than the Association, was the only entity with authority to seek enforcement of the fines and attorneys' fees. **(R. pp. 19-66; 343-359; Final Brief in Appellate Case No. 2013-000614 dated July 22, 2013)**. He also argued that the Association was precluded from fining him because it failed to comply with Section 13.3 of the Bylaws by holding a hearing. **(Id.)** This Court considered and rejected these arguments in issuing the Unpublished Opinion and affirming the Final Order. **(R. pp. 69-74)**.

Accordingly, these issues have been decided and were affirmed on appeal and should not be disturbed under the law of the case doctrine.

II. No Abuse of Discretion

The circuit court judge did not abuse his discretion in denying Jarmuth's Rule 12(b)(1) and 60(b) Motion to Dismiss Respondent's counterclaims.

A. The Circuit Court had Subject Matter Jurisdiction

The circuit court had jurisdiction over the counterclaims asserted in the Consolidated Cases before the matters were transferred to the Special Referee.

Jarmuth moved pursuant to Rules 12(b)(1) and 60(b)(4) to dismiss the Association's counterclaims and to vacate the judgment based on an alleged lack of subject matter jurisdiction. "Rule 60(b)(4) of the South Carolina Rules of Civil Procedure provides, on motion and upon such terms that are just, the court may relieve a party or his legal representative from final judgment, order or proceeding if the judgment is void." Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817 (2013). "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." Id. "A void judgment is one that, from its inception, is a complete

nullity and is without legal effect." Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002).

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which proceedings belong." Normandy Corp. v. S.C. DOT, 386 S.C. 393, 688 S.E.2d 136 (Ct. App. 2010). The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution of the laws of the state. Id. Pursuant to Art. V., § 11 of the Constitution of the State of South Carolina, "[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts . . ."

"Every circuit court judge in this State shall at all times have jurisdiction to discharge and perform all duties of his office within the circuit wherein he resides . . ." S.C. Code Ann. § 14-5-390 (Supp. 2008). Under S.C. Code Ann. § 14-5-350, circuit court judges may "hear and determine actions for partition and foreclose suits and all other equity matters concerning real estate whether within or without the county where the land in questions lies."

The circuit court, "the general trial court with original jurisdiction in civil . . . cases", had jurisdiction over the Association's counterclaims for a declaratory judgment as to the rights and obligations of the parties under the Declaration and for fines, attorneys' fees, and costs. See S.C. CONST. art. V., § 11. As pled in the counterclaims, the Association governs the International Club, a community located in the 15th Judicial District, and Jarmuth owns a home within the International Club. **(R. pp. 422-433; 434-441)**. The counterclaims also asserted a declaratory judgment against Jarmuth that he and his International Club property are subject to the Declaration and the architectural

review restrictions contained therein, because Jarmuth asserted in the 2009 Case, the SCHAC matter, and the 2010 Case that he was not subject to the Declaration. (**Id.**). The Association also sought an order of the circuit court holding that Jarmuth violated the Declaration by beginning the installation of his fence on the property line without approval of the Association's architectural review board. (**Id.**). These allegations established that the Court had subject matter jurisdiction to hear the Association's claims, which was admitted by Jarmuth in replying to the counterclaims. (**Id.**).

The counterclaims further sought attorneys' fees and costs in bringing the counterclaims and enforcing Declaration against him. (**Id.**). Those fees were paid in the form of two $2,500.00 deductibles to the undersigned counsel, the attorneys retained to defend the Association in the various matters filed by Jarmuth under the Association's director's and officer's insurance policy. (**R. pp. 274-290**). The first amount was paid after the 2009 Case was filed and the second amount was paid after SCHAC matter was initiated. (**Id.**) No separate deductible was required for the 2010 Case, because it was related to the previous matters filed. (**Id.**) Despite Jarmuth's attempt to characterize the evidence admitted regarding the attorneys' fees as false, testimony was presented at trial as to these facts, and the Special Referee awarded $5,000.00 to the Association. (**Id.**). Based on the facts alleged in the counterclaims and the testimony presented at trial, the lower court did not abuse its discretion in finding that the Special Referee had subject matter jurisdiction to award fines, attorneys' fees and costs to the Association in the Final Order.

Jarmuth's arguments that the Special Referee did not have subject matter jurisdiction under Rule 8, SCRCP, and Rule 9, SCRCP, are without merit and lack any

legal support. The claims were sufficiently pled under the South Carolina Rules of Civil Procedure in order to confer jurisdiction on the circuit court. Rule 8 requires "(1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." The allegations set forth above were sufficient facts alleged in order for the circuit court to exercise jurisdiction over the counterclaims and to award the judgment for fines and attorneys' fees and costs.

Furthermore, Rule 9, SCRCP, does not affect jurisdiction in this matter. No authority exists for Jarmuth's contention that the counterclaim needs to be verified in order for the circuit court to hear the Association's counterclaims and to award fines, attorneys' fees and costs. The circuit court, as the general trial court over civil disputes, clearly has authority to hear the counterclaims and award the Association the judgment in the Final Order.

B. The Referral was Proper

The referral of this case conferred jurisdiction on the Special Referee to try the counterclaims in the 2009 Case and the 2010 Case.

The circuit court may, upon application of any party or upon its own motion, "direct reference" of some or all of the causes of action in a case to special referee. Rule 53(b), S.C.R.C.P. When a reference is made, the special referee must enter final judgment as to the causes of action referred. S.C. Code Ann. § 14-11-85 (Supp. 2008). "Once an action is referred, the special referee possesses all power and authority that a

circuit judge sitting without a jury would have in a similar matter." Rule 53(c), S.C.R.C.P.

In Normandy Corp., the Department of Transportation argued that the Master-In-Equity did not have subject matter jurisdiction to enter a declaratory judgment action as to the amount of jurisdictional wetlands. 386 at 404. In that case, the parties entered an order of reference that "did not limit the issues to be addressed by the master" but rather "it referred the case to him". Id. The South Carolina Court of Appeals found that the Master-In-Equity had jurisdiction to enter a declaratory judgment action based on the broad authority conferred upon him under the order of reference.

The circuit court properly transferred jurisdiction to the Special Referee by the Order of Reference. Similar to the order in Normandy Corp., the Order of Reference consented to by Jarmuth referred the "above entitled actions" in their entirety to the Special Referee. 386 at 404. No limitations were contained in the Order of Reference that limited the jurisdiction of the Special Referee to enter a final judgment as to the counterclaims asserted. It also held that the Special Referee had authority to rule on "pre-trial and post-trial motions" and to make "findings of fact and conclusions of law, directing entry of final judgment." Because the Order of Reference expressly conferred jurisdiction on the Special Referee to enter a final judgment and rule on post-trial motions without any limitations, he had authority to enter the Final Order awarding the Association fines, attorneys' fees and costs.

Because the circuit court had jurisdiction over the counterclaims and properly transferred jurisdiction to the Special Referee, the lower court did not abuse its discretion in denying Jarmuth's motion to set aside the judgment in the Final Order.

CONCLUSION

For the foregoing reasons, this Court should affirm the April 27, 2016 Order denying Jarmuth's Rule 12(b)(1) and 60(b) Motion to Dismiss the Counterclaims.

Respectfully submitted,

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Date: March 1, 2017

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

RECEIVED
DEC 15 2016
SC Court of Appeals

Ronald Jarmuth Appellant,

v.

The International Club Respondent

REPLY BRIEF OF APPELLANT

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ARGUMENT

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

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

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

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

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

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

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

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

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

matter jurisdiction.

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

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

(1) Orders of Reference to a Special Referee [2] automatically confers subject matter jurisdiction on anything, whether in the complaint or not;

(2) Orders of Recusal by a Special Referee [3] after a trial has ended likewise retroactive confers subject matter jurisdiction on all matters in the final order; and

(3) An admission of venue in an answer [4] confers subject matter jurisdiction by a party's "litigation conduct".

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

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

Simply put –

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

---

1 Respondent did not controvert that the HOA Board never actually held that a covenant usage violation occurred nor did it controvert that the HOA Board never actually imposed any related fine.
2 June 13, 2012 Order of Reference.
3 October 20, 2012 Order of Recusal.
4 December 12, 2012 Appellant's Answer to Counter-Claim admitting Venue.

attorney fees –

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

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

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

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

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

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5 Responded March 3, 2016 Memo P5 Lines 3-6; P7 top.
6 Appellant's housing discrimination complaint was filed August 26, 2009 three months after Respondent filed it's answer to the Complaint.
7 Respondent gave Appellant copies of the two attorneys checks for the first time during the trial; they were not offered as impeachment evidence.
8 The swing set for Appellant's foster children was never actually constructed, hence no covenant violation could have occurred.
9 HOA Bylaws Section 13.3 states that the HOA can not impose any fines or take any

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

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

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

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

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

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

11 Rule 9(i) SCRCP.

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

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

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

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

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

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

RESPONDENT'S ERRONEOUS ARGUMENT

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

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

The ACTUAL central issues on appeal are:

a. The reimbursement of attorney fees has nothing to do with the counter – claim actually stated. It is as if the Respondent asked for "A" and the Court gave it "B".

b. There is no contract or statutory provision enabling the court to award "fines" (and thus to be reimbursed for attorney fees) for violating the usage restriction provisions of the covenant.

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

> **"MS. THOMPSON: ... Mr. Jarmuth moved to dismiss based on a lack of subject matter jurisdiction, challenging the judgment that was entered ... for attorney's fees, costs and fines. ... I just ask that the motion this morning be limited to the arguments in the motion that was made and filed. ...**
>
> **THE COURT: All right ... you are limited to whatever you allege in your motion as the grounds for the motion."**

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

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

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

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

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

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

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

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

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

March 11, 2016 Motion to Vacate:

> **"Absent pleading compliance with the predicate procedures of the Bylaws, the IHOA Counter –Plaintiff is precluded by its own Bylaws from filing a claim to mitigate damages, to collect fines, and for consequential attorney fees, and the Court lacks subject matter jurisdiction" (RoA P.294)**
>
> **"The trial court lacks subject matter jurisdiction over the IHOA Defendant's Counter – Complaint (to mitigate a violation; to collect a fine; and for attorney fees to mitigate the violation and collect the fines);" (RoA P.299)**
>
> **(Counter-Claim) "Paragraph 65 alleges only the possibility of fines and does not allege that the IHOA's Board actually imposed such a fine. Both paragraph 65 of the Counter – Claim and Section 13.3.1.3 of the predicate Bylaws provide only the possibility of a fine. ... it never alleges that any of the predicate requirements after the initial notice had been satisfied." (RoA P.294)**

From the hearing transcript, RoA P.97:

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

In Allstate Ins. Co. v. Global Med. Billing, Inc., 2013 U.S. App. LEXIS 7277 (6th Cir. April 8, 2013) the court held that if a plaintiff has failed to satisfy all pre-litigation provisions of an agreement not only does the plaintiff lack standing, but the court also lacks subject matter jurisdiction, citing Harold H. Huggins Realty, Inc. v. FNC, Inc., 634

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

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

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

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

At the hearing Appellant plead this issue to the Court stating

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

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

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

> **"an appeal is, is dependent on there being a violation, period, not, not on someone saying they want an appeal or not." RoA P.268 at 21.**
>
> **"We would call a Board meeting if you said, even if you said you wouldn't fix it, ... we would call a Board meeting in a case where we were afforded the opportunity to do that, and we would make sure, first of all, that we understood the facts and that we, we were doing -- we were behaving properly." RoA P.271 at 12**
>
> **"We would discuss it first to decide -- we wouldn't just do anything automatically in that case. ... we would discuss the particulars and decide what to do before -- we would discuss it before moving." – RoA P.270 at 11**

RESPONDENT STATED A BOGUS ISSUE ON APPEAL

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

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

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

Page "v" of Respondent's Brief incorrectly states that the second issue is –

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

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

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

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

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

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

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

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

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

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

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

SUBJECT MATTER JURISDICTION

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

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

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

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

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

In Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 495-96, 450 S.E.2d 616, 619 (Ct. App. 1994) the Court held that a matter was never before the court – and never actually decided – unless and

> "until issues actually and necessarily litigated and determined" ...
> "The law of the case ... applies only to issues actually addressed and decided at a previous stage of the litigation." citing Koppers Co., Inc. by Beazer East, Inc. v. Certain Underwriters at Lloyd's London, 993 F. Supp. 358, 364 (W.D PA 1999)
> " This (prior subject matter jurisdiction decision) determination does not, however, foreclose challenges to subject matter jurisdiction based on entirely independent grounds. The law of the case doctrine applies only to issues expressly decided by a court in prior rulings." citing See Bolden 21 F.3d at 31.
>
> "It is well-settled that issues relating to subject matter jurisdiction may be raised at any time." Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995); GNOC Corp. v. Estate of Rhyne, 312 S.C. 86, 439 S.E.2d 274 (1994); State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971).
>
> "A court that lacks subject matter jurisdiction lacks constitutional or statutory authority to hear the case ... If, at any point ... the court is held to lack subject matter jurisdiction all of its orders will be nullified and the parties' efforts will have gone for naught. Chicot County Drainage Dist. v Baxter State Bank, 308 U.S. 371, 376 (1940)

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

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

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

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

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

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

> "Because of these 'drastic' jurisdictional procedures, litigants may be 'disturbingly disarm[ed]'" citing Auburn Reg'l Med. Ctr., 133 S. Ct. at 824.

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

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

> "When the absence of subject-matter jurisdiction is noticed by, or pointed out to, the trial court, that court has no jurisdiction to entertain further motions or pleadings in the case. It can do nothing but dismiss the action forthwith. ... Any other action taken by a court lacking subject matter jurisdiction is null and void.'" op cit. (quoting Beach v. Director of Revenue, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996)).
>
> "It is well-settled that courts must determine as a threshold matter whether they have jurisdiction to decide the issues presented. Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued on Next Page)

CONCLUSION

1. The trial court lacked subject matter jurisdiction to award attorney fees sought by Respondent

2. The trial court lacked subject matter jurisdiction to award fines for violation of alleged covenant usage restrictions.

3. Appellant preserved the issues on appeal through the Motion to Vacate and through argument and evidence at the hearing.

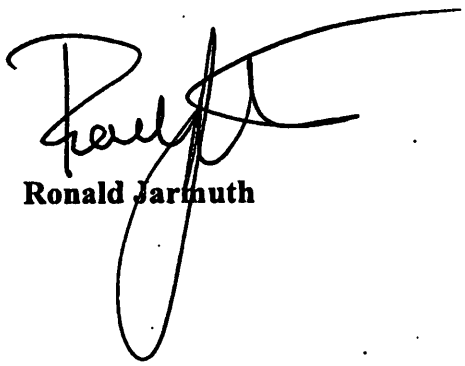
4. The attorney fees actually awarded was not to enforce the covenants and thus was never before the court as a claim. and the court had no authority to grant that relief.

5. Respondent's issues of discretion and the sufficiency of the pre-trial referral of the case to the Special Referee are irrelevant.

6. Respondent's Memo opposing the Motion to Vacate and at the Hearing on same, Respondent never controverted that the trial court lacked subject matter jurisdiction to award attorney fees for the actual purposes the fees were spent.

7. Respondent's Memo opposing the Motion to Vacate and at the Hearing on same, Respondent never controverted that the Respondent failed to comply with the pre-litigation provisions of the contract which was the basis for the counter – claim..

8. The provisions of the September 10, 2012 final order relating to award of attorney fees and award of usage violation fines must be vacated.



Ronald Jarmuth

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Appellant, Pro Se

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ronald Jarmuth, Appellant,

v.

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

Appellate Case No. 2016-001063

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2018-UP-275
Submitted May 1, 2018 – Filed June 27, 2018

AFFIRMED

Ronald Jarmuth, of Murrells Inlet, pro se.

Henrietta U. Golding and Alicia E. Thompson, both of McNair Law Firm, PA, of Myrtle Beach, for Respondents.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: 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,

except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . ."); *id.* ("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 . . . ."); *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006) ("Whether to grant or deny a motion under Rule 60(b)[, SCRCP,] lies within the sound discretion of the [circuit court]."); *id.* at 551, 633 S.E.2d at 502-03 ("Our standard of review, therefore, is limited to determining whether there was an abuse of discretion."); *id.* at 551, 633 S.E.2d at 503 ("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) ("[S]ubject[-]matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong."); S.C. Const. art. V, § 11 ("The [c]ircuit [c]ourt shall be a general trial court with original jurisdiction in civil . . . cases, except those cases in which exclusive jurisdiction shall be given to inferior courts . . . ."); S.C. Code Ann. § 15-53-20 (2005) ("Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."); S.C. Code Ann. § 14-5-10 (2017) ("The circuit courts . . . shall be courts of record . . . ."); S.C. Code Ann. § 15-53-30 (2005) ("Any person interested under a deed, . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the instrument . . . [or] contract . . . and obtain a declaration of rights, status or other legal relations thereunder."); Rule 53(b), SCRCP ("In an action where the parties consent, . . . some or all of the causes of action in a case may be referred to a . . . special referee by order of a circuit judge . . . ."); Rule 53(c), SCRCP ("Once referred, the . . . special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter.").

AFFIRMED.[1]

LOCKEMY, C.J., and WILLIAMS and KONDUROS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case Number 2009-CP-26-3596
Consolidated With
Case Number 2010-CP-26-11320

Appeal No. 2016-001063

Ronald Jarmuth ..... Pro Se Appellant,

v.

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

APPELLANT'S PETITION FOR REHEARING

Ronald Jarmuth
249 Pickering Drive
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843-314-4355
Appellant, Pro Se

The Appellant hereby Petitions the Court of Appeals to Rehear this Appeal En Banc pursuant to SCRAP Rule219 or by the Panel per SCRAP Rule 221.

Jarmuth's Rule 60 Motion and Argument at the Hearing on the Motion sufficiently invoked all dimensions of Rule 60(b)(4) SCRCP ("The Judgment is Void")

1. Paragraph 1 of the Motion invoked Rule 12(b)(1) SCRCP's provision relating to a "lack of subject matter jurisdiction" AND the unrestricted authority of Rule 60. The Panel should note that Rule 60 lacks a subdivision for lack of subject matter jurisdiction, instead folding it into the more general subdivision (b)(4) "The Judgment Is Void". A Void judgment goes beyond bringing a claim to a court without statutory jurisdiction. It includes the HOA's failure to sufficiently invoke that authority by stating a proper claim grounded in applicable law to which the HOA has standing to assert. Until a proper claim has been filed AND served the court can not exercise in an actual case the hypothetical jurisdiction it has per statute.

2. The requirement to put an individual on sufficient notice of a claim through a properly plead claim is not just procedural and statutory. It arises from Amendment V to the U.S. Constitution:

> **"No person (may) be deprived of life, liberty, or property, without due process of law"**

The requirement to (a) file a claim in a complaint where (b) adequately pleads the relief sought, the statutory, contractual, or common law right for the claimant to that relief, and the facts that implicate that right; (c) to formally serve the claim on the opposing side; and (d) have discovery in the matter arises because courts have construed these as all essential to satisfying the due process requirement. Arguing a case in the correct court is the second part of satisfying this metric and the Panel and Hearing Judge were amply and sufficiently informed that is all the HOA did.

3. Orders are void per Rule 60(b)(4) for a variety of reasons: a contractual clause that a case may NOT go to a court but must go to arbitration; a notice requirement before suing the state or a physician (and a requirement for a subscribing statement of another physician); limitations of actions; errors in venue; statutory immunity of officials or the state, etc. If bringing a case to the Court of Common Pleas was all that is needed for that court to uphold an order of that court then most of the civil rules would be "suggestions" not enforceable procedure.

4. While perhaps inarticulate, Jarmuth briefed and plead – at the motions hearing and in appellate briefs – all the reasons at law why the

underlying trial order (as to attorney fees and fines) is void as a matter of law (and a lack of applicable facts to invoke the authority to grant such relief).

5. Jarmuth's Motion to Dismiss raised all of these (and more) reasons why the absence of a plead claim, absence of supporting authority for relief, and absence / contradiction of facts meant that the trial court never had the authority to even hear these issues, let alone grant relief for them – that the order is void as to attorney fees and fines. Simply put, the authority of the court was never implicated and if it had been implicated, there is no legal or factual support for that relief. See Motion to Dismiss, pages 1 para 2 and page 2 para 5 through page 6 para 8(b).

6. But for the Special Referee (SR) not paying attention to the case the objectionable aspects of his order would not be before the Panel. The SR is ultimately responsible and accountable for entering provisions of an order which do not relate to any claim, which have no supporting legal authority or predicate facts, and which has not been subjected to such basic due process as discovery. The SR abused his discretion by ignoring the lack of a procedural, factual, and legal underpinning for his award of attorney fees and fines. The SR never

bothered to even read any of the pleadings – they remained locked in the clerk of court's office during the entire trial. He did not bother to read the exhibits after the trial to determine the facts and what legal conclusions they provide a sufficient legal predicate for. Again, one can not point the finger at the HOA because the order bears the SR's signature and the HOA never filed insufficient claims in a counter – complaint – they never filed a claim at all to object to. One might think that the record implies that the SR violated Canon 3(b)(2)'s mandate to be true to the law but a conclusion by the panel is not needed here. It is sufficient to observe what the SR and hearing judge did not – that the Order was void from its inception because of procedural and legal frailties.

> **Canon 3(b)(2) B. Adjudicative Responsibilities. ... (2) A judge shall be faithful to the law**

The Panel and Hearing Judge Failed to Apply the Legal Notion That Bringing a Case to a Court of General Jurisdiction is in itself insufficient to perfect subject matter jurisdiction.

7. Before a court (judge) can proceed judicially, jurisdiction must be complete.

A plaintiff must plead a cause of action and until the plaintiff does so the court has no basis upon which to rule judicially.

8. The two halves of subject matter jurisdiction are (a) the statutory or common law authority the action is brought under (the theory of indemnity) and

(b) the evidence of credible evidence of predicate facts regarding the injury (the cause of action). Without both the court lacks subject matter jurisdiction and lacks adjudicative authority.

9. Applicable case law that subject matter jurisdiction is not complete, and the judgment is void are:

> **Absence of a particular claim in the complaint Brown v. VanKeuren, 340 Ill. 118, 122 (1930)**
>
> **Where a claim adjudicated was not presented to the court through proper pleadings, Ligon v. Williams, 264 Ill. App.3d 701, 637 N.E.2d 633 (1st Dist. 1994).**
>
> **Where a claim does not state a cognizable cause of action against the adversary party, Charles v. Gore, 248 Ill.App.3d 441, 618 N.E.2d 554 (1st Dist. 1993).**
>
> **A judge does not follow statutory procedure, Armstrong v. Obucino, 300 Ill. 140, 143 (1921**
>
> **Violation of due process, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938); Pure Oil Co. v. City of Northlake, 10 Ill.2d 241, 245, 140 N.E.2d 289 (1956); Hallberg v. Goldblatt Bros., 363 Ill.25 (1936);**
>
> **the court exceeded its statutory authority, Rosenstiel v. Rosenstiel, 278 F.Supp. 794 (S.D.N.Y. 1967).**

10. Further case law ties an adjudication without statutory, contractual, or common law authority to an automatically void order from its inception. On review a court does not determine the order is void. It observes the order has always been void:

> **"without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers." Elliot v. Piersol, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828);**
>
> **"A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. Pennoyer v. Neff, 95 U.S. 714, 732-733 (1878)." World-Wide Volkwagen Corp. v. Woodson, 444 U.S. 286 (1980)]**
>
> **Judgment is a "void judgment" if court that rendered judgment ... or acted in a manner inconsistent with due process. Klugh v. U.S., D.C.S.C., 610 F.Supp. 892, 901.**
>
> **"A void judgment which includes judgment entered by a court which ...**
> **lacks inherent power to enter the particular judgment, ... can be attacked at any time, in any court, either directly or collaterally," Long v. Shorebank Development Corp., 182 F.3d 548 (C.A. 7 Ill. 1999)**
>
> **A Void judgment is one where court's ... entry of order violated due process, U.S.C.A. Const. Amend. 5 - Triad Energy Corp. v. McNell 110 F.R.D. 382 (S.D.N.Y. 1986).**
>
> **Judgment is a void judgment if court that rendered judgment ... acted in a manner inconsistent with due process, Fed. Rules Civ. Proc., Rule 60(b)(4), 28 U.S.C.A., U.S.C.A. Const. Amend. 5 - Klugh v. U.S., 620 F.Supp. 892 (D.S.C. 1985); Eckel v. MacNeal,**

628 N.E. 2d 741 (Ill. App. Dist. 1993).;

Void judgment is one entered by court that lacks the inherent power to make or enter the particular order involved, and it may be attacked at any time, either directly or collaterally; such a judgment would be a nullity. People v. Rolland, 581 N.E.2d 907, (Ill.App. 4 Dist. 1991; (or where the court lacked) "the inherent power to enter the particular order or judgment" In re Adoption of E.L., 733 N.E.2d 846, (Ill.App. 1 Dist. 2000).

11. As it stands now the Panel has ruled strictly that Rule 12(b), lack of subject matter jurisdiction by reason of being in the "right court" does not control, and has ignored the alternative basis for dismissal brought by Jarmuth – Rule 60(b)(4) the Judgment is Void. This is a waste of judicial resources because as written res judicata does not apply since the panel has not rendered a decision on the Rule 60 (void order) issue, meaning that the panel will see the case again on a Rule 60(b)(4) Motion that the Order is void. The Panel should do the right thing and acknowledge that the law mandates recognizing that the decision awarding attorney fees and fines was void from its inception.

The Judge at the April 27, 2016 Hearing Lacked the Authority to enter a decision on June 6, 2016 – That Order is Void

12. The "long order" entered by Hon. Judge Culbertson on June 6, 2016 is void as a matter of law because a Notice of Appeal was filed on May 17, 2016 from the April 27, 2016 Form 4 Order entered by that same judge. As a matter of law there is no June 6, 2016 Order

following a hearing for the appellate panel to affirm.

13. This was noted in the body of Jarmuth's June 24, 2016 Amended Notice of Appeal and on Page 2 of Jarmuth's Appellate Brief. On May 31, 2016 the (then) Chief Administrative Judge, Hon. Steven John, entered and published an order noting that the Circuit Court lacked jurisdiction to take any further action in the case due to the appeal. Hon. Judge Culbertson ignored the cautionary order and the law when entering the long order. Because of the uncertainty of how the Appellate Court would construe and depend on the long order, Jarmuth addressed the deficiencies of the long order. That argument was not a waste because with a bare Form 4 Order, which made no findings of fact nor conclusions of law, the decision (as Jarmuth noted) was before the Court for the first time, not de novo (Jarmuth Brief, p.2 bottom).

The Panel abused it's discretion when it failed to note that the hearing judge's order is procedurally void because the motion to dismiss was not properly before that judge.

14. The April 27, 2016 Form 4 Order entered by Hon. Judge Culbertson is void because he "stole the case" from the assigned judge and it was not properly before him. On June 15, 2012 the case, which was scheduled to be tried before Hon. Judge John (it was on his trial roster for January 17, 2012 but never called) was referred to Special

Referee Ralph Stroman for trial AND for hearing of all post-trial motions. When Jarmuth filed a post-trial motion citing numerous issues with how Referee Strohman conducted the trial and with the final order, Referee Strohman entered an Order of Recusal on October 17, 2012 specifically transferring the hearing of post-trial motions to Hon. Judge John. This is why another post-trial matter came before Hon. Judge John on May 31, 2016 and occasioned the "no jurisdiction" order entered that day. Other matters remain pending before Hon. Judge John. A Rule 60(b) motion is always heard before the judge who entered the final order, primarily because that Judge has an understanding of why he construed the final order which is under protest. Immediately after the final Order was entered in September, 2012 Hon. Judge John heard the post-trial pleadings which followed. Hon. Judge Culbertson was "a stranger" to the matter and knew nothing about the case sufficient to comprehend how subject matter questions raised at the 2016 hearing related back to the rationale underlying the 2012 order. Hon. Judge Culbertson "stole" the case; the Order assigning it to Hon. Judge Johns was and still is in force and continues to be acted on by Hon. Judge John.

The Panel Misunderstood That the Granting of Relief Without A Claim and Without a legal entitlement is reversable Judicial Error

15. It's all about trial court abuse of authority where it is lacking by asserting and granting relief never plead by the HOA which the HOA would not have been entitled to if plead in a claim.

16. The Panel ignored that the lack of authority to grant the relief objected to is rooted in judicial over-reach, not HOA pleading error. It was plainly before the Panel and the Hearing Judge that the Trial Judge (Special Referee (SR)) granted relief without a corresponding claim in a complaint), without statutory or contractual authority entitling the HOA to that relief, and without any form of notice that the relief was even contemplated (no notice, no discovery, no hearing on the merits). The Panel and the Hearing Judge were aware that the unrefuted evidence was that the transactions behind the two checks had nothing to do with the claims (or transactions) being litigated. The Panel and Hearing Judge ignored that the HOA at the hearing never asserted a statutory or contractual basis for any of the relief sought or that Jarmuth erred in any way as to the total lack of authority – and astoundingly, both ignored that even seeking reimbursement for Fair House Act legal defense expenses is a crime (retaliation) in itself, even if

made in a court proceeding, and that no set of facts, contract provisions, common or statutory law allows the award of defense legal costs. Such SR mis-conduct calls in question the judgment of the SR to fairly and logically adjudicate case at the time of the trial – which the public might think is behind the Panel never saying a word about relief in an order unrelated to any claim and without supporting statutory or contractual authority.

The Panel's Assertion that Jarmuth erred by not filing a Rule 12(b) Motion at the onset of the case is an abuse of discretion and a mis-reading of the law

17. The Panel erroneously points to procedure which is applicable only if a claim has been asserted by a party in a complaint (or counter – claim). This is clear because the panel started its order by saying:

> **"Affirmed pursuant to ... Rule 12(b), SCRCP ("Every defense . . . to a cause of action in any pleading ... shall be asserted in the responsive pleading")**

18. Clearly the panel "blame shifted" the award of relief without authority to Jarmuth ignoring a flawed claim in an HOA counter-claim. Except the over-reach was the SR in his post-trial final order.

19. Pray tell how the opposing party can ascertain whether any of the grounds for a Rule 12(b) motion opposing a claim are applicable if there is no claim? The filing of a Rule 12 answer is clearly predicated on

being served a claim in a complaint:

> **"A defendant shall serve his answer within 30 days after the service of the complaint upon him" – Rule 12(a) When Served**

20. Clearly there was an "abuse of discretion" by the SR and by the hearing judge and by the Panel.

> **"error of law or ... based on factual conclusions that are without evidence"**

21. At the hearing and in the HOA's motion and appellate papers the HOA never controverted that the SCHA and Central Electric matters were never part of the actual case, and that they were never mentioned in a pleading. The HOA's Response Brief never mentioned a statutory or contractual provision entitling the HOA to either.

22. Ignoring that the HOA Brief was silent about the evidence that Check #2 was for Central Electric, accepting the HOA's version of the facts as true the Court had no statutory or contractual authority from which to reimburse the HOA for either.

23. The HOA's Response Brief p.7 stated that both attorney checks were spent to defend the 2009 case and defending a SCHA FHA Discrimination Investigation two years before a covenant violation was alleged to have happened. The HOA's response brief conceded that no additional money was spent to enforce the covenants / cause a violation

to cease or to "collect fines".

24. At Response Brief p.7 the HOA claimed that the 2009 check (#1, actually the SCHA deductible per the evidence in the HOA's own ledgers) was spent to DEFEND the covenants. The HOA wrote:

> **"The defense of the Association was covered under its director's and officer's insurance; the Association paid a $2,500.00 deductible in connection with defending the 2009 Case. (R. p. 279)."**

25. The HOA's own brief quoted the covenants which state that attorney fees are only permitted if actually spent to sue to eliminate an actual covenant violation. The covenants do not provide authority which the court could look to reimburse attorney fees the HOA spent when sued. [1]

26. At Response Brief p.7 the HOA claims that the 2010 check #2 was spent to DEFEND against a SC Human Affairs Discrimination Investigation (per the HOA's ledgers the 2010 check was spent for legal expenses related to a Central Electric Easement issue having nothing to do with Jarmuth). The HOA brief says (p.7)

> **"Jarmuth filed a complaint with the South Carolina Human Affairs Commission (hereinafter "SCHAC") alleging that the Association discriminated against him in connection with denying his application for a swing set. (R. pp. 198-201).**

---

1 At all times the HOA referred to both checks as legal expenses to "defend" not to advocate or secure any relief.

The Association filed a response and paid an additional $2,500 deductible in defending the matter"

Neither the HOA counter-claim, nor the trial court's final order, nor the HOA's Response Brief on appeal cite any statutory or contractual provision upon which the HOA could ask for these costs. Certainly no such provision has ever been plead and the Panel and Hearing Judge were clearly told this. The SCHA matter was not part of the case at trial and a matter of fact was never a part of any civil case at all. Certainly this could not invoke a covenant usage violation because the swing set involved was never built nor even alleged to have been built. If it was, the only place such costs could be requested would have been in that separate, but non-existent case. So the trial judge made believe that there was a count in the case before him and a covenant violation related to the SCHA matter and that the HOA sued to cause the non-existent swing set to non-exist. Worse, South Carolina law provides that no one gets costs from an SCHA investigation and only a prevailing discriminated against plaintiff gets costs in a civil case alleging FHA Discrimination. Far worse, federal law provides that going to court to seek FHA investigation related costs constitutes FHA Retaliation, a federal crime. The panel and the hearing judge were made aware that anyone involved in the award of FHA related attorney fees had

committed a federal civil rights violation – to include judges.[2].

27. The Final Order following the trial stated that Special Referee understood that the checks were paid to DEFEND matters, not to enforce anything. He said so in his final order. However, the Judge cited the covenant provision related to enforcing covenants against violations -and he said that the 2009 check was for the SCHA matter which had nothing to do with the case and never cited any authority to reimburse the HOA for that. This was pointed out to the hearing judge whose order was silent on this enigma. Plaintiff's brief made the absence of authority clear to the panel. It is an outrageous abuse of discretion for these judicial entities to grant relief for matters outside the case and where there not only is no authority but written and case law prohibiting this. To put it in the context the panel defined as an abuse of discretion, at all levels – It is "An abuse of discretion"!

- COVENANT VIOLATION FINES -

The Panel and Hearing Judge Abused their Discretion by Ignoring the Absence of Predicate evidence of a "Covenant Violation" and absence of an enforceable contract provision

28. The award of fines and the decision by the hearing judge and panel to ignore lack of authority and lack of supporting facts is likewise

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2 Using official capacity to retaliate against a citizen from the exercise of a statutory right in general and an official act taken as a consequence of filing an FHA complaint..

an abuse of discretion on all levels.

29. As was pointed out in all the appellate briefs, in the hearing briefs, and in the final order, the only authority for the HOA to seek "fines: is after the HOA Board determines on the record [3] that there has been an actual violation of usage restrictions in the covenants, when after notice a homeowner refuses to eliminate the violation, and when thereafter on the record the HOA Board votes to impose a fine. The trial and hearing judges and the panel abused their discretion by ignoring the absence of evidence that the HOA Board actually determined a covenant violation and actually imposed a fine – but they further abused their discretion when confronted with actual documentary evidence that the Board never did either [4]. The necessary fact predicate to invoke contract authority for a fine is absent. All are aware the HOA never plead nor suffered any direct damages from a covenant violation and none was plead.

30. The Covenants are at Exhibit 547 RoA P.737. The Usage Restrictions begin on p.16 of the Covenants RoA p 3754. The Restriction on Fences is:

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3 Per the HOA Bylaws and the SC Non-Profit Corporation Act, on the HOA Board's official minutes perpetuated in its permanent files.
4 HOA Board Meeting Minutes. At trial the HOA President testified that a fine was owed but never testified that a violation was determined or a fine imposed.

> **Section 7.4. No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls ... Said fences shall be made of materials approved ... by the ... Architectural Review Board ... No fences shall be permitted which obstruct the view of any stream or body of water, golf courses or recreational amenity when viewed from inside any other Unit, or which interferes with the playing of golf ... .**

Jarmuth requested to build "a fence" (not a wall) using the same vinyl privacy panels previously approved for dozens of homes in the development. But Jarmuth never erected that fence. No one claimed he erected that fence. Jarmuth at all times denied he erected a fence or a wall. The HOA never presented any evidence or <u>first hand</u> [5] witness to say that Jarmuth erected either a wall or a fence nor that Jarmuth did any site preparation work. Without any evidence or fact-witness statement the SR found that Jarmuth erected a wall and the hearing judge and panel ignored the absence of the essential facts before even trying to apply a legal right as to fines. [6]

31. The ARB Guidelines about fences and walls are:

> **III. Homeowner Guidelines. S. Fences.**
> **1. No fence or fence wall shall exceed a height of four feet. No fence can extend beyond the setback lines as indicated on each homeowner's plat/survey.**
> **2. Pre-finished black or white steel, aluminum and vinyl are the recommended materials. ... No chain link fences are permitted.**

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5 The trial testimony of William Freiboth was hearsay.

6 HOA pleadings state that Jarmuth did some site preparation work ("a foundation") for the never-erected fence but ground work is not a fence or a wall and is not prohibited by ARB Guideline or Covenant Usage Restrictions.

3. No fence may be constructed on the portion of the unit between the single family dwelling and the golf course parcel...
4. Fences will not be constructed in the front yard of any unit.
5. No fences shall be permitted which obstruct any view from inside or outside any other unit, or which interferes with the playing of golf ....
-- Exhibit #385 RoA P. 3589

32. The Panel and Judge ignored that the HOA counter-claim for "fines" plead without establishing a factually based contractual entitlement was just a bare demand. [7]

> **"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" – Panel Order**

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7 The hearing judge and the Panel were shown uncontroverted evidence that fences and walls are permitted under the covenants and more importantly that the HOA board never determined a violation occurred and never imposed a fine; and there was no evidence a wall was actually erected anyway. The HOA never plead any damages attributable to Jarmuth for any reason, plead or unplead.

Conclusion

1. Both orders following the hearing on the Motion to Dismiss are void on procedural grounds. For the "long order" (the second) the court lacked case jurisdiction at the time that order was entered. Because the entire panel review was predicated on having a valid "long order" before them – the panel did not review the matter "de novo" – the panel's decision is likewise void.

2. As a matter of law the aspects of the trial court's final order granting attorney fees and fines was legally void at its inception and must be reversed.

WHEREFORE Appellant, for just cause shown, Moves the Court of Appeals to Rehear this Case and to Reverse its Affirmation on the issues presented.

Ronald Jarmuth, Appellant Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
July 10, 2018

EXHIBITS

None added.

AUTHORITIES

Authorities	Page
Rule 219 SCACR	2
Rule 221 SCACR	2
Rule 12(b) SCRCP's	2, 6, 9, 10
Rule 60 SCRCP	2. 3, 6, 8
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Charles v. Gore, 248 Ill.App.3d 441, 618 N.E.2d 554 (1st Dist. 1993)	5
Eckel v. MacNeal, 628 N.E. 2d 741 (Ill. App. Dist. 1993).	6
Elliot v. Piersol, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828)	5
Hallberg v. Goldblatt Bros., 363 Ill.25 (1936)	5
In re Adoption of E.L., 733 N.E.2d 846, (Ill.App. 1 Dist. 2000)	6
Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938)	5
Klugh v. U.S., 620 F.Supp. 892 (D.S.C. 1985)	6
Klugh v. U.S., D.C.S.C., 610 F.Supp. 892, 901	6
Ligon v. Williams, 264 Ill. App.3d 701, 637 N.E.2d 633 (1st Dist. 1994)	5
Long v. Shorebank Development Corp., 182 F.3d 548 (C.A. 7 Ill. 1999)	6
People v. Rolland, 581 N.E.2d 907, (Ill.App. 4 Dist. 1991)	6
Pure Oil Co. v. City of Northlake, 10 Ill.2d 241, 245, 140 N.E.2d 289 (1956)	5
Rosenstiel v. Rosenstiel, 278 F.Supp. 794 (S.D.N.Y. 1967)	5
U.S.C.A. Const. Amend. 5 - Triad Energy Corp. v. McNell 110 F.R.D. 382 (S.D.N.Y. 1986)	6
World-Wide Volkwagen Corp. v. Woodson, 444 U.S. 286 (1980)	5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2009-CP-26-3596
Consolidated With
Case No.: 2010-CP-26-11320

Appeal No.: 2016-001063

RECEIVED
JUL 23 2018
SC Court of Appeals

Ronald Jarmuth, ... *Pro Se* Appellant,

v.

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

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

The Respondents, The International Club Homeowners Association, Inc. ("Association"), Rosemary Toth, and K.A. Diehl & Associates, Inc. (collectively hereinafter referred to as "Respondents"), hereby submit this Return to Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc* dated July 10, 2018 ("Petition"). This Court should deny the Petition, because it raises no issues that the Court either misapprehended or overlooked, unpreserved issues are raised for the first time on appeal, and sufficient grounds do not exist to justify a rehearing *en banc*.

BRIEF PROCEDURAL HISTORY

Consolidated Case Nos. 2009-CP-26-3596 and 2010-CP-26-11320 were tried by a special referee in August, 2012. The final order (hereinafter "Final Order") awarding a judgment to the Association on its counterclaims under the Declaration of Covenants for the International Club Community (hereinafter "Declaration") was affirmed on appeal in 2015. Appellant now seeks to appeal a 2016 order (hereinafter "Order") entered by the circuit court denying his post-appeal Motion to Dismiss the Association's counterclaim.

STANDARD OF REVIEW

The purpose of a petition for rehearing is not to try the case for a second time or to argue a party's appeal to the Court again. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 173, 167 S.E. 234, 238 (1933). The purpose of a petition for rehearing is to bring those matters to the Court's attention that it "overlooked or misapprehended." Rule 221(a), SCACR. Petitions for rehearing are usually "dismissed with a simple order ... for the reason that they contain nothing but a 'rehash' of what the losing party has said before, matters which the Court has already considered well and disposed of." Arnold, 168 S.C. at 173, 167 S.E. at 238.

ARGUMENT

I. No Facts or Arguments Were Overlooked or Misapprehended.

This Court should deny the Appellant's Petition for Rehearing because it raises no issue this Court either overlooked or misapprehended. The Petition merely rehashes the same arguments the Appellant made in his brief.

Appellant contends that the Association did not properly plead a counterclaim; thus, no subject matter jurisdiction existed to award fines and attorneys' fees and costs under the Declaration. This argument was addressed on page twenty-seven (27) of Appellant's brief. The Court of Appeals properly affirmed the Order under SCACR, Rule 220.

Next, Appellant argues that this Court erred in citing to SCRCP, Rule 12(b) in affirming the Order under SCACR, Rule 220. The Order was properly affirmed pursuant to Rule 12(b). The Appellant did not assert this defense in reply to the Association's counterclaim.

Appellant also argues that this Court erred in ignoring his argument that the attorneys' fees and costs recovered were related to "Central Electric", as the Association did not address this argument in its brief. The Court of Appeals need not address any argument that is manifestly without merit under SCACR, Rule 220.

The next argument is that the Declaration is not a binding contract and does not grant the Association with the right to award fines and attorneys' fees and costs. The Appellant made the same argument on pages thirty-six (36), thirty-seven (37), and thirty-eight (38) of his brief. This Court properly affirmed the Order in light of this argument under SCACR, Rule 220.

The Court of Appeals should deny the Petition because it raises no issues that were overlooked or misapprehended. Instead, in his Petition, the Appellant makes the same arguments that he has made in the multiple appeals in these cases.

II. New Issues Are Not Preserved On Appeal.

Appellant raises new, unpreserved issues for the first time in his Petition.

The first step in preserving an issue for appellate review is to actually raise it to the lower court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." Id.

The following issues were not raised or ruled upon by the trial court or set forth in his brief to this Court: 1) the Association's counterclaim did not provide sufficient notice and was a violation of due process under the Fifth Amendment to the U.S. Constitution; 2) the special referee abused his discretion in entering the Final Order Case Nos. 2009-CP-26-3596 and 2010-CP-26-11320; 3) the Order is void under SCRCP, Rule 60(b)(4); 4) the circuit court did not have subject matter jurisdiction to enter the Order.[1] These issues are not preserved on appeal; therefore, the Petition should be denied as to those grounds. Furthermore, under SCACR, Rule 220, this Court need not address points which are manifestly without merit.

III. No Grounds Justify Rehearing *En Banc*.

A rehearing *en banc* is only appropriate in order to maintain uniformity of the Court's decisions or where there is an issue of exceptional importance. See, Rule 219,

[1] In fact, as to the third issue, the Appellant asserted in his brief that the lower court "had the authority to rule on the original lack of subject matter jurisdiction to grant relief for the counter-claim" at the April 27, 2016 hearing. Appellant's Brief, p. 1.

SCACR. Here, the Court's decision is consistent with the South Carolina Rules of Civil Procedure and statutory and case law regarding subject matter jurisdiction. No exceptional issue is presented in this case. It fits within well-established jurisprudence on jurisdictional issues. Accordingly, *en banc* review is not warranted.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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Myrtle Beach, South Carolina
Date: July 20, 2018

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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v.

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

APPELLANT'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR REHEARING

Ronald Jarmuth
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Appellant, Pro Se
July 26, 2018

Petitioner / Appellant Ronald Jarmuth replies to Respondent's Return to the Petition for Rehearing.

I. Panel's Failure to Conduct De Novo Review of Motion to Dismiss Is Clear Abuse of Judicial Discretion Meriting Rehearing

The motion below to dismiss per SCRCP Rule 60 stated that the Final Order (as to attorney fees and fines) was void as a matter of law. Appellate review of trial court interpretations / application of law is subject to de novo review to determine what the correct applicable law is and whether it was correctly applied, not an abuse of discretion standard.

A de novo review is mandated when the law / contract terms are clear and when applied to a set of facts, only one outcome is possible. The hearing judge and the Panel committed an abuse of discretion.

> **"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." Rabkin v. Oregon Health Sciences Univ., 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); see also In re Korean Air Lines Co., Ltd., 642 F.3d 685, 698 n.11 (9th Cir. 2011).**

A trial court abuses its discretion when:

> **court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. See Jeff D. v. Otter, 643 f.3d 278 (9th Cir. 2011) (citing Casey v. Albertson's Inc., 362 F.3d 1254, 1257 (9th Cir. 2004)).**

court rules in an irrational manner. See Chang v. United States, 327 F.3d 911, 925 (9th Cir. 2003); see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 618 F.3d 1066, 1084 (9th Cir. 2010) (concluding district court did not rule in an irrational manner).

court makes an error of law. See Koon v. United States, 518 U.S. 81, 100 (1996); Strauss v. Comm'r of the Soc. Sec. Admin., 635 F.3d 1135, 1137 (9th Cir. 2011) (citing Koon); Forest Grove School Dist. v. T.A., 523 F.3d 1078, 1085 (9th Cir. 2008) (applying Koon); United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002) (applying Koon). Thus, the court abuses its discretion by erroneously interpreting a law, United States v. Beltran-Gutierrez, 19 F.3d 1287, 1289 (9th Cir. 1994), or by resting its decision on an inaccurate view of the law, Richard S. v. Dep't of Dev. Servs., 317 F.3d 1080, 1085-86 (9th Cir. 2003). See also Fox v. Vice, 131 S. Ct. 2205, 2211 (2011) (recognizing trial court has wide discretion "but only when, it calls the game by the right rules").

II. "Attorney Fee Facts" The HOA Told The Panel In Their Brief Which Implicate Abuse of Discretion

On p.15 of the HOA Response Brief to the Panel the HOA told the Panel that the two attorney fee checks were paid to "defend" the FHA matter and to "defend" Jarmuth's civil complaint filed against the HOA.

> Those fees were paid in the form of two $2,500.00 deductibles to the undersigned counsel, the attorneys retained to defend the Association in the various matters filed by Jarmuth under the Association's director's and officer's insurance policy. (R. pp. 274-290). The first amount was paid after the 2009 Case was filed and the second amount was paid after SCHAC matter was initiated. (Id.) No separate deductible was required for the 2010 Case, because it was related to the previous matters filed. (Id.)

The HOA told the panel they paid nothing to "enforce" anything. The

abuse of discretion at the trial and appellate levels is that there is no statute, rule, or contract provision allowing reimbursement of "defense" costs and this is settled law.

The applicable law or contract provisions (all of which were ignored by the hearing judge and the panel) are:

a. <u>FHA Attorney Fees</u>. Is there any statute or rule which permits a respondent to Fair Housing Discrimination Investigation to recover the costs of legal representation concerning that investigation?

The clear answer is NO. Not only that, only a prevailing Complainant in a Fair Housing Discrimination ACTUAL COURT CASE (not a prevailing Defendant) may have an award of attorney fees (black letter law). There never was a discrimination court case at all and if there was, the HOA would have been a defendant ineligible for attorney fees whether it prevailed or not. Not only that, as a matter of federal law, demanding reimbursement of attorney fees is the crime of FHA retaliation and federal courts routinely reverse state court orders with the effect of enabling retaliation. Clearly there was and is no law permitting the trial court to award FHA attorney fees to a respondent to an investigation. This is a matter of clear law and thus mandated de novo review and is a clear abuse of discretion at the trial court level.

b. Civil Case Attorney Fees.

(1) There is no statute or common law provision permitting a defendant to recover attorney fees in a civil case. This is settled law.

The Form 4 Order 1 was obviously silent on this. This being the only valid order flowing from the hearing, a de novo review is mandated. A court speaks through its orders and the Panel has no way of discerning how the hearing judge considered this issue. The Long Order [2] was silent on this controlling legal issue meaning the hearing judge failed to determine the controlling law.

(2) There is no contract provision permitting the award of attorney fees to DEFEND a case brought against the HOA.

In the HOA's Response Brief to the Panel the HOA stated that the only provision for the HOA to recover attorney fees and costs is if the HOA has to pay additional fees / costs specifically to enforce the covenants after an actual covenant usage violation. Whether there was such a violation is immaterial because the HOA has admitted it paid nothing to undo a violation (if there was one). On page 1 of their brief,

1 April 27, 2016
2 June 6, 2016

footnote 1, they stated that the recovery provision applies to enforcement, not defense:

> Section 8.9 provides that the Association is entitled to attorneys' fees incurred in enforcing the Declaration: "[s]hould any person employ counsel to enforce ... all costs incurred in the enforcement, ... shall be paid by the Owner ... ." (R. p. 124). Moreover, the Bylaws of the Association, § 13.4, echoes § 8.9 of the Declaration: "[s]hould the Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, ineluding court costs and reasonable attorneys' fees, shall be paid by the Owner." (R. p. 130).

c. HOA Fines.

(1) Exclusive authority to grant fines is in Bylaws Section 13.3.

In paragraph 14 page 5 of the "Long Order"[3] the hearing judge acknowledged that the only authority for the Court to grant fines to the HOA is in paragraph 13.3 of the Bylaws. That provision was before the Court as Jarmuth's Exhibit #9. On page 6 paragraph 1 of the "long order" the judge declared that the final order conformed to the legal provisions of the contract (bylaws). An erroneous application of the clear terms of the contract is an error of law, thus an abuse of discretion, and is subject to de novo review.

Also before the hearing judge and the Panel was Jarmuth's

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3 But the "long order" does not legally exist and can not be affirmed by the Panel, which, lacking any findings of fact or conclusions of law in a valid order following the hearing, must conduct its own de novo review.

hearing Exhibit #10, the minutes of the HOA Board's May 5, 2010 Board Meeting in which the HOA Board clarified any ambiguity which might attach to the procedures of Bylaws Section 13.3, Enforcement – Procedures. In Section VI "New Business" Paragraph C "New Violation Policy" the HOA Board declared that final step in enforcement "shall be a hearing scheduled" as is required by Bylaws Section 13.3. This document was before the court at the trial but was ignored.

Also before the hearing judge was Jarmuth's hearing Exhibit #11, the minutes of the November 10, 2011 meeting of the HOA Board of Directors. Jarmuth's hearing pleadings, hearing testimony, and appellate brief pointed out that per the minutes the HOA board never determined that a violation occurred nor imposed a fine.

(2) The Bylaws As Exclusive Authority for Fines. It is uncontroverted that the only authority for the court to award fines to the HOA arises from Section 13.3 of the Bylaws.

The issue of law before the court(s) is whether there is authority for the HOA to impose a fine on a member without holding a hearing to which the putative offender is invited. Imposing a fine is an official act of the non-profit home owners association and is governed by the Non-

Profit Corporation Act.

Section 33-31-821 of the Act provide that no action taken by the Board without a meeting is effective unless the HOA Board's Meeting Minutes reflects a consent "on the record to the action taken without a meeting. Thus there is no official act of a non-profit corporation's board unless it can be found in the minutes, whether the action is taken in or out of a board meeting. There is no record of Board action of any kind taken against Jarmuth.

Section 33-31-1601 of The Act provides that the HOA's permanent records must include a record of all actions taken by the Board, with or without a meeting, and by Committees of the Board. Per the trial and hearing courts and per the HOA, the imposition of fines was an "official act" performed specifically per its Bylaws Section 13.3. Yet such an alleged act does not legally exist when it is not found in the official records of the HOA. The absence of such a record has been asserted by Jarmuth in the hearing and in this appeal. The HOA has never controverted that there is no record of the HOA Board ever taking any action against Jarmuth. Instead, the HOA and the hearing judge argued that official actions is "optional" that the HOA Board could conduct an official and binding act "off the record". This is an

abuse of discretion because it violates the letter of the Non-Profit Corporation Act and Section 13.3 of the Bylaws.

(3) The Misuse of the phrase "may" in the Bylaws.

First, the Panel must know that at the trial the HOA President, William Freiboth - in direct examination from the same attorneys representing the HOA in this appeal - testified that the HOA did in fact hold a hearing at which time the HOA imposed a fine. The minutes of the November 10, 2011 meeting at which the fines were supposedly imposed were unavailable to Jarmuth (at trial) because they were never produced in discovery and were in fact also hidden from the members at large. Per Jarmuth's motion pleadings, they became available four years later when Jarmuth tricked a management company employee into providing it (in 2016).

The "long order" following the hearing reflects that the hearing judge refused to consider the language of Bylaws Section 13.3.

> **In para 14 page 5 of the "long order" the court wrote that**
>
> **The Special Referee also found in the Final Order that "the Defendant HOA '<u>may</u>' provide the Owner with a hearing" under Section 13.3 of the Bylaws, but that a hearing was not required before fines were levied.**
>
> **The court then added it would not see if this was an "error of law"**

holding that re-interpretation of controlling law is barred by the "law of the case" (long order p.6 para 11) meaning that there is no review if a court misapplies or makes up a law.

In considering the import of "may" the Panel should look to the analog of a criminal trial. A Prosecutor "may" bring someone to trial but unless he does so and obtains a conviction, he can not impose a penalty without prevailing in a trial. The trial is optional but it is a mandatory predicate to a penalty. There is the exact same parallel in Section 13.3 of the Bylaws. The board "may" hold a hearing but unless it does it can not impose a penalty. At the HOA Boards May 5, 2011 meeting, hearing Exhibit #10, the HOA Board clarified that the correct interpretation of Bylaws Section 13.3 is that no sanction can be imposed without a hearing and the Board mandated such a hearing (it determined such a meeting is not "may / optional").

> Bylaws Section 13.3
> 13.3 Procedure. ... the Board shall not impose a fine, ... 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, ... the Board may serve such Owner with written notice of a hearing to be held ... .
> 13.3.3 The hearing shall be held in executive session of 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.

While there is a clear procedure to impose a fine WITH a hearing, there is no alternative provided to impose fines without a hearing. The language "Board shall not impose a fine, ... unless and until" and "Prior to the effectiveness of any sanction here under" is meaningless if the entire mechanism of the hearing on notice and on the record could be skipped. There is also the legal contradiction of the HOA Board's May 5, 2011 prior official determination that a hearing is always required and the requirement of the Non-Profit Corporation Act for a record of official decisions.

Clearly the hearing judge abused his discretion by failing to consider what the contract actually provides, and likewise the trial judge committed an abuse of discretion by misapplying the contract language which is clear and unambiguous. The Panel likewise committed an abuse of discretion by not considering the interplay of the Covenants, the Non-Profit Corporation Act, and the lack of a record of an HOA official act in determining whether all the legal predicates had been satisfied to provide the Court authority to grant fines.

It is significant that no first hand witness or photographic

evidence was ever produced to prove that a covenant usage violation had occurred. There was only hearsay testimony that a wall had been built, opposed by first hand testimony by Jarmuth that he had not built a wall or a fence. This has always been a clearly erroneous conclusion of fact. No admissible evidence.

III. Return is Not Permitted and is thus Invalid.

SCRAP Rule 221(a) (revised May 1, 2018) provides that

> "No return to a petition for rehearing may be filed unless requested by the appellate court."

The HOA's return is thus void and must be treated as "lodged, not filed" and must be ignored. Respondent is represented by a major law firm, McNair Law, with many offices and many attorneys. The Return was mailed / filed July 10, 2018. This was more than seventy (70) days after the rule revision came into effect. There is a presumption that McNair Law knew about the rule change, and that the filing of the Return in spite of the rule was not an oversight but intentional. If Respondent desired to file a Return the proper procedure would have been to file a motion, which they did not do. The proper burden is not for Petitioner to request (by motion) that the Court enforce the rule, nor for the Court to "stand in the shoes of the Respondent" to determine whether the prohibited Return is

meritorious, bur rather for the Respondent as the non-conforming party to file a separate motion explaining why the circumstances are so exceptional that the rule prohibiting returns should be ignored.

IV. The only valid Lower Court Order had no findings of fact nor conclusions of law - Panel Abused its' Discretion By Looking Beyond What Was Written in the Lower Court Order -

The Return is silent on and thus concedes that the only valid order before the Panel is the April 27, 2016 Form 4 Order which the Panel ignored, and that the June 6, 2016 "Formal Order" which the Panel affirmed is void on its' face.

In the Petition Jarmuth pointed out that the only valid lower court order before the Panel was the April 27, 2016 "Form 4 Order" (Exhibit 1). [4] 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. The Form 4 Order was an immediately appealable order. Thereafter the lower court lost jurisdiction to enter a formal order. This is settled law.

> 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)

4 "Plaintiff's Motion to Dismiss is Denied. A formal order to follow ... within 10 days.

V. The Panel's Affirmation of the Hearing Order is an Exceptionally Grievous Determination in that the Panel has affirmed that all notions of constitutional due process are irrelevant – and thus merits Appellate Reconsideration.

On its' face the Order following the hearing holds that –

a. Due process and the rules do not require that a litigant file a claim, put the opponent on notice of a claim, afford discovery, or produce evidence in order to obtain a decision on a matter.

b. Due process, the rules, and the law are not violated if a court makes a determination which lacks a statute, contract, or provision of common law providing authority for such a decision.

c. Due process is not offended if a decision is contrary to the law relating to the matter.

d. SCRCP Rule 60 motions to void a judgment because there was no legal authority for the judgment are not to be reviewed by appellate courts because the panel will always defer to rulings of law by a trial court without the panel needing to look at the asserted authority – if any – to determine if it was correctly applied.

e. In South Carolina pre-litigation clauses are no longer enforceable so long as a litigant brings a matter to a court of general jurisdiction.

f. In South Carolina it is now fair game to retaliate against an

FHA complainant.

The panel's decision does not reflect any attempt to examine the law and the facts to determine what decision is merited as a matter of applying the correct law to the facts.

The lack of a claim was amply briefed and it is part and parcel, of a lack of due process and the lack of authority to even consider the HOA claims.

The panel did not do it's job and did not consider whether the law was ignored at the trial court level - that it had not satisfied the Constitutional and procedural predicate necessary to be able to assert authority to act on the SCHA and Attorney Cost matters.

Void Judgments

The U.S. Supreme Court has put all courts – including appellate – that it is a judicial function for every court to take note of a lack of authority. A void order is void not because a court ultimately finds it erred but because it notices that it was void from its' inception.

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).**

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".

Law of the Case Not Applicable When Question of Underlying Authority is Raised

The Panel erred in holding that Jarmuth could only raise a Rule 12(b) objection when the HOA filed its counter - claim in 2011.

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

> 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).'"

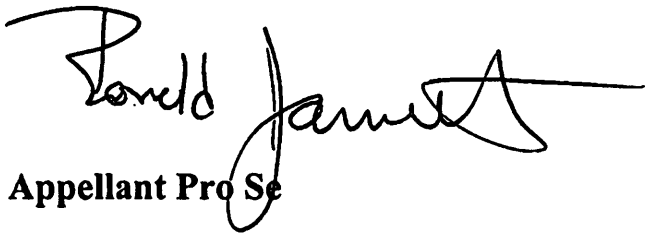
As a Matter of Law, without an enabling statute or contract the determination could not be "on the merits". Without first finding a cause of action based on enabling predicate authority (all of it) the court can not get to factual issues. The law invoked determines what facts are needed to satisfy the necessary prongs – the relevant facts to prove that relief is merited.

Conclusion

1. Both orders following the hearing on the Motion to Dismiss are void on procedural grounds. For the "long order" (the second) the court lacked case jurisdiction at the time that order was entered. Because the entire panel review was predicated on having a valid "long order" before them – the panel did not review the matter "de novo" – the panel's decision is likewise void.

2. As a matter of law the aspects of the trial court's final order granting attorney fees and fines was legally void at its inception and must be reversed.

WHEREFORE Appellant, for just cause shown, Petitions the Court of Appeals to Rehear this Case and to Reverse its Affirmation on the issues presented.



Ronald Jarmuth, Petitioner, Appellant Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
July 26, 2018

EXHIBITS

None added.

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The South Carolina Court of Appeals

Ronald Jarmuth, Appellant,

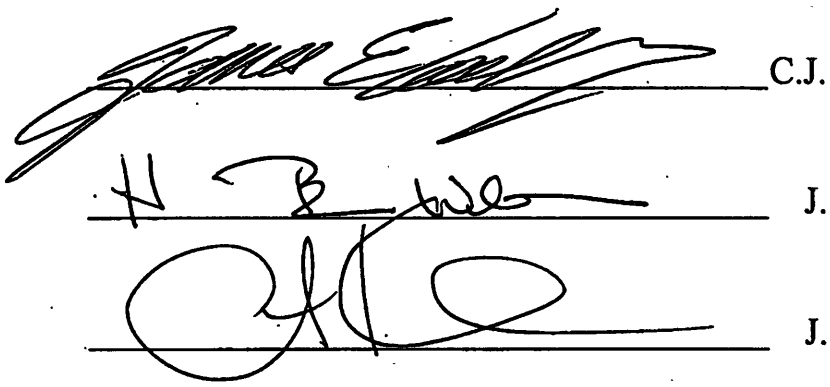
v.

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

Appellate Case No. 2016-001063

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.

J.

J.

Columbia, South Carolina

cc: Ronald Jarmuth
Henrietta U. Golding, Esquire
Alicia E. Thompson, Esquire
The Honorable Benjamin H. Culbertson

FILED

Aug. 16, 2018

3)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal No. 2016-001063

RECEIVED
DEC 15 2016
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Ronald Jarmuth Appellant,

v.

The International Club Respondent

RECORD ON APPEAL

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

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Alicia F. Thompson
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Attorneys for Respondent

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STATE OF SOUTH CAROLINA COUNTY OF HORRY Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, Defendants.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2009-CP-26-3596 **CONSENT ORDER OF REFERENCE**
STATE OF SOUTH CAROLINA COUNTY OF HORRY Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc., Defendant	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2010-CP-26-1320

FILED
HORRY COUNTY
12 JUN 15 PM 1:48
MELANIE WEGMAN-WARD
CLERK OF COURT

This matter came before the Court upon motion of the undersigned Defendants, International Club Homeowners Association, Inc. ("HOA"), Rosemary Toth, and K.A. Diehl & Associates, Inc. to refer the above entitled actions to Ralph Stroman, as Special Referee.

The claims of the Plaintiff, Ronald Jarmuth ("Plaintiff"), include a declaratory judgment action seeking an order as to the validity of provisions contained in the restrictive covenants for the International Club and amendments thereto, the authority of the HOA to govern the International Club, the validity of the HOA's contracts with third parties, and the validity of the

restrictive covenants regulating parking in light of the Developer's dedication of International Club streets to Horry County, as well as claims for breach of fiduciary duty and defamation.

The undersigned Plaintiff and Special Referee Ralph Stroman consent to the referral of the above entitled actions.

It appearing that pursuant to Rule 53(b) SCRCP the herein actions are appropriate to be referred to Ralph P. Stroman, as a Special Referee, with authority to enter a final judgment in the cases:

IT IS ORDERED that the above entitled actions are referred to Ralph P. Stroman who, pursuant to Rule 53(b) SCRCP, shall exercise all the power and authority that a circuit judge sitting without a jury would have, including but not limited to, hearing pre-trial and post trial motions, making findings of fact and conclusions of law, directing entry of final judgment in these actions under Rule 53(b) SCRCP, and issuing any and all Orders necessary.

Pursuant to Rule 53(b) SCRCP, any appeal from the final judgment entered by the Special Referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

Mr. Stroman's hourly charge is $250.00. By agreement of the parties, the HOA shall pay the hourly charges of the Special Referee for the Special Referee's time expended in trying these actions, together with any additional court costs, such as the cost of the court reporter and court personnel in attendance, if charged by the Court at the trial of these matters. The parties agree that the South Carolina Appellate Court Rules shall determine the party responsible for the costs of any appeal that may be filed.

The trial shall commence on Wednesday, August 8, 2012 at 9:00 A.M. at the Horry County Government and Judicial Center and shall continue until concluded.

IT IS SO ORDERED.

Conway South Carolina

Dated: 6/13/2012

The Honorable Steven H. John
Chief Administrative, Judge Fifteenth Judicial Circuit

I SO MOVE:

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Attorneys for the Defendants

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June 12, 2012

4 of 6

I SO CONSENT:

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Pro Se Plaintiff

Murrells Inlet, South Carolina

June 6 2012

I SO CONSENT.

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Pawleys Island, South Carolina
June 4, 2012

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, Inc. Defendants.	**FINAL ORDER DISMISSING PLAINTIFF'S CLAIMS AND AWARDING JUDGMENT AGAINST THE PLAINTIFF IN THE AMOUNT OF $7,326.00 AND GRANTING INJUNCTIVE RELIEF**
Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc. Defendant.	CIVIL ACTION NO.: 2010-CP-26-11320

HORRY COUNTY
12 SEP 10 AM 10:52
MELANIE HUGGINS-WARD
CLERK OF COURT

The above entitled actions were referred to the undersigned, as Special Referee, by Consent Order filed with the Clerk of Court's office on June 15, 2012. The Parties agreed that this referral to the undersigned is a referral with finality with any appeal being directly to the South Carolina Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules. The trial was held before the undersigned on August 8, 9, and 10, 2012. In accordance with Rule 52, South Carolina Rules of Civil Procedure, the following are my Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Plaintiff became a property owner in the International Club subdivision (hereinafter known as the "Community"), when he purchased a home in the Pebble Creek subdivision by Deed dated October 23, 2006.

2. The Community, since it is located in Horry County, is subject to the Horry County zoning ordinances. From the evidence introduced at trial, it appears that this Community was approved as a planned unit development ("PUD") by Horry County Council in the late 1990's.

3. The Community is a residential community consisting of over 670 single family and multi-family units located off of Highway 707 in Horry County approximately 10 miles south of Myrtle Beach. In addition, situated within the Community is the International Club Golf Course (hereinafter "Golf Course"). This Golf Course is privately owned and open to public play.

4. According to the plats introduced as exhibits and the Declaration of Covenants and Restrictions recorded in Deed Book 2117 Page 1353 in Horry County Registar of Deeds Office on February 8, 1999 (hereinafter "Declaration"), the Community currently encompasses over 300 acres.

5. Initially, this Community was named Murrells Inlet Golf Plantation but its name was changed in the first amendment to the Declaration filed in Deed Book 2258 at Page 1453 in the Horry County Registrar of Deeds Office on May 9, 2000 ("First Amendment").

6. The Declaration and the First Amendment for the Community was recorded by Plantation A.D., LLC, the original Developer and Declarant. The Declaration sets forth the real property subject to the restrictive covenants, additional real property that may be added, criteria

for governance, provisions relating to the creation of a homeowners association and an Architectural Review Board (hereinafter "ARB"), and other related provisions. The Developer attached to the Declaration as Exhibit "C" the Bylaws for the homeowners association. The Bylaws were also incorporated into the Declaration by reference pursuant to Section 1.5 of the Declaration. These are the only Bylaws that the Defendant HOA has utilized since its incorporation.

7. Plantation A.D., LLC, as well as its successors and assigns, were defined as the Declarant in the Declaration. Plantation A.D., LLC added acreage to the Community by way of amendments to the Declaration. In 2003, the developer rights were assigned to D.R. Horton, Inc.

8. The Declaration was amended five times and the following are the amendments:

- First Amendment, May 9, 2000: This Amendment changed the name of the Community to "International Club", added the property that was developed as the Villas Horizontal Property Regime; however no property description was attached to this Amendment. With respect to the Villas Horizontal Property Regime only, the Amendment waived the Declarant's rights to certain provisions in the Declaration.
- Second Amendment, April 25, 2003: This Amendment assigned to D.R. Horton, Inc. all the rights and powers of the original Developer, Plantation A.D. LLC, except that Plantation A.D., LLC continued as owner of the roads and streets in the Community. Thus, as of April 25, 2003, the Developer was D.R. Horton.
- Third Amendment, March 26, 2004: This Amendment added approximately 100 acres for the developments known as The Glens, The Meadows, The Links, The Highlands, and The Cambridge, as well amended a provision in the Declaration regarding capital contributions from purchasers.
- Fourth Amendment, December 23, 2004: This Amendment resolved the mistake in the first amendment by attaching the property description for the Villas Horizontal Property Regime. It also required a $150.00 contribution from each multi-family owner for road maintenance.
- Fifth Amendment, June 20, 2008: This Amendment added 14.10 acres for the development of a multi-family phase. This property was also subjected to the Declaration pursuant to Exhibit "A" of the governing documents. The development has not been constructed.

9. The Defendant homeowners association, the International Club Home Owners Association (hereinafter "Defendant HOA"), was incorporated as a South Carolina nonprofit corporation on March 1, 2001. Its status with the South Carolina Secretary of State has not changed since its incorporation.

10. Until 2007, the Defendant HOA was controlled by the Developer. In January 2007, the Developer appointed Community homeowners to a transition committee organized to assist in turning over control of the Defendant HOA to the homeowners. Since September 2007, the Defendant HOA has held annual elections for Directors. According to the Defendant HOA's annual meeting minutes, the Plaintiff ran for election to be a Director in September 2007 and in September 2008, however, neither time was he elected.

11. The Defendant HOA contracts for cable television services and garbage collection services for the single family owners in the Community. By contract dated May 31, 2001, the Defendant HOA contracted with Waste Industries, Inc. for garbage collection. The cable television contract is dated October 30, 2003; this contract is a bulk services contract providing cable, at reduced rates, to the Defendant HOA members. According to the testimony of Denise Ambuhl, a sales representative of HTC, some single family homeowners in the International Club contract for video services through other providers including, however they have the option of utilizing HTC's cable services.

12. The streets and the roads in the Community were initially owned by the Developer. D.R. Horton conveyed Right of Way Easements for International Boulevard and Pickering Drive to Horry County by deed recorded on February 26, 2006. Currently all existing streets and roads in the Community, except in the Glens, the Villas, and the Cambridge, are

maintained by Horry County. Horry County obtained Right of Way easements over the rest of the streets in the International Club, which dedicated the streets.

13. After D.R. Horton assumed the rights of the Declarant and Developer, it entered into a Developer's Agreement on May 16, 2003 with the parties being D.R. Horton and Sunbelt Associates, LLC (hereinafter "Sunbelt Associates"). This agreement sets forth that D.R. Horton agrees to construct an "amenities center" and that "the amenities center will be used as a clubhouse with a pool and other recreational facilities for the use and enjoyment of the Class A members of International Club Homeowners Association or other association to be formed by D.R. Horton..." Sunbelt Associates agreed to pay $1,000.00 to D.R. Horton for each home it previously sold and for each lot sold after the execution of the Agreement with the monies being for the construction of an amenity center (hereinafter "Amenity Center").

14. On October 3, 2003, D.R. Horton entered into a Golf Course Agreement with the parties being D.R. Horton, Plantation Golf A.D., LLC (the owner of the Golf Course at the time) and the Defendant HOA. In this agreement, the Golf Course owner agreed to convey to the Defendant HOA property adjacent to the planned Amenity Center and rights to use its turbine pumps and ponds to irrigate the Community's Common Areas. As consideration, Defendant HOA forgave unpaid assessments before December 31, 2003 from the Golf Course owner and discounted future HOA assessments due from the Golf Course owner through 2014.

15. In addition to the Defendant HOA owning the Amenity Center property, being around 2 acres, D.R. Horton deeded to the Defendant HOA 5.42 acres to be used as the main entrance way into the Community. These properties, as well as other areas in the Community, are landscaped by the Defendant HOA. The Defendant HOA irrigates these Common Areas with water provided by the Golf Course. If the Defendant HOA did not have rights to the Golf

Course water, it would have to construct, and maintain, 2 deep water wells with the necessary pumps and the requisite piping. According to Chris Sullivan, an irrigation contractor, the cost for the installation of the 2 deep water wells is approximately $34,000.00; however, he testified that the cost for the installation of the piping was unknown due to the probable need to install under some of the roads.

16. The Community has an Amenity Center consisting of a clubhouse, swimming pool, and 2 adjacent parking lots. The Amenity Center property and 1 parking lot is owned by the Defendant HOA for it received a Deed from Plantation Golf A.D., LLC recorded on August 22, 2002. The second Amenity Center parking lot, previously owned by the Golf Course, was deeded to the Defendant HOA by deed recorded on August 4, 2004.

17. The Amenity Center is maintained by the Defendant HOA for its members who have a home in a single family subdivision or who live in a multi-family development that does not have separate amenity facilities. According to Section 6.5 of the Declaration, members in multi-family developments within the Community which contain separate recreational amenities do not have a right to use the Amenity Center owned by the Defendant HOA. As a result, the Defendant HOA does not utilize assessments paid by members living in such a multi-family development for expenses relating to the Amenity Center.

18. One neighborhood in the Community is a development known as the Glens. The Glens is a townhome community. Ms. Maureen Sullivan, a former member of the Defendant HOA Board of Directors as well as the President of the Glens homeowners association, testified at trial. Ms. Sullivan purchased her home in the Glens in September 2005, and since that time, has utilized the Defendant HOA's Amenity Center as well as paid the assessments for use of the Amenity Center, because the Glens does not have a separate amenity facility.

19. The Plaintiff has utilized the Amenity Center since his purchase in October 2006. His utilization consists of attending socials at the Amenity Center as well as use of the swimming pool. He also attended Board of Directors meetings since 2007 held in the Amenity Center and took depositions there in 2012.

20. Defendant K.A. Diehl is the manager for the Defendant HOA. Since the early 2000's, it has served the Community in this capacity. It contracts with the Defendant HOA, and since January 1, 2008, this contract has been renewed upon the expiration of the previous contract.

21. Plaintiff filed his Complaint with the Clerk of Court's Office in Horry County on April 7, 2009. Shortly after service of the Complaint on the Defendant HOA, the Defendant HOA's Board of Directors met with the Defendant HOA's attorney, Ms. Golding. According to Maureen Sullivan, a member of the Board of Directors, the Board requested that Ms. Golding prepare a letter regarding the Plaintiff's claims that included information that could be provided to the Community members. On May 27, 2009, Ms. Golding sent a letter to the Board of Directors outlining the Defendant HOA's position as to the various claims asserted by the Plaintiff as well as providing information as to Plaintiff's involvement in previous litigation. A list setting forth cases that the Plaintiff was a party to was included, as well as published Court decisions. The Directors, except for the President Toth, instructed K.A. Diehl to mail Ms. Golding's letter to all Community members.

22. Also, after commencement of this legal action, Plaintiff directed a letter to K.A. Diehl seeking a membership list containing the members' email addresses, phone numbers and their delinquency status. This request was denied by the Defendant HOA's attorney due to the Plaintiff seeking email addresses, phone numbers and information regarding a member's

payment of assessment as well as Plaintiff's failure to set forth a good faith basis for requesting the list. Further, the Defendant HOA maintains a website for its members, and the members list is readily available to Plaintiff; however, Plaintiff has refused to access the website for he does not want to disclose his email address or to accept the website's privacy policy. Plaintiff has also received the membership list in the past and has accessed the Defendant HOA's website through other Community homeowners.

23. On April 20, 2010, the Defendant Board of Directors granted a power line easement to Central Electric Power Cooperative, Inc. ("Central Electric"). As consideration for this easement, the Defendant HOA received $83,000.00 as well as an agreement from Central Electric that it would maintain the easement area in good condition as required by a landscape mitigation agreement with the Defendant HOA.

24. Part of the consideration that the Defendant HOA received from Central Electric was distributed to the members, for each member received $75.00. The Defendant HOA shared the proceeds with its members to refund the assessments that the members annually paid because the Defendant received unbudgeted revenue for 2010.

25. The Declaration required the formation and existence of an ARB. Beginning in the early 2000's, the ARB members were appointed by the Defendant HOA Board of Directors. The Declaration specifically requires that an ARB exist with the authority to approve or disapprove "any building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement, ... vegetation cover, landscaping, grading, filling, or any other item ... upon any portion ..." of the Community. According to K.A. Diehl's representative Beckie Abel, over the years the Community's ARB has processed hundreds of applications that it has received from Community homeowners.

26. Since 2006, the Plaintiff submitted applications to the ARB for a variety of matters. He sought approval, and obtained approval, for planting a palm bed, installing an outside bench, and a flower bed. In July 2009, Plaintiff applied for the installation of a swing set to be placed on the side of his house. The ARB denied this request in August 2009 for the application proposed that the swing set to be installed on the side of Plaintiff's home and visible to the street. As a result of this denial, Plaintiff filed a discrimination claim with the South Carolina Human Affairs Commission contending that the Defendant HOA discriminated against him due to his foster children. This discrimination claim was dismissed by the South Carolina Human Affairs Commission when it issued its determination of no reasonable cause on December 11, 2009.

27. In the fall of 2010, Plaintiff undertook to modify an existing landscape bed as well as install a brick/stone addition to his yard along the property line. The Defendant ARB issued a Notice Violation requiring Plaintiff to submit an application. Subsequently, Plaintiff submitted an application for a 6 foot high vinyl side yard fence with a brick foundation to be installed on his property line and a flower bed with red brick edgers. The Defendant ARB approved the request for the flower bed and edging in the County easement near a power box as long as the Plaintiff had an encroachment permit but denied his request to install a 6 foot vinyl fence with a brick foundation. Additionally, the ARB fined Plaintiff $50.00 for constructing the brick foundation. The Plaintiff, by letter dated October 11, 2010, disputed the authority of the ARB to deny his request for the fence as well as assess $50.00. He further stated that he disputed the necessity of any appeal.

28. The Plaintiff has refused to remove the brick foundation as required by the Defendant ARB, and as a result, he is being fined $100.00 a month. The Plaintiff has refused to

pay the monthly fine, and as of the date of the trial, he owes the Defendant HOA the sum of $2,326.00.

29. In February 2012, the Plaintiff applied to the Defendant ARB for a landscape modification. By letter dated March 16, 2012, the ARB informed Plaintiff that his application was deferred due to the existing violation that could be remedied by removing the brick work along the property line and restoring the sod. The letter further stated that his account balance as of the date of the letter was $1,735.00.

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

CONCLUSIONS OF LAW

1. The Defendant HOA is the Proper Homeowners Association to Exercise the Powers in the Declaration.

The Declaration provides that there should exist a non-profit corporation for the purpose of exercising the functions set forth in the Declaration and the attached Bylaws. The Declaration identified the association as the "Murrells Inlet Golf Plantation, Inc.". This name was changed by the First Amendment, recorded May 9, 2000, with the name change being to the International Club. On March 1, 2001, the Articles of Incorporation for the Defendant HOA were filed with the South Carolina Secretary of State. The evidence at trial established that the Defendant HOA has been the only non-profit corporation homeowners association to exercise the powers granted in the Declaration and the Bylaws. It is the entity that the original Developer, Plantation A.D., LLC, established in accordance with Article 3 of the Declaration. It is the entity that owns the Common Areas in the Community, that collects the assessments and fines, and that contracts with third parties for maintaining and administering the common facilities and providing

common services. Finally, it is the entity that enforces covenants and restrictions in the Declaration.

In the fall of 2010, the Plaintiff established 2 South Carolina non-profit corporations known as Murrells Inlet Golf Plantation Association, Inc. and International Club Association, Inc. According to the Plaintiff's testimony, he intends to utilize one of these non-profit corporations to manage the affairs of the Community in the event that the Defendant HOA is declared to be without the requisite authority to do so.

At trial, the Plaintiff contended that the Defendant HOA is not the entity entitled to manage the affairs of the Community, for the Defendant HOA is not named in the Declaration. I find this claim to be without merit. The Defendant HOA's Articles of Incorporation were submitted to the Secretary of State by the Community's Developer, and the Developer caused the First Amendment to be filed which changed the name of the Defendant HOA to its present name.

It is basic law that in reading the governing documents of a non-profit organization, including any amendments, they must be read together to determine the intent of the Developer. *Palmetto Dunes Resort v Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985). Having reviewed the Declaration, together with the amendments, as well as the Defendant HOA's Articles of Incorporation, I find that the Defendant HOA is the proper legal entity designated by the Declaration.

2. The Bylaws are Valid and Binding.

Plaintiff argued that the Bylaws are invalid because the Bylaws were not signed, not indexed to any homeowners association, not adopted by homeowners association Board, not approved by the homeowners, were recorded a year prior to the establishment of the Defendant HOA, and state that they apply to "Murrells Inlet Golf Plantation Association" instead of "International Club Home Owners Association". I find that Plaintiff's claims are without merit.

The Defendant HOA came into existence at the time that the Declaration was filed. The Developer, Plantation A.D., LLC, had certain rights under the Declaration with respect to the Defendant HOA. Section 3.1 states:

> "The Developer has established or will establish the Association for the purpose of exercising powers of maintaining and administering common facilities and providing common services, administering and enforcing covenants, conditions, and restrictions contained herein, and levying, collecting, and disbursing the Assessments and other charges herein created. Further, the Developer reserves the right to convey to the Association, and the Association shall accept, any or all of the Developer's rights and obligations as set forth herein."

The Declaration Recitals, as amended, state:

> "The Developer has or will cause to be incorporated under South Carolina law "International Club Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C".

Pursuant to Section 3.1 and the Recitals, the Defendant HOA, whether it was incorporated or not, is governed by the Bylaws. According to the testimony of Jeff King, an expert lawyer in real property development, it is common practice in South Carolina to attach Bylaws as an Exhibit to property restrictive covenants, then record the property restrictive covenants with the attached Bylaws. Mr. King also testified that bylaws are often filed with the property restrictive covenants before an association is incorporated. Notably, the Bylaws are also specifically incorporated into the Declaration by Section 1.5.

Pursuant to South Carolina law "[t]he incorporators or board of directors of a corporation shall adopt bylaws for the corporation." S.C. Code Ann. Section 33-31-206 (1976). The Developer, as the incorporator of the Defendant HOA, adopted the Bylaws by attaching the Bylaws to the Declaration and then recording the Declaration.

The Non Profit Corporation Act ("Act") does not mandate that the Bylaws be signed or separately adopted by the members or the Board. Plaintiff relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007), which held that Rules and Regulations were invalid, because they conflicted with the recorded Bylaws for the association and were not properly signed, acknowledged, and indexed. The Bylaws in this case are different, because they are attached as an Exhibit to the Declaration, which was properly signed, acknowledged, and recorded with the Horry County Registrar of Deeds Office.

In addition, the Defendant HOA's Bylaws have been utilized for over ten years to govern the Defendant HOA. To declare, at this late stage, that these Bylaws are invalid or ineffective when they have been relied upon by all of the homeowners within the Community would be inequitable. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 393-94, 680 S.E.2d 289, 291-92 (2009) (holding that a homeowners' justified reliance on a restrictive covenant weighs in favor of its enforcement). Plaintiff has not pointed to any provision in the Bylaws which is unreasonable (*See Armstrong v. Ledges Homeowners Association, Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006) (holding that unreasonable covenants are unenforceable)), that is indefinite, or violates public policy (*Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 494 S.E.2d 465, 467 (Ct.App. 1998)(covenants are void if they are indefinite or contravene public policy), *see also, Palmetto Dunes Resort*, 287 S.C. at 6, 336 S.E.2d at 18).

3. The Pebble Creek and Meadows' Subdivisions and the Golf Course are Subject to the Declaration.

The Plaintiff contends that two subdivisions in the Community are not subject to the Declaration. The first is Pebble Creek subdivision where Plaintiff resides. The Pebble Creek subdivision was developed by Sunbelt Associates. Sunbelt Associates purchased the property from Plantation A.D., LLC. The Plaintiff introduced two deeds, Plaintiff's Exhibits 544 and 545,

as being deeds relating to the real property developed as Pebble Creek. The Plaintiff testified that since these two deeds are dated prior to the filing of the Declaration, the Pebble Creek subdivision is not subject to the Declaration. However, both deeds describe the real property being conveyed to Sunbelt Associates as being:

> ... conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (the "Declaration")
> ....

Even though one deed from Plantation A.D., LLC to Sunbelt Associates left blank the particular deed book and page, this does not negate the provision in the property description that real property is subject to the Declaration. Furthermore, the deed Plaintiff received for his property in Pebble Creek clearly states that it is subject to the Declaration.

I find that the Plaintiff's contention that his home in Pebble Creek is not subject to the Declaration is without merit.

As to Plaintiff's contention that the Meadows development in the Community is not subject to the Declaration, this is also without merit. In the Declaration, the Developer specifically provided that additional real properties can be added to the Community and these additional properties were identified in Exhibit "B" attached to the Declaration. The Meadows is part of the real property described in Exhibit "B". The Meadows was added to the Community by the Third Amendment. Therefore, the addition of the Meadows to the Community is proper and, the Meadows is subject to the Declaration.

As to the Golf Course property, this property is subject to the Declaration, for the Golf Course is part of the property described in Exhibit "A" to the Declaration. However, the Golf Course, even though it is subject to the Declaration, is not subject to certain provisions in the Declaration for the Golf Course property is not a "Unit" as defined in Section 1.27 of the Declaration. Therefore the Golf Course owner is not an owner as defined in Section 1.22 of the

Declaration. I find that the Golf Course, even though it is subject to the Declaration, is not subject to all of the covenants in the Declaration since the definitions control the applicability of the specific covenants in the Declaration.

4. The Golf Course is Current in the Payment of its Assessments.

On November 20, 2003, the Golf Course entered into an agreement with D.R. Horton, the Declarant/Developer. This Golf Course Agreement provided for a reduction in the actual dollar amount that the Golf Course pays for assessments in exchange for the Defendant HOA receiving certain real properties. One of the properties that the Defendant HOA received was a parking lot for the Amenity Center. The Defendant HOA President testified that this property was needed in order to obtain a permit to construct the swimming pool. In addition, the Defendant HOA received the right to utilize the Golf Course ponds and pumping system for irrigation of the Community's Common Areas. The Defendant HOA's right to use these ponds and the pumping system is a significant consideration; otherwise, the Defendant HOA would have to construct and maintain 2 deep wells. Further, according to Chris Sullivan, an expert irrigation contractor, additional significant costs are likely for the installation of pipes.

Plaintiff argued that the Defendant HOA had the authority to access the Golf Course irrigation system, without permission, under Section 4.17 of the Declaration, and as a result, the Golf Course Agreement is not supported by consideration. Illogically, he also argued that Section 4.17 of the Declaration was deleted by the First Amendment. The provision provides:

> Wells and Effluent. There is hereby reserved for the benefit of the Developer, the Association, and their respective agents, employees, successors and assigns an alienable, transferable, and perpetual right and easement: (i) to pump water from lagoons, ponds, and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes; (ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities

> and systems within the Common Areas, including within any portion of the Recreational Amenities...

Chris Sullivan, an expert in irrigation systems, testified that the Defendant HOA ties into the Golf Course's irrigation system through its pump house and that the Defendant HOA could not simply pump water out of the pond to irrigate the Community. The HOA President, William Freiboth, testified that the Golf Course pump house is not located on Common Area. For these reasons, the Defendant HOA does not have the right or ability to access the irrigation system of the Golf Course without the owner's permission.

The Defendant HOA's decision to accept the parking lot property and obtain its needed water from the Golf Course in exchange for a portion of the assessments is a valid exercise of its powers. The Golf Course owner's payment of this consideration was in lieu of assessments. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith." *Dockside Ass'n v. Deyton*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987).

Plaintiff also contended that the Golf Course Agreement was invalid due to conflicts of interest in that the Golf Course provided membership opportunities to D.R. Horton, the developer, which, at the time, controlled the Defendant HOA. Even though the Plaintiff, not being a property owner in 2003 lacks standing, the Defendant HOA accepted the benefits, the land and the water, from the Golf Course. Furthermore, the transaction was fair to the corporation at the time that it was entered into, as the Defendant HOA received significant benefits from the agreement. If a transaction is fair, it is not voidable pursuant to the Act, SC Code Ann. § 33-31-831.

The Golf Course Agreement was entered into in 2003 and the Defendant HOA and the Golf Course have abided by this Agreement since its inception. Plaintiff became a property

owner in the Community in October 2006 but did not challenge the Golf Course Agreement until April 2009. Aside from the fact that Golf Course is not a party to this lawsuit, the undue delay on the part of the Plaintiff in challenging the validity of the Golf Course Agreement is prejudicial not only to the Golf Course but to the Defendant HOA. I find that the Plaintiff has waived his rights to assert any claims as to the Defendant HOA's compliance with the Golf Course Agreement (*Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992)), and that his claims are barred by the doctrine of laches. *See Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583, 598 (Ct.App. 1999). Plaintiff is also estopped from objecting to the agreement regarding assessments pursuant to his failure to object for almost three (3) years. *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (holding that the doctrine of estoppel bars a refund of assessments to homeowner who has paid without objection for several years even if assessments were not properly voted upon). The Golf Course Agreement is an obligation of the Defendant HOA that it properly enforces and the Plaintiff's claim that the Defendant HOA does not have the authority to abide by the agreement is without merit.

Plaintiff lastly contends that the Defendant HOA did not collect funds from the Golf Course pursuant to the terms of the Golf Course Agreement. However, William Freiboth testified that the funds were collected in accordance with the agreement. As a result, I find that that the Defendant HOA properly collected assessments from the Golf Course according to the terms of the Golf Course Agreement.

5. Plaintiff is Obligated to Pay Assessments Relating to the Amenity Center.

As set forth in the Findings of Fact, the Defendant HOA owns the real property upon which is situated the Amenity Center. The Plaintiff contends that he is not obligated to pay the assessments for the Amenity Center. This contention is without merit because, as a member of

the Community, he is subject to the Declaration. Whether he uses or does not use the Amenity Center is not a factor in determining his obligation to pay for the assessments. Restatement (Third) of Property (Servitudes) § 6.5 (T.D. No. 7, 1998) (setting forth that homeowner's obligation to pay assessments is unconditional); *see also*, S.C. Code Ann § 27-31-190 ("no co-owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him.").

It appears that Plaintiff believes that because Section 6.5 in the Declaration states that "... both annual and special assessments must be fixed at a uniform rate for all Units ..." the Declaration is being violated by the Defendant HOA since single family owners are assessed for the Amenity Center but multi-family owners who have their own amenities are not. However, this section specifically states that multi-family Unit owners with separate recreational facilities are not assessed for the Amenity Center. I find that the Plaintiff agreed to Section 6.5 by accepting the Deed to his property and that he is obligated to pay assessments for the Amenity Center.

6. The Defendant HOA's Contracts for Bulk Cable Television Services and Garbage Collection are Valid and Enforceable and were Properly Enforced.

The Defendant HOA entered a "Telecommunication Service and Access Agreement" with HTC on October 30, 2003, a contract that commenced on September 30, 2003 and has a duration of fifteen (15) years. The agreement states that the Defendant HOA "shall pay to [HTC] for the Service fee set forth in Exhibit 'B' attached hereto for each and every Unit located on the Premises", which establishes a bulk billing system for the Community unit owners. Ms. Denise Ambuhl testified that the contract is a bulk billing arrangement. The Defendant HOA pays for the cable services with funds from the assessments. In exchange for the bulk billing arrangement, Community homeowners receive cable services at a significantly discounted rate.

The homeowners are not precluded from contracting with third parties for other video services that HTC provides under its contract with the Defendant HOA or upgrading HTC services. In other words, as testified to by Ms. Ambuhl, the HTC contract is not an exclusivity agreement.

The Defendant HOA also entered a contract with Waste Management Industries for the collection of homeowners' garbage on May 31, 2001. The contract has been renewed each year and provides services at a cost of $92,870.00 annually for the Community.

a. The Services "Touch and Concern" the Land.

Plaintiff argues that the assessments used to pay for cable services and waste management are invalid, because the services do not touch and concern the land. As a matter of law, covenants for payment of annual assessments for the operation of property owners associations are covenants running with the land. *21 C.J.S. Covenants § 42.* "Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern the land and therefore 'run with the land'." *Queen's Grant II Horizontal Property Regime*, 368 S.C. at 358, 628 S.E.2d at 911. Assessing all owners for cable and garbage collection services lowers the cost of the services for all the units within the Community. Because the assessments have a beneficial effect on the owners' properties, the assessments touch and concern the land and are enforceable.

b. The Defendant HOA's Assessment for Cable Services and the HTC Contract Do Not Violate FCC Regulations.

Plaintiff argues that the HTC Contract is void, therefore, the cable assessment violates public policy. He relies on the following authority:

- *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, 2007 WL 3353544 (F.C.C. 2007);

- *National Cable & Telecommunications Ass'n v. Federal Communications Commission and United States of America*, 567 F.3d 659 (D.C. Cir. 2009); and
- Exclusive access to multiple dwelling units generally, 47 C.F.R. § 76.2000 (2008).

The Defendant HOA agrees that contracts between video services and Multiple Dwelling Units and other real estate developments (MDU's) containing exclusivity clauses are not consistent with the Code of Federal Regulations. However, the HTC Contract does not contain an exclusivity clause; the contract constitutes a system of bulk billing several owners within an MDU.[1] The Community homeowners are not precluded from contracting with other video services, even if the HTC cable services are available through the Defendant HOA and by paying the assessments to the Defendant HOA. The FCC specifically addressed this issue *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 25 FCC Rcd. 2460, 2010 WL 709834 (F.C.C. 2010):

> The first issue we address is bulk billing. This is an arrangement in which one MVPD provides video service to every resident of an MDU, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Bulk billing arrangements do not hinder significantly, much less prevent, a second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPD's services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD form providing its services to those residents. The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband. Based on the evidence of all the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements.

[1] Section 8 of the HTC Agreement provides that "Owner shall have the right to contract with third parties for supplementary video and/or other services so long as it does not interfere with Company's right to provide Service under this Agreement." This provision specifically allows owners to use other services.

Pursuant to the FCC's 2010 Order, the bulk billing arrangement memorialized by the HTC contract is not invalid under the Federal Code of Regulations. Therefore, Plaintiff's argument that the HOA's assessment for video services violates public policy based upon the 2007 FCC Order is without merit.

c. The Rate Increases and Credit Allocations were Consistent with the HTC Contract.

Plaintiff also testified that the HTC contract increased the rate annually in violation of the terms of the agreement. He also attested that HTC issued credit allocations to the Defendant HOA that were misappropriated by the Board of Directors or K.A. Diehl. however, he did not present evidence that credit allocations were made. In contrast, Ms. Denise Ambuhl testified that the rate increases were consistent with the HTC contract. She also clarified that no credit allocations were made to the Defendant HOA for cable services, because that particular line of business has not been profitable since 2003. Accordingly, I find that the payments made by the Defendant HOA to HTC were proper and that no credit allocations were made to the Defendant HOA.

As noted with the Golf Course Agreement, the cable contract and the contract with Waste Management Industries have been in existence for many years. In fact, Plaintiff was a property owner in the Community for over 2 1/2 years before he challenged the validity of these agreements. Further, it should be noted that neither HTC nor Waste Management were parties in this action.

I find that the Plaintiff's arguments with respect to the HTC Cable Contract and the Waste Management Industries Contract are without merit and the Defendant HOA has the authority to enter into and enforce these Contracts. Furthermore, I find that the Defendant HOA

has the right to assess the Plaintiff and other single family homeowners for the cable services, and the Plaintiff has an obligation to pay the assessments.

7. The Defendant HOA has the Right to Govern Parking in the Amenity Center Parking Lot and the Streets and Roads Within the Community.

Pursuant to the Declaration, the Defendant HOA has the right to restrict parking at the Amenity Center and on the streets within the Community.

a. Street and Amenity Center Parking.

Section 7.25 of the Declaration specifically addresses parking on the streets and Common Areas in the Community. This Section specifically authorizes the Defendant HOA to tow or remove vehicles and enforce parking as it does assessments.

The streets and the parking lots in the Community, with the exception of a small portion of International Club Boulevard and Pickering Drive, are within the property descriptions in the Declaration; therefore, they are subject to the Declaration. Subsequent to the filing of the Declaration, certain Community streets were dedicated to Horry County. Plaintiff argued that the dedication and conveyance precludes the Defendant HOA from enforcing Section 7.25. The dedication documents references plats that show the roads. Plat Book 181, Page 89, one of the referenced plats, shows the portions of International Club Drive. The plat specifically states that the property on the plat, including International Club Boulevard "are subject to all rights and restrictions of record", which include the covenants contained in the Declaration.

"Dedication is the giving of land or an easement for the use of the public by the owner." *Sloan v. City of Greenville*, 111 235 S.C. 277, 111 S.E.2d 573 (1959). "That a dedication, whenever completed, is irrevocable is well settled." *Id.* "Hence: If a dedication is made for a specific or defined purpose, neither the Legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated,

whether such use be public or private, and whether the dedication is a common-law or a statutory dedication, and this rule is not affected by the fact that the changed use may be advantageous to the public." *Id.*

"The party dedicating land...may impose certain restrictions or reservations." 77 Am. Jur. Proof of Facts 3d. 1. "However, the dedicator cannot attach conditions or reservations that are inconsistent with the grant or which violate public policy." *Id.* "Various conditions and reservations have been judicially validated, such as conditions restricting the use of a street for pedestrians, or limiting the use of a road to specific time periods during a year." *Id.* "In order to create conditions or reservations, appropriate and specific language must be used." *Id.*, *See also*, *Olde Severna Park Improvement Ass'n v. Gunby*, 402 Md. 317, 936 A.2d 365 (2007) (holding that a developer's notation on a plat reserving riparian rights served only to ensure that the riparian rights were not dedicated to the public or a governing body). "Generally, acceptance by the public body constitutes agreement to the condition or reservation." *Id.*

Additionally, the Horry County Zoning Department has confirmed that the Declaration roads are enforceable against the owners of a subdivision or PUD. Pursuant to Janet Carter's letter, the Horry County Planning Director and I&R counsel for the Planning & Zoning Department, Horry County does not enforce the covenants governing dedicated roads, but the County does its best not to issue permits that would be in conflict with covenants.

I find that the streets within the Community were dedicated subject to the Declaration and all amendments thereto.

b. Declaration Section 7.25 was not Deleted.

Plaintiff argued that section 7.25 was deleted by the First Amendment due to the language that the Developer waived the architectural controls in certain provisions. I find that

the Developer's waiver of certain rights was solely with respect to the Villas Horizontal Property Regime and did not waive the applicability of the covenants to the rest of the Community or the ARB's or the Board of Directors' ability to enforce the Declaration. It is noted that when the Developer intended to delete a provision in the Declaration, the Developer consistently used the word "delete" in the Amendments.

8. **Plaintiff's Request for Members' Information was Properly Denied.**

Immediately after Plaintiff commenced this lawsuit, he emailed a demand for a membership list containing members' email addresses, telephone numbers and delinquency status. In response, Defendant HOA's attorney sent a letter denying his request.

The Act sets forth the circumstances that members may inspect a membership list. If a member would like to inspect the membership list, the member's demand for inspection must meet the following requirements: 1) the member's demand provides five days written notice; 2) "the member's demand is made in good faith and for a proper purpose"; 3) "the member describes with reasonable particularity the purpose and the records the member desires to inspect"; and 4) "the records are directly connected with this purpose." *See* S.C. Code Ann. Section 33-31-1602 (1976). If the aforementioned requirements are met, the member can inspect the membership list. *Id.*

Plaintiff failed to state a good faith basis for his request for the voting list as required by the Act. According to his email, he requested the list to "communicate with fellow homeowners" after he filed his complaint in the 2009 Lawsuit. His request was not specific and did not provide the reason for communicating with fellow homeowners; as a result, it was properly denied.

Finally, the evidence established that the Plaintiff always had access to the membership list but he did not choose to access the Defendant HOA's website.

9. The Sale of the Easement to Central Electric was Properly Effectuated and is Valid.

The Defendant HOA Board of Directors has the authority to grant easements pursuant to Sections 4.3 and 4.10 of the Declaration and Article 4, Section II of the Bylaws. Under Bylaws' Article 4, the Board exercises all rights of the Defendant HOA, unless a provision specifically requires a membership vote. Plaintiff stated that his argument that the Defendant HOA improperly transferred the easement to Central Electric is based upon Bylaws, Section 11:1. However, the vote requirement in Article 11 does not apply, because the Defendant HOA did not convey Common Area; it granted an easement over the Common Area owned by the Defendant HOA. Furthermore, condemnation was never threatened; the Board was offered a package of significant value in exchange for the easement, and it granted an easement based on that consideration.

Plaintiff further argued that the Defendant HOA should not have distributed a portion of the monies it received for the easement to members in the Community. Mr. Freiboth, the Defendant HOA's President, testified that this was not a profit distribution but rather for the purpose of passing a benefit to the members. Plaintiff then contended that a portion of the funds for this easement was allocated for the payment of a lawsuit. The Act permits the Defendant HOA to distribute benefits to its members in conformity with its purpose. S.C. Code Ann. § 33-31-140(11)(6). The Defendant HOA had the authority to utilize the funds as it did and therefore there was nothing improper or invalid.

I find that the Defendant HOA properly granted an easement to Central Electric and it properly utilized the funds it received from Central Electric.

10. The Defendant HOA's Committees and the ARB are Consistent with the Act.

Plaintiff testified that the Defendant HOA is in violation of the Act, because the Board of Directors does not appoint members of the Board of Directors to serve on committees. S.C. Code Ann. Section 33-31-825 provides: "[u]nless prohibited or limited by the articles or bylaws, a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more directors who serve at the pleasure of the board."

The ARB is a separate Board of the Defendant HOA created by Article VII of the Declaration. Pursuant to S.C. Code Ann. Section 33-31-801, "[t]he articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized, the person or persons shall have the duties and responsibilities of the directors..." Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents, and therefore, Section 33-31-825 does not apply.

Likewise the Defendant HOA's committees are not committees of the board. The committees consist of members of the Defendant HOA. Therefore, Section 33-31-825 also does not apply to Defendant HOA's committees. Furthermore, the committees are not provided separate authority to act and merely make recommendations to the Board of Directors.

I find that the Defendant HOA complied with the Act and the Declaration in establishing its committees and the ARB.

11. The Architectural Guidelines are valid.

Plaintiff argued that the Architectural Guidelines are invalid and relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007). In *Arcadian Shores*, the restrictive covenants provided that the association had the authority to pass rules and regulations to govern the location of fixtures and appliances on the properties subject to the covenants and to determine the location of mobile homes on the properties. *Id.* The Association passed regulations prohibiting the parking of mobile homes in driveways. *Id.* The Court held that the covenants impliedly allowed mobile homes, and the regulations' prohibition of the vehicles amended the restrictive covenants without approval of the owners as required by the covenants. *Id.*

Here, the Architectural Guidelines are distinguishable from the rules and regulations in *Arcadian Shores*. The Defendant HOA was specifically granted the authority to establish, amend, and enforce architectural guidelines, rules, and regulations, to aid the ARB and Owners in establishing an orderly and efficient procedure for accomplishing its duties pursuant to § 7.2 of the Declaration.[2] The Architectural Guidelines do exactly that, they set specific standards for approval to create uniformity in the application of the covenants and clearly delineate the procedure for applications, approvals, and reviews. This case is different, in that the *Arcadian Shores* association only had the authority to regulate the location of fixtures and appliances, but not to entirely prohibit them. Because the Defendant HOA has the authority to pass the Architectural Guidelines and because those Guidelines are within the scope of authority set forth in the Declaration, they are valid. *See Sea Pines Plantation Company v. Wells*, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987) (holding that a refusal to approve plans for aesthetic reasons

[2] Section 7.2 of the Declaration sets forth: "The Architectural Review Board shall have the right and authority to establish, amend, and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers hereunder."

will be upheld where the covenant or appropriate authority has provided guidelines for enforcement and expressed the purpose of the restrictive covenant).

Plaintiff also testified that the parking restrictions in ARB Guidelines invalidates the document. However, no parking restrictions are contained in the ARB Guidelines at issue in this case.

I find that the Plaintiff's claims regarding the ARB Guidelines are without merit.

12. The ARB's denials of Plaintiff's applications for a fence and swing set and the deferral of his application are valid.

When reviewing the actions of an ARB, South Carolina courts first determine whether the board had the authority to approve or disapprove construction proposed and secondly decide whether the board exercised its authority reasonably and in good faith. "When a covenant provides an architectural review board with broad authority for approval of improvements, the architectural review board's discretion is constrained only by reasonableness and good faith." *Id.* (citing *River Hills Prop. Owners Ass'n, Inc. v. Amato*, 326 S.C. 255, 259, 487 S.E.2d 179, 181 (1997)(holding that an HOA board acted reasonably and in good faith in denying approval of a landowner's plan to build a fence and pool based upon aesthetic reasons). The courts will uphold an ARB's rejection of a homeowner's improvements based on aesthetic considerations when the board's decision is not arbitrary but bears a sufficient relation to the subdivision's general plan of development. *Id.* (citing *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894).

a. <u>The ARB has the authority to regulate improvements within the Community</u>.

First, the ARB had the authority to deny Plaintiff's applications for fence and a swing set. Declaration, Section 7.2, Prior Review of all Plans, provides:

> No ... structure, fence, sidewalk:..shall be commenced...nor shall any exterior addition or change be made until the plans and specifications...shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer.....this right of approval shall be transferred to an Architectural Review Board for the Association ....Refusal or approval of plans, specifications, and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board deem sufficient....

Section 7.4 of the Declaration specifically regulates fences:

> No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board...

Plaintiff argued that Sections 7.2 and 7.4 were deleted by the First Amendment to the Declaration. Scott Pyle, a principal of the Declarant Plantation A.D., LLC, testified in his deposition that the Declarant deleted Section 3.7 under the First Amendment, but not Sections 7.2 and 7.4. He further testified that the Declarant only intended to waive its rights in a limited way and that the document must be read as a whole. Jeffrey King testified, that in his expert opinion, the Amendment only waived the Declarant's rights with respect to the Villas; the Defendant HOA's rights and therefore the ARB's rights, were unaffected.

Plaintiff argued secondarily that the ARB waived its right to enforce Sections 7.2 and 7.4 by previously approving various other fences. The Plaintiff pointed to privacy fences but these, if approved, are specifically permitted by the Declaration. Also the President of the Defendant HOA testified that there were only a few fences that were not privacy fences but these were erected in the early 2000's while the Developer controlled the Defendant HOA. "A waiver is a voluntary and intentional abandonment or relinquishment of known right." *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388 (holding that an HOA and property management company waived the right to enforce covenants where they had knowledge of unapproved improvements for several

years and made no effort to enforce the covenants against an owner.). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id.*

Plaintiff primarily relied upon *Arcadian Shores Homeowners Ass'n*, 373 S.C. 292, 644 S.E.2d 778. The case is illustrative of the doctrine of waiver. In *Arcadian Shores*, testimony revealed that some homeowners did not submit plans or specifications for certain projects to the Association and that the Association never consistently enforced the requirement that applications be submitted. *Id.* In fact, the Association's president testified that he was "fine with the fence" and that the homeowner in violation of the covenants "could have submitted a variance and it could have been approved by the board if he would have been hospitable, but he took it on himself to do whatever." *Id.* The Court held that the Association waived its right to enforce the covenant requiring the Association's approval to build a fence. *Id.*

The facts here are distinguishable from *Arcadian Shores*. Beckie Abel, the Defendant HOA's property manager, testified that the ARB has existed since the early 2000's. Plaintiff applied for other improvements and received approval. Not until his applications for a swing set and subsequently the 6 foot fence were denied did he claim that the ARB waived its right to enforce Article VII. The fact that other fences have been approved within the Community does not support Plaintiff's waiver argument, because either the approved fences are privacy fences as permitted by the Declaration or an existing fence approved by the Developer. Additionally, Mr. Freiboth testified that front yard fences are not permitted in the Community.

As to the swing set, the argument that other swing sets have been approved also does not waive the Defendant ARB's right of denial, because swing sets cannot be built in the side yard, a

rule that has been evenly applied by the ARB. All existing swing sets are actually situated in the backyards. The ARB has consistently rejected applications for swing sets in locations other than the backyard. The South Carolina Human Affairs Commission found the same in its dismissal of the Plaintiff's claim.

b. The ARB acted reasonably and in good faith in denying Plaintiff's applications.

The South Carolina Court of Appeals specifically held that rejecting applications based on aesthetic principles is not arbitrary or capricious. *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894. Similarly, the ARB made decisions based on aesthetic principles. *Id.*

Plaintiff's proposed fence was denied because it was to be situated in the front yard and close to his property line. The swing set was denied because its proposed location was the side yard. The denials of Plaintiff's applications were reasonable and not arbitrary or capricious.

c. The deferral of Plaintiff's application was valid.

On February 27, 2012, Plaintiff submitted an application requesting the approval of two pindo palms and the extension of brick edging surrounding his existing garden. The ARB deferred his application until he removes the brick foundation and his fines in the amount of $1,735.00 are paid. Plaintiff argued that the ARB's knowledge of the outstanding fines is a violation of his privacy. He also contends that the deferral is a breach of the Declaration and the Implied Duty of Good Faith and Fair Dealing, because only acceptance or denial of applications are permitted. He also argued that Mr. Roche, the husband of Defendant Ms. Toth, engaged in a conflict of interest transaction by voting to defer the application and disclosing the fine amount to the other ARB members.

Plaintiff's contentions are without merit. The ARB is the body that determines the fines and their assessment. Further, this information was not disclosed to the ARB through Mr.

Roche, but instead, was provided by K.A. Diehl, the management company. Also, to comply with Plaintiff's request that Mr. Roche refrain from voting on his application leads to the same decision that was reached by the Board on March 16, 2012: a deferral of the application. Without Mr. Roche's vote, the ARB did not have a quorum and would have been forced to defer Plaintiff's application.

d. The ARB complied with the Bylaws when fining Plaintiff for his violations.

Plaintiff argued that the Defendant HOA violated Article 13, Section 13.3 of the Bylaws by assessing fines for his ARB violations. Section 13.3 provides that the Board of Directors shall not fine an owner for violation of the Declaration, Bylaws, or rules and regulations unless an Owner is provided notice of the violation and given a period of 10 days to remedy the violation without further sanction. If the violation is not abated within 2 months, the Defendant HOA "may" provide the Owner with a hearing. Plaintiff was informed that he could appeal but he specifically chose not to appeal. The South Carolina Affairs Commission also found that Plaintiff did not follow the appeal process with respect to the swing set application.

Additionally, Section 13.3 specifically applies to the Board of Directors, not the ARB. The ARB is granted the right to promulgate rules and regulations and to enforce those regulations under Section 7.2 of the Declaration. The $50.00 fine levied by the ARB upon notice of the violation is the procedure set forth in the ARB guidelines as is the $100.00 monthly fine for Plaintiff's continuing refusal to remove the brick foundation and place sod in that area.

I find that the ARB's denials of Plaintiff's applications are proper, as are the fines and the deferment.

13. The Glens owners are allowed access to the Amenity Center.

Plaintiff argued that the homes located within the Glens are multi-family homes, and as result, should be precluded from using the Amenity Center. Section 6.5 of the Declaration states: "...the Developer shall have the right, at its sole discretion to create multi-family associations within the subdivision which will contain separate recreational amenities. In such case, the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association."

Assuming arguendo that the Glen is a multi-family neighborhood, the preclusion of properties that are "multi-family" from using amenities is contingent upon the Developer having provided separate amenities for that neighborhood under Section 6.5. Furthermore, according to Ms. Sullivan, the Glens homeowners have paid assessments for the Amenity Center and used the Amenity Center since 2005. The Glens do not have separate amenities, and therefore, the Glens homeowners are entitled to access to the Amenity Center.

14. Capital contributions and initial assessments from Owners were properly collected and managed.

Plaintiff argued that the capital contributions and initial assessments owed by International Club homeowners to the Defendant HOA upon purchase of their unit were not properly collected, were mismanaged, and misspent.

The Third Amendment to the Declaration added the Glens, the Highlands, the Links, the Cambridge and the Meadows to the Community and deleted Section 3.5 of the Declaration in its entirety. The Section is replaced with the following covenant: "The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner upon transfer of such Unit either from the Developer or from another Owner. All sums paid are in addition to and not in lieu of regular assessments for common expenses." Under the

Third Amendment, Section 6.7, "Initial Assessment", was deleted and replaced with language that states the Defendant HOA shall collect a Capital Contribution as set forth in Section 3.5.

The Fourth Amendment added the following language: "Owners of Units in the Multi-Family Parcel shall pay the amount of One Hundred and Fifty ($150.00) and no/100 Dollars to the Association at the time a Unit is conveyed from the Developer to a third-party purchaser as a contribution toward the maintenance of the entrance roads of the International Club PUD."

a. Separate Accounting for Capital Contributions.

Plaintiff argued that funds paid as capital contributions must be segregated from the operating funds. No provision in the Declaration, Bylaws, or rules and regulations for the Defendant HOA require it to separate capital contributions from assessments. South Carolina law does not require capital contributions to be separated. However, while capital contributions were collected, they were separately accounted for in the HOA's general ledgers. Therefore, Plaintiff's argument regarding the separation of capital contributions is without merit.

b. Equitable Ownership of Capital Contributions.

Plaintiff asserts that the unit owners equitably own the funds they pay to the Defendant HOA under sections 3.5 and 6.7 of the Declaration. The Declaration does not create equitable ownership in the capital contributions. Once the payment is made to the Defendant HOA, the Defendant owns the funds.

c. Developer's and Defendant HOA's Use of Capital Contributions to construct Infrastructure or Amenities.

The Capital Contribution constitutes an initial assessment of the International Club homeowners. Under Section 6.2 of the Declaration:

> "[a]ssessments levied by the Association must be used exclusively to promote the recreation, health, safety, and welfare of the Owners in a Subdivision and for the improvement, protection,

> replacement, operation, and maintenance of the Common Areas and the Recreational Amenities including reserves for the replacement of capital items and for the provision of various forms of insurance for the Association, its property..., members, directors, officers, employees and agents, and for the provision of necessary and reasonable services for and other expenses of the Association."

Arguably, the assessment may be used by the Defendant HOA to improve Common Areas and Recreational Amenities. If any Developers controlled the Defendant HOA Board and decided, on behalf of the Defendant HOA, to construct improvements with the Assessments, that action is valid. However, no evidence was presented that the Developer constructed improvements with HOA funds.

d. Assessments from Single Family Owners and Multi-Family Owners.

Plaintiff argued that the capital contributions from single family owners (who can use the Amenity Center) and multi-family owners (who cannot use the Amenity Center) must be separated. The Fourth Amendment provides that capital contributions will be collected from multi-family owners to maintain the entrance road. No similar restriction exists on capital contributions from single family owners. Nothing in the Defendant HOA's governing documents prohibits the pooling of funds, even if the use of the assessment is specified in the Fourth Amendment.

e. Collection and Use of Capital Contributions.

Plaintiff contends that the Capital Contributions were not properly collected and used by the Defendant HOA. He asserted that the funds can only be used for the maintenance of the entranceway. Further, he stated that the roads were dedicated to Horry County, and as a result, the entrance area cannot be maintained by the Defendant HOA and the capital contributions are useless. Lastly, he claimed that the contributions were collected by D.R. Horton in 2004 but they were not deposited into the Defendant HOA's account. I find the Plaintiff's claims without

merit. The evidence reflects that the entrance area is approximately 5.42 acres and owned by the Defendant HOA, and as the owner, the HOA shall maintain the property. Further, the capital contributions may be used for purposes other than the maintenance of the entranceway, including but not limited to, maintenance of the Common Areas, other property in and near the Subdivision, and as reserve funds for future capital expenditures. Finally, William Freiboth testified that the capital contributions collected from 2004 through 2007 were properly accounted for by Defendant HOA.

f. Validity of the Third Amendment.

Plaintiff contends that the Third Amendment is invalid, because it was not approved by the homeowners. However, developers may amend restrictive covenants or impose new restrictive covenants without the consent of homeowners, if five conditions are met:

> 1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants;
>
> 2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development;
>
> 3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants;
>
> 4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and otherwise may be provided by law; and
>
> 5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy."

Queen's Grant II Horizontal Property Regime, 368 S.C. at 350, 628 S.E.2d at 907.

Pursuant to Declaration Section 8.5, the Declarant has the right to amend the Declaration without consent of any owner or mortgagee, provided that the amendment does not materially alter or change the owners' use and enjoyment of their property and does not affect the security, title, or interest of the mortgagee, as determined by the sole judgment of the Declarant.

At the time of the Third Amendment, D.R. Horton added an additional 90 acres of developable property, which constitutes a sufficient interest in the development. *See Queen's Grant II Horizontal Property Regime*, 368 S.C. at 364-65, 628 S.E.2d at 915-15 ("Sufficient Property Interests" include ownership of right of ways, easements, and land held in trust for the association).

D.R. Horton complied with the Declaration, in that the Third Amendment does not materially alter or change the homeowners' use and enjoyment of their property. Importantly, the amount collected under the original Section 3.5 and the Third Amendment is the same. 1/6 of the annual assessment is equal to 2 months of assessments. The capital contribution requirement only applies to new Owners. The existing Owners at the time of the Amendment did not have to make any additional contributions.

D.R. Horton provided notice of the amended covenants by filing the Third Amendment in the chain of title of the owners' properties. This constructive notice is sufficient pursuant to *Queen's Grant II Horizontal Property* Regime. *Id.* at 367-68, at 916-17.

Plaintiff argued that the Third Amendment is in violation of public policy, because it sets forth that each new Owner of a Unit must pay a capital contribution equivalent to two months of assessments at the time the Unit is transferred. However, the Defendant HOA's minutes reflect that counsel for the Defendant HOA advised not to collect a capital contribution in this circumstance. Furthermore, Plaintiff failed to present evidence that contributions were collected upon re-sale of Units. Therefore, I find that the Defendant HOA's enforcement of the Third Amendment was valid.

g. Validity of the Fourth Amendment.

Plaintiff argued that the Fourth Amendment is invalid, because it requires multi-family owners to contribute $150.00 at the time the unit is transferred, rather than two months of assessments as set forth in the Third Amendment. The Declaration sets forth different monetary payments for the single family owners and multi-family owners, because single family owners have access to the Amenity Center and the multi-family owners do not. Because different rights and obligations exist for the class of members under the Declaration, the contribution of $150.00 is reasonable and not in violation of public policy. It is also reasonable to conclude the developers of the multi-family parcels damaged the roads as a result of the construction and the additional assessment was to compensate the HOA for this damage.

15. **The Third Amendment's Reference to Developer Contributions is Related to the Developer Agreement.**

The Third Amendment designates Sunbelt Associates as a "Designated Builder" as defined by the Declaration. The following sentence was also added to Section 7.2:

> Sunbelt Associates, LLC and Developer have previously entered into a Developer's Agreement wherein Sunbelt Associates, LLC has agreed to contribute One Thousand and 00/100 ($1,000.00) per home sold to an Owner for capital improvements. Any other builder wishing to construct single family or multi-family dwellings in the subdivision shall contribute to the capital improvements by separate agreement with Developer in order to attain the status of Designated Builder within the Subdivision.

Plaintiff seeks an order as to whether builders that construct homes within the Community are required to contribute $1,000.00 and whether the $1,000.00 contributions may be used for the construction of amenities.

Assuming arguendo that the builders are not necessary parties, the plain and obvious meaning of the covenant is to require all designated builders to pay the Declarant, D.R. Horton, a contribution for the construction of amenities and infrastructure within the Community. This is

clear based upon the requirement that the designated builders enter a separate agreement with the Developer. The Developer Agreement is consistent with this interpretation of the Third Amendment, which sets forth that Sunbelt Associates must pay D.R. Horton, not the International Club HOA, a $1,000.00 capital contribution.

16. The Defendant HOA's maintenance contracts are proper.

Plaintiff's claim that the Defendant HOA misspent funds stems from his argument that the Defendant HOA maintains property that it does not own. However, pursuant to Sections 3.1(a) of the Declaration, the Defendant HOA may maintain "all open spaces, lagoons, lakes, swales, ditches, pipes, and other water courses or drainage ways, whether the same are within the Subdivision or in a reasonable proximity to the Subdivision such that their conduction would affect the appearance of the Subdivision as a whole." Therefore, the Defendant HOA has the authority to maintain property that it does not own to ensure that the Community as a whole has a consistent appearance, including property of adjacent owners and property within Horry County's right of way.

17. The Fairways and Enclave are not subject to the Declaration.

The Plaintiff argued that the Fairways and Enclave are a part of the PUD and that owners living in these neighborhoods must pay assessments. The Fairways HPR and the Enclave projects are located on tracts adjacent to properties within the Community. These projects also utilize the same entranceway as the other neighborhoods within the International Club and the County dedicated roads. However, I find that the properties that constitute the Fairways HPR and Enclave are not subject to the Declaration, and therefore, the Defendant HOA cannot collect assessments from owners in these neighborhoods.

18. The Highway 17 Connector Association Covenants are valid and the Defendant HOA is obligated to collect the assessments.

Plaintiff challenged the validity of the Declaration of Special Covenants for Highway 17 Connector Road Maintenance District Association, Inc. ("Connector Road Declaration"). Pursuant to the Connector Road Declaration, the developers of property between Highway 707 and Bypass 17 agreed to contribute property to build a connector road between these two roads. The purpose of the Connector Road Declaration, as stated in its whereas clauses, is to provide landscaping along the connector road and to maintain drainage and provide signage. The property subject to the Connector Road Declaration is described in Exhibit "A", attached to the Connector Road Declaration and it includes the Suntech Tract and the Plantation A.D. Tract (except those portions of the Suntech Property which have been previously conveyed). The property description encompasses 2,881.5 acres, less and excepting specific tracts; the specific tracts excluded do not include the International Club. The Connector Road Declaration is signed by Plantation A.D., LLC and Suntech AD, LLC. Since Plantation A.D., LLC agreed to the Connector Road Declaration and it was the property owner at the time, the property now being the Community is subject to the Connector Road Declaration. Therefore, the Connector Road Declaration is valid.

In the Connector Road Declaration, Article V, Section 1, Creation of Lien and Personal Obligation for Assessments, sets forth: "In the event any sub-association is formed which affects all or any portion of the Property, such sub-association shall have the obligation to collect any assessment hereunder." Therefore, the Defendant HOA has the obligation to collect assessments from individual homeowners and pay the assessment to the Highway 17 Connector Association.

19. The Plaintiff's Defamation Claim is Without Merit.

During the trial the Plaintiff represented to the Court that Ms. Golding's letter dated May 2009 is not defamatory. His exact wording was "...nothing in the letter is defamatory." Ms. Golding's letter is a two page letter, an attached list of cases, and reported decisions. Since Plaintiff testified that there was nothing defamatory in Ms. Golding's letter, he can no longer claim defamation; however, even without his stipulation, the Plaintiff had no grounds to contend that the letter was defamatory.

a. The Defense of Absolute Privilege Bars Plaintiff's Claims.

Defamatory statements made during the course of a judicial proceeding are absolutely privileged. *See Redfearn v. Pusser*, 276 S. C. 506, 280 S. E. 2d 206 (1981). This privilege applies even though the statements were made maliciously and with knowledge of their falsity. *Texas Co. v. C. W. Brewer & Co.*, 180 S. C. 325, 185 S. E. 623 (1936). Moreover, the privilege extends to communication that are preliminary to the judicial proceedings. *Crowell v. Herring*, 301 S. C. 424, 392 S. E. 2d 464 (Ct. App. 1990). The privilege protects the statements of judges, parties, and witnesses offered in the course of judicial proceedings. *Id.* It protects not only trial and deposition testimony, but also statements in pleadings, affidavits, communications between counsel, statements by counsel to prospective witnesses, and in general "any utterance arising out of any judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial actions of any official nature provided those steps bear reasonable relationship to it." *Id.* Whether a particular statement is "relevant" to the judicial proceeding is for the court to decide, with all doubts resolved in favor of relevancy. *Texas Co.*, 180 S.C. 325, 185 S.E. 623.

Ms. Golding's letter was prepared as a result of Plaintiff's lawsuit and provided to the Defendant HOA Board of Directors. The letter was disseminated to the Community members to provide information regarding the lawsuit. This communication is an utterance arising out of a

judicial proceeding and has a reasonable relationship to it, and therefore, it is absolutely privileged and protects the Defendants from liability.

b. The Defendants' statements are privileged.

"Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001). "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

The Defendant HOA notified its members regarding Plaintiff's lawsuit and his history of filing litigation pro se. The Defendant HOA had a duty to inform its members that Plaintiff has filed several other cases and to inform the members' of the status of this lawsuit. The Board did not exceed the scope of the privilege nor provide an opinion as to the motives of Plaintiff's litigation.

20. The Claims Against the Defendant Rosemary Toth are Without Merit.

The Plaintiff alleged that the Defendant Rosemary Toth, former President of the Defendant HOA, defamed him, invaded his privacy, caused intentional infliction of emotional distress, violated her obligations of good faith and fair dealing, and failed to properly provide to him information. He also alleged that due to the counterclaim asserted by the Defendant HOA, the Defendant Ms. Toth violated the South Carolina Frivolous Proceedings Act.

Board members have immunity under South Carolina law. Pursuant to the Act, S.C. Code § 33-31-834:

> All directors, trustees, or members of governing bodies of not for profit cooperatives, corporations, associations, or organizations described in subsection (b) are immune from suit arising from the conduct of the affairs of these cooperatives, corporations, associations, or organizations. This immunity from suit is removed when the conduct amounts to willful, wanton, or gross negligence.

No evidence was presented that Ms. Toth acted improperly in any way much less acted in a wanton, willful or grossly negligent manner or that she breached any duty to the Defendant HOA or its members.

Plaintiff alleged that Ms. Toth failed to produce documents, that she entered contracts on behalf of International Club HOA that were in violation of the Declaration, she voted in favor of the Central Electric easement, she directed K.A. Diehl to mail a list of lawsuits Plaintiff has been a party to, she made representations about the ownership of the roads and parking lots that were inaccurate, she did not follow the advice of committees, and she failed to disclose the Golf Course Agreement. However, Ms. Toth's actions were consistent with the Declaration and her obligations as a Board member. Ms. Toth did not act individually; instead, all actions were authorized by the Board. The Board had the authority to reject recommendations of committees and to vote in favor of the easement. With respect to the mailing about Plaintiff, Ms. Toth was out of town and did not take part in the decision to send the mailing; the mailing was authorized by the other board members. Regardless, the mailing is privileged and justified under the circumstances.

Even if Ms. Toth was negligent, the governing board of a non-profit corporation homeowners' association is entitled to have the validity of its intra vires action tested by the business judgment rule. *Dockside Ass'n*, 291 S.C. at 216-17, 352 S.E.2d at 715-16. Under the rule, derived from corporate law, as long as a board acts in a reasonable manner, its business judgment is protected from challenge. *Id.* Under the business judgment rule, a court will not

review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith. *Id.*

As long as Ms. Toth acted within her authority under the Declaration and no evidence of bad faith exists, her actions are protected by the business judgment rule. I find that Ms. Toth acted within her authority and in good faith, and therefore, Plaintiff's claims against Ms. Toth are without merit.

21. **The Plaintiff's Invasion of Privacy Claim is Without Merit.**

Invasion of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the ; ubl . has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. *Meetze v. The Associated Press*, 230 S.C. 330, 335, 95 S.E.2d 606 (1956).

The letter to the Community members was regarding public matters; lawsuits Plaintiff filed.[3] There was no exploitation of Plaintiff's personality, publication of private affairs or intrusion into private activities. Therefore, his invasion of privacy claim is without merit.

22. **Plaintiff's Intentional Infliction of Emotional Distress Claim is Without Merit.**

To recover for intentional infliction of emotional distress, a Plaintiff must establish that 1) the Defendant intentionally and recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; 2) the conduct was so "extreme or outrageous" as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized society; 3) the actions of the Defendant caused the Plaintiff emotional distress; and 4) the emotional distress suffered by the Plaintiff was so

[3] In fact, Plaintiff's witness Ms. Pizzi testified that the litigation in which Plaintiff was involved could be googled.

severe that no reasonable man could be expected to endure it. *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 160 (Ct.App. 2000).

Plaintiff's outrage claim is based upon the letter that was sent by the Defendant HOA to its members. Courts rarely grant relief under outrage claims. The Defendant HOA communicated that the Plaintiff is a litigious individual, which is true, and a fact that its members had a right to know based upon the multiple claims asserted in this lawsuit. Plaintiff's claim is without merit.

23. The Defendant K.A. Diehl Properly Performed its Duties as the Community's Manager.

The Plaintiff attacked the Defendant K.A. Diehl on a number of fronts. First he testified that K.A. Diehl obtained monies from capital contributions and these monies are missing. He testified that there were no checks and balances in place to prevent any fraud and it was "more likely than not that K.A. Diehl is responsible . . . ." Then the Plaintiff attacked the practices of K.A. Diehl as a contracting agent for the Defendant HOA. He testified that K.A. Diehl's practices were illegal and in violation of public policy. He pointed to K.A. Diehl having a vendor program. In order to qualify as an approved contractor for any one of the communities managed by K.A. Diehl, the vendor pays a fee for advertising services provided by K.A. Diehl. Plaintiff argued that K.A. Diehl's conduct amounted to a conspiracy to defraud in violation of Section 39-3-140 of the Code of Laws of the State of South Carolina. Aside from the fact that the Plaintiff does not have standing with respect to K.A. Diehl's contracts with third parties, K.A. Diehl's actions in no way constitute a conspiracy to defraud. Nothing in the evidence shows that K.A. Diehl attempted to limit competition in its trade. Furthermore, there was no evidence that the Defendant HOA utilized K.A. Diehl's preferred vendor program.

Plaintiff also testified that K.A. Diehl failed to perform its duty under the Act and the Defendant HOA Bylaws. He testified that when he requested the membership list, K.A. Diehl refused to provide it; however, Plaintiff's request was for a membership list containing homeowners emails, phone numbers and delinquency status. K.A. Diehl's representative, Beckie Abel, testified that Plaintiff's request was denied due to improperly requesting personal information. Further, she testified that the list was available on the Defendant HOA's website which the Plaintiff could easily access. Lastly, Plaintiff was provided a members' directory on at least one previous occasion.

Plaintiff also testified that he did not receive the Defendant HOA publication known as "Friday Facts". However, the Plaintiff, on cross-examination, admitted that he refused to access the Defendant HOA website for he did not want to disclose his email address and therefore he does not receive Friday Facts. The evidence was abundantly clear that membership lists were available to the Plaintiff on the Defendant HOA website which is a restricted website for the Community members.

24. Plaintiff is indebted to the Defendant HOA in the amount of $7,326.00.

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. Declaration 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 by the Defendant HOA.

"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). 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). 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.

"There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Menne*, 368 S.C. at 569, 629 S.E.2d at 697.

Clearly, the $5,000.00 that the Defendant HOA seeks to recovery from the Plaintiff is reasonable. This action has lasted over 3 years and much discovery has taken place. The trial lasted 3 full days with court starting each day at 9:00 a.m. and ending each day between 5:00 to 6:00 p.m. The issues raised by the Plaintiff were numerous. I conclude that Plaintiff should pay the Defendant HOA the sum of $5,000.00.

As to the ARB fines, as of August 8, 2012, the Plaintiff owes $2,326.00 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 in the amount of $7,326.00.

25. Plaintiff must remove the brick foundation.

Since the Plaintiff has intentionally disregarded the ARB's directive to remove the brick foundation, he is hereby ordered to remove the brick foundation and replace with sod within fifteen (15) days from the date of this Order.

Based upon the above Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED, and DECREED:**

(a) All Plaintiff's claims against the Defendants are dismissed with prejudice;

(b) The Plaintiff is directed to remove, within fifteen (15) days from the date of this Final Order, such date being set forth below, the brick foundation, and all parts thereof, which was directed to be removed by the Architectural Review Board and to cover the ground area with sod;

(c) The Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

IT IS SO ORDERED.

The Honorable Ralph P. Stroman
Horry County Special Referee

Conway, South Carolina
Dated: 2/14/2012

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO.: 09-CP-26-3596
Ronald Jarmuth,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER OF RECUSAL
	)	AND SENDING CASE
The International Club HOA, et al,	)	BACK TO CIRCUIT COURT
	)	
Defendants.	)	

Plaintiff Ronald Jarmuth, a self-represented litigant, has made post-trial motions and has mailed several letters to the Honorable Steven H. John, Chief Administrative Judge for the 15th Judicial Circuit, Civil Court, with copies to defense counsel and the undersigned requesting that Judge John preside over all post trial motions in this matter instead of the undersigned who served as the trial judge. Specifically, Mr. Jarmuth makes what I consider to be unfounded and general accusations that this Court is biased against him and has committed other acts of misconduct in the trial of this matter. While not admitting any bias towards Mr. Jarmuth, and in fact, wholeheartedly denying any such bias and/or misconduct, this Court finds and concludes that it is in the interests of justice and judicial economy that I recuse myself from further involvement in this matter and that the matter be sent back to the Circuit Court for further proceedings.

I, THEREFORE, FIND AND CONCLUDE that this matter be referred back to the Honorable Steven H. John, Chief Administrative Judge for the 15th Judicial Circuit, Civil Court, for further proceedings in this matter.

AND IT IS SO ORDERED.

FILED
HORRY COUNTY
2012 OCT 17 PM 1:28
MELANIE HUGGINS-WARD
CLERK OF COURT

RALPH P. STROMAN
Special Referee for Horry County

Oct 17, 2012

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ronald Jarmuth, Appellant,

v.

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

Appellate Case No. 2013-000714

Appeal From Horry County
Ralph P. Stroman, Special Referee
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2015-UP-111
Submitted January 1, 2015 – Filed March 4, 2015

AFFIRMED

Ronald Jarmuth, of Murrells Inlet, pro se.

Henrietta U. Golding and Alicia E. Thompson, both of McNair Law Firm, PA, of Myrtle Beach, for Respondents.

PER CURIAM: Ronald Jarmuth appeals the special referee's order dismissing his claims, awarding judgment against him, and granting injunctive relief. On appeal, Jarmuth argues: (1) the special referee denied him a fair trial; (2) the special referee did not address all of his issues; (3) the International Club Homeowners Association, Inc. (the Association) did not have any rights under the declaration of covenants and restrictions; (4) the South Carolina Nonprofit Corporation Act[1] preempted the declaration of covenants and restrictions; (5) K.A. Diehl & Associates, Inc. (K.A. Diehl) and the Association were liable to him for defamation and invasion of privacy; (6) Rosemary Toth and K.A. Diehl were liable to the Association for mishandling Association funds; (7) certain covenant obligations under the declaration of covenants and restrictions were voidable personal service contracts; (8) he was entitled to the approval of various modifications to his unit; (9) Pebble Creek and the Villas were not subject to the declaration of covenants and restrictions; (10) certain waivers of covenants contained within the first amendment to the declaration of covenants and restrictions were general waivers; (11) Horry County owned certain roads within the International Club community free of covenant restrictions; (12) the Association illegally withheld the voter list from him; and (13) the Association was not entitled to attorney's fees. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

As to Issue 1: *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("[A] party may not complain on appeal of error or object to a trial procedure which his own conduct has induced."); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("[W]here an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."); Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

As to Issue 2: *Ellie, Inc.*, 358 S.C. at 99, 594 S.E.2d at 496 ("[W]here an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no

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[1] *See* S.C. Code § 33-31-620(a) (2006).

authority other than an evidentiary rule was abandoned), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000); Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

As to Issue 3: *O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (explaining when the relief sought in an action for breach of restrictive covenants is monetary in nature, a claim for breach of the covenants is legal); *id.* (stating "in an action at law, tried without a jury, . . . we will not disturb findings of fact of the [trial court] unless there is no evidence reasonably supporting the [trial court's] findings"); *McCall v. IKON*, 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct. App. 2005) ("[A] corporation may be known by several names in the transaction of its general business.").

As to Issue 4: *Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 382-83 (Ct. App. 2004) (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); S.C. Code Ann. § 33-31-620(a) (2006) ("A member may resign at any time.").

As to Issue 5: *Mellen v. Lane*, 377 S.C. 261, 275, 659 S.E.2d 236, 244 (Ct. App. 2008) (explaining an action in tort for damages is an action at law, and in an action at law decided by a special referee, this court will correct any error of law); *id.* (stating in reviewing an action at law, this court "must affirm the [referee's] factual findings unless there is no evidence reasonably supporting them"); *Murray v. Holnam, Inc.*, 344 S.C. 129, 140-41, 542 S.E.2d 743, 749 (Ct. App. 2001) ("A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable."); *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 396, 665 S.E.2d 222, 227 (Ct. App. 2008) ("Invasion of privacy consists of the public disclosure of private facts about the plaintiff, and the gravamen of the tort is *publicity as opposed to mere publication.* The defendant must intentionally reveal facts which are of no legitimate public interest, as there is no right of privacy in public matters. In addition, *the disclosure must be such as would be highly offensive and likely to cause serious mental injury to a person of ordinary sensibilities.*" (emphases added) (quoting *McCormick v. England*, 328 S.C. 627, 640, 494 S.E.2d 431, 437-38 (Ct. App. 1997))).

As to Issue 6: Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit."); *Ellie, Inc.*, 358 S.C. at 99, 594 S.E.2d at

496 ("[W]here an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal.").

As to Issue 7: *Marshland Trust*, 358 S.C. at 661, 596 S.E.2d at 382-83 (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005) ("'Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.'" (quoting *Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987))).

As to Issue 8: *Marshland Trust*, 358 S.C. at 661, 596 S.E.2d at 382-83 (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); *Berger*, 365 S.C. at 239, 616 S.E.2d at 434 ("'Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.'" (quoting *Pelzer*, 292 S.C. at 347, 356 S.E.2d at 414)); *River Hills Prop. Owners Ass'n, Inc. v. Amato*, 326 S.C. 255, 260, 487 S.E.2d 179, 181 (1997) (holding the architectural review board of a subdivision did not act unreasonably in disapproving modifications for aesthetic reasons).

As to Issue 9: *Marshland Trust*, 358 S.C. at 661, 596 S.E.2d at 382-83 (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); S.C. Code Ann. § 30-7-10 (2007) (providing South Carolina is a "race-notice" state); *First Union Nat'l Bank of S.C. v. Shealy*, 325 S.C. 351, 355, 479 S.E.2d 846, 848 (Ct. App. 1996) ("It is a well established rule of law that a deed is not legally effective until it has been delivered."); *Williams v. Lawrence*, 194 S.C. 1, 6, 8 S.E.2d 838, 840 (1940) (explaining the recording of a deed is prima facie evidence of delivery).

As to Issue 10: *Marshland Trust*, 358 S.C. at 661, 596 S.E.2d at 382-83 (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed de novo); *Kinard v. Richardson*, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct. App. 2014) ("Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution. [T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." (alteration by court) (citation and internal quotation marks omitted)).

As to Issue 11: *Town of Kingstree v. Chapman*, 405 S.C. 282, 309, 747 S.E.2d 494, 508 (Ct. App. 2013) ("On the matter of dedication, this court makes findings

of fact in accordance with our own view of the preponderance of the evidence, and the evidence must be strict, cogent, and convincing."); *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 418 n.3, 633 S.E.2d 136, 140 n.3 (2006) (explaining an implied easement may arise when the claimant "has been in possession of both the dominant and the alleged servient tenement, and while in this possession he creates the easement, . . . and he afterwards sells a portion of the land over which the alleged easement runs, [expressly] reserving the easement"); *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("[A]n appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance." (citations omitted)); 23 Am. Jur. 2d *Dedication* § 14 (2013) ("An owner of land subject to a right-of-way may dedicate what it owns, at least where such dedication does not adversely affect the rights of the dominant owner."); *Id.* at § 6 (2013) ("A dedicator of land to the public may impose reasonable terms, restrictions, and limitations on which the land is given.").

As to Issue 12: *O'Shea*, 308 S.C. at 14, 416 S.E.2d at 631 (explaining when the relief sought in an action for breach of restrictive covenants is monetary in nature, a claim for breach of the covenants is legal); *id.* (stating in an action at law tried without a jury, "we will not disturb findings of fact of the [trial court] unless there is no evidence reasonably supporting the [trial court's] findings"); S.C. Code Ann. § 33-31-1602(c) (2006) (providing a member of a nonprofit corporation may inspect and copy the membership list "only if: (1) the member's demand is made in good faith and for a proper purpose; (2) the member describes with reasonable particularity the purpose and the records the member desires to inspect; and (3) the records are directly connected with this purpose").

As to Issue 13: *O'Shea*, 308 S.C. at 14, 416 S.E.2d at 631 (explaining when the relief sought in an action for breach of restrictive covenants is monetary in nature, a claim for breach of the covenants is legal); *id.* (stating in an action at law tried without a jury, "we will not disturb findings of fact of the [trial court] unless there is no evidence reasonably supporting the [trial court's] findings"); *Berger*, 365 S.C. at 238-39, 616 S.E.2d at 434 ("[T]he authority to award attorney's fees can come only from a statute or be provided for in the language of a contract." (internal quotation marks omitted)); *id.* at 240, 616 S.E.2d at 434 ("Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." (internal quotation marks omitted)); *id.* at 239, 616 S.E.2d at 434 ("'Restrictive covenants are

contractual in nature and bind the parties thereto in the same manner as any other contract.'" (quoting *Pelzer*, 292 S.C. at 347, 356 S.E.2d at 414)).

As to any remaining issues not included in Jarmuth's statement of issues: Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

AFFIRMED.[2]

HUFF, SHORT, and KONDUROS, JJ., concur.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

Ronald Jarmuth, Appellant,

v.

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

Appellate Case No. 2013-000714

ORDER

Appellant has filed a motion to supplement the record and an amended motion to supplement the record, seeking to provide this court with a supplemental citation pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules. We grant the motions.

Appellant has also filed a petition for rehearing. After careful consideration of all of Appellant's filings, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

David G. Short, J.

Thomas E. Huff, J.

J.

Columbia, South Carolina

FILED

April 24, 2015

The Supreme Court of South Carolina

Ronald Jarmuth, Petitioner,

v.

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

Appellate Case No. 2015-001019
Lower Court Case No's 2009CP2603596 & 2010CP2611320

ORDER

Petitioner seeks a writ of certiorari to review the court of appeals' decision in *Jarmuth v. Int'l Club Homeowners Ass'n, Inc.*, Op. No. 2015-UP-111 (S.C. Ct. App. filed March 4, 2015). The petition is denied.

_____ C.J.
FOR THE COURT

Columbia, South Carolina

January 15, 2016

cc:
The Honorable Jenny Abbott Kitchings
Henrietta U. Golding, Esquire
Alicia E. Thompson, Esquire
Ronald Jarmuth
Melanie Huggins-Ward

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-26-03596; 2010-CP-26-11320

Ronald Jarmuth,

PLAINTIFF(S)

The International Club Homeowners Association, Inc., et al.,

DEFENDANT(S)

Submitted by: ALICIA E. THOMPSON, SC BAR # 77056 MCNAIR LAW FIRM, P.A. P.O. BOX 336 MYRTLE BEACH, SC 29578	Attorney for: ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court. *Plaintiff's Rule 60 and 12(b)(1) Motion are denied.*

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: Enclosed is a proposed Order Denying Plaintiff's Rule 60 and 12(b)(1) Motion.

INFORMATION FOR THE PUBLIC INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

/s/ Benjamin H. Culbreath — 2148 — May 31, 2016
Circuit Court Judge — Judge Code — Date

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of ____, 20__ and a copy mailed first class or placed in the appropriate attorney's box on this ____ day of ____, 20__ to attorneys of record or to parties (when appearing pro se) as follows:

COPY

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc., Rosemary Toth, And K.A. Diehl & Associates, Defendants.	ORDER DENYING PLAINTIFF'S RULE 60 AND 12(b)(1) MOTION
STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-26-11320
Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc. Defendant.	

PRESIDING JUDGE:	The Honorable Benjamin Culbertson
HEARING DATE:	April 27, 2016
PLAINTIFF Pro Se:	Ronald Jarmuth
ATTORNEY FOR DEFENDANTS:	Alicia Thompson, Esq.

The above captioned actions (hereinafter "Consolidated Cases") came before me on April 27, 2016 in Conway, South Carolina for a hearing on the Motion to Dismiss Counterclaim and to void the September 10, 2012 Final Order for Lack of Subject Matter Jurisdiction pursuant to Rules 12(b)(1) and 60 of the South Carolina Rules of Civil Procedure ("SCRCP") dated April 11, 2016

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and filed March 11, 2016 (hereinafter referred to as "Motion to Dismiss") by the *pro se* Plaintiff, Ronald Jarmuth (hereinafter "Jarmuth").

The Motion to Dismiss seeks the dismissal of the breach of the Declaration claim of the International Club Home Owners Association (hereinafter "Association") filed on October 24, 2011 (hereinafter "Counterclaim") in Civil Action No. 2010-CP-26-11320 (hereinafter "2010 Case"). Jarmuth asserts that the Court did not have subject matter jurisdiction to enter into the September 10, 2012 Final Order (hereinafter "Final Order") granting the Association fines, attorneys' fees, and costs for Jarmuth's breach of the Declaration of Covenants and Restrictions for the International Club filed in the Horry County Register of Deeds Office (hereinafter "Declaration"). Jarmuth argues that the Court and the Special Referee did not have subject matter jurisdiction, because:

- the Association failed to sufficiently plead a cause of action under Rule 8, SCRCP;
- the Association failed to verify the Counterclaim under Rule 9, SCRCP;
- the ARB was the only entity that had standing to bring the Counterclaim;
- the Association violated Section 13.3 of the Bylaws by failing to provide Jarmuth with a hearing before suit was filed.

As a result, Jarmuth argues that the Final Order in the 2010 Case and Civil Action No. 2009-CP-26-3596 (hereinafter "2009 Case") awarding the Association attorneys' fees, costs, and fines is void pursuant to Rule 60(b), S.C.R.C.P.

Having duly considered the arguments of the parties, and based on a review of the pleadings, memorandums, and applicable case and statutory law, the following are my findings and conclusions.

PROCEDURAL HISTORY

1. The 2009 Case was filed by Jarmuth on April 7, 2009 asserting equitable and legal causes of action against the Association, Rosemary Toth, and K.A. Diehl & Associates, Inc. in connection with the Association's operation of the International Club located in Horry County, South Carolina.

2. The Association filed an Answer on May 13, 2009 and asserted a counterclaim for attorneys' fees and costs.

3. Jarmuth filed the complaint in the 2010 Case in Magistrate's Court on October 12, 2010 challenging the Association's authority to enforce the architectural restrictions in the Declaration against his International Club property and the denial of his swing set application on.

4. The Association moved to dismiss the 2010 Case on November 9, 2010 for lack of subject matter jurisdiction and due to the pendency of the same claims in the 2009 Case.

5. After the motion to dismiss was filed in Magistrate's Court, the Association timely filed an Answer to the complaint in the 2010 Case on November 17, 2010.

6. The Magistrate's Court transferred the 2010 Case to circuit court by order dated November 30, 2010 and filed on December 1, 2010.

7. After the 2010 Case was transferred, it was consolidated with the 2009 Case by order dated August 29, 2011 and filed September 16, 2011.

8. Thereafter, the Association filed an Amended Answer and Counterclaim, with leave by this court, on October 24, 2011 seeking a declaratory judgment that Jarmuth is subject to the Declaration pursuant to S.C. Code Ann. 15-53-10 *et seq.* and seeking damages related to fines incurred, injunctive relief, and attorneys' fees and costs as a result of Jarmuth's breach of the Declaration. The Counterclaim sought fines imposed against Jarmuth for breaching the

architectural review restrictions in the Declaration by constructing an unapproved addition on his property line.

9. Allegations in the Counterclaim establishing subject matter jurisdiction include the following:

- "Plaintiff's International Club property is subject, without qualification to the Declaration . . . and the HOA's Bylaws, as amended (collectively referred to as 'Governing Documents')." ¶ 2.
- "...the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at International Club ("Property"). ¶ 24
- "The Property is located in Horry County, South Carolina, and this Court has jurisdiction over the Property and the parties to this action." ¶¶ 52-3
- "Plaintiff is subject to the Governing Documents." ¶ 54
- "Provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision." ¶ 55

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

11. The Consent Order referring this matter to Ralph Stroman as Special Referee set forth that the Consolidated Cases were referred with all power and authority to enter final judgment as provided for in Rule 53(b):

> IT IS ORDERED that the above entitled actions are referred to *Ralph P. Stroman who, pursuant to Rule 53(b) SCRCP, shall* exercise all power and authority that a circuit judge sitting without a jury would have, including but not limited to, hearing pre-trial and post-trial motions, making findings of fact and conclusions of law, directing entry of final judgment in these actions under Rule 53(b) SCRCP, and issuing any and all Orders necessary.

12. The Consolidated Cases were tried in 2012 by the Special Referee, who entered into the Final Order awarding the Association attorneys' fees, costs, and fines.

13. The Final Order included a finding that "[t]he above entitled actions were referred to the undersigned, as Special Referee, by Consent Order" and that the "referral" to Judge Stroman "is a referral with finality".

14. The Special Referee also found in the Final Order that "the Defendant HOA 'may' provide the Owner with a hearing" under Section 13.3 of the Bylaws, but that a hearing was not required before fines were levied.

15. After the Final Order was entered, the Special Referee recused himself from hearing the post-trial motions as a result of the Plaintiff's accusations that he was biased by Order of Recusal dated and filed on October 12, 2012 (hereinafter "Order of Recusal").

16. As a result, the Consolidated Cases came before the Circuit Court pursuant to the Order of Recusal.

17. Jarmuth appealed the Final Order, which was affirmed on appeal in 2015.

18. The remittitur was issued on January 21, 2016.

STANDARD OF REVIEW

1. "[W]hen considering whether to grant relief from final judgments under Rule 60(b), a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute." Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 20, 594 S.E.2d 478 (2004), citing Chewning v. Ford Motor Co., 345 S.C. 72, 579 S.E.2d 605 (2003).

2. South Carolina courts have "recognized a longstanding policy towards final judgments" and that "important benefits are achieved by the preservation of final judgments". Id.

3. In determining whether to set aside a judgment under Rule 60(b), the trial judge should consider the following relevant factors: 1) the promptness of the relief sought; 2) the reasons for failure to act promptly; 3) the existence of a meritorious defense; and 4) the prejudice to the other parties. McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008).

4. The movant must also seek relief "within a reasonable time". S.C.R.C.P., Rule 60(b).

5. The granting of relief under Rule 60(b) is within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992).

6. Although the trial court has wide latitude in granting relief under Rule 60(b), that discretion is limited by the above factors contained in Rule 60(b), S.C.R.C.P. See McClurg, 380 S.C. at 571, 671 S.E.2d 87; Coleman, 306 S.C. at 494, 413 S.E.2d at 17.

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).

CONCLUSIONS OF LAW

I. Law of the Case

1. The findings in the Final Order and the Order of Reference that the Special Referee had jurisdiction over the Consolidated Cases and that the fines were proper without a hearing are the law of the case and cannot be disturbed.

2. Upon the issuance of the remittitur, an appealed order becomes the law of the case and the findings contained in the order govern the case. Holly Hill Lumber Co. v. McCoy, 210 S.C. 440, 442, 43 S.E.2d 143, 143 (1947) (appellate court's decision, from which "there was no petition for rehearing," becomes "the law of the case" and prevents the re-raising of the issue appealed).

3. As a result, the lower court cannot make findings in separate order that are inconsistent with the findings in an order affirmed on appeal after the remittitur has issued. Id.

4. If an appellant does not challenge an issue on appeal that has been ruled upon in the appealed order, that ruling becomes the law of the case and cannot be disturbed. See, e.g.,

Bone v. United States Food Serv., 733 S.E.2d 200, 205 (S.C. 2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so"); McEachern v. Wilson, 154 S.C. 201, 151 S.E. 472 (1930) (an order "which is the law of the case" cannot be challenged).

5. "A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." Austin v. Specialty Transp. Servs., 358 S.C. 298, 302, 594 S.E.2d 867, 878 (Ct. App. 2004).

6. Likewise, "[a]n unappealed order that is appealable becomes the law of the case". McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181 (Ct. App. 2004) (unappealed order dismissing parties with prejudice is the law of the case).

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

8. I find that the Final Order finding that the Special Referee had subject matter jurisdiction is the law of the case and cannot be disturbed.

9. Additionally, I find that the finding in the Final Order that the Association did not need to hold a hearing before fining Jarmuth and bringing this action is also the law of the case and cannot be disturbed.

10. Moreover, I find that the Order of Reference finding that the Special Referee has jurisdiction is also the law of the case, because it was consented to by Jarmuth and was never appealed.

11. Therefore, I find that the Special Referee had subject matter jurisdiction over the claims in the Consolidated Cases, including the Counterclaim, and that the Final Order is not void for lack of subject matter jurisdiction.

II. Subject Matter Jurisdiction

12. The Final Order is not void for lack of subject matter jurisdiction because the Circuit Court had jurisdiction over the Consolidated Cases, and the Order of Reference conferred jurisdiction on the Special Referee to enter the Final Order.

13. Although not specifically stated in Jarmuth's motion, it appears that he is moving pursuant to Rule 60(b)(4) to vacate the judgment based on lack of subject matter jurisdiction.

14. "Rule 60(b)(4) of the South Carolina Rules of Civil Procedure provides, on motion and upon such terms that are just, the court may relieve a party or his legal representative from final judgment, order or proceeding if the judgment is void." Ware, 404 S.C. at 10.

15. "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." Id.

16. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect." Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002).

17. Subject matter jurisdiction is the power to hear and determine cases of the general class to which proceedings belong." Normandy Corp. v. S.C. DOT, 386 S.C. 393, 688 S.E.2d 136 (Ct. App. 2010).

18. The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution of the laws of the state. Id.

19. Pursuant to Art. V, § 11 of the Constitution of the State of South Carolina, "[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts. . . ."

20. "Every circuit court judge in this State shall at all times have jurisdiction to discharge and perform all duties of his office within the circuit wherein he resides . . ." S.C. Code Ann. § 14-5-390.

21. Pursuant to S.C. Code Ann. § 14-5-350, circuit court judges may "hear and determine actions for partition and foreclose suits and all other equity matters concerning real estate whether within or without the county where the land in questions lies."

22. Furthermore, the circuit court may, upon application of any party or upon its own motion, "direct reference" of some or all of the causes of action in a case to special referee. Rule 53(b), S.C.R.C.P.

23. When a reference is made, the special referee must enter final judgment as to the causes of action referred. S.C. Code Ann. § 14-11-85 (Supp. 2008).

24. "Once an action is referred, the special referee possesses all power and authority that a circuit judge sitting without a jury would have in a similar matter." Rule 53(c), S.C.R.C.P.

25. The claims asserted in the Consolidated Cases were related to Jarmuth's International Club property and arose out of the Association's governance of the International Club subdivision located in Horry County, South Carolina. The causes of action asserted actionable conduct by the Defendants in connection with the Association's operations.

26. I find that the circuit court had subject matter jurisdiction over the claims alleged in the Consolidated Cases, including the Counterclaim, at the time that the actions were brought.

27. Additionally, I find that the Association properly pled a cause of action for breach of the Declaration in accordance with Rule 8, SCRCP, to confer the jurisdiction of the circuit court over the Counterclaim.

28. Furthermore, I find that the that the Association did not violate Rule 9, SCRCP, by not verifying the Counterclaim, nor does the absence of a verification affect the jurisdiction of this Court over the Counterclaim.

29. Moreover, the Association, rather than the ARB, had standing to bring the Counterclaim, under the Declaration and the Bylaws of the Association.

30. I find that the Order of Reference providing the Special Referee with jurisdiction over the Consolidated Cases is valid and not void for lack of subject matter jurisdiction.

31. Accordingly, the Special Referee had subject matter jurisdiction over the claims asserted in the Consolidated Cases, including the Counterclaim, and the Final Order is not void for lack of subject matter jurisdiction.

THEREFORE, it is hereby **ORDERED, ADJUDGED AND DECREED** that this Court **DENIES** Plaintiff's Motion to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction pursuant to Rules 12(b)(1) and 60.

AND IT IS SO ORDERED.

The Honorable Benjamin H. Culbertson
Fifteenth Judicial Circuit Judge

May 31, 2016
Conway, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2009-CP-26-3596
Ronald Jarmuth,	)	
Plaintiff,	)	Transcript of Record
vs.	)	April 27, 2016
International Club Homeowners Association, Inc., et al.	)	
Defendants.	)	

B E F O R E:

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Ronald Jarmuth, Appearing Pro Se

Alicia Thompson, Esquire
Attorney for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

(There were no exhibits marked during the hearing.)

(On the record, April 27, 2016.)
THE COURT:All right.This is the case of Ronald Jarmuth -- am I pronouncing that correctly?
MR. JARMUTH: Yes, Your Honor.
THE COURT:-- all right -- versus the International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, Inc., also Ronald Jarmuth versus the International Club Homeowners Association, Inc. According to my roster, the matter is before the court on a motion to dismiss. Please give the court reporter your name and who you represent.
MR. JARMUTH: Ronald Jarmuth, Plaintiff, pro se.
THE COURT:All right.
MS. THOMPSON: Good morning, Your Honor.My name is Alicia Thompson, and I represent the Defendants in the case. Your Honor --
THE COURT:Alicia?
MS. THOMPSON: Alicia Thompson.
THE COURT:Thompson, okay.
MS. THOMPSON: Yes, sir. Just one housekeeping issue, Your Honor, that I wanted to address at the beginning of the hearing --
THE COURT:All right.
MS. THOMPSON: -- Mr. Jarmuth moved to dismiss based on a lack of subject matter jurisdiction, challenging the judgment that was entered in the 2010 case in favor of the Association

for attorney's fees, costs and fines. This morning Mr. Jarmuth provided me with a memorandum in support of his motion to dismiss that challenged 25 other conclusions of law in the final order in the 2009 and 2010 cases. I just ask that the motion this morning be limited to the arguments in the motion that was made and filed and that the court require our motion to dismiss on the additional grounds so that it can brief, be briefed properly and comply with the administrative order in place that requires motions and memos in support.

THE COURT: All right.

MS. THOMPSON: And I also wanted to provide you with our memorandum in opposition to the motion which was filed just so you have a handy -- copy handy, Your Honor.

THE COURT: All right.

MS. THOMPSON: Thank you.

THE COURT: All right. Let me look at his motion. When was his motion filed?

MS. THOMPSON: This one's filed on March 15th, 2016, Plaintiff's Rule 12(b)(1) Rule 60 motion to dismiss counterclaim for a lack of subject matter jurisdiction.

THE COURT: Yeah. All right. Let me see. This is an eight-page motion? All right. Well, Mr. Jarmuth, you are limited to whatever you allege in your motion as the grounds for the motion. Okay. And you can't get into any extraneous matters that are not included in your motion.

MR. JARMUTH: Your, Your Honor, I'd like, Your Honor, I'd like to point out under Rule 12(h)(3) says that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject, subject matter of any claim the court shall dismiss the action. I believe you're, it's up to you to say how it's going to be, that that was a matter to be presented to the court for lack of subject, subject matter jurisdiction at any time, we have, have the evidence --

THE COURT: That's right, at any time, but you've got to put them on notice as to the basis for your argument.

MR. JARMUTH: Fine, Your Honor.

THE COURT: You can't ambush them at a hearing. You've got to -- you're right. The court can dismiss it for lack of jurisdiction at any time, the day after the judgment or a hundred years after the judgment, but when you bring your motion to dismiss for lack of jurisdiction you have to give them the reasons and you can't show up at the motion hearing with any extraneous argument to catch them off guard. Okay?

MR. JARMUTH: Fine, Your Honor.

THE COURT: Because, because the, the, the issue is you're supposed to put everything before the court with you knowing what they're going to say, they know what you're going to say and then the court makes the right decision.

MR. JARMUTH: Fine, Your Honor.

THE COURT:All right.
MR. JARMUTH: May I approach the court reporter? I've got a set of exhibits I want to provide so that you can follow along with what's being said. These consist --
THE COURT:All right.
MS. THOMPSON: Thank you, Your Honor.
THE COURT:All right.Thank you.
MR. JARMUTH: They're, they're numbered. They're labeled. Who gets them?
THE COURT:I do.All right.Go ahead. Let me hear from you, Mr. Jarmuth.
MR. JARMUTH: The counterclaim is void because of lack of subject matter jurisdiction in the claim. There's no subject matter jurisdiction.The counterclaim, which are void -- which is void because there was procedural defects with a claim or conclusions of law in the final order without supporting claims. The counterclaim is defective for four basic procedural reasons:one, that pre-litigation contract provisions that is in the by-laws of the HOA itself which preclude going to court until those pre-litigation provisions are satisfied. These are mandatory on the HOA. South Carolina Supreme Court has held that pre-litigation provisions will be enforced if they are clear, unambiguous and mandatory on the party moving the case.
Second area, that the counterclaim involves a demand on

an account which of specific amounts, and therefore, a verified case requirement is required which was ignored in the claim, rather than a verification of the account on actual knowledge under oath the counterclaim was just signed by Ms. Thompson without even a verification or authentication. Third, there's -- the counterclaim is an assertion by the HOA of a non-party's claim, that is a claim properly asserted by the ARB, and this is, as I will say later, the court, the court in conclusion of law itself said that these claims were claims of the ARB as I'll explain later. The court itself held that the ARB is, in fact, independent of the HOA, and the fourth thing is that the claim does not provide sufficient facts of law to create a viable claim. Rule 12(h)(3) preservation of defenses provides if a court is shown at any time, well, you know obviously. Then the Supreme Court in Gainey v. Gainey has said 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), and it goes on to say a void judgment is one that, from its inception, is a complete nullity and is without legal effect.

Only two things are to be examined here. The first is the claim stated in the counterclaim, and secondly, the final order. We do not look at the trial. We don't look into the pleadings, and we look back from the final order to the claim

to see if the, the, the conclusions of law relate actually back to a viable claim.
Voiding a conclusion of law means that res judicata does not apply to this issue, and this is one of the reasons I'm bringing it. There's no subject matter jurisdiction over an issue addressed by a conclusion of law unless there is or has been properly raised in a claim.
Subject matter jurisdiction is derived exclusively from within the four corners of the counterclaim. Consent of the parties cannot convey it. The court cannot create its own subject matter jurisdiction by order, and the conclusion or finding must map directly to a well pled claim in a complaint. It requires well-pled claim and may be challenged at any time.
Let me go to the four areas. Pre-litigation preclusion, the Defendant ignored the pre-litigation claim -- clause in the applicable contract of the HOA by-laws Section 13.3, which is Exhibit Nine in my book page 199, as ratified by the HOA's board at its May 5th, 2010, meeting by Exhibit 10 on page 202. The evidence is that the required hearing was not held at the board's November 10th, 2010, meeting, Exhibit 11, book page 205 before the fines were imposed.
THE COURT: But how does that dissolve the court of jurisdiction?
MR. JARMUTH: Because the pre-litigation clause in the by-laws 13.3 says that the HOA may not impose a fine, may not

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

THE COURT: Well, it might be a prerequisite, but it still doesn't dissolve the court of jurisdiction to hear and decide the matter. That means -- jurisdiction means whether or not the court is the proper forum to decide the issue.

MR. JARMUTH: Except as I'll cite in a few minutes the South Carolina Supreme Court has held that if you don't satisfy pre-litigation clause it will deprive the court of jurisdiction. I'm looking for the case. Here it is. In Ranucci v. Crain, the South Carolina Supreme Court held that, that courts will strictly enforce a pre-litigation clause, and if the pre-litigation clause is not, is not complied with the courts will dismiss the claim for lack of subject matter jurisdiction. That's Ranucci v. Crain, number 27422 South Carolina Supreme Court filed July 23rd, 2014. It's Shearouse advisory number 29 at 49. It's called Ranucci II.

The clauses, there are other pre-litigation clauses at

13.3 which have to be satisfied. Number one, the by-laws required that a hearing be held, but none was even scheduled. The pre-litigation clause requires a notice of hearing be sent to me, but it was never pled that the hearing was held, nor that the notice, the requirement of 13.3, was sent to me. The pre-litigation clause requires that the hearing be held on the record in the minutes of the HOA, and the minutes at Exhibit 11 show that no hearing was held. The -- 13.3 also requires that the minutes of the board show the results of the hearing, but there exists no hearing, there's no results of the hearing. The minutes of the -- the 13.3 requires that the minutes also show that a notice was sent to me of the results of the hearing so I know what to do all before they could proceed to trial, and of course, it was not pled nor an actual fact that any notice to me of the non-existent hearing was ever sent, so they didn't satisfy a host of pre-litigation clauses, and of course, the courts have universally held that similar pre-litigation clauses such as arbitration, the requirement to send a notice to the Attorney General, they send a notice to the municipality, send a notice to a franchisee is fatal to find to go into court.

Now, sir, as to notice, the claim did plead that the ARB sent me a notice, but conclusion of law number 10 reads the ARB is a separate board parallel to and independent of the HOA created by Article 7 of the covenants, and they did this

because and they claim I filed which was never answered, that's another matter, I allege that all acts of the ARB are void because contrary to the South Carolina Non-Profit Corporation Act which requires two members of the board on every committee for it to have a viable, legally viable act, no members of the HOA board were on the ARB. So they answered it with this conclusion of law saying that's okay, it's not a part of the HOA. It's a separate independent parallel body. So any pleading having pled that the ARB did, did this, the ARB did that is irrelevant because the ARB is not a party to the act, to the complaint.

Again, Exhibit Two, page 36 it was not pled or true that the HOA itself ever sent a notice. It only pled that the ARB sent a notice, the counterclaim, Exhibit Eight, paragraph 33 at page 195, and also I want to point out it ignored the requirement to file an affidavit, which is also at 13.3.

Let's look at another reason why the counterclaim is fatally flawed. It required authentication or verification requirement. The counterclaim did not satisfy Rule 9(i)'s requirement for a verification of the amount due on account. Ms. Thompson here merely signed the counterclaim, Exhibit Eight, book page 198. The claim at page 197, paragraph 44 eads about the amount on account. 44, as of August 26th, 2011, the Plaintiff owes $1,132. 46, Defendant HOA has incurred attorney fees, again, that's the HOA, never pled the

ARB, they incurred attorney's fees, the conclusion of law relied on the unverified claim and took at its exact amount on account, conclusion 24, Exhibit Two, page 56.24, as to the RB fine as of August 8th, 2012, the Plaintiff owes $2,326. Again, conclusion of law says it's the ARB fine, not an HOA fine, the ARB not a party to the case. The Plaintiff is indebted, it said also the Plaintiff is indebted to the Defendant HOA in the amount of $7,326. Note that conclusion reads ARB fines. It never reads violation of covenants. The conclusion 10 at page 36 again says the ARB is a separate, parallel and independent board created by the declaration. Conclusion 24 went on to relate at page 56 the Defendant HOA paid $5,000 to McNair Law Firm, the $5,000 the exact sum created in 2009 over two years before the counterclaim was filed. Therefore, it's an exact claim of an exact amount they're claiming on an account. Therefore, it also would be part of the verification on actual knowledge which was never filed with a notary in the counterclaim. The claim was -- the attorney fees was claimed as quote, fines and costs to collect the fines. Rule 9(i), verification of account, as held by the Supreme Court in Dawkins v. Fields, a verification is required and its absence deprived the court of subject matter jurisdiction over the counterclaim.

The next issue, the counterclaim does not satisfy pleading requirements of Rule 8(a)(1), which requires specific

facts in the counterclaim and the legal basis entitling the Plaintiff, the pleader to the relief sought. See my Exhibit One page one, which means they didn't show how the HOA somehow was able to demand fines to the separate ARB.

In Player v. Chandler, the Supreme Court held that the pleading must show four things: one, relating to demands on the covenant, that a covenant exists before the deed was executed; two, that the covenant was properly recorded with the correct recorder of deeds, signed -- and it was assigned a book and page; three, that the deed actually cited the covenant by book and page; four, that the HOA is a named party in the covenants you must plead sufficient facts to satisfy the statute of frauds, that -- but here the counterclaim didn't plead any of that, none of the four things, just went on at the beginning, "Oh, here are the covenants and you violate the covenants, we want money."

In Player v. Chandler, the court went on to say such phrases as subject to the covenants of record, which where, where there are any, are mere meaningless and their meaning unenforceable or all terms must exist and be in writing at the time the deed is signed. The terms cannot be interpreted to include a secret purpose or intent on the part of one of the parties thought were in his mind.

The HOA failed to plead that the HOA is a named party to the covenants. Exhibit Two, book -- page, my page one,

conclusion of law number one and here's how -- I need some background. When I filed claim 5(f) in my 2010 complaint there were at the time three HOAs which could compete to be the Association named in the covenants. The covenants actually say the name of the Association with rights under the covenants. The first one was the Murrells Inlet Golf Plantation Association, which actually is a viable South Carolina non-profit corporation with papers recorded in this courthouse. The second one is the International Club Association, another South Carolina non-profit corporation with papers recorded in this courthouse. The third is the Defendant International Club Homeowners Association. This is like asking in a contract is Jane Doe the party because the contract says Jane Doe is one of the parties or is it Jane Doe Hudson because she says she's the party even though the contract only said Jane Doe, not Jane Doe Hudson, and that's a legally distinguishable name.

Conclusion of law number one says that the declaration identified the Association as the Murrells Inlet Golf Plantation, Inc. The name in the covenant was changed by the first amendment to the International Club, Inc., which is ICA, not International Club Homeowners Association. That would satisfy one of my questions I raised, but it went on to ask another question. It said -- went on to say, oh, there was a claim not pled which is can the Defendant HOA step into the

shoes of a named party to the contract because of performance. That claim was not raised in the counterclaim. It was not raised by me. Yet the conclusion of law went on to assume that claim was pled, which it wasn't.

They said, they said that the HOA by virtue of performance can enforce the covenants, can collect assessments. That question was never raised, and the germane question in enforcing the covenants and suing you under the covenants is are you a named party to the covenants, and the court answered the question by saying the International Association, Association, Inc., is the named party, not the HOA and maybe there's some other reason they could sue, but in their counterclaim they never gave an explanation of how they -- how the rights under the covenant to seek relief under the covenant, they just assume, "Hey, there's a covenant, you violated the covenant, pay us." Basically the HOA did not plead the legal basis of principal rights to relief. Rule 9(a) reflects Rule 8(a)(2)'s requirement that the claim show that the pleader personally is entitled to relief by stating the entitling relationship of the pleader to the claim for relief.

Another problem, defective pleading of amount in dispute. Rule 9(i) requires that if a claim states that a Defendant owes an amount on account such in unpaid assessments, such as unpaid assessments, fine or specific sums allegedly owed to

pleader the claim must be again be supported by a sworn verification of personal knowledge and it hasn't been. I will point out at this point that res judicata does not preclude this motion because the issue of subject matter jurisdiction was never before raised either the trial or the appellate levels.

Let me look at the HOA defense. There are two defenses raised. Number one, they allege I consented to the -- to subject matter jurisdiction when I answered without contesting one of their paragraphs in their counterclaim where they said that the court has personal jurisdiction. Of course they do, I mean, because I filed the complaint to which they did a counterclaim, and then they said the court has jurisdiction over the property because it is in Horry County. I admitted this because that is an admission of venue not of subject matter jurisdiction, and again, no matter what I might have said the court could not do subject matter jurisdiction by consent of the parties.

Defense two, they claim that the court created subject matter jurisdiction over everything through -- when it -- through its order of reference to Ralph Stroman as a special referee, but subject matter jurisdiction resides in the court not in the individual judge, and transferring a case from one judge to another does not change the status of the case, and again, the courts can't bestow subject matter jurisdiction on

tself by its own order. So the order of reference is irrelevant to the issue of subject matter jurisdiction, and the fourth problem, the counterclaim judgments are void because they assert claims of the non-party ARB. The conclusions of law relates to its obligations and rights between me as a party and the ARB a non-party. The court, the counterclaim asserts that the order to move the bricks was issued by the ARB and the, and the fine actually imposed, I don't see it in the counterclaim, was imposed by the ARB, not by the HOA. At page 195, paragraph 29, counterclaim, 29, the Architectural Review Board holds the architectural review rights pursuant to the covenants, and at 37, the Architectural Review Board also demanded that the brick wall be removed or he would be subject to monthly fines. Again, never pled as subject fines, no fines were actually imposed. The counterclaim gave no explanation how the demand of the ARB, the ARB's entitlement to fines were transferred to the HOA. 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 Five 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.

The claim asserts that the HOA, not the ARB, spent money on attorney's fees to collect the transferred debt, but the claim belonged to the ARB, book page 197, says, 46, as a direct and proximate result of the Defendant HOA pursuing collection of these fees and costs which belonged to the ARB, by the order of the court and by their own pleadings, pleading -- to collect these fees and costs imposed by the ARB. South Carolina 37-7-412 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. aragraph 44 of the counterclaim says, "As of August 26th, 2011, the Plaintiff owes 1132," which would be about $50, the maximum attorney's fees if the transfer of the debt was viable. It says at 37, the Architectural Review Board, that the claim, counterclaim also demanded that the wall be removed within 15 days or he could be subject to a monthly fines, book page 196. They never pled at all that the HOA made any demand. The final order has a conclusion of law page 57 that the fine is owed to the ARB. 24, conclusion of law, as to the RB fines as of August 8th, 2012, the Plaintiff owes $2,326 to the Defendant HOA, somehow missing the issue of transfer entitled to relief. As stated here and above the ARB, and

again it goes back to the ARB, the ARB has the authority to assess these funds. It never says in the conclusion of law the HOA has that authority. Simply put, there is no subject matter jurisdiction over claims by the non-party ARB. This voids the fine clause of conclusion 24, page 5, quote, "The Defendant HOA shall have judgment against the Plaintiff;" which is also void because it is transfer of debt governed by the FDCPA and by South Carolina 37-2-412, and the attorney fees exceeds the statute limit of 37-2-412. They never pled, one, a transfer was made of a non-party ARB's claims and demands and they never pled, two, that the debt transfer notice requirement was satisfied and they never made any debt transfer notice. Thank you, Your Honor.

THE COURT:All right.Ms. Thompson.

MS. THOMPSON: Thank you, Your Honor. May it please the court? The standard of review for a Rule 60 motion is -- defers to the finality of the judgment. Finality is balanced with the need for a just result, but there's a longstanding policy recognizing finality in South Carolina. There are factors that the court should consider in deciding on this motion today including the promptness of the relief sought, he reasons for any failure to act in seeking the relief, the existence of a meritorious defense and any prejudice to the non-moving parties.

Because we're talking about subject matter jurisdiction,

it would make sense and would be helpful to talk about the procedural history in the cases and how it came before the special referee to make the findings in the final order that re being challenged today. In October 12th, 2010, Mr. Jarmuh filed this action challenging the Association's authority to enforce the architectural review restrictions in magistrate's court. The Association moved to dismiss based on lack of subject matter jurisdiction, and the case was transferred to Circuit Court and the Association then filed an answer. After that case was transferred, the case was consolidated with 2009-CP-3596, and that that 2009 case also included a counterclaim for attorney's fees and costs. My understanding is that Mr. Jarmuth is only challenging the court's subject matter jurisdiction with respect to the counterclaim in the 2010 case, so that's particularly important.

After that the answer was amended by the Association to, to assert a counterclaim and in -- two counterclaims, one, a declaratory judgment action that Mr. Jarmuth is subject to the declaration of restrictive covenants for International Club, and two, a breach of the covenants action seeking fines for an improvement that he constructed on his property without approval as required by the declaration of covenants. Jarmuth then filed a reply to that amended answer and counterclaim, and in that reply he specifically admitted in paragraph two that the Circuit Court had jurisdiction over the counterclaim

as asserted in paragraph 53 of the amended answer and counterclaim.

n June 12th, 2012, an order of reference was entered into in this case, and Mr. Jarmuth signed and consented to that order of reference, and the order of reference referred the case to Ralph Stroman under Rule 53 with all powers to enter a final judgment in the 2009 and 2010 cases and that order of reference was not limited in any respect.

After that the case was tried in August of 2012, and a final order was entered into in the fall of 2012, and in that final order the court awarded attorney's fees and costs and fines to the Association on its counterclaims, and the order specifically found that the 2009 and 2010 cases were referred to the special referee with finality.

After that, Mr. Jarmuth challenged the final order on the basis that Ralph Stroman acted improperly and accused him of wrongdoing. So Judge Stroman at that time had to enter into an order of recusal and that sent the case back to the Circuit Court. The final order was then appealed. The case -- the final order in the two cases was affirmed on appeal and then the remittitur was issued on January 21st, 2016. So there are two main arguments here that in opposition to the motion to dismiss. First, 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, and the established case law in South Carolina is that an un-appealed finding in an order that is appealed and affirmed on appeal and then a remittitur is issued that becomes the law of the case after that remittitur is issued and it cannot be disturbed. Likewise, South Carolina case law holds that an un-appealed order becomes the law of the case. So 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 pursuant to this Rule 60 motion.

Secondly, the court did, the special referee did have subject matter jurisdiction to enter into the final order in this case. 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 and there's cases on point, Normandy Corp. versus South Carolina Department of Transportation. In that case the Department of Transportation tried to challenge a final order that was entered into the -- by the master-in-equity and said that the order of reference didn't give him the authority to make certain findings in that case and the court held that if the case is referred then the

judge has the ability to make any findings that would be necessary to enter into a final order. So under Normandy Stroman did have the authority to enter into the final order and did have jurisdiction over the case to award the fines, attorney's fees and costs.

With respect to the factors that were brought up at the beginning of the case or at the beginning of this argument, Jarmuth admitted that there was jurisdiction in his pleading. He waited more than four years after the final order was entered to challenge jurisdiction and more than six years after the case was initially, the counterclaim was initially brought. The Association -- there's no reason for the delay. There are several -- there's other Rule 60 motions that are currently pending. This is just an attempt to try to get out of the final judgment that was rendered against him for attorney's fees and costs because he lost on appeal, and the Association has spent many years litigating this case and expended a lot of funds. So there would be prejudice to the Association if the final order was disturbed.

Now, addressing Mr. Jarmuth's specific arguments, he has four of them. One of them is that the -- let's see. I'm sorry -- that the -- that there needed to be a hearing before the action could be brought because there was no jurisdiction. The final order specifically found that a hearing was not required as a procedural requirement before the action could

be filed. So that finding is the law of the case and cannot be disturbed now at this time.

Secondly, he says the ARB should have been the entity to bring the action. The ARB is a separate committee or board of the Association that has the authority to make decisions about ARB improvements in the community and to render fines, but the Association is the legal entity with the authority to bring the action under the declaration for breach of the covenants. So that argument also does not have any validity, and then with respect to the Rule 9 verification, this was a breach of the covenants claim and a verification was not required under Rule 9. It doesn't affect subject matter jurisdiction in the case.

Lastly, Jarmuth says that the pleading is deficient, it's not specific enough. The Association pled that the declaration of covenants was subject to the property, that he was noticed a fine, noticed a violation for making an improvement, that their -- that he was fined under the covenants and he failed to remove the improvement and that's sufficient under the South Carolina Rules of Civil Procedure under Rule 8 to plead a cause of action. Thank you, Your Honor.

THE COURT: All right. Anything in reply?

MR. JARMUTH: Your Honor, if it pleases the court, there are two -- there actually were a number of claims in their

counterclaim. One is a demand for fines. Another one is a demand to remove a row of bricks. Each one is an independent, the fact, cause of action or a demand for relief, and if you go to the demand for relief at the end of the counterclaim it specifically says they want money and they want the wall removed. When they make a demand for a specific sum in any complaint and the rule is, the rule is for a verification is extremely broad. It says has no exceptions to it. It says when you have a demand, it's pleading special matters, you demand a specific sum or sum on account and a fine was a sum on account, you must do a verification on actual knowledge under oath. There is no exception to it, and the cases I've cited show that this is strictly enforced by the courts without exception. Number two, I ask where in the final order is held that a hearing need not be held? I don't see that, that we have the whole final order here as I think it's Exhibit Two.

As a matter of a fact at trial the president of the HOA, Bill Freiboth, testified that a hearing was, in fact, held, and the final order reflect, reflects about the hearing being held by the HOA, but of course, that's another matter because we don't look to what the trial has said, we look what the claim said and the claim never claimed that the HOA held that, held that hearing, and the claim says ARB this and ARB that and the final order it says ARB fine, ARB demand.

Let's look at the order of reference. Orders of reference can grant subject matter jurisdiction, and it just says that the Ralph Stroman inherited the status that a judge would have held. Here's the important thing. To make a determination of subject matter jurisdiction, there must be a claim, a demand for the court to find there is no subject matter jurisdiction or the court must enter a, a finding saying that, "Because of this and because of that I find I had subject matter jurisdiction." None of that is there in the final order, and this is just a matter of routine thing, and there's one thing that Ms. Thompson left out, that's Henrietta Golding, another attorney, wrote in its entirety the final order, and another matter it's not a, a motion under 2010. It's an action under the consolidated cases, which is 2009 and 2010, and the final order is not two final orders. It's a final order against the consolidated cases, but that doesn't matter because the counterclaim was raised in duplicate counterclaims by the McNair in both the 2010 case and 2009 case with word for word exact paragraphs, so whichever one you want to proceed on, and furthermore, she talked about the original answer in the 2009 claim which says, "We want attorney's fees." Well, until November of 2011, long after the answer in 2009, there was not even an allegation of violation of the covenants. They never pled that. I have to go back to the covenants and the by-laws have a special

provision, and as we know under the law of South Carolina, the common law, you can't get to attorney's fees unless your contract, this is an action under a contract or a covenant, unless the contract specifically provides for attorney's fees under the circumstances which they may be collected, and the covenants say, actually the covenants say you can only collect attorney's fees to collect unpaid assessments. They never pled I didn't pay my assessments, and in fact, I've always paid the assessments. The by-laws, which questionable applicability, the by-laws say that after doing 13.3 the HOA can then proceed to court and then can collect attorney fees to collect fines and enforce the covenants, but the original demand for attorney fees under the 2009 complaint was unrelated to any covenant violation, as a matter of a fact the allegation of a covenant violation didn't occur until the November 2011 counterclaim. So there was no pled basis for a right to collect attorney fees under the 2009, only goes to the 2010 complaint, counterclaim where they alleged a violation of covenants as determined by the ARB, and again, let's go to the timeline. As soon as the final order was determined by the trial court as binding, within a week I went to the Court of Appeals. This motion was only filed quickly after the case came back, within weeks after the case came back from the Court of Appeals. This court did not have jurisdiction over the case to entertain or adjudicate on a

motion to void an essential element of the case that is subject matter jurisdiction their counterclaim. Rule, the rule one, two and three is the provisions that said those reasons for vacating a judgment must be done within one year. The rule explicitly excludes Rule B(4) summary judgment from the requirement to, to plead within one year. Now, those say this is explicitly done to avoid the necessity for a separate action to vacate the judgment for lack of subject matter jurisdiction. The courts have held that they should really go directly to the motion because of a denied motion all I have to do is go back in and file a separate action to void the subject matter jurisdiction because all of the reasons I've stated, and the economies of, of the court, the Supreme Court said we should always look at the motion for subject matter jurisdiction without requiring a party to go file a separate action to void a judgment. There is no case I've seen, recent case, and these document change over the years which says that the, the case should not be allowed to proceed on subject matter jurisdiction as the motion just because I waited till after the case came back from the Court of Appeals, and the rule says that the court can only proceed on a Rule 60 motion if you go to the Court of Appeals and the Court of Appeals grants a motion for the court to proceed on motion as to subject matter jurisdiction. Without the Court of Appeals action time is standing still, and this court could not have

acted on a motion I had filed in 2010, '11, '12, whenever because and not until 2016 when it came back from the Court of Appeals. This court simply did not have jurisdiction to hear this matter, and quite frankly, from my point of view, I think any such motions filed would have to be not docketed but it's another phrase, have it booked or something because the court would not have subject matter jurisdiction over this thing to hear it until it came back from the Court of Appeals. Thank you, Your Honor.

THE COURT:All right.

MR. JARMUTH: Oh, there was one other thing.Ms. Thompson cited all sorts of things which happened between the filing of their claim and the final order, and again, issues of subject matter jurisdiction only occur with -- by looking through the four corners of the counterclaim and the final order. Nothing at trial, not look to immediate pleadings, nothing even at the Court of Appeals which where -- when this was not pled. Thank you.

THE COURT:All right.All right.I'm going to deny your motion to dismiss. I find that there is subject matter jurisdiction. All right.

MS. THOMPSON: Your Honor, do you need a proposed order?

THE COURT:Mr. Jarmuth, will a Form 4 suffice or do you need a formal order?

MR. JARMUTH: I need a formal order, Your Honor, since it

ill be appealed.
THE COURT:All right.Ms. Thompson -- all right, Ms. Thompson, if you would prepare the order.
MS. THOMPSON: Okay.Thank you, Your Honor.
THE COURT:All right.Thank you.
MS. THOMPSON: Ten days is sufficient?
THE COURT:That'll be fine.
MS. THOMPSON: Thank you, Your Honor.
(Adjourned.)

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of Ronald Jarmuth versus International Club Homeowners Association, Inc., et al., held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on April 27, 2016. I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

_____

Grace L. Hurley, CVR-CM-M
Official Reporter

July 5, 2016.

DECLARATION OF COVENANTS AND RESTRICTIONS FOR MURRELLS INLET GOLF PLANTATION

ARTICLE VI - COVENANT FOR MAINTENANCE ASSESSMENTS

Section 6.1. Creation of the Lien and Personal Obligation of Assessments.

The Developer, for each Unit owned within the Subdivision, hereby covenants, and each Owner of any Unit by acceptance of a deed therefor, whether or not it shall be so expressed in such deed or other conveyance, shall be deemed to covenant and agree to pay to the Association:

(1) annual Assessments or charges for uses and purposes set forth in Section 6.2 below, together with such reasonable reserves as the Association may deem necessary, and

(2) special Assessments for capital improvements, such Assessments to be established and collected as hereinafter provided.

The annual and special Assessments, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit and improvements thereon against which each such Assessment is made. Each such Assessment, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof (all of such Assessments, interests, costs and fees being herein referred to as the "Assessment" or "Assessments"), shall also be the personal obligation of the person who was the Owner of the Unit and improvements thereon at the time when the Assessment fell due. The personal obligation for delinquent Assessments shall not pass to such Owner's successors in title unless expressly assumed by them, but shall remain a lien as aforesaid.

Section 6.8. Effect of Nonpayment of Assessments: Remedies of the Association. Any Assessment not paid within thirty (30) days after the due date shall bear interest from the due date a rate equal to the lesser of (a) eighteen percent (18%) per annum or (b) the maximum rate provided by applicable law. The Association may bring an action at law against the Owner personally obligated to pay the same, or foreclose the lien against the Unit (as in the foreclosure of a mortgage), or both. No Owner may waive or otherwise escape liability for the Assessments provided for herein by non-use of the Common Area or abandonment of such Owner's Unit.

ARTICLE VII - USE RESTRICTIONS

Section 7.2. Prior Review of All Plans.

No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement, and no change in topography, vegetation cover, landscaping, grading, filling or any other item shall be commenced, erected or maintained upon any portion of the Subdivision, nor shall any exterior addition or change be made until the plans and specifications (including but not necessarily limited to all elevations, a complete landscaping plan for the Unit and a complete tree survey of the Unit) showing the grading, filling, nature, kind, size, shape, height, materials, color and location of the same shall have

been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer. Any change in exterior appearance of any building, structure, fence, sidewalk, wall, drive, exterior lighting, painting or other improvement, and any change in the appearance of the landscaping, shall be deemed an alteration requiring approval.

Provided, however, that upon the Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association. Such Architectural Review Board shall be comprised of not less than three (3) representatives to be appointed by the Board of Directors of the Association; provided, further, that the Developer may transfer its rights of approval under this Declaration prior to its selling 3,650 of the Units in the Subdivision if it so chooses. The Developer or the Architectural Review Board shall require a minimum application fee of $50.00 with each request or submission of plans or specifications. The Architectural Review Board shall have the power and authority to adjust the application fee at any time.

In the event the Developer or the Architectural Review Board fails to approve or disapprove any request within thirty (30) days after complete written plans and specifications have been submitted to it, the same shall be deemed denied. Refusal or approval of plans, specifications and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board may deem sufficient. Neither Developer nor any member of the Architectural Review Board shall be responsible or liable in any way for any defects in any plans or specifications approved by the Developer or the Architectural Review Board, nor for any structural defects in any work done according to such plans and specifications approved by the Developer or the Architectural Review Board. Further, neither Developer nor any member of the Architectural Control committee shall be liable for damages to anyone submitting plans or specifications for approval under this Section, or to any owner of property affected by this Declaration by reason of mistake in judgment, negligence, or non-feasance arising out of or in connection with the approval or disapproval or failure to approve or disapprove any such plans or specifications. Every person who submits plans or specifications to the Architectural Review Board for approval agrees, by submission of such plans and specifications, and every Owner of any Unit agrees, that such Owner will not bring any action or suit against Developer, or any member of the Architectural Review Board, to recover for any such damage. No approval of plans, location or specifications shall be construed as representing or implying that such plans, specifications or standards will, if followed, result in a properly designed residence. Such approvals and standards shall in no event be construed as representing or guaranteeing that any residence or improvement thereto will be built in a good workmanlike manner. Neither the Developer, the Association nor the Architectural Review Board shall be responsible or liable for any defects in any plan or specification submitted, revised or approved under these covenants nor for any defects in construction pursuant to such plans and specifications. Each Owner shall have sole responsibility for compliance with approved plans and shall hold the Architectural Review Board and the Developer harmless for any such failure to comply whether caused by the Owner's architect, builder or any other person or entity.

The Architectural Review Board shall have the right and authority to establish, amend and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers here-under.

ARTICLE VIII - GENERAL PROVISIONS

Section 8.1. Enforcement. The Developer, the Association, and any Owner shall have the right to enforce, by any proceedings at law or in equity, all of the restrictions, conditions, covenants, easements, reservation, liens and charges now or hereafter imposed by the provisions of this Declaration, or of any rules or regulations now or hereafter promulgated by the Association. Failure of the Developer, the Association, or any Owner to enforce any covenant or restriction herein contained shall in no event be deemed as a waiver of the right to do so thereafter. The Developer and the Association, as the case may be, shall have the right to establish, assess and collect reasonable fines and penalties for violations of this Declaration, which shall be liens against Units and improvements thereon in the same manner as Assessments as provided herein. Such fines shall not exceed $50.00 per violation per day.

Section 8.9. Remedies for Violation of Restrictions. Each Owner is and shall be responsible for the actions and omissions of such Owner's guests, invitees, tenants, or family members of such Owner, and such Owner's Unit shall be subject to the lien of an Association in favor the Association for all damages caused by such actions or omissions. In the event of a violation or breach of any of these restrictions by any Owner, or tenant, guests, invitees, family member or agent of such Owner, then the Owners of Units in the Subdivision, the Developer and the Association, or any of them, jointly or severally, shall have the right to proceed at law or in equity to compel a compliance with the terms hereof or to prevent the violation or breach. In addition to the foregoing, the Developer, its successors and assigns, shall have the right, whenever there shall have been built on any Unit in the Subdivision any structure which is in violation of these restrictions, to enter upon the Property where such violation exists, and summarily abate or remove the same at the expense of the Owner, if after thirty (30) days written notice of such violation, it shall not have been corrected by the Owner. The Association is hereby granted a perpetual easement across each Unit for the purpose of enforcing its rights under this Section, and any such entry and abatement or removal shall not be deemed a trespass. The failure to enforce any rights, reservation, restriction or condition contained in this Declaration, however long continued, shall not be deemed a waiver of the right to do so thereafter as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affect its enforcement. 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 of such Unit or Units in breach thereof. The Developer herein shall not in any way or manner be liable or responsible for any violation of these restrictions by any person other than itself.

CUMULATIVE LIST OF PROPERTY INCORPORATED INTO THE "PUD"

Plat Book 160 Page 79 — **Exhibit A to Original Covenants**

Parcel 1 76.08 acres
Parcel G-1 192.52 acres
Parcel clubhouse 9.07 acres
Parcel 4 13.08 acres

Pebble Creek
Golf Course
Golf COurse
Ballycastle

Plat Book 160 page 79 — **Exhibit B by Amendment #1**

449.22 acres ** Hwy 17 Assoc

Enclaves
Fairways
Villas
Highlands
Links
Glens
Meadows

Plat Book 169 page 116 — **By Amendment #2 NOT ALLOWED IN**

Tracts I-1b and J **Fairways and Enclaves**

Plat Book 169 at Page 116 — **by Amendmnent #3**

I-2 CAMBRIDGE 3.88 acres

Plat Book 189 at Page 154 — **By Amendmenet #3**

Tract 2 LINKS & 3 HIGHLANDS MEADOWS – 94.06 acres

Plat Book 158 page 155

5.42 acres and 9.79 acres in Garden City = Grand Vistas * International Club Drive ** Hwy 17 Assoc

Plat Book 171 at page 149 — **By Amendment #4**

10.2 acres The Villas

Plat Book 237 page 296 — **By Amendment #5**

14.10 acres BALLYCASTLE

DECLARATION OF COVENANTS
AND RESTRICTIONS FOR MURRELLS INLET GOLF PLANTATION

ARTICLE VI - COVENANT FOR MAINTENANCE ASSESSMENTS

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The Developer, for each Unit owned within the Subdivision, hereby covenants, and each Owner of any Unit by acceptance of a deed therefor, whether or not it shall be so expressed in such deed or other conveyance, shall be deemed to covenant and agree to pay to the Association:

(1) annual Assessments or charges for uses and purposes set forth in Section 6.2 below, together with such reasonable reserves as the Association may deem necessary, and

(2) special Assessments for capital improvements, such Assessments to be established and collected as hereinafter provided.

The annual and special Assessments, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit and improvements thereon against which each such Assessment is made. Each such Assessment, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof (all of such Assessments, interests, costs and fees being herein referred to as the "Assessment" or "Assessments"), shall also be the personal obligation of the person who was the Owner of the Unit and improvements thereon at the time when the Assessment fell due. The personal obligation for delinquent Assessments shall not pass to such Owner's successors in title unless expressly assumed by them, but shall remain a lien as aforesaid.

Section 6.8. Effect of Nonpayment of Assessments: Remedies of the Association. Any Assessment not paid within thirty (30) days after the due date shall bear interest from the due date a rate equal to the lesser of (a) eighteen percent (18%) per annum or (b) the maximum rate provided by applicable law. The Association may bring an action at law against the Owner personally obligated to pay the same, or foreclose the lien against the Unit (as in the foreclosure of a mortgage), or both. No Owner may waive or otherwise escape liability for the Assessments provided for herein by non-use of the Common Area or abandonment of such Owner's Unit.

ARTICLE VII - USE RESTRICTIONS

Section 7.2. Prior Review of All Plans.

No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement, and no change in topography, vegetation cover, landscaping, grading, filling or any other item shall be commenced, erected or maintained upon any portion of the Subdivision, nor shall any exterior addition or change be made until the plans and specifications (including but not necessarily limited to all elevations, a complete landscaping plan for the Unit and a complete tree survey of the Unit) showing the grading, filling, nature, kind, size, shape, height, materials, color and location of the same shall have

been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer. Any change in exterior appearance of any building, structure, fence, sidewalk, wall, drive, exterior lighting, painting or other improvement, and any change in the appearance of the landscaping, shall be deemed an alteration requiring approval.

Provided, however, that upon the Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association. Such Architectural Review Board shall be comprised of not less than three (3) representatives to be appointed by the Board of Directors of the Association; provided, further, that the Developer may transfer its rights of approval under this Declaration prior to its selling 3,650 of the Units in the Subdivision if it so chooses. The Developer or the Architectural Review Board shall require a minimum application fee of $50.00 with each request or submission of plans or specifications. The Architectural Review Board shall have the power and authority to adjust the application fee at any time.

In the event the Developer or the Architectural Review Board fails to approve or disapprove any request within thirty (30) days after complete written plans and specifications have been submitted to it, the same shall be deemed denied. Refusal or approval of plans, specifications and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board may deem sufficient. Neither Developer nor any member of the Architectural Review Board shall be responsible or liable in any way for any defects in any plans or specifications approved by the Developer or the Architectural Review Board, nor for any structural defects in any work done according to such plans and specifications approved by the Developer or the Architectural Review Board. Further, neither Developer nor any member of the Architectural Control committee shall be liable for damages to anyone submitting plans or specifications for approval under this Section, or to any owner of property affected by this Declaration by reason of mistake in judgment, negligence, or non-feasance arising out of or in connection with the approval or disapproval or failure to approve or disapprove any such plans or specifications. Every person who submits plans or specifications to the Architectural Review Board for approval agrees, by submission of such plans and specifications, and every Owner of any Unit agrees, that such Owner will not bring any action or suit against Developer, or any member of the Architectural Review Board, to recover for any such damage. No approval of plans, location or specifications shall be construed as representing or implying that such plans, specifications or standards will, if followed, result in a properly designed residence. Such approvals and standards shall in no event be construed as representing or guaranteeing that any residence or improvement thereto will be built in a good workmanlike manner. Neither the Developer, the Association nor the Architectural Review Board shall be responsible or liable for any defects in any plan or specification submitted, revised or approved under these covenants nor for any defects in construction pursuant to such plans and specifications. Each Owner shall have sole responsibility for compliance with approved plans and shall hold the Architectural Review Board and the Developer harmless for any such failure to comply whether caused by the Owner's architect, builder or any other person or entity.

The Architectural Review Board shall have the right and authority to establish, amend and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers here-under.

ARTICLE VIII - GENERAL PROVISIONS

Section 8.1. Enforcement. The Developer, the Association, and any Owner shall have the right to enforce, by any proceedings at law or in equity, all of the restrictions, conditions, covenants, easements, reservation, liens and charges now or hereafter imposed by the provisions of this Declaration, or of any rules or regulations now or hereafter promulgated by the Association. Failure of the Developer, the Association, or any Owner to enforce any covenant or restriction herein contained shall in no event be deemed as a waiver of the right to do so thereafter. The Developer and the Association, as the case may be, shall have the right to establish, assess and collect reasonable fines and penalties for violations of this Declaration, which shall be liens against Units and improvements thereon in the same manner as Assessments as provided herein. Such fines shall not exceed $50.00 per violation per day.

Section 8.9. Remedies for Violation of Restrictions. Each Owner is and shall be responsible for the actions and omissions of such Owner's guests, invitees, tenants, or family members of such Owner, and such Owner's Unit shall be subject to the lien of an Association in favor the Association for all damages caused by such actions or omissions. In the event of a violation or breach of any of these restrictions by any Owner, or tenant, guests, invitees, family member or agent of such Owner, then the Owners of Units in the Subdivision, the Developer and the Association, or any of them, jointly or severally, shall have the right to proceed at law or in equity to compel a compliance with the terms hereof or to prevent the violation or breach. In addition to the foregoing, the Developer, its successors and assigns, shall have the right, whenever there shall have been built on any Unit in the Subdivision any structure which is in violation of these restrictions, to enter upon the Property where such violation exists, and summarily abate or remove the same at the expense of the Owner, if after thirty (30) days written notice of such violation, it shall not have been corrected by the Owner. The Association is hereby granted a perpetual easement across each Unit for the purpose of enforcing its rights under this Section, and any such entry and abatement or removal shall not be deemed a trespass. The failure to enforce any rights, reservation, restriction or condition contained in this Declaration, however long continued, shall not be deemed a waiver of the right to do so thereafter as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affect its enforcement. 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 of such Unit or Units in breach thereof. The Developer herein shall not in any way or manner be liable or responsible for any violation of these restrictions by any person other than itself.

CUMULATIVE LIST OF PROPERTY INCORPORATED INTO THE "PUD"

Plat Book 160 Page 79 — **Exhibit A to Original Covenants**

Parcel 1 76.08 acres
Parcel G-1 192.52 acres
Parcel clubhouse 9.07 acres
Parcel 4 13.08 acres

Pebble Creek
Golf Course
Golf COurse
Ballycastle

Plat Book 160 page 79 — **Exhibit B by Amendment #1**

449.22 acres ** Hwy 17 Assoc

Enclaves
Fairways
Villas
Highlands
Links
Glens
Meadows

Plat Book 169 page 116 — **By Amendment #2 NOT ALLOWED IN**

Tracts I-1b and J **Fairways and Enclaves**

Plat Book 169 at Page 116 — **by Amendmnent #3**

I-2 CAMBRIDGE 3.88 acres

Plat Book 189 at Page 154 — **By Amendmenet #3**

Tract 2 LINKS & 3 HIGHLANDS MEADOWS – 94.06 acres

Plat Book 158 page 155

5.42 acres and 9.79 acres in Garden City = Grand Vistas * International Club Drive ** Hwy 17 Assoc

Plat Book 171 at page 149 — **By Amendment #4**

10.2 acres The Villas

Plat Book 237 page 296 — **By Amendment #5**

14.10 acres BALLYCASTLE

EXHIBIT "C"

BY-LAWS OF MURRELLS INLET GOLF PLANTATION ASSOCIATION, INC..

13. RULE MAKING

13.1 Rules and Regulations.

Subject to the provisions hereof, the Board of Directors may establish reasonable rules an regulations concerning the use of Units, Multi - Family Areas and the Common Areas, Recreational Amenities and other facilities located thereon. In particular but without limitation, the Board of Directors may promulgate from time to time rules and regulations which shall govern activities which may, in the judgment of the Board of Directors, be environmentally hazardous, such as application of fertilizers, pesticides and other chemicals. Copies of such rules and regulations and amendments thereto shall be furnished by the Association to all Owners prior to the effective date of such rules and regulations and amendments thereto. Such rules and regulations shall be binding upon the Owners, their families, tenants, guests, invitees, servants and agents, until and unless any such rule or regulation be specifically overruled, canceled or modified by the Board of Directors or in a regular or special meeting of the Association by the vote of the Owners, in person or by proxy, holding a majority of the total votes in the Association; provided that in the event of such vote, such action must also be approved by the Developer, for so long as the Developer owns any Unit or Units primarily for the purpose of sale or has the unexpired option to add the Additional Property or any portion thereof to the Subdivision.

13.2 Authority and Enforcement.

Subject to the provisions hereof, upon the violation of the Declaration, the By-Laws or any rules and regulations duly adopted here under, including without limitation the failure to timely pay any Assessments, the Board shall have the power: (i) to impose reasonable monetary fines which shall constitute equitable charge and a continuing lien upon the Unit, the Owners, occupants or guests of which are guilty of such violation; (ii) to suspend an Owner's right to vote in the Association; or (iii) to suspend an Owner's right (and the right of such Owner's family, guests and tenants and of the co-Owners of such Owner and their respective families, guests and tenants) to use any of the Recreational Amenities, and the Board shall have the power to impose all or any combination of these sanctions. An Owner shall be subject to the foregoing sanctions in the event of such a violation by such Owner, or such Owner's family, guests or tenants. Any such suspension of rights may be for the duration of the infraction and for any additional period thereafter, not to exceed thirty (30) days.

13.3 Procedure.

Except with respect to the failure to pay Assessments, the Board shall not impose a fine, suspend voting rights or infringe upon or suspend any other rights of an Owner or other occupant of the Subdivision 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 from an alleged violation shall be served upon the Owner responsible for such violation specifying:

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, if such violation is a continuing one, or if the violation is not a continuing one, a statement that any further violation of the same provision of the Declaration, the By-Laws or of the rules and regulations of the Association may result in the imposition of sanctions after notice and hearing.

13.3.2 Within two (2) months of such demand, if the violation continues past the period allowed in the demand for abatement without penalty, or if the same violation subsequently occurs, the Board may serve such Owner with 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, which time shall be not less than ten (10) days from the giving of the notice;

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.

13.3.3 The hearing shall be held in executive session of 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. Such proof shall be deemed adequate if a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director or other individual who delivered such notice. The notice requirement shall be deemed satisfied if an alleged violator appears at the meeting. The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed, if any.

13.4 Enforcement. Each Owner shall comply strictly with the By-Laws and the published rules and regulations of the Association adopted pursuant to the Declaration, as either of the same may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the Declaration and in the deed or other instrument of conveyance to such Owner's Unit, if any. Failure to comply with any of the same shall be grounds for imposing fines, for suspending voting rights or rights of use in and to the Recreational Amenities, or for instituting an action to recover sums due, for damages and/or for injunctive relief, such actions to be maintainable by the Developer, the Board of Directors on behalf of the Association or, in a proper case, by an aggrieved Owner. Should the Developer or 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. Inasmuch as the enforcement of the provisions of the Declaration, the By-Laws and the rules and regulations of the Association are essential for the effectuation of the general plan of development contemplated by the Declaration and for the protection of present and future Owners, it is hereby declared that any breach thereof may not adequately be compensated by recovery of damages. The Developer and the Association may require, and each shall be entitled to the remedy of injunction to restrain any such violation or breach or any threatened violation or breach. No delay, failure or omission on the part of the Developer, the Association or any aggrieved Owner in exercising any right, power or remedy herein provided shall be construed as an acquiescence thereto or shall be deemed a waiver of the right to enforce such right, power or remedy thereafter as to the same violation or breach, or as to a violation or breach occurring prior or subsequent thereto, and shall not bar or affect its enforcement. No right of action shall accrue nor shall any action be brought or maintained by anyone whomsoever against the Developer or the Association for or on account of any failure to bring any action account of any violation or breach, or threatened violation or breach, by any person under the provisions of the Declaration, the By-Laws or any rules and regulations of the Association, however long continued.

South Carolina Secretary of State
Corporation Details

Corporation Information

Corporation Name:	INTERNATIONAL CLUB HOME OWNERS ASSOCIATION						
Name Type:	ELE	**Status:**	GDS	**Profit/Non-Profit:**	N	**Domestic/Foreign:**	D
Corp EMail:							
Agent Name:	K A DIEHL & ASSOC					**Original Filing**	03/01/2001
Address1:	9751 MOOSE PARK #8					**Effective Date:**	03/01/2001
Address2:						**Expiration Date:**	
City:	MURRELLS INELT			**State:**	SC	**Dissolved Date:**	
Zip	29576 0000	**Incorporated State:**	SOUTH CAROLINA			**Termination Date**	
Agent EMail:						**LLP Renewal Date:**	
						Tax Year End:	

Corporation Comments:

Filing Information

File ID	Filing Date	Filing Type	Description	Comment	Associated Name	Microfilm ID
01-010374CC	03/01/2001			NONPROFIT INCORPORATION		
03-003770CC	01/08/2003			CH AGT/ADD FR-KEN GROVER		

Associated Names Information

Associated Name	Associated Type	Corporation Name	Name Type	Status	Expiration Date
INTERNATIONAL CLUB HOME OWNERS	INC	INTERNATIONAL CLUB HOME OWNERS ASSOCIATION	ELE	GDS	

Effective Date: 09/08/2008 14:46:12

Jim Miles 4
SECRETARY OF STATE
FILED
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AM PM
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STATE OF SOUTH CAROLINA
SECRETARY OF STATE
NONPROFIT CORPORATION
ARTICLES OF INCORPORATION

TYPE OR PRINT CLEARLY IN BLACK INK

Pursuant to Section 33-31-202 of the South Carolina Code of Laws, as amended, the undersigned corporation submits the following information:

1. The name of the nonprofit corporation is International Club Home Owners Association

2. The initial registered office of the nonprofit corporation is 11883 Plaza Drive (Street Address)
Murrells Inlet (City) Horry (County) South Carolina (State) 29576 (Zip Code)

The name of the registered agent of the nonprofit corporation at that office is

Ken Grover (Print Name)

I hereby consent to the appointment as registered agent of the corporation.

X _____ (Agent's Signature)

3. Check "a", "b", or "c" whichever is applicable. Check only one box:

a. ☐ The nonprofit corporation is a public benefit corporation.

b. ☐ The nonprofit corporation is a religious corporation.

c. ☒ The nonprofit corporation is a mutual benefit corporation.

CERTIFIED TO BE A TRUE AND CORRECT COPY AS TAKEN FROM AND COMPARED WITH THE ORIGINAL ON FILE IN THIS OFFICE

SEP 0 8 2008

SECRETARY OF STATE OF SOUTH CAROLINA

4. Check "a" or "b", whichever is applicable:

a. ☒ This corporation will have members.

b. ☐ This corporation will not have members.

5. The address of the principal office of the nonprofit corporation is

11883 Plaza Drive (Street Address) Murrells Inlet (City) Horry (County) South Carolina (State) 29576 (Zip Code)

6. If this nonprofit corporation is either a public benefit or religious corporation (when box "a" or "b" of paragraph 3 is checked), complete either "a" or "b", whichever is applicable, to describe how the remaining assets of the corporation will be distributed upon dissolution of the corporation.

a. ☐ Upon dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future Federal tax code, or shall be distributed to the Federal government, or to a state or local government, for a public purpose. Any such asset not so disposed of shall be disposed of by the Court of Common Pleas of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said court shall determine, which are organized and operated

01-010374CC

International Club Home Owners Association
Name of Corporation

exclusively for such purposes.

b. ☐ Upon dissolution of the corporation, consistent with the law, the remaining assets of the corporation shall be distributed to

7. If the corporation is a mutual benefit corporation (when box "c" of paragraph 3 is checked), complete either "a" or "b", whichever is applicable, to describe how the (remaining) assets of the corporation will be distributed upon dissolution of the corporation.

a. ☐ Upon dissolution of the mutual benefit corporation, the (remaining) assets shall be distributed to its members, or if it has no members, to those persons to whom the corporation holds itself out as benefiting or serving.

b. ☒ Upon dissolution of the mutual benefit corporation, the (remaining) assets, consistent with the law, shall be distributed to

back to the association

8. The optional provisions which the nonprofit corporation elects to include in the articles of incorporation are as follows (See 33-31-202(c) of the 1976 South Carolina Code of Laws, as amended, the applicable comments thereto, and the instructions to this form)

This organization is a Homeowners Association.

9. The name and address of each incorporator is as follows (only one is required)

Ken Grover 11883 Plaza Drive Murrells Inlet SC 29576
Name Address Zip Code

Name Address Zip Code

Name Address Zip Code

10. Each original director of the nonprofit corporation must sign the articles but only if the directors are named in these articles:

Name (Only if named in articles) Signature of director

Name (Only if named in articles) Signature of director

Name (Only if named in articles) Signature of director

11. Each incorporator must sign the articles.

X
Signature of incorporator

Signature of incorporator

Signature of incorporator

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**Civil Action No. 2009-CP-26 -3596**
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	**COMPLAINT**
	)	**(NON-JURY)**
vs.	)	
	)	**(DECLARATORY JUDGMENT)**
The International Club Homeowners Association, Inc.,	)	**(AND EQUITABLE RELIEF)**
	)	
	)	**(DERIVATIVE ACTION BY SHAREHOLDERS)**
And	)	
	)	
Rosemary Toth	)	
	)	
Defendants	)	
	)	

09 APR 7 PM 3:49

Ronald Jarmuth ("Jarmuth" complaining of the Defendants, The International Club Homeowners Association, Inc ("HOA") and Rosemary Toth, putative President of the HOA, respectfully shows and alleges unto this Honorable Court as follows:

1. The Plaintiff is a citizen of South Carolina, a resident of Horry County, a member of the HOA and is an owner of a lot in the International Club Planned Unit Development ("PUD") and which lot is subjected to certain covenants which allegedly apply to all properties within the PUD.

2. The Defendant HOA is a non-profit corporation organized and existing under the laws of the State of South Carolina by virtue of its non-profit corporation Articles of Incorporation filed with the Office of the Secretary of State of South Carolina on or about March 1, 2001.

3. Rosemary Toth is the putative President of the HOA. She is the co-owner (with Charles Roche) of a lot in the HOA subject to the same certain covenants under dispute.

4. The property that is the subject of this action is located in Horry County, South Carolina and lies within the PUD. The events that are the subject of this action took place in Horry County, South Carolina.

5. This is an action for declaratory judgment relief pursuant to the Uniform Declaratory

Judgment Act of South Carolina as set forth in S.C. Code Ann. §15-53(1976) as amended, et. seq., to determine:

a. Whether the **covenants** originally made applicable to all property within the PUD (and thereafter amended) are still legally viable – whether they have long ago been **declared null, void, and unenforceable**.

b. Whether the owners of homes in the Pebble Creek Subdivision ("Pebble Creek") of the PUD were fraudulently or otherwise improperly deprived of their **equitable title to the (now) HOA Amenity Center, Swimming Pool, and Playground** when one of the developers, DR Horton, Inc, transferred title to same to the HOA. This was done without recognizing the standing of or acknowledging equitable claims to said property collectively held by the Pebble Creek homeowners to determine the extent of their equitable ownership and control over the Amenity Center, Swimming Pool, and Playground built on their behalf subject to obligations acknowledged to in writing by the Pebble Creek Developer, Sunbelt Homes (Charles Flynn).

c. IF the covenants were not amended out of existence, a declaration as to what the **cumulatively amended covenants** consists of.

d. Whether a **bulk cable television contract** negotiated on behalf of the PUD without the express consent of the PUD homeowners is null and void due to –

(1) A Pre-emptive decision and implementing guidance issued by the US Federal Communications Commission ("FCC") which voided any and all bulk cable agreements affecting centrally managed communities and / or condominium communities effective on or about November 13, 2007 with supplemental implementing guidance issued on or about May 9, 2008;

(2) Lack of capacity of the putative representative of the HOA to enter into a contract on behalf of the homeowners in the PUD; and the absence of any approval by the putative Board of the HOA for said contract;

(3) Breach of contract towards the HOA by the bulk cable tv provider, Horry Telephone Cooperative, Inc ("HTC");

(4) the fact that the HOA is operating an un-franchised cable tv utility in violation of federal and state laws;

e. .How **much money the homeowners in the PUD are entitled to as refunds**;

(1) from the HOA since the HOA fraudulently – and through threat of liens – collected **cable TV charges** it was not entitled to AND

(2) from the HOA since, upon information and belief, HTC provided the HOA **cable TV refunds / return of excess capital contributions** which were never passed on to or credited to the homeowner cable tv accounts and, upon information and belief, were paid by HTC to the HOA but were never deposited into the HOA accounts.

f. Whether the **HOA putative Board** has fraudulently and in breach of fiduciary responsibility and the provisions of the bylaws and covenants (in so far as they were believed to exist and upon which the putative Board expressed dependent reliance for their authority) refused to do their duty to collect golf course assessments due and payable under the covenants, and **mis-spent monies held in trust for the common expenses** of the homeowners by:

(1) Using MOST of the funds which were collected under express provisions of the covenants solely for the purpose of maintaining "Common Areas" (owned by the HOA) to maintain property owned by the International Club Golf Course, by DR Horton, and by private landowners when these property owners have an obligation under the covenants to maintain their own property and the recourse of the HOA under the covenants is to compel the private landowners to fulfill their obligation;

(2) Expending money collected through assessments by the compulsion of the covenants and threat of liens, which should only have been expended on HOA property, to landscape and maintain land belonging to Horry County which is part of the International Club Drive public road right of way and for which the HOA has / had no obligation under law or under contract to maintain (specifically including all amounts collected after the FCC voided bulk cable agreements at centrally managed or gated communities or containing condominiums);.

g. **How much money the putative HOA Board has mis-spent** by breach of their asserted capacity and accepted fiduciary duty.

h. **Whether "The Glens", a town house development, is a multi-family area OR Townhouse development** within the meaning of the Covenants and if so, whether The Glens is

excluded from the use of the Amenity Center / Pool / Playground, given that the Covenants exclude from such use any multi-family area or town house area.

i. Whether "The Grand Vistas", a condominium multi-family association, is a member of the PUD subject to the covenants and entitled to membership and a vote in the HOA.

HOA Structural Issues

j. Whether the present **HOA Board of Directors is wrongfully holding office**, as a matter of fact , equity, and of law, since:

(1) In both the September 2007 and September 2008 HOA Board elections hundreds of HOA members (specifically the homeowners living in The Villas and The Cambridge) were not on the list of eligible voters, were not sent ballots, and were denied participation in those elections;

(2) The owner of the International Club Golf Course, who by covenants is supposed to pay 50 full assessments (i.e., the same amount that a homeowner pays who is eligible to use the Amenity Center and Pool)) was in 2007 $ 231,687 in arrears on assessments and in 2008 was $259,816 in arrears based on strict application of the provisions of the covenants applicable to the Golf Course. None the less the Golf Course was permitted to vote in both elections, casting the deciding votes as to who was "elected" to the HOA Board. Per the Covenants the Golf Course was not permitted to vote while in arrears.

(3) The owner of the Golf Course was not on the list of eligible voters provided this Plaintiff at his request prior to both elections, yet was permitted to vote in violation of statutes applicable to non-profit corporations in South Carolina.

(4) At both elections additional ballots were freely handed out to individuals who had already (and in advance) mailed in their proxies. This included handing multiple proxies to each person living in a home unit (e.g., a husband and wife) disregarding that only one vote may be cast for each home unit. These ballots were collected at each general meeting and included in the tally.

(5) Despite a demand made in writing prior to these general meetings / elections, the incumbent board and it's management company (KA Diehl) did not allow Plaintiff to inspect the counting of the votes, to compare each proxy / ballot received by mail against the voter list (such

as it was), nor to oversee the distribution of additional paper ballots at the meeting so as to insure that duplicate ballots were not issued.

(6) Copies of the "vote tally" sheets were not provided this Plaintiff despite Defendant being asked for same, preventing a numeric comparison against the ostensible number of persons mailing ballots, appearing in person, or on the "voting list".

(7) At the September 2007 election, when Plaintiff challenged the voting results and asked the management company representatives to inspect the ballots and tally sheets, an employee of the Developer stated openly that there was no point to this as "the Developer just picked who he wanted on the board, and that was that". It was admitted that at least the 2007 election was "rigged".

k. Whether the awarding of the **grounds maintenance contract in 2009 to "Amazing Blades" was a violation of fiduciary duty"** because

(1) Upon information and belief, a potential bidder, Southern Landscaping, was told by a Board member not to even bother to bid as the outcome had already been decided;

(2) Upon information and belief, the previous contractor offered a lower bid;

(3) Upon information and belief the Board has directed that the contract to "Amazing Blades" be increased ostensibly to maintain additional areas where (1) the additional property was already in the specification and had been maintained within the 2007 and 2008 contracts; and (2) approximately two thirds of the grounds maintained and a greater proportion of cost is to maintain property owned by the Golf Course (who pays less than his owed assessments and even less than the cost of maintenance services he receives) and by the former Developer, DR Horton, who pays NOTHING in assessments, as well as several other areas of private property.

(4) Upon information and belief, Rosemary Toth in particular, and other Board members in general, have been shown documents and given presentations by the Buildings and Grounds committee supporting these allegations. Her response has been to mow / maintain even more private property at additional HOA cost.

l. Whether the Board has abused its fiduciary duty by allowing the **Golf Course to escape paying the assessments** specified by the Covenants, specifically, and by falsely telling the homeowners that the Golf Course has been paying more and more when in fact it has been

paying less and less – and never even half of it's contractual obligation.

m. **Whether an agreement between the Golf Course and the Developer Controlled HOA Board** (which ostensibly allowed the Golf Course to ignore the obligations set out in the Covenants) **should be set aside**. At the time the Developer, DR Horton, appointed the Board which consisted almost entirely of employees of Developers (Horton and Sunbelt) and / or the Golf Course because:

(1) The agreement signed by a putative HOA representative, Doug Brown, was made without representative capacity or in violation of the guidance given him and in violation of the approval by the HOA board, as the minutes of the HOA Board approved an entirely different agreement more favorable to the HOA which agreement was largely ignored. They directed that two months of golf course assessments would be traded for half an acre of golf course property to be used for added Amenity Center Parking. The agreement signed by Doug Brown defied his direction as he agreed to one quarter acre and forgiveness of all prior assessment debt and reduction of years of future golf course assessments.

(2) The agreement was in direct violation of the South Carolina Non-Profit Statute, the duties of a fiduciary, and the Covenants and Bylaws of the HOA as Doug Brown, the person signing for the HOA received a free multi-year golf course membership as part of the agreement; and that free golf course membership is currently held by Rosemary Toth the putative President of the HOA – likewise in violation of statute, covenants and bylaws.

(3) Likewise, the agreement provided that the employer (DR Horton) of the person signing on behalf of the HOA (Doug Brown, the Horton appointed "HOA President") received 20 (twenty) free rounds of Golf per month for many years to use for Horton's business purposes AND 75 (seventy five) OR MORE highly discounted golf course memberships which was to enable Horton to use this to entice individuals to buy Horton housing units by giving these to purchasers of Horton homes as part of the cost of the Horton homes.;

(4) Likewise, as a consideration for Horton directing his appointed HOA president / salesperson employee to sign the agreement, Horton got the free use of Golf Club offices to sell real estate from and a highly discounted price of $50 per day to rent the entire club house for Horton sales events.

(5) The consideration given the HOA, ostensibly 0.25 acres to be used for additional parking space for the HOA Amenity Center, was not a consideration at all to the HOA as by written agreement and acknowledgement Horton had an absolute obligation to buy sufficient land for sufficient parking so as to satisfy the Horry County Ordinance requirement as to parking; it was not an obligation of the HOA to deal with inadequate parking space.

(6) The HOA got the additional cost of paying $150 per month to irrigate DR Horton owned property along International Club Drive, which is a cost that Horton, not the HOA, had an obligation to bear. This cost also was towards irrigating Golf Course owned property at the Golf Course main entrance, where the Golf Course was obligated to maintain / irrigate it's own property.

(7) The HOA thus received nothing in exchange for forgoing past and future assessments from the Golf Course and the only entities that received anything of value in exchange were the Golf Course, the Horton employee ostensibly representing the HOA, and the Developer DR Horton. All this conduct amounted to much more than excusable self dealing since the value of this exceeded $ 5000, upon information and belief, this conduct constituted a felony by Horton and his appointed board and employee who signed the agreement ostensibly for the HOA but actually for everyone's benefit but the HOA.

n. That the putative HOA Board has violated it's obligations to maintain to open meetings, agendas, and minutes by holding unannounced or Closed (to HOA members) Board Meetings ostensibly as "workshops" or "executive sessions" where no minutes were kept and where decisions were made, such as appointing replacement members of the Board, approving contracts, or discussing budget issues. At the end of the March 2009 meeting the Board ostensibly went into "executive session" to "discuss matters with their attorney" but the attorney left before the executive session was held.

o. That the putative HOA Board has violated its obligations to maintain minutes as the minutes never identify any matter discussed without resolution, never give the votes and voters for matters put to vote, and ignore (as new business) matters submitted in writing by homeowners as "new business". Likewise that the putative board has violated it's obligations to the HOA by refusing to allow any homeowner to question the Board or ask questions of the Board at Board meetings. The Board stated (March 2009) that Board Meetings are "Our"

Meetings – not the homeowner meetings, and homeowners are entitled to put anything before the Board only at general meetings of the membership.

p. That the Board and it's managing agent, KA Diehl, has ignored demands to inspect and copy documents in violation of the Covenants, Bylaws, and the SC Statute as to Non-Profit Corporations. Plaintiff still has pending document requests lodged in 2008 as well as document requests lodged in writing in prior months of 2009. Upon information and belief, various requested contract documents have either been destroyed (although they apply to contracts active and payable in 2008) or removed from the registered agent's files by Rosemary Toth, putative Board President, or have simply been hidden.

q. That the putative Board and it's employee, KA Diehl, has acted in breach of it's fiduciary duty by

(1) **demanding that prospective vendors of goods and services pay Diehl** what can only be described as a "bribe" of **$200 to be even informed** of HOA requests for goods and services; and likewise

(2) by **requesting prospective contractors to join the Community Association Institute** (CAI) which has nothing to do with plumbers, groundskeepers, pool maintainers, etc, but upon information and belief which results in CAI giving KA Diehl consideration for every contractor signed up; and

(3) likewise that the putative **Board and Diehl have defrauded the HOA** by Diehl **charging for and the Board approving payment to Diehl for use of the (free) SmartStreet website** Diehl did not own and which was in fact provided by RCB Bank to the HOA FREE as a consideration of use of RCB Banks depository services for assessments (approximately $860 in January of 2007 and $860 in January 2008).; and

(4) Likewise by permitting Diehl to arbitrarily select vendors, without competing a bid or searching for a lowest cost source, on requirements for goods and services under $2000 – which constitutes most of the HOA business; and likewise

(5) By beginning in 2009 allowing Diehl to keep for itself (as added to the 2009 Diehl Contract but missing from earlier Diehl contracts) rebates, refunds, discounts, or other payments by sources related to providing goods or services to the HOA through Diehl.

r. The putative Board has breached it's fiduciary duty towards the HOA by paying Diehl $75 per Diehl employee per meeting – and by having Diehl provide 2 employees (Julie Case and Beckie Abel) at $75 per hour per employee whereas for contract years prior to 2009 the contract provided payment to Diehl at $75 (or less) on a per MEETING hour basis, not a per DIEHL EMPLOYEE hour basis. Thus the putative Board **knowingly allowed the HOA to be over-billed by double** for this.

s. That the putative Board has violated Section 2.1 of the Covenants by selectively imposing $ 35 user fees on some, but not all homeowners, for the use of the Amenity Center for which they already pay an annual assessment. Section 2.1 reads

> "The Developer and the Association, as the case may be, shall have the right to assess and collect reasonable fees and charges for the use of Recreational Amenities."

The $35 fee ostensibly is to pay Diehl, the managing agent, to inspect the Amenity Center to assure that all is in order after use – but the same homeowners are not charged the $35 fee if they are part of a group (e.g., "hand and foot card game") selectively favored by the putative Board. There is no provision in the prior or current management (Diehl) contract providing for the payment to Diehl of those fees and, upon information and belief, these "inspection cost recovery fees" are simply put into the general income of the HOA. Upon information and belief, per 26 USC 277 the income from "furnishing services, insurance, goods or other items of value to members" is non-exempt income subject to taxes and per 26 USC 528 the only non-exempt income is annual membership dues, fees or assessments. A cost directly related to furnishing services (the use of the Amenity Center) is taxable at a 30 percent rate – and the HOA Board has directed that these fees not be reported to the federal or state IRS and that no tax be paid. The Court is asked to hold that the HOA Board may not collect funds it is hiding from the IRS and fraudulently claiming as exempt income.

t. **That all existing contracts are null and void** which were entered into by the HOA after March, 2002, at which time (per statute) it was mandated that a board elected by the homeowners take office.

u. **That neither the Covenants nor the HOA rules may be Amended by the Developer** ("Declarant") **or the HOA** to add additional burdens on homeowners such as –

(1) Charges upon sale of a unit to a successor owner not related to services in connection with the sale of a unit (e.g.: document production or certification of accounts);

(2) Charges for reserves for maintenance of roads no longer owned by the HOA for which no obligation of maintenance exists anymore;

(3) Charges for capital contributions for recreational facilities to which particular homeowners (i.e., residents of multi-family tracts) are not eligible to use; for additional recreational facilities not approved by the homeowners or which can not be build because of lack of available land;

(4) Making after – the – fact additional housing tracts eligible to use the Amenity Center complex where the developer has not made an equitable contribution for same to the original cost of the complex, and which would burden the complex with additional users beyond it's planned or legal occupancy limits or parking capacity (the builder shifting his obligation if any to provide recreational facilities for the new tracts from himself to the HOA).

v. **That the Covenants and Developer Agreements relating to the Amenity Center** complex bar town house or condominium tracts within the PUD from the use of the Amenity Center complex.

w. **That the HOA Board has failed in it's fiduciary responsibility** to diligently collect the debts of the HOA owed by the golf course and by the various developers.

EQUITABLE RELIEF

6. This is also a derivative action for equitable relief against Rosemary Toth in her asserted capacity as President of the HOA and as a self-proclaimed fiduciary to the HOA to recover from her

a. the funds she mis-spent to maintain golf course, DR Horton, and other private property after

(1). being advised numerous times by the Buildings and Grounds Committee that said land was not HOA property, that the HOA had no obligation to maintain same, that the property owners were obligated under the Covenants to maintain same enforceable by lien;

(2). being advised of the approximate cost of her mis-management decisions; and

b. the assessments she has refused to allow to be collected from the golf course, aka the International Club LLC, (a South Carolina for-profit corporation whose registered agent is W. Jack Davis), prior to December 10, 2008 being owned by Davis Mining & Manufacturing, (whose registered agent was also W. Jack Davis) and before April 21, 2006 the Plantation Golf AD LLC, a South Carolina for-profit corporations still in good standing.

7. Plaintiff asserts that he has been directly harmed by all this as an individual and is thus entitled to sue in his individual capacity because as a consequence

a. He has been denied a seat on the HOA Board;

b. His assessments have been higher than they would otherwise have been had the Golf Course been compelled to pay the 50 full assessments mandated by the covenants and had HOA monies not been mis-spent maintaining non-HOA property, particularly the property of the golf course which benefited to a greater degree than the very reduced assessments Ms. Toth permitted it to get away with;

c. He has been compelled, under threat of lien, to pay for cable television services he did not contract for under a class of contract which the FCC has held to be void and unenforceable;

d. His equitable share in the Amenity Center complex has been improperly transferred to the HOA without notation of Plaintiff's ownership share; and homeowners who did not pay, directly or on their behalf, a capital contribution stake in the construction of the Amenity Center complex have been allowed to use said facility, creating illegal over-capacity situations at times;

e. With the consent or inaction of Ms. Toth, the Joe Bernat Golf Academy [1] (PO Box 14187; Myrtle Beach, SC 29587-4187; 888-513-5928) has been allowed to use the HOA swimming pool parking lot, which at time results in no parking for Plaintiff;

f. Plaintiff has been subjected to covenants which do not exist in their entirety or to sections which have been deleted by amendment.

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[1] Upon information and belief, the Joe Bernat Golf Academy is not licensed to do business in South Carolina nor in Horry County – thus functioning as an unlicensed business - nor does it have it's own parking faciliities – thus violating the related Horry County ordinance,

8. The conditions have been met for Plaintiff to sue as a representative of a class in a Derivative Action by Shareholders of the HOA and of a class of homeowners wrongfully subjected to the voided or amended covenants.

a. The class is so numerous that joinder of all members is impracticable. The HOA includes 483 single family homes, 71 town houses, 204 condominium units, and one business, the golf course, with 50 votes per the covenants (but none when in arrears).[2]

b. All questions of law or fact are common to all class members.

c. Plaintiff's claims are typical of the claims of the class.

d. Plaintiff will fairly and adequately protect the interests of the class.[3]

e. The amount in controversy for each member of the class (except the golf course) exceeds one hundred dollars.[4]

RELIEF SOUGHT

9. The Plaintiff is informed and believes that he individually and as Class Representative is entitled to an Order of this: Court to cure the above cited problems, and Plaintiff asks the Court to Order the following:

a. To remove the existing Board from Office;

b. To void all contracts entered into by the HOA after March 2002.

c. To void the "Golf / Assessment" agreement / contract made between the HOA, Horton, and the Golf Course on or about November 3, 2003;

d. To order that upon the agreement between Plantation AD, DR Horton, and Sunbelt Inc, entered into on May 16, 2003, all prior covenants running with the land within the International Club Planned Unit Development ("PUD") which same land is arguably subject to

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[2] Single Family Homes: Pebble Creek - 222; Highlands - 98; Links - 103; Meadows - 60. Townhouses: Glens – 47; Cambridge – 24. Condominiums: Villas – 140; Grand Vistas – 64. Golf Course – 50.
[3] Plaintiff has since 2007 effectively been the spokesman for the disenfranchised or wronged homeowners against the board which has wrongfully seized control and which has mismanaged the HOA affairs.
[4] $80,000 – 2007 + 2008 maintaining non-HOA grounds; $290,000 through 2009 in uncollected golf assessments: 2008- 2009 void / collected cable charges = $ 500.40 per unit; 2006 -2007 overcharges = $53.58 per unit.

the Defendant International Club HOA, ceased to exist and thereafter no authority existed to resuscitate or amend the covenants without the unanimous agreement of all property owners within the PUD;

e. In the alternative to 5(d), if the Court does not so order, to codify the cumulative effect of the amendments to the covenants;

f. To appoint a Special Master under the direction of the Court and at the expense of the HOA to

(1) Organize a new election of the Board;

(2) To gather, hold and control the records, books, and finances of the HOA;

(3) To manage the affairs of the HOA, himself or through a property manager licensed by the South Carollina Department of Licensing and Regulation (i.e., the Board of Realtors) likewise at the expense of the HOA;

(4) To identify instances of waste, fraud, abuse or fiduciary misconduct by the now current putative board and / or it's employees and to refer instances where it is believe to constitute criminal conduct to the Prosecutor for further action, and where such misconduct does not warrant criminal action, to sue Board members and employees or contractors on behalf of the HOA and at the expense of the HOA to recover money disbursed fraudulently or in abuse of fiduciary responsibility;

(5) To sue on behalf of the HOA to recover debts due the HOA, specifically assessments owed by the International Club Golf Course and by various private landowners (e.g., Golf Course, DR Horton, and others) for the cost of maintaining the private property of same;

(6) To cause a forensic audit of the accounts of the HOA to take place, at the expense of the HOA, so as to restate the records in accordance with genrerally accepted accounting principals, to separate and segregate money improperly within common accounts, to issue to the homeowners individual statements of account, and to restate the tax filings of the HOA in recognition of the mis-labelling of non-exempt income as exempt income; and to pursue by criminal and civil means any misconduct uncovered through said forensic audit;

(7) To identify the equitable interest of the homeowers in Pebble Creek in the Amenity Center / Pool / Playground and related parking lots, and to prepare and file an Amended Deed with the authority of this Court so reflecting; to prepare and put to the vote of the homeowneres in Pebble Creek a suggested regime to represent these homeowners' interest in said facility;

(8) To determine what refunds or rebates were or should have been issued to the HOA by the Horry Telephone Cooperative in connection with provision of cable television services to the HOA, and to take such action to collect such refunds or rebates and credit them to the appropriate homeowner accounts; to identify, collect and refund to homeowners any excess between funds collected for cable television services and the legal and equitable amounts which were actually due on those accounts;

g. To order the exclusion from use of the facility of any homeowner living in a town house / town home, or condominium homeowner unit;

h. To void the HTC / HOA bulk cable television agreement;

i. To order that all meetings of the Board or of any Committee whether termed "social events", "workshops" or otherwise with the exception of when an attorney is actually addressing ONLY privileged attorney – client matters -

(1) must be open to the homeowners;

(2) must be perpetuated with adequate minutes as described in the South Carolina Non-Profit Corporation Statute; and the minutes must promptly be made available;

(3). must accept onto the agenda as new business any matter put before it by a PUD homeowner;

(4) must permit any homneowner to question the board or committee in a reasonable length of time and must reasonably attempt to answer such questions when the answers to do not compromise instances where courts have accepted claims of privilege for like circumstances;

j. To hold Rosemary Toth personally responsible for the excess costs to the HOA (October 2007 through the termination of this suit) to maintain non-HOA property, said sum to be repaid to the HOA.

k. To hold Rosemary Toth personally responsible for the assessments she allowed the golf course to avoid paying, while allowing the golf course to vote in elections and directing that golf course property be maintained, said sum to be repaid to the HOA.

l. To hold Rosemary Toth and the HOA jointly liable to Plaintiff and the homeowners for the cable tv charges they paid in 2006 and 2007 in excess of the permitted rate increases, and for the cable tv charges forcibly collected at Ms. Toth's direction through assessments under threat of lien after the FCC voided all such contracts in November, 2007.

m. To hold that the only consequence of late payment of an assessment (apart from collection costs allowed in the covenants) is, per Section 6.8 of the Covenants,

> "interest from the due date a rate equal to the lesser of (a) eighteen percent (18%) per annum or (b) the maximum rate provided by applicable law"

which is the exclusive and complete remedy provided for in the covenants.

n. AND such other orders as are necessary to achieve the declarations and equitable relief sought by Plaintiff.

CHRONOLOGICAL HISTORY

10. On **October 22, 1998** Plantation AD LLC a South Carolina corporation, filed the deed of sale of **9.79 acres** in Deed **Book 2082 Page 456** from Stella Vereen and others to Plantation AD which land subsequently became "The Grand Vistas", whose membership in the HOA and subjection to the covenants is in contention. This land is described at **Plat Book 158 Page 155** which also relates to the **5.42 acres** separately purchased (see below) and which later became International Club Drive (from what became The Grand Vistas down to Kaminski Boulevard aka Tournament Boulevard).

11. On **January 15, 1999** Plantation AD LLC, filed a plat of what was to become the core of the PUD – **Book 160 Page 79,** 459.22 acres in Socastee Township. This related to land Plantation AD owned between McDowell Shortcut Road, south east of Route 707, and north of what on December 29, 1999 had been dedicated as Kaminski Boulevard, later renamed Tournament Boulevard. Upon information and belief and upon inspection of this Plat, the land described includes **"The Fairways"** (which has been wrongfully excluded from the HOA and wrongfully exempted from assessments), **"The Villas"** which has been deprived of voting rights

in the HOA while being subjected to assessments – and which has separately sued Defendant HOA, **"The Cambridge"** which like "The Villas" has been deprived of a vote but subjected to assessments, as well as the current International Club Golf Course.

12. On **January 19, 1999** Plantation AD owned the land which ultimately became the golf course as well as most of the land which became the PUD. This is perpetuated in a **"Golf Course Membership Rights Agreement"** filed that day in Deed Book 2112 at Page 19. The Golf Course Membership agreement was stated as "a covenant running with the land and shall be binding upon all future purchasers of the Plantation Tract Golf Course Property". This agreement has since been repudiated (and it's very existence denied) by the current / successor International Club Golf Course, Inc, owned until December 2008 by Davis Mining and Manufacturing. It has never been honored. Exhibit B to that document at Deed **Book 2112 Page 22** refers to the same plat recorded at Plat Book **160 Page 79** to make this golf agreement applicable to the entire area and adds reference to the plat at Book **158 Page 155** explicitly applying it to the 5.42 (International Club Drive) and 9.79 acres (Grand Vistas) referred to above.

13. On **January 19, 1999** Plantation AD recorded at Deed Book 2112 Page 5 the deed of sale of **5.42 acres** bought from the Kaminski 17 Limited Partnership which was later subjected to the covenants at issue referring to Plat Book 158 Page 155. This land was later sold to DR Horton and has an easement on it providing for use by all homeowners who bought lots in the PUD originally owned by Plantation AD. The road through the center of the property is currently named International Club Drive.

14. On **January 29, 1999, Plantation AD sold to Plantation Golf** AD three (3) tracts of land described on the aforesaid Plat in exchange for cash and membership interests for Plantation AD (and it's successors) in the Plantation AD Golf course (and its successors) further subjecting the golf course to a restriction that for 99 years it could only be used as a golf course. Upon information and belief, the Horry County Planning Commission's requirements for open space for the planned unit development (PUD) contemplated by Plantation AD required this in partial satisfaction of the open space requirements imposed on housing developments such as the PUD. The property was made subject to certain easements for the use by the golf course of planned and existing roads in the PUD AND the covenants simultaneously filed. This deed was actually

recorded on **February 8, 1999** at Deed Book **2117 Page 1413.**

15. On **February 8, 1999** (the same day) Plantation AD filed a **Declaration of Covenants** applying to the entire PUD, at **Deed Book 2117 Page 1353.** These are the covenants (and it's later amendments) subject to contention in this suit. **These ARE THE ONLY COVENANTS BETWEEN Plantation AD, Sunbelt, and DR Horton and their successors** and assigns.

16. The **covenants** for the PUD were made applicable to the PUD and to any additional land later subjected to the covenants by amendment to the covenants. The golf course was subjected to these covenants as was the land described in Exhibits A and B therein. The golf course and it's successors are subject to the same covenants as the homeowners.

a. The Declaration of the **February 8, 1999** (original) Covenants used the following text to state what land was to be subject to the Covenants:

> **"NOW, THEREFORE, the Developer hereby declares that all of the Property described in Exhibit "A" and the Additional Property described in Exhibit "B" ... shall be ... subject to the following easements, restrictions, covenants, charges, liens and conditions"**

b. **Exhibit A** referred to Plat Book 160 page 79 (October 12, 1998, revised through January 13, 1999) and listed the following property:

(1) 76.08 acres – Parcel 1; this is the "Pebble Creek" group of single houses sold to and developed by Sunbelt.

(2) 192.52 acres – Parcel G-1; this is the Golf Course.

(3) 9.07 acres – "Clubhouse"; this is the Golf Course clubhouse.

(4) 13.08 acres – Parcel 4; this is currently empty land to the north east of the golf club house;

c. **Exhibit B** referred to the same Plat Book 160 Page 79 and listed 449.22 acres further qualifying it as the property conveyed by the Murrells Inlet Golf Plantation LLC to Plantation AD in Deed Book 1996 at Page 1104. which sale included the above tracts AND

(1) Parcel 2, 50.18 acres; this is "The Meadows", "The Highlands", and part of "The Links" single family homes;

(2) Parcel 3, 45.72 acres; the remainder of "The Links" single family homes are here

as well as "The Glens" townhouse development.

(3) Parcel 5, 7.95 acres; this is where the Bally Castle condominiums are currently being constructed; and

.(4) Parcel 6, 56.45 acres; this is "The Villas" condominium development.

d. **Exhibit B** also refers to the property on Plat Book 158 Page 155 filed October 22, 1998, specifically including:

(1) 5.42 acres which is the main entrance of the PUD, more particularly the stretch of road (plus wetlands and parallel adjoining land) called "International Club Drive running from Tournament Drive (formerly Kaminsky Blvd) to The Villas; and

(2) 9.79 acres which is "The Grand Vistas" condominium development.

Thus the areas in the PUD subjected to the covenants and entitled to votes and privileges in the HOA are Pebble Creek, The Golf Course, The Meadows, The Highlands, The Grand Vistas, The Villas, and The Glens.

17. Also on **February 8, 1999 Plantation AD sold to Sunbelt Associates** (Charles Flynn) the tract of land which became the Pebble Creek subdivision of the PUD. This was recorded at Deed Book 2117 Page 1401 and was subjected to the Declaration of Covenants referred to above.

18.. Also on **February 8, 1999** in connection with the aforesaid sale of land to Sunbelt, **Plantation AD assigned to Sunbelt Golf Course Membership** rights it held as a consequence of it's placing same in a covenant relating to the sale by Plantation AD to Plantation Golf of the golf course tract. This **"Golf Course Membership Agreement"** was recorded in Deed Book 2117 at Page 1408 and was redundant to the previous Golf Course Membership Agreement between Plantation AD and Plantation Golf. This agreement provided Pebble Creek homeowners single annual golf course memberships for $690 and $1035 for family memberships.

The Glens

19. On May 10, 2000 Plantation AD recorded the First Amendment to the Covenants.

a. It changed the name of the PUD from "Murrells Inlet Golf Plantation" to

"International Club". This applied to the entire PUD, demonstrating that Amendment 1 is an Amendment of General Application to the entire PUD.

b. Parcel 6, "The Villas", was redundantly subjected to the Covenants; Plantation AD also noted that said parcel was being conveyed to a new owner / developer, International Club Villas. This second paragraph clearly referred only to Parcel 6.

c. The third paragraph, referring only to Parcel 6, stated that Parcel 6 has no common areas *belonging to the HOA*.

d. Section 3.7 of the covenants was "hereby deleted in its entirety". The amendment did not say "does not apply to Parcel 6", and the failure to limit the application of the deletion clearly deleted Section 3.7 from applying to any area subject to the Covenants. This paragraph (4) of the amendment went on to say that "property management firms used to operate any multi-family association" in Parcel 6 shall have no limitations. Clearly where a sentence was meant to apply to a multi-family development, not to the entire PUD, the Declarant said as such.

e. Paragraph 5 of the amendment denied owners of multi-family units the right to use any PUD / HOA recreational facilities, which includes the Amenity Center / Swimming Pool / Playground. At the time there were no recreational facilities in the PUD.

> "The owners of Dwelling Units within the Multifamily Parcel shall not *have* the right to use any Recreational Amenities, if any, owned by the International Club Homeowners Association, ` Inc. (the "Master Association"), nor will such owners be assessed any of the cost of operating, constructing, repairing, or replacing any such Recreational Amenities."

f. Paragraph 8 of the amendment required separate calculation and segregation of funds / budgets for the recreational facilities (and their reserves) and other general PUD maintenance obligations.

g. Paragraph 9 was an unqualified amendment of general application obviously meant to apply to the entire PUD. It deleted ('waived") the obligations of sections 4.10, 4.12, 4.16, and 4.17 of the covenants without qualification or reservation. There was no qualifying phrase stating that this waiver was limited to the multi-family parcel.

h. Paragraph 10 was qualified as applying only to the multi-family parcel, stating that the payment required by covenant section 6.7 could be deferred, in the multi-family parcel,

until a unit was sold.

i. Likewise in Paragraph 11 Amendment 1 made a general unqualified deletion "waives" of covenant sections 7.2, 7.4, 7.25, and 7.31. Lacking was the specific qualification made when referring (in paragraph 10) to section 6.7.

j. Paragraph 12 of the Amendment likewise made a general and unqualified waiver of Section 7.37 of the Covenants.

20. On **March 1, 2001** the Homeowners Association referred to in the Covenants was registered with the South Carolina Secretary of State as a non-profit corporation subject to SC Code 33-31 et seq. specifically being subject to dissolution under section 33-31-1404.

21. On **April 29, 2003** Plantation AD recorded the Second Amendment to the Covenants.

a. Plantation transferred to DR Horton its status as developer / Declarant.

b. It excluded from annexation without Plantation's consent land owned by Plantation AD (which had not been incorporated into the PUD) to the north and south of the main entrance (International Club Drive).

c. Plantation declared that it, not Horton, owned the roads and streets in the PUD and that same could only be transferred to the HOA.

22. Also on **April 29, 2003** Plantation sold to Horton the land which Horton later used to build The Links, The Highlands, The Meadows, The Glens, and the Grand Vistas, together with the property which included the lower end of International Club Drive (5.42 acres) connecting to Tournament Drive, over which all homeowners in the PUD had an easement of use.

23. On **May 11, 2003** Plantation AD, DR Horton, and Sunbelt Associates signed a tri-partite "**Developers Agreement**". These parties included the former and current Declarant of the Covenants (for the PUD) and between the three owned all property in the PUD with the exception of the Golf Course (which upon information and belief, was owned by Plantation Golf, a subsidiary of Plantation AD). The ONLY COVENANT between these three was the covenant filed with the Recorder of Deeds on February 8, 1999, as later amended. These parties had the power to amend the Covenants and, by the ultimate form of amendment, to amend the covenants out of existence. The agreement abolished the Covenants, set in place a non-competition regime between Horton and Sunbelt, and provided for the joint construction of the (eventual) Amenity

Center / Pool / Playground for the exclusive benefit of single family homes and to the absolute exclusion of townhouse and condominium owners..

a. The paragraph titled "1. Contract with Plantation AD LLC" contained the following text which could relate ONLY to the PUD Covenants since these covenants, referred to in the contracts for sale of real estate, were the only covenants between Plantation and Horton and / or between Plantation and Sunbelt, and which were also simultaneously applicable to both Sunbelt, Horton, and Plantation.:

> "Further, said parties, their heirs, executors, administrators and successors, mutually remise, release and forever discharge DRH, Sunbelt and Plantation, its or their heirs, executors or administrators **or its successors or assigns**, as the case may be, of and from all, and all manner of action and actions, cause and causes of actions, suits, debts, sums of money, accounts, reckonings, bonds, bills, specialties, **covenants**, ..."

Thus as of May 11, 2003 the Covenants as Amended thereto ceased to exist. With that went the power to further Amend or to resuscitate the Covenants without the unanimous consent of all property owners (such resuscitation would be a "new" covenant") in the PUD – which was never sought nor achieved.

b. In Paragraph 2 Horton and Sunbelt contracted for the creation of what is now the Amenity Center / Pool / Playground.

(1) It was to be constructed on land then owned by Plantation Golf AD, specifically on Parcel D of Plat Book 189 Page 89.

(2) It was to have a 2000 square foot pool plus deck; a 3000 square foot clubhouse with bath and shower areas, a workout facility, and a common room for community functions with a kitchenette. It was also to have an outdoor children's playground area.

(3) The contract provided that the recreational facility

> **"shall be for the sole and exclusive use of the owners of Single Family Residences** within the Planned Unit Development known as the International Club or any other Planned Unit Development ".

c. In this agreement Sunbelt recognized it's obligation to purchasers of single family homes in Pebble Creek to provide them a similar recreation facility, which obligation was undertaken by Sunbelt to sell Sunbelt homes. As a consequence, the contract provided for Sunbelt to pay Horton $1000 per Pebble Creek home, upon information and belief totaling

$222,000. Sunbelt owned no other property in the PUD.

d. On Page 4 Paragraph 3 of the Agreement ("No Competition") Horton and Sunbelt further qualified single family homes to mean "detached single-family homes". The non-competition agreement was that

> "DRH shall not market or sell detached single-family homes which are larger than 1900 heated / cooled square feet, ... (and) that Sunbelt shall not market or sell detached single-family homes which are smaller than 1200 heated / cooled square feet,"

e. In Paragraph 10 (b) "Interpretation" Horton and Sunbelt declared that "the parties .. intend the plain meaning of the provisions herein."

f. As part of the Agreement Horton and Sunbelt attached a model "HUD Settlement Statement" (Form HUD-1) which provided (Line 518) that $1000 of the purchaser's funds will be used to purchase a $1000 interest in the Amenity Center to be built by Horton in part for the Pebble Creek Homeowners.

g. There is no provision in the Agreement that the Amenity Center be DEEDED to the HOA. Upon information and belief, Sunbelt had promised each Pebble Creek homeowner to build, as a representation related to the sale of houses in Pebble Creek, a recreation complex for the exclusive use of Pebble Creek homeowners.

24. The Glens and The Cambridge are clearly multi-family areas within the meaning of the Covenants which states that

> "Section 1.18. Multi-Family Area shall mean and refer to any portion of the Subdivision designated as such by the Developer in which **common elements are owned** by either the Owners of Units in such Multi-Family Area as tenants-in-common or **by the Multi-Family Association composed of such Owners,** pursuant to a Horizontal Property Regime **or other multi-family legal structure** within the Subdivision upon which there shall have been or will be constructed **either attached or detached townhouses**, condominium units, apartment units, cooperative units, cluster homes, patio homes or similar multi-family structures."

a. The townhouses in The Glens are members, by their additional covenants made applicable to their deeds, of "The Glens @ International Club Homeowners Association, Inc", incorporated November 8 2004, and constituted as a sub-HOA. It owns common areas apart from the master HOA. These common areas consist of Parcels 1944301060 and 072. The Glens HOA is responsible for the maintenance of the front of the townhouses as well as the

parking lots. These townhouses do not have garages nor even driveways. The zoning ordinances of Horry County contemplates only single family detached houses, duplexes, and townhouses. Duplexes can consist of no more than two attached (by a common wall) units.

b. The "multi-family legal structure within the Subdivision" was recorded as covenants and attached bylaws on November 8, 2004 at the Courthouse in Deed Book 2818 Page 1282 et seq. Page 7 Paragraph 5.1 of the Covenants provides that the townhouse association is responsible to maintain not only the common areas, but also "the exterior of the Units, including but not limited to the landscaping around and in front of the Units". This is typical of a multi-family association but not of single family homes, where the homeowner is responsible to maintain the landscaping on his property as well as his individual structure. In exactly the same manner as condominiums, the sub-HOA, not the homeowner, shall peridically treat all exterior walls and foundations of the individually owned units for Termites. Peculiarly, Article XI of the Glens covenants provides for The Glens to have it's own Architectural Review Board (ARB) with it's own distinct standards, which further sets The Glens townhouses apart from the single family houses which are subject to a common and different set of standards and which is administered by the master HOA's own ARB.

c. In attempting to avoid filing this suit Plaintiff engaged in discussions with members of The Glens, particularly Maureen Sullivan, an officer of The Glens HOA and a putative (but never elected and illegallyappointed member of the master association HOA). The Glens has claimed that they are permitted to have their own independent ARB because multi-family associations are so allowed. Upon information and belief, The Glens has altered it's landscaping and built structures in the common areas without applying for permission from the master association ARB.

d. The Glens units lack the standard black mail boxes which are required under the covenants for each individual single family residence. They instead use a multi-box assembly typical of condominium and town house developments.

e. The deeds of individual Glens townhouses do not provide an expectation or right in any recreational facility. The rights conveyed by deed of individual townhouses is only for the use and enjoyment of Glens common areas.

f. Amended Section 7.2 of the master HOA covenants provided that Sunbelt had

contributed $1000 per home through a "Developer's Agreement" for the capital cost of the Amenity Center and required that a separate developer's agreement be constituted which included the contribution of $1000 per unit towards the same capital costs (which agreement has been discussed supra, and which provides exclusively for construction and use of the Amenity Center complex). Upon information and belief, no developer's agreement and no payment of $1000 per unit was made on behalf of The Glens.

g. The Glens is thus a multi-family area ineligible to use the Amenity Center Complex.

h. Pebble Creek homeowners have a collective $222,000 [5] equity ownership in the Amenity Center complex independent of the HOA.

Golf Course "Agreement"

25. Paragraph 8.5 of the Covenants provides the sole and exclusive mechanisms to amend the Covenants. Simply put, the board of the HOA may not alter the express terms of the HOA by amendment, letter, agreement, handshake, contract, or nod. The strict letter of the covenants applies until amended.

26. This is further subject to Article 10 of Title 33 Section 21 (33-31-10xx) of the South Carolina statutes. Per 33-31-1002 of the Code, the only variations from the letter of the covenants that Directors are permitted to make are -

"(1) to extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;
(2) to delete the names and addresses of the initial directors;
(3) to delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State;
(4) to change the corporate name by substituting the word "corporation", "incorporated", "company", "limited", or the abbreviation "corp.", "inc.", "co.", or "ltd.", for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution to the name; "

27. The statutes applicable to non-profit (33-31-831 et seq) corporations prohibit transactions where a director has a conflict of interest. The minutes of the Board of Directors for the period from September 2003 through November 2003 do not perpetuate and disclosure of a conflict of

[5] In 2003 dollars.

interest between one or more HOA Board members, Horton, and the Golf Course regarding the subsequent "Golf Course Agreement" nor do said minutes perpetuate any before or after approval of any such conflict of interest. In point of fact numerous conflicts of interest and self-dealing related to the 2003 "Golf Course Agreement".

"SECTION 33-31-831. Director conflict of interest.

(a) **A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. ...**

(b) A transaction in which a director of a public benefit or religious corporation has a conflict of interest may be:

(1) authorized, approved, or ratified by the vote of the board of directors or a committee of the board if:

(i) the material facts of the transaction and the director's interest are disclosed or known to the board or committee of the board; **and**

(ii) the **directors approving the transaction in good faith reasonably believe that the transaction is fair to the corporation;** or ...

(c) A transaction in which a director of a **mutual benefit corporation** has a conflict of interest may be approved if:

(1) **the material facts of the transaction and the director's interest were disclosed** or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved, or ratified the transaction; or

(2) the material facts of the transaction and the director's interest were disclosed or known to the members and they authorized, approved, or ratified the transaction.

(d) **For purposes of this section, a director of the corporation has an indirect interest in a transaction if:**

(1) another entity in which the director has a material interest or in which the director is a general partner is a party to the transaction; or

(2) another entity of which the director is a director, officer, or trustee is a party to the transaction.

(e) For purposes of subsections (b) and (c) a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board or on the committee who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors on the board who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any

action taken under subsections (b)(1) or (c)(1) if the transaction is otherwise approved as provided in subsection (b) or (c).

(f) For purposes of subsection (c)(2), a conflict of interest transaction is authorized, approved, or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by or voted under the control of a director who has a direct or indirect interest in the transaction, and votes cast by or voted under the control of an entity described in subsection (d)(1), may not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (c)(2). The vote of these members, however, is counted in determining whether the transaction is approved under other sections of this chapter. A majority of the voting power, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section. "

"SECTION 33-31-842. Standards of conduct for officers.

(a) An officer with discretionary authority shall discharge his duties under that authority:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the officer reasonably believes to be in the best interests of the corporation, and its members, if any. "

"SECTION 16-13-230. Breach of trust with fraudulent intent.

(A) A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny.

(B) A person who violates the provisions of this section is guilty of a:

(1) **misdemeanor** triable in magistrate's court if the **amount is one thousand dollars or less.** Upon conviction, the person must be fined or imprisoned not more than is permitted by law without presentment or indictment by the grand jury;

(2) **felony** and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the amount is **more than one thousand dollars but less than five thousand dollars;**

(3) **felony** and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years if the amount is **five thousand dollars or more."**

28. Section F of the Bylaws of the HOA provides that

"The Association shall not pay compensation to its members, directors or officers for services rendered."

29. Section 6.5 of the Covenants provides that

> "the owner of the golf course shall pay an assessment which equals **fifty (50) times the rate of Unit owners who also pay for the costs of the recreational amenities;**

30. In 2003 the full assessment for owners who pay for the costs of the Amenity Complex was **$65 per unit.** Thus per the covenants the **Golf Course owed $3,250 per month** in assessments.

31. In 2003 no member of the Board of the HOA had been elected. Each and every one of them had been appointed, were removable on demand by, and owed allegiance to Horton, the developer. Per the information cited supra, Horton also had an absolute responsibility to pay for the cost of the Amenity complex either through his own funds or through funds from Developers Agreements with builders of single family homes. The HOA had NO obligation or responsibility to pay anything for the Amenity Complex. Title to the Complex was not held by the HOA.

32. Per the September 3, 2003 minutes of the HOA Board meeting:

a. Horton through Doug Brown appointed his employee / salesperson Doug Brown as member and president of the board; together with his employees Rick Ryan, Russ Carson and Ron Peoples. He also appointed Charles Flynn, President of Sunbelt, to the Board. Between Doug Brown and Charles Flynn, there was complete knowledge of the obligations of the Golf Course to pay assessments per the covenants and of Horton to build the Amenity Center at the cost of Horton and Sunbelt, but at no cost to the HOA.

b. The September 3, 2003 minutes perpetuate that on that day, **through the end of August 2003,** the Golf Course was **$15,000 in arrears.** The vote of the Board was that the golf course **arrears of $ 15,000 through August 2003** be

> "written off in exchange for a parcel of land approximately **½ acre** to be given to the association for the purpose of completing a **parking area for the recreational facility**. The motion passed unanimously".

This of course was an illegal abuse of fiduciary responsibility because Horton and Sunbelt, not the HOA, was obligated to acquire sufficient parking. There was no board authorization for any further forgiveness of golf course debt nor reduction in future golf course obligations. In recognition of the requirements of the covenants, the board minutes noted that any approved alteration to the golf course future assessment "would be incorporated into an amendment to the

master deed". No such amendment was ever recorded. It is also believed that the $15,000 itself was fraudulent because upon information and belief, it was not computed at the $65 per unit rate but upon approximately $20 per unit, the rate paid by units NOT having access to the amenity center (which had not been built). According to a letter dated January 19, 2004, signed by Tracy W Fisher, an attorney with the law firm of Willcox, Buyck & Williams, the golf course did not pay any assessments for September, October, November or December of 2003, accumulating a new assessment arrearage of $13,000 on top of the admitted debt through August 2003 of $15,000.:

33. The minutes reflect that at the September 3 3003 meeting the Board also approved a contract between the HOA and the golf course to buy water to **irrigate International Club Drive** which runs from the intersection of Pebble Creek / golf course entrance to Tournament Drive, and that the board approved a contract specifying **$100 per month**. The minutes scheduled the next meeting for September 10 2003 in Horton's offices but this apparently did not take place as there are no minutes for such a meeting (and hence no "off-the-minutes" approvals have any validity).

34. Instead of carrying out the very flawed and unlawful agreement as approved by the Board, Horton's salesman / employee and putative "Board President" Doug Brown put in place a very different agreement between Horton (who should have had no place in the contract, since Horton was not owed anything by the golf course), Plantation Golf, and ostensibly the HOA with Brown in questionable representative capacity. Recall that Horton and Sunbelt had an obligation to provide parking satisfying the applicable Horry County ordinance – at their expense – and that the Board had an obligation to collect the debts owed it per the covenants and that no board member could negotiate a contract benefiting himself or his employer.

35. Section 1104 of the Horry County Ordinances governs parking for Indoor / Outdoor recreational facilities. For a community / recreation center (C)(1) there must be "**1 space per 50 sq. ft of useable seating area**". The contract between Horton and Sunbelt provided for a 3000 square foot facility – **60 spaces**. Combining both the "new" parking (1/4 acre) lot bought through this objectionable agreement with the parking spaces near the pool, there are no wheres near the mandated 60 spaces. Perhaps if Doug Brown had obeyed the board and added ½ acre of parking, this might have happened. Section 1104(C)(2) provides that for a swimming facility

there must be **"1 space per 75 sq. ft. of gross water area"**. The Developer's Agreement provided for a 2000 square foot pool, hence a requirement for **27 more spaces**, or a total requirement of **87 parking spaces**. Instead of fulfilling his fidudiary duty or at least nominally obeying the Board's mandate, Doug Brown and Horton (a representative of Horton signed this ugly agreement) lined their own pockets at the expense of the HOA – which got nothing out of the agreement and stood to lose approximately $423,000 through 2014 from this illegal agreement.

a. Doug Brown agreed to accept ¼ acre for parking from the golf course, not the 1/2 acre the Board demanded. The minutes of the board did not give him negotiating powers. Per the documents on file at the Courthouse, the ¼ acre transferred was declared to have a value of $5,000, according to documents filed with the Deed at Bood 2771 Page 1480 and the assessment records of Parcel 1940002107 for 0.258 acres dated August 4, 2004 (this late transfer of the deed invalidated the agreement which required full performance (Agreememt Paragraph 6, Real Property) "within seven (7) days of this Agreement, the Golf Course shall convey the real property ... free and clear of all liens to the HOA". As noted, while the date of the Agreement was November 3, 2003, the deed was not conveyed until August 4, 2004, invalidating the entire agreement.

b. In Parfagraph 1, Forgiveness of Debt, Doug Brown overstepped his authority and forgave golf course debt through the end of December, 2003, not just the $15,000 (questionable) debt through the end of August, forgiving an additional $13,000. This additional money is owed the HOA by the Golf Course (as is the prior debt).

c. In paragraph 2 (Future Assessments), without any authority and in direct violation of the covenants, Brown agreed to allow the golf course to pay 20 full assessments ($65) a month, $1300 not $3250. at 50 assments in 2004. He also agreed that the golf course would pay 23 full assessments in 2005, and 3 more each year through 2014. Upon information and belief the golf cousre never paid even these reduced (ultra vires) amounts.

Here are the figures: The golf course had been paying at $35 per unit, not the "full assessment" amount thus the true arrearage in 2003 was $116,000 (estimated).

Year	Golf Course Assessable Units	Paid Per Year at $35 per Unit	Payable Per Year at Full Assm't Per Unit & 50 Units	Loss to HOA	Mo/per Golf unit Paid	Full Assm't
Thru 2003	50	-	-	$116,000	$35.00	$65
2004	20	$8,400	$39,000	$30,600	$35.00	$65
2005	23	$9,660	$39,000	$29,340	$35.00	$65
2006	26	$10,920	$42,000	$31,080	$35.00	$70
2007	29	*$17,333*	$42,000	$24,667	*$45.14*	$70
2008	32	*$13,871*	$42,000	$28,129	*$36.12*	$70
2009	35	$14,700	$45,000	$30,300	$38.28	$75
2010	38	$15,960	$45,000	$29,040	$41.56	$75
2011	41	$17,220	$45,000	$27,780	$44.84	$75
2012	44	$18,480	$45,000	$26,520	$48.13	$75
2013	47	$19,740	$45,000	$25,260	$51.41	$75
2014	50	$21,000	$45,000	$24,000	$54.69	$75
Cumulative Assessment Loss to HOA				$422,716		

Note: Full Assessment is $75 beginning in 2009
Note: Italicized is actual from General Ledger
Note: $ 35 from 11/03/2003 Agreement admitting $1,750 debt per mo on 50 units
Note: In 2003 the golf course owed $3250 per month.

d. For November 2003 through September 2007, **Doug Brown**, the Horton salesperson / employee / HOA president provided in the contract that he personally would receive a **FREE GOLF COURSE MEMBERSHIP** valued at $4,500 which makes Doug Brown's self-dealing a felony and further invalidates the entire agreement (Paragraph 3(B) of the agreement – "Board Memberships."). Per the bylaws, no Board member is allowed to get any consideration as a consequence of service and such is also a conflict of interest and a breach of fiduciary responsibility under the statutes.

e. Paragraph C. Marketing Memberships, **gives Horton 20 free rounds of golf per month**, continuing into the indefinite future with a **value of $180,000** through 2014, making this yet another felony count and further invalidating the contract. Horton, of course, traded nothing for this consideration. But the self-dealing didn't end there.

f. The agreement also provided that Horton would buy Seventy Five (75) reduced price golf memberships to be included with houses Horton was selling as buyer incentives. Paragraph A "Third Party Purchaser Memberships" were to be sold to Horton at $400 or $700 (single or family) per renewable (at same rate) membership, far below the public rates of $900 or $1650. Depending on the mix, the value to Horton was between $450,000 and $855,000. We are stating major crime and abuse of fiduciary responsibilities here.

g. From November 2003 through February 2004 Horton got free use of facilities in the golf club house to sell houses from. Value unknown.

h. From November 2003 through the distant future, Horton also gets to rent the golf club house for sales or any other event at the very reduced rate of $50 per evening. Value unknown.

i. The Doug Brown agreement overstepped his authority to the benefit of Horton and the golf course even further. The Board authorized payment of $100 a month to irrigate International Club Drive, which in fact was and is Horton property. Horton has never paid a single cent in assessments. The Doug Brown agreement set the HOA's payment at $150 per month and added that the HOA will irrigate, at HOA expense, the golf course's main entrance. Paragraph 5, Irrigation. It also provides that the HOA will (per agreement Paragraph 7, "Ponds") maintain, improve and repair the two GOLF COURSE water retention ponds installed for golf course rain water drainage, (upon information and belief) said ponds being required by the County in connection with approval of the golf course construction.[6]

j. To recap, the HOA was not responsible for the parking lots; Horton and Sunbelt were, thus the HOA got nothing it was obligated to buy. Horton and Sunbelt got out of their obligation (unless the Court intervenes) to provide parking, and in any event provided only a fraction of the parking mandated by Horry County Ordinance. The HOA lost approximately $423,000 in assessments and in exchange Horton and Doug Brown and the Golf Course got lots of stuff. The HOA got nothing. This was clearly a case of felonious abuse of fiduciary responsibility and cries out for relief from the Courts and for referral by the Court to the County

[6] Prior to filing this suit Plaintiff, per SC FOIA statutes, had requested a copy of the drainage plan for the golf course from the Horry County Planning Commission, which request has not yet been satisfied.

Prosecutor.

36. Since the current putative HOA President (Defendant) Rosemary Toth's assumption to HOA Presidency in September 2007 she has lied to the HOA about the status of golf course assessments. She has falsely claimed that each year the golf course has been paying at the (invalid) 2003 schedule of full assessments whereas the golf course has never paid full assessments at that rate and has in fact, under Rosemary Toth's ascendancy, actually been paying less. There is no reason to believe that the "budgeted" golf course assessment number of $14,700 will be paid. Per the actual HOA ledgers, prior budgeted numbers were not met in 2007 and 2008 – and in any event these "reductions" were illegally granted and are prohibited per the covenants. Upon information and belief, Defendant Toth has now stated her intention to allow the golf course to continue it's disregard of it's obligations under the covenants and she has personally declared that the Board will not seek to collect the full assessments required by the covenants. Note Bene" The golf course was allowed by the Board to cast 50 votes in the 2007 and 2008 elections, the second of which was under Toth's ascendancy. Toth has also directed that golf course property be maintained by the HOA, the value of which is far in excess of the assessments the golf course actually pays. Grounds maintenance of private property is a responsibility of the golf course.

37. On **April 29, 2004** Horton recorded the **Third Amendment** to the Covenants at Deed Book 2714 at Page 551.. Plaintiff contends that after May 11, 2003 there were no longer any covenants and any further attempts to amend the covenants were null and void, ultra vires..

a. It added (Paragraph 1) to the PUD and covenants tracts 2 and 3 which were already subjected to the covenants and incorporated into the PUD – the Links, The Meadows, and The Highlands. It also likewise added Tract I-2, The Cambridge, 3.88 acres from Plat Book 169 Page 116 which apparently was already in the PUD / Covenants.

b. In an amendment (Paragraph 2) of general application Horton amended Section I.9 to require that no builder might build anything unless he was a "Designated Builder" which implies having a "Developer's Agreement" and contributing $1000 per unit into the capital construction fund.

c. Paragraph 3, in an amendment of general application, Horton deleted covenant section 3.5 "in its entirety" and instead required a "Capital Contribution" of two months

assessments per unit from a new original owner or from a purchaser from another homeowner..

(1) . It is asserted vy Plaintiff that this is an illegal additional burden on property because it modifies an original existing contract relating to property to add a burden which the original purchaser had not agreed to and could not contemplate. The Supreme Courts of other states have held that an existing contract / covenant on land may be modified to REDUCE the burdens of property with a super-majority (e.g., seventy five percent (75%) as provided for in the covenants, but that an increased burden requires 100 percent (unanimous) agreement of all existing owners of property, which was never even sought. The Developer simply imposed an additional burden, which Plaintiff argues is contrary to the South Carolina Common Law as to Contracts.

(2) The case on point is Hazelbaker v County of St. Charles and Highland Trails Community Assoc., 235 S.W.3d 598, Court of Appeals of Missouri, Eastern District Division 1, No. ED89060, ED89061; October 16, 2007.

d. Paragraph 4 likewise deleted in its entirety Section 6.7 of the Covenants and substituted a new Section 6.7 mandating the collection of the same Capital Contribution as was set out in the new Section 3.5 supra; the same objections of law are raised against this additional burden without the unanimous consent of the existing homeowners.

e. Paragraph 5 was a general amendment recognizing Sunbelt as a "Designated Builder" and acknowledging the Developer's Agreement previously addressed in this Complaint.

(1) The Amended (in this Amendment) Covenants having prohibited building by other than a "Designated Builder", now stated in an Amended Section 7.2 mandating the $1000 capital improvement contribution by a builder to be a "Designated Builder" so as to be permitted to build at all.

(2) These requirements apply to ALL builders, thus DR Horton was required to contribute $1000 per unit to the Capital Improvement Fund.

(3) In an abuse of fiduciary capacity, Horton's appointed Board neglected to collect from Horton (the employer of all Board Members except Charles Flynn from Sunbelt, the $1000 per house Horton sold. Horton thus has a credit for what Horton spent on the Amenity Center – less the $ 222,000 from Sunbelt, and owes $47,000 for the Glens, $98,000 for the Highlands,

$103,000 for houses sold in The Links, $60,000 for homes sold in The Meadows, $64,000 for condominiums sold in The Grand Vistas, and $24,000 for homes sold in the Cambridge.

(4) This information has been hidden from the knowledge of the homeowners because KA Diehl, the management agent appointed by Horton, failed to include the existence of any amendment to the covenants when it disclosed to home buyers (in the disclosure package it charged $100 for) relating only the existence of the original un-amended covenants. Plaintiff became aware of this when on or about September 3, 2008 he did a search of the records of the Recorder of Deeds looking for all documents indexed to the party name "International Club" in category "Deeds". Horton's appointed management agent, KA Diehl maintained an HOA Community Web site called "SmartStreet" which represented that it had a complete set of all documents relating to the homeowners. That web site contained only the original un-amended covenants and the HOA bylaws.

(5) In September 2008 and later, multiple times, Plaintiff has made the putative Board aware of these cumulative amendments and has been met by denials. Much of this correspondence took place on "ICBUZZ", a "news / conversation" "Blog" maintained for the HOA members which was created to transmit pertinent information to homeowners in the PUD. The putative ultra-vires Board clearly is dedicated to protecting the Builder, and the Golf Course, against the interests of the HOA and the homeowners in abuse of their fiduciary duty.

38. On **August 4, 2004** Horton and Plantation Golf finally recorded the **deed for the ¼ acre parking lot** for the Amenity Center – nine months after the putative agreement was signed and eight months after performance was to have been accomplished.

39. On **December 28, 2004** Horton recorded the putative **Fourth Amendment** to the Covenants at Deed Book 2840 Page 740.

a. The Villas had previously been incorporated into the PUD and made subject to the covenants by the Original Covenants. The land was owned by Horton.

b. The Villas was eventually built by Seacoast Associates. Seacoast had never executed a "Developers Agreement" and had never contributed the $1000 per unit and thus should not have been permitted to build in the PUD. The $1000 capital contribution is an obligation of Seacoast and not of the purchasers of units in The Villas. At this time Horton

controlled / appointed all Board members of the HOA Board and had a fiduciary duty, which it ignored, to collect the capital contribution from Seacoast. Horton had only recently recorded Amendment 3 which had this requirement.

c. Paragraph 1 added the Villas to the PUD, which was redundant to the original covenants.

d. Paragraph 2 recognized that Seacoast was going to build a condominium development in The Villas. Paragraph 3 recognized that The Villas, as a multi-family development, would not be eligible to use the Amenity Center complex and hence would not pay the "full assessment" related to same. Clearly Horton enforced this provision against multi-family developments built by other builders, but not against itself when it built The Glens which was a multi-family townhouse development.

e. Paragraph 4 required all original and transfer owners of units in The Villas to pay two months of assessments into the general fund. Plaintiff again asserts that this violates the South Carolina common law as to adding additional burdens to property without the unanimous consent of all homeowners in the PUD. Plaintiff has standing to assert this because Plaintiff was charged this when he purchased his dwelling in Pebble Creek from an original homeowner.

f. Paragraph 5 required a $150 contribution to the "road fund" upon the sale of a unit in The Villas by Seacoast to an original homeowner. Plaintiff asserts that this is fraudulent because the HOA does not own the roads and has no responsibility to maintain same; the roads are dedicated to Horry County, which accepted same.

g. Paragraph 6 granted the Villas an easement to use the roads, which is peculiar because the roads are available to all members of the PUD per the terms of the sale from Plantation AD to Horton.

h. Paragraph 7 observed the self-evident fact that all covenants of the Villas are subject to the over-riding covenants of the master HOA. Horton apparently failed to uniformly apply this to the multi-family townhouse development it built in The Glens as it and the successor boards have permitted The Glens to escape accountability to the master HOA ARB.

40. On **April 21, 2006** Plantation Golf sold the golf course to Davis Mining and Manufacturing, subject to all the existing covenants and obligations of Plantation Golf and

inheriting it's debts to the HOA and obligations to the homeowners in the PUD together with the golf course assets as perpetuated in Deed Book 3083 Page 805. Under the Davis regime the golf course, through it's membership sales personnel in the club house, through it's Superintendent, and through it's resident professional, has in person and by e-mail multiply denied the existence of discounted golf membership contracts available to the PUD, has in effect repudiated those contracts which run with the land, has failed to pay the assessments required in the covenants, and has failed even to abide by the ultra-vires and illegal golf course agreement of 2003.

41. **From January 2006 through the end of December, 2008,** the HOA and it's managing agent Diehl issued to the homeowners eligible to use the Amenity Center assessment coupon books which stated a **monthly combined assessment** in the amount of $70 and a late fee of $35 (the coupon book said the $105 was payable after the last day of the month in which the assessment was payable). A flat (or $35) late fee is not within the exclusive consequences of late payment of an assessment provided for in the covenants (see supra) and constitutes both usury and an interest rate - fifty percent (50%) if paid the following month – not allowed in the covenants.

a. On December 7, 2007 the HOA mailed the homeowners a letter which stated that

> "A one time late charge of **$10.00** **per month** will be added to the homeowners' account for each month in which the management agent receives the dues payment after the 30th day of the month in which it is due."

b. Even after that, the HOA and Diehl continued to issue the same assessment coupons for 2008 which stated a flat $35 late fee (payment of $105). The $10.00 per month charge violates the covenants which does not provide for late fees as a consequence of late payment of an assessment, and is in fact a not too hidden interest charge in excess of the interest charge allowed by the covenants and which is likewise usury under existing law.

c. Beginning with the January 2009, the assessment coupons were changed to show only the $10.00 late charge, which still violates the provisions of the covenants and which is ambiguous as to whether it is a one time charge or a monthly charge.

42. On **January 30, 2008** Horton **deeded the Amenity Center complex** to the HOA thorugh a Quit Claim Deed recorded in Deed Book 3311 Page 2294 a transfer of ownership which in form and content was not a quit claim deed in that it did not purport to release only Horton's

equitable interest in the Amenity Center complex but rather to transfer total title to the land and improvements to the HOA, while omitting the existing claim in equity on said complex that the homeowners in Pebble Creek have on said complex. Plaintiff, individually and on behalf of the homeowners in Pebble Creek, asserts equitable ownership in part or in whole of the complex together with the right to have a say in controlling it's use independent of the HOA.

43. On June 20, 2008 Horton attempted to make a fifth amendment to the covenants by recording same in Deed Book 3344 Page 2065.

a. The amendment stated it's intention "to remove Section 3.7 of the Declaration in its entirety" which is a phrase of general application, whatever the motivating reason.

b. The amendment purported to be an annexation into the PUD and the covenants of 14.10 acres described on Plat Book 237 Page 296 which in reality was the same Parcel 4 which had already been incorporated into the PUD in the original declaration of Covenants, Exhibit B. The Amendment stated that Parcel 4 would be used as a multi-family development.

c. It acknowledged that per Section 6.5 of the covenants this additional multi-family tract would be ineligible to use the Amenity Center and would thus not be an additional burden on the existing homeowners eligible to use same.

d. It subjected the purchasers of units in Parcel 4 to a capital contribution fee as provided for in putative sections 3.5 and 6.7 of the covenants which required such purchasers to pay two months of the (non-amenity center computed) assessments (perhaps $56) as capital contribution and $150 "towards the maintenance of the entrance and roads". The roads are owned by and maintained by Horry County and there are no capital projects. Per Sections 6.3 and 6.4, Assessments for capital improvements may not be arbitrarily applied by the developer, through amendment or otherwise, but only by the properly notified homeowners on a 60 percent vote of approval and only for that particular year. There are thus conflicting provisions in the covenants and since Sections 6.3 and 6.4 specifically apply, these should govern and the amendments to 3.5 and 6.7 were illegally made by the Developer, apart from the question as to whether the covenants have existed since May, 2003.

e. Kinsale Contracting LLC was made a "Designated Builder" under paragraph 7 of the Amendment, but the existing putative HOA Board, led by Rosemary Toth, has failed to

demand the "Developers Agreement" and payment of $1000 per unit as mandated elsewhere in the already amended covenants. It would seem that said Defendants are servants of the developers in spite of their fiduciary duty to the homeowneres.

44. On **October 17, 2008** Plaintiff went to the Golf Club House and inquired about special rates for homeowners in Pebble Creek. Plaintiff was told by the manager on duty that there were no special rates for anybody. Later that day Plaintiff asked the question on ICBUZZ – whether anyone knew of any special rates for homeowners (knowing the answer in advance).

45. On **October 18, 2008** Plaintiff emailed "Jamie Roderick" who had earlier that day responded to Plaintiff and had identified himself as "the Head Professional at International Club". In Roderick's earlier email he had identified himself as the golf course person who had a hand in setting rates and was the go to person on the matter. Plaintiff "copies" this to ICBUZZ so that the exchange of information would be public. Plaintiff asked:

> *"My question is simple: (1) Is the golf course offering a reduced price individual and / or reduced price family membership to International Club HOA members, and if so, for how much? This has nothing to do with prospective Bally Castle owners. (2) Are there any International Club homeowners who have bought golf memberships at the "public" price posted by the Golf Course, that is, no special homeowner discount? "*

Mr. Roderick responded that same day as follows:

> "There is no homeowner discount...never has been. Everyone pays the same rate."

On **October 19, 2008** Mr. Jim Knaffle, the Golf Course "Superintendent", wrote to the collective PUD (on "ICBUZZ") that "I don't have any idea where people come up with" the idea that there is a reduced price golf agreement.

ELECTIONS

46. The HOA was incorporated on **March 1, 2001** as a non-profit corporation. By the Covenants and Bylaws of the HOA, every homeowner became a member of the HOA as soon as said homeowner purchased a unit.

47. On **September 27, 2001** Plaintiff's unit in Pebble Creek with completed home was purchased from Sunbelt Homes, which had previously purchased said tract from Plantation AD. On that day the HOA had at least one homeowner member. Upon information and belief, at the time there were many other homeowner members of the HOA in Pebble Creek.

48. SC Code 33-31-701 mandates that

> "(a) A **corporation with members shall hold a membership meeting annually** at a time stated in or fixed in accordance with the bylaws. "

49. Section 3(a) of the HOA Bylaws provides that

> **"The annual members' meeting shall be held** at the office of the Association or such other place as may be designated by the Board of Directors, **on the second Saturday in March of each year".**

Upon information and belief, no annual members' meeting was held in 2001 or 2002. Upon examination of the minutes of board meetings for the years 2003 through 2006, no such meeting was held those years either. Upon information and belief prior to September 2003 the then Developer / Declarant Plantation AD appointed every member of the HOA Board. Upon examination of the minutes of the meetings of the HOA Board for the years 2003 through 2006, beginnin with September 3, 2003 DR Horton simply appointed the Board of the HOA. The first attempt at an election was the flawed election held in September 2007 which Plaintiff alleges was "rigged" by Horton and did not conform to the requirements of statute or bylaws.

50. SC Code Section 33-31-804 mandates that the Board of a non-profit corporation such as the HOA with members "must be elected at the first annual meeting of members" which per SC Code 33-31-701 was required to have been held in March, 2002 if not earlier.

51. Chapter 4, Sections 1 and 2 of the Bylaws of the HOA permitted the Developer to appoint an interim board "until the first annual meeting of the members" which again could be no later than March, 2002. First Plantation AD and later Horton as Developers ignored the mandate of law and covenants and continued to appoint an ultra-vires Board until a putative board was "elected" in September, 2007. The minutes of the various board meetings between September 3 2003 and through 2006 document that the "selection" for Board members in those years was made by Horton without the election and secret ballot required by Bylaws Section 7 of Chapter 4 (Board of Directors).

52. Accordingly, the Board of Directors of the HOA between March 2002 and September 2007 was illegaly constituted and all acts, contracts, and decisions made by them were ultra-vires, null and void. This included the fraudulent "Golf Course Agreement" of November 2003, the putative Cable TV Contract with HTC entered into on or about October 30, 2003, the acts and decisions of all committees appointed by the putative HOA Boards during that period, and

likewise the contract with and acts of KA Diehl during that time period. All "fines" levied on homeowners during that period are likewise ultra-vires and must be returned to the homeowners.

53. It has been shown that in September, 2007 the owners of units in Pebble Creek, The Glens, The Highlands, The Links, The Meadows, The Grand Vistas, The Cambridge, and The Villas were proper voting members of the HOA. It has been shown that the Golf Course, very much in arrears on it's assessments, should not have been allowed to vote in any election

a. The **September 2007 election** was announced on **August 8, 2007** in a "Notice to International Club Homeowners" which was not mailed to homeowners in The Villas, The Cambridge, or The Grand Vistas. The mailing included a proxy ballot and the homeowners were urged to return it to Diehl in a postage paid return envelope. The proxy ballot listed seven homeowners "running" for the Board of which this Plaintiff was one.

b. After receiving the August 8 election announcement, Plaintiff went in person to Diehl and demanded a copy of a voting list conforming to Section 33-31 of the Code. None was ever provided Plaintiff, which flawed the election. Plaintiff stated his desire to inspect the accouting for ballots received by mail (to be sure that each was from a voter and no "extras" were added to the pile) as well as the issuance of ballots at the meeting (to be sure that no voter received a ballot who had already mailed a ballot in).

c. Plaintiff noted and objected to the fact that ballots were freely handed to anyone who asked for them at the meeting, with no regard as to the restriction that only one vote may be cast for any unit irrespective of how many owners or residents there are for a given unit. Ballots were handed out without checking whether a person given a ballot was an owner or had already mailed a ballot (or whether another person from the unit had already been given a ballot). All such ballots were counted.

d. The golf course was allowed to vote 50 ballots.

e. Plaintiff nominally "lost" the election although (a) Plaintiff's "straw count" of homeowners showed that he had won; (b) discounting the golf course vote which was stated by the golf course representative as voted against Plaintiff, Plaintiff had a majority of votes cast; (c) when Plaintiff objected to the entire election in the presence of Beckie Abel of Diehl and other board members, the Horton representative flat out admitted that he had "picked the board he

wanted and that is that" – that he had rigged the election.

f. Including the 228 units from the disenfranchised multi-family tracts there was no quorum at the September 2007 election. Subtracting the golf course's 50 votes made this even more so. The "board" elected in 2007 was illegally seated and it's acts thereafter and those of it's agents are ultra vires, null and void.

54. On **June 23, 2008** the "Board" announced elections for two vacancies which was to take place at the general meeting to be held on September 17, 2008. On August 21, 2008 Diehl sent out an announcement listing 8 homeowners running for the Board; that mailing included (as in 2007) a proxy ballot. As in 2007, neither of these mailings went to the Cambrdige, The Villas, or The Grand Vistas. At the time, collections from all three were present in the general ledgers of the HOA.

55. On **July 24, 2008** Plaintiff hand carried to the HOA registered agent, Diehl a letter which demanded per SC Code 33-31 the "voters list" as of that moment as specified in the statute, the voters list as it exists on the day of the election to be used to validate ballots dirstributed / counted at the election, and that Plaintiff or his representative be allowed to "observe the validation" of the distribution / counting of the ballots at the election, including demanding proof of identity of anyone participating in the election or asking for / casting a ballot.

a. This request was answered only by an emailed list of homeowners which did not contain the number of votes each unit owner was entitled to vote; the list did not contain any of the unit owners in The Villas, Grand Vistas, or Cambridge – and it did not list the Golf Course as an eligible voter. None-the-less the golf course, very much more in arrears than in 2007, was permitted to vote 50 votes..

b. Plaintiff was not permitted to inspect / verify / qualify the issuance / receipt of ballots or the counting of same. Once again, there was no true quorum and the election was fraudulent. Once again ballots were freely given out (and later counted) to anyone asking for same and there was no cross checking between mailed ballots and handed out ballots (at the election). There was no checking to be sure that duplicate ballots were not mailed nor that ballots were mailed from non-owners.

c. While Plaintiff did not vote them, both Plaintiff and his wife were handed

additional ballots although a ballot for Plaintiff's unit had been mailed in previously.

d. Once again, after discounting the golf course vote (which was stated as against Plaintiff), Plaintiff had sufficient "admitted" votes to win a seat on the Board. By Plaintiff's "straw vote" survey of voters, Plaintiff had more votes in his favor than Diehl had admitted.

e. Immediately after the vote was announced, Plaintiff demanded that Diehl provide Plaintiff a copy of the vote tally sheets. Diehl agreed to do this but never provided same.

56. No true quorum having been present and the 2007 and 2008 elections having been so flawed, it is clear that the HOA has never had a legally elected board. All actions of the board from September 2007 and thereafter, together with the acts of their agents and committees, and all contracts and undertakings approved by them, are thus ultra-vires, null and void.

CABLE TV CONTRACT

57. Plaintiff incorporates the attached "Cable TV Addendum to Complaint" to be served jointly with this Complaint.

58. On October 30, 2003 the same Doug Brown described supra entered into and signed a contract [7] with Horry Telephone Cooperative (HTC) to provide cable television service to the PUD, asserting that he had representative capacity to bind each and every homeowner to this contract. This is false as far as his representative capacity as well as his capacity as a member of the Board. The minutes of the prior meeting of the putative board (September 3, 2003 do not reflect the subject of a cable tv contract even being discussed, let alone approval having been granted to enter into such a contract. The minutes of the meeting of the putative board held after the ultra-vires signing of this contract (November 20, 2003) likewise is silent on the matter. No decision of this significance can have legal weight unless and until the board, however putative it is, votes approval or delegates authority to enter into such a contract.

59. The contract is further defective in that it sets the HOA up as an unfranchised cable tv operator. HTC is on record (to Plaintiff) that the homeowners in the PUD are NOT cable tv customers of HTC; HTC asserts that the HOA is it's customer. The homeowners must then be cable tv customers of the HOA, which owns the cable tv infrastructure in the PUD, controls the

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[7] He claimed to be "Vice President" of the HOA. He was never appointed to that capacity by the

turn on/off of individual service, and is thus an unfranchised cable operator. This by itself invalidates the contract, or at least the obligation of homeowners to pay the HOA for said service collected as part of assessments and subject to lien on property.

60. The contract as implemented violates the contract itself, state and federal law as to the extent of permitted rate incrases.. In 2008, for example, there were two increases totalling over 9 percent whereas the contract permits only one increase, in April of each year, limited to 7 percent per Schedule A of the contract. Thus HTC breached the contract and it is void. In addition HTC has billed (and been paid) for "phantom" houses which do not exist. While houses tend not to appear and disappear, the bills examined by Plaintiff show the number of units billed for to fluctuate from month to month.

61. In addition the HOA has consistently billed the HOA homeowners significantly in excess of what the HOA paid HTC. This is another token that the contract is not a "pass through" but that the HOA is an unfranchised operator; the HOA is also defrauding the homeowners as it falsely claims it is billing, through assessments, only for what HTC charges. While HTC increases it's rates ostensibly only in April of each year, the HOA imposes rate increases on the homeowners beginning on January 1 of each year.

62. Each year HTC refunds to it's subscribers, both corporate and indivdidual, a percentage of the annual collections. The HTC official in charge of bulk cable operations informed Plaintiff that such refunds were issued to the HOA on account of the cable subscription in the PUD – but refused to provide any details since HTC asserts that Plaintiff lacks the legal capacity to demand same from HTC. The HOA, upon multiple demands from Plaintiff for copies of all financial and correspondence documents between the HOA and HTC, has not produced any related documents. The general ledger of the HOA does not reflect the deposit of said HTC refund / rebate checks. Since HTC does not consider the homeowners to be customers of HTC, they are not invited to the HTC annual meetings and thus are deprived of a chance for a drawing of prizes and further consideration in the form of free entertainment and food.

63. Irrespsective of the niceties of the contract and it's performance, on October 31, 2007 the Federal Communications Commission (FCC) on it's pre-emptive authority issued a change to

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Developer, Horton.

Subpart X of the FCC rules holding that contracts such as the HOA – HTC contract are "null and void". FCC Director Jonathan Adelstein wrote into the record a statement condemning the involuntary / exclusive / non-competitive bulk cable contracts of which instant contract is a representative sample. On May 9, 2008 the FCC issued an "Enforcement Guide" specifically aimed at bulk cable contracts administered by homeowner associations, reminding such entities that these contracts are null, void, and unenforceable.

64. Thus for any number of reasons the HOA cable tv contract is null, void, and unenforceable.

LANDSCAPE CONTRACTS

65. The **2007 and 2008 landscape contract** was held by Sunbelt Landscape Services. It ostensibly provided for the maintenance of the Front Entrance area at Tournament Boulevard and International Club Drive; International Club Drive (the land adjacent to the road actually being owned by Horton and the maintenance thereof being Horton's responsibility; Horton paid NOTHING to the HOA in assessments or other payments); the area at the entrance to The Cambridge (adjacent to International Club Drive; this land is owned by The Cambridge Townhouse Association; they collectively are responsible to maintain this property, not the HOA); HOA common property in The Links and The Highlands; property belonging to The Glens @ International Club HOA Inc, a townhouse subcommunity whose covenants provide the obligation of same to maintain said property, such maintenance of private property not being an HOA obligation); grounds around The Amenity Center complex, which is the responsibility of the HOA; and ostensibly HOA common property in the Pebble Creek area.

66 The putative Board had prepared a **2009 Landscaping / Grounds Maintenance Contract** (upon information and belief, the details of same were dictated by Defendant Toth) which used the 2007 / 2008 contracts to describe to prospective bidders what work was to be performed but which 2009 contract omitted the specifications of what was to be maintained.

67. Two prospective bidders submitted bid proposals: "Amazing Blades" and "Sunbelt Landscape Services". Upon information and belief, Rosemary Toth personally told the owner of Southern Landscaping not to bother to submit a bid, as the contractor had already been chosen by her.

68. On **June 25, 2008** the Buildings & Grounds Committee made a presentation to the putative Board regarding the forthcoming 2009 Landscape contract to be awarded. The presentation addressed the two bids submitted as well as the specifications as to what property was to be maintained per Rosemary Toth's instructions to the contractors.

69. The Buildings & Grounds.Committee presentation pointed out that only 38 percent of the area to be maintained was actually HOA property or the HOA's obligated responsibility. Ms. Toth was instructing that the winning vendor maintain golf course property (38 percent of the contract area to be maintained), property owned by Horton (22 percent of the contract area), and property owned by residents for which the residents were responsible (2 percent of the contract area). Thus of the estimated cost for the contract which the Buildings & Grounds committee prepared, **only $24,700 of the $65,000 was for HOA property.** Upon information and belief, Ms. Toth demanded that the contractor maintain the Horton and golf course property.

70. The **Sunbelt** bid to maintain the HOA property was **$30,496** plus $43,904 to maintain the golf course and Horton property. The **Amazing Blades** bid to maintain the HOA property was **$34,896,** substantially higher than the Sunbelt bid as to HOA property. Amazing Blades offered to maintain the golf course and Horton property for an additional $42,499, making Amazing Blades the high bidder -- $74,400 for Sunbelt v $77,395 for Amazing Blades – including the non-HOA property. Southern Landscaping's bid, having not been submitted, was not evaluated.

71. The landscaping contract was awarded to the high bidder, Amazing Blades, upon information and belief upon the demand of Defendant Toth, and likewise per her demand included maintenance of golf course and Horton property.

72. In 2009 when performance occurred, upon information and belief Toth approached the Buildings and Grounds committee and demanded that they amend the landscaping contract to pay Amazing Blades even more, ostensibly to maintain the property privately owned by The Cambridge residents (outside of the HOA). Upon information and belief she was informed that said property had been in the bid specification and had been maintained by whatever contractor for many years. Upon information and belief, Toth insisted none-the-less that the contract be increased as she demanded.

73. On **March 12, 2009** at a regularly scheduled meeting of the putative HOA Board, the Buildings & Grounds Committee made a public presentation to the Board pointing out the facts

of maintaining golf course, Horton, and private property at the HOA's expense without an obligation to do so. At said meeting Plaintiff heard Toth demand that the maintenance be continued as she had directed. Upon information and belief, since that time Toth has demanded that the Buildings & Grounds Committee amend the contract further to have Amazing Blades maintain even more private property – at an increased cost to the HOA.

74. Upon information and belief, in 2007 and 2008 the landscape contractor Sunbelt maintained Horton and golf course property at the behest of the Board, more specifically at the direction of Rosemary Toth. Because the Board and Diehl have refussed numerous written demands for a copy of the 2007 contract the exact loss to the HOA is not yet known. Per the 2009 Sunbelt bid, it's 2008 contract to maintain the same property was 15 percent less than the 2007 contract amounts. Given that in 2007, 2008 and 2009 (original specification) approximately 61.3 percent of the maintained area was private / non-HOA property, **$47,443** of the **$77,395 2009 landscape contract** was spent wastefully, fraudulently, abusively and intentionally in disregard of fiduciary responsibility by Toth despite the expert opinions and advice of the Buildings & Grounds Committee; and likewise 61.3 percent of the **2008 contract** (for the period March 1, 2008 through December 31, 2008), **$34,256** out of $55,883 was likewise mis-spent; and for the **2007 landscaping** year approximately **$40,301** out of approximately $65,674 was wasted (the 2007 contract was the legacy of the putative last "Developer Board"; per Sunbelt's documents the 2008 contract numbers were 15 percent less than in 2007).[8] The loss to the HOA because of Toth's abuse of her fiducairy responsibilities in 2008 and 2009 (ignoring the latest increases in the contract per Toth's demands to maintain either non-HOA property already in the maintenance specification or to maintain even more private property, as will become known in discovery) amounts to $81,699 on "Toth's watch".

75. This is an outrageous abuse of fiduciary responsibility and constitutes a fraud on the HOA by Defendant Toth personally and the putative Board in general.

DOCUMENT REQUESTS

76. On **December 12, 2008** Plaintiff in writing asked the HOA Board to explain and remedy the problems with the cable television contract which Plaintiff complains about herein. No

[8] The Board and Diehl having ignored many written demands for the 2007 landscaping contract.

answer was received and no relief afforded. Separately on **December 12, 2008**, by certified mail, Plaintiff asked the HOA Board to explain inconsistencies and irregularities in the 2009 budget, including maintaining non-HOA property and other financial issues raised in this complaint. No explanations or substantive answers were ever provided. On December 17, 2008 Rosemary Toth responded in writing saying "The Board will take it under advisement as soon as we can". On December 19, 2008 Plaintiff received a letter signed by Beckie Abel of Diehl on behalf of the HOA Board which said in part: "Since we are so near the Holidays, it will take some time to respond to your letter in detail, but be assured that we will get to it as soon as possible." That was never.

77. On **January 26, 2009** Plaintiff hand served a written demand for a copy of the minutes of a formal meeting which was scheduled to be held later that week between the putative HOA Board and the Board of the Villas, at which two Diehl employees were to be paid to attend and take notes. That went unanswered. The meeting indeed took place on Thursday January 29, 2009 and HOA business was addressed in a context not entitling a claim of privilege. The complaints of The Villas eventually matured into a parallel lawsuit filed by them March 30, 2009, against the HOA Board.

78. On **February 12, 2009** Plaintiff emailed Beckie Abel another demand for the "Minutes of Meeting between Intl Club & the Villas Boards", writing that

> "I note that I have not received, by email, a copy of the notes from the recent "non-meeting" between the boards of the Intl Club HOA and the Villas HOA. I understand that both you and Julie were there and that one or both of you took "notes". In our conversation today you told me that you would email me the notes of that meeting. When can I expect to see them?:

79. On **February 13, 2009** Abel responded by email, writing "As soon as Julie Case, my assistant, has an opportunity to send them to you."

80. On **February 17, 2009** Plaintiff served (by email on the registered agent, Diehl) a "Third Request" for copies of the minutes of the January 29th Board meeting. It was noted that two Diehl employees, Beckie Abel and Julie Case, were in paid attendance, in part to take notes and prepare the minutes. Later that day (February 17, 2009) Beckie Abel responded as follows:

> "Mr. Jarmuth, We are in the process of compiling the notes **from the meeting** and making certain that the Board agrees with our version as is necessary prior to handing them out. As soon as that is done, you will be forwarded a copy."

Plaintiff almost immediately responded

> "Re - notes /minutes: I thought this is supposed to reflect what was said, the good bad and ugly, not the sanitized version. Perhaps an audio recorder is appropriate to get an accurate record of what everyone's view points and thoughts were."

Beckie Abel (for the Board, then responded:

> "This "meeting" as you call it was **simply a get together between the two Boards.** Both Boards agreed that this was not a meeting, but simply a way to clear the path for future discussions. Both Boards agreed not to take notes, but allow management to jot down action items that they were asked to complete. Quite frankly, most sanctioned Board meetings minutes do not reflect discussions, but simply the action and the vote on each action.
>
> The two items that we were asked to accomplish were to request the owners names and contact information for the Villas. Also, I was asked to send the Villas the current Budget information.
>
> This was the jest of this session."

Upon information and belief, having talked to members of The Villas board after reading this (and reflecting back on the initial responses received from Diehl) this was a formal meeting, there was a formal agenda (set by The Villas), notes were taken, there was no agreement not to take notes, and the matters discussed went far beyond those admitted to by Diehl for the Board.

81. On **February 18, 2009** Plaintiff emailed the Board through it's registered agent, Diehl, and demanded the **2007 landscaping contract** as had been orally promised a few days before. Plaintiff also rejected the "no meeting / cheese and crackers" characterization of the January 29th board meeting and reiterated his demand for the minutes. It is noted that it is unusual that no "formal" Board meeting was held (and minutes made available) on any other day in January (and the Board refused to post minutes of at least one Board meeting in February, 2009). Plaintiff has never received any response regarding the **2007 landscaping contract.**

82. Later that day on **February 18, 2009** Beckie Abel responded, stonewalling on the minutes in absolute defiance of Plaintiffs rights per statute applicable to non-profit corporation records (which includes notes of meetings). She wrote:

> "There are no minutes or notes for the **get together** with the Villas Board and **none will be provided to you now or in the future.** This was simply a **social get together** at which my assistant Julie and I were invited. No charges were invoiced to the association. I do not know why you want our version of this event as it sounds like you have been given explicit details as to the discussions that took place here."

83. Plaintiff responded writing

> "Re the 2007 (landscaping) contract which was in force in early 2008, month to month - if it is in your archives why don't you have access to it.
>
> Late Wednesday today HTC faxed over copies of some letters dealing with the 2008 rate increase. Please make me a copy of same or make them available. My name should have been on the cover page of the fax from HTC to you.

When Plaintiff went to pick up the incriminating material about cable tv rebates faxed HTC Diehl, Diehl denied ever receiving same from HTC.

84. On **February 20, 2009** Plaintiff mailed another document request to Diehl and emailed same to most members of the HOA board, including Defendant Toth. In it Plaintiff demanded to inspect and copy the 2007 Landscape Contract which was actually in effect through March (and payable through April) of 2008, less than a year prior to the document request. Plaintiff also requested the HOA 2006, 2007, and 2008 tax returns, the 2006, 2007 and 2008 year end account balance sheets (for each account, not the journals or ledgers), the cable tv correspondence for 2007 and 2008 (a few scattered documents were eventually produced), AND the minutes / notes of the January 29, 2009 Board Meeting, Except as noted Defendants have defied their obligations under SC Code 33-31 et seq and have ignored all requests to inspect and copy (with Plaintiff's own copy machine) said documents. It is plainly clear that the only time the incumbent putative board will fulfill it's obligations under the law is when they are handed an Order of Court and then only if threatened with contempt of court for disobedience.

85. On **March 7, 2009** Plaintiff wrote Diehl and Defendant Toth by email and US mail, requesting to speak at the March 12, 2009 meeting. By email the putative board had let it be known that unless one filed a written demand in advance, one would not be able to speak or ask questions from the floor. Plaintiff also posed a list of questions that he desired public answers to.

86. On **March 12, 2009** a burly man with unconcealed handgun was present, paid ($120) by the board to intimidate the homeowners present and to throw out anyone who dared question the board. A board – paid attorney ($600 estimated) was there, ostensibly to particpate in a closed / privileged "executive session" later, as well as two Diehl employees ($150 per hour for the two, times two hours). Plaintiff and the assembled homeowners were plainly told by the putative board that this was "their" meeting and that the homeowners had "no right" to speak or question the board outside of the annual membership meeting, which was "seconded" by the attorney –

his only action for the evening (he also stated that Roberts Rules of Order do not apply to Board Meetings). Buildings and Grounds publicly challenged the board about spending HOA funds on private property and about increasing the contract to pay for areas already in the specification; this was ignored. The homeowners were then told to leave immediately so the Board could go into privileged session with the attorney; however, the attorney left with the homeowners and did not attend this "executive session". Among the issues Plaintiff set before the board was a request that the Board adopt a code of ethics which was nothing more than a restatement of the statutory obligations of boards and officers of non-profit corporations as already set forth in statute. They refused to do so.

87. Plaintiff and other homeowners (Buildings and Grounds) have plainly made heroic efforts to resolve these and other issues to no avail. The putative board, led by Defendant Toth, are deteremined to act wastefully, fraudulently, and abusively in intentional disregard of their fiduciary status. This Plaintiff and the homeowners have no recourse except to seek relief from the Courts.

By: _____

Ronald Jarmuth, Plaintiff
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355

April 7, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) VERIFICATION
)

PERSONALLY appeared before me, Ronald Jarmuth who, being first duly sworn, deposes and says that he is a homeowner in Pebble Creek, a member of the International Club Homeowners Association, Inc, and is the Plaintiff in the above-captioned matter, and that he has read and knows the contents of the within and foregoing **Complaint** and that the contents are true and correct to the best of his own knowledge, save and except those matters and things therein based upon information and belief and as to those he verily believes them to be true.

Ronald Jarmuth, Plaintiff Pro Se

SWORN AND SUBSCRIBED before me, this 7 day of April, 2009.

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires:

My Commission Expires June 12, 2010

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth,)	
)	
Plaintiff,)	
)	
vs.)	DEFENDANTS' ANSWER AND
)	COUNTERCLAIM
The International Club Homeowners)	
Association, Inc. and)	
Rosemary Toth,)	
)	
Defendants.)	

The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth, answering the Complaint would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations of Paragraph 1 are admitted except that Plaintiff's International Club property is subject, without qualification, to the Declaration of Covenants and Restrictions (hereinafter "Declaration") for The International Club, as amended.

3. The allegations of Paragraphs 2, 3 and 4 are denied as stated, but it is admitted that the Defendant, The International Club Homeowners Association (hereinafter referred to as "Defendant HOA") is non-profit corporation, organized under the laws of the State of South Carolina, the Defendant, Rosemary Toth is the elected President of the Defendant HOA and she is a co-owner of International property subject to the Declarations, and that said property is located in Horry County.

4. The allegations of Paragraphs 5, 6, 7, 8 and 9 are denied and strict proof demanded thereof.

5. The allegations of Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 are denied in that the documents referred to therein speak for themselves.

6. The remaining allegations in the Complaint are denied and strict proof demanded thereof.

SECOND DEFENSE

7. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

8. The Answering Defendants assert the applicable statutes of limitation as a complete defense to Plaintiff's claims.

THIRD DEFENSE

9. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

10. The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims.

FOURTH DEFENSE

11. The allegations of the First, Second and Third Defenses are incorporated herein and made a part and parcel hereof.

12. Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule.

FIFTH DEFENSE

13. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

14. The Answering Defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

15. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

16. The Answering Defendants assert consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

17. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

18. The Defendant, Rosemary Toth, at all times, has acted and continues to act within the powers and authorities given to her by the governing documents for the Defendant HOA and therefore, is immune from any claims asserted by the Plaintiff.

EIGHTH DEFENSE
AND COUNTERCLAIM

19. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

20. Upon the dismissal of Plaintiff's claims, the Defendants seek an Order of the Court declaring that the Plaintiff is totally and solely liable for all attorney's fees, costs and expenses associated with the defense of this action and therefore seek a judgment against the

Plaintiff for all attorney's fees, costs and expenses incurred in this action to defend the claims of the Plaintiff.

WHEREFORE, having answered the Complaint, the Defendants pray that the same be dismissed and that the Court issue an Order directing that the Plaintiff be solely and totally responsible and liable for all attorney's fees, costs and expenses in the defense of this action, and for such other and further relief as this Court may deem just and proper.

McNair Law Firm, P.A.

Henrietta U. Golding, SC Bar #2173
Alicia E. Smith, SC Bar #77056
2411 Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
Ph: (843) 444-1107
Fax: (843) 443-4137
Email: hgolding@mcnair.net
asmith@mcnair.net
Attorneys for the Defendants

Myrtle Beach, South Carolina
May 12th, 2009

Architectural Review Board Modification Request Application

In an effort to provide and protect each individuals homeowner rights and property value, it is required that any homeowner or group of owners considering improvements to their deeded property which affects the structure of a building common to other homeowners, or improvements which are visible from other Homes, submit a REQUEST APPLICATION to the ARB prior to initiating work on planned improvements.

Owner's Name: RONALD JARMUTH

Home hone: 843-314-4355

Lot #: 12 **Address:** 249 PICKERING DRIVE

What is the nature of the improvement that you propose (Example: awning installation, addition to house, porch enclosure, satellite dish, signage, landscaping, etc.) Please be specific:

PLAY / SWING SET.

[Revision of Improvement Review - Submit one copy of drawings and/or letter of description of revisions or improvements to the Developer/ARB for review. No revisions or improvements shall be implemented without Developer/ARB approval.]

See attached letter.

Location of Improvement (check application area): _____ **Front of House** _____ **Back of House** _____ **Garage** _____ **Patio XXX Right Side of House**

Other, (please explain):

Materials and colors that you will use for the proposed improvements:

Cedar Wood with Green Plastic fittings.

I understand that the Architectural Review Board and the Board of Directors will act upon this request, at the next regular meeting. I also understand that if enough information is not included in this REQUEST APPLICATION that it may be returned to me for more information. I cannot begin this improvement until I have received written approval from the International Club Architectural Review Board.

Date of Request: July 21, 2009

Homeowner Signature: *Ronald Jarmuth*

TO: INTERNATIONAL CLUB HOMEOWNERS ASSOC
ARCHITECTURAL REVIEW BOARD (ARB)

SUBJECT: REQUEST FOR APPROVAL OF SWING SET AS PROPOSED

I am requesting approval of a child's swing set to be erected on the right side of my house adjacent to the right (of two) Cul De Sac's as specified below.

I am requesting that my next door neighbor, Mr. Cartman abstain from this decision and that his input be considered only as that of another homeowner. I also request that you ignore any comment of his which relates to noise that a child can make or which relates to him seeing children at play.

During planning for this I have consulted with Jay and Yvonne Cartman, who live on that side of my house, in an effort to accommodate him. He stated that no barrier of any sort is acceptable to him as a gesture of good will from me to him.

Mr. Cartman has stated that he is absolutely opposed to anything adjacent to his house which involves children because he bought the house he is in to be away from children - a posture which posits that this is a retirement community, which it is not, and which is quite frankly a violation of the federal civil rights stature (which prohibits any decision which takes into account the existence of children in a family). Mr. Cartman told me that he bought his house because he had been assured that neither homeowner on either side of the house he is in had children. He made no inquiry of me and I made no commitment to him, nor do I owe him any obligation or duty with regard to children.

State law as to covenants prohibits enforcement of any rule or restriction where a waiver has already been granted or where something has already been permitted (however it came to be). To do otherwise is called "capricious and selective enforcement" and is illegal.

The Architectural Guidelines have no restriction on where a swing set may be placed. Paragraph L, Recreational Equipment, Subparagraph 2, says only that "*Swing-sets must be approved by the ARB and if approved must be securely anchored per hurricane specifications.*"

I have identified one child's swing / play set in Pebble Creek which is very similar to mine. It is behind the house at 105 Pickering Drive (Scott and Kelly Allen) - except I do not intend to install a Plastic Playhouse with the unit.



109 Pickering Drive

Please note that it was installed without any fence and it can plainly be seen from the adjacent houses (viewed from windows and living areas, not from a blank wall).

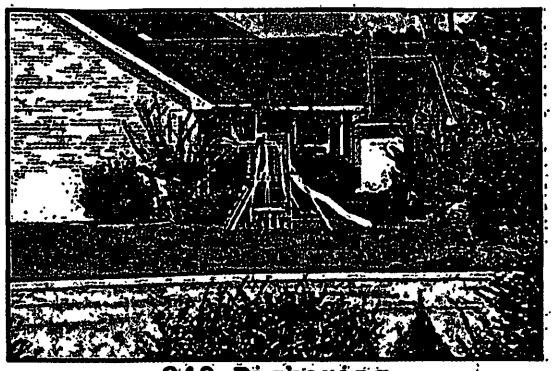
Another even larger swing / play set was for many years behind another house in Pebble Creek - at 105 Keswick.



105 Keswick

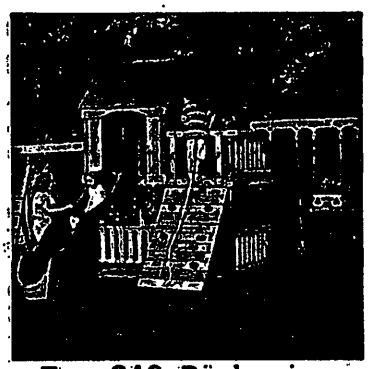
My play set central unit is roughly the size of ONE of the TWO double towers in the play set at 105 Keswick (Jason & Elizabeth Boudreau). Or put another way, my proposed play / swing set is the size of one of the two Keswick towers plus the swing bar of 105 Keswick. The Keswick unit is visible from the neighbors' houses. There is no fence.

Thomas and Michelle Parr live across the street from me at 239 Pickering Drive. Their swing set is plainly visible to me when I eat breakfast, work in my kitchen, or stand in my driveway. It is also plainly visible from the windows of their / my neighbor on the house to their right - Joan Piotrowski at 243 Pickering Drive. The Parr's swing set has no fence.



249 Pickering

The swing set which I propose to install is pictured below:



For 249 Pickering

It can thus be plainly seen that the ARB / HOA has approved swing sets like the one I propose to install - And Larger. And it can also be plainly seen that there are at least three swing sets installed in Pebble Creek without any fence at all, and further that all three can be plainly seen from windows and porches of the adjacent houses; and that the one closed to my house, Parr, can be seen from a cul de sac exactly as mine will be.

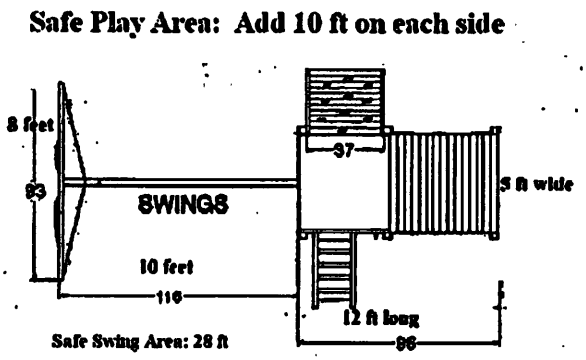
In approving Pebble Creek the lots had to meet a minimum size (or bigger). The placement of the house was up to the builder but a certain amount of "uncovered" land was required for the use of the owner - not as "open space" for the community.

My lot is rather peculiar. While most other houses in Pebble Creek have miniscule side yards (i.e., none at all) with houses built side to side almost touching and with a substantial yard in back satisfying the uncovered space requirement of the County, my lot has a trivial "rear" area and instead places the open space available for the owner on the left and right. My house is unique in that there are no houses to the left and right - only cul de sacs. The largest of this space is on the side of my house nearest to Jay and Yvonne Cartman. The side of

the Cartman house facing mine has NO WINDOWS, thus a play set on that side of my house can not actually be seen by the Cartmans. From within the front of the Cartman's house one can not see a play set on that side of my house either (one would have to be standing in the Cartman driveway or entrance sidewalk to see it).

When I went to negotiate with Jay and Yvonne Cartman, another comment was that if I put a fence up it would diminish their property values because it would then be obvious that their lot is much smaller than their lot appears to be. My lot line goes almost to the left side of their driveway (as it does for my other neighbor, the Bernstein's). So visitors to their house assume that a large portion of my lot adjacent to Cartman belongs to Cartman. The desire to perpetuate this deception is not a valid basis for an objection.

Swing sets need a footprint at least ten (10) feet beyond the front and rear of where the swing of a swing goes (that is, ten feet further than where a swing would be if swung to the extreme front or rear). For a swing with a six (6) foot chain, that means that the foot print of the swing set has to be 32 feet front to back (6 + 6 + 10 + 10) to leave a safe margin for a child "flying" off a swing seat.



Jay suggested that I should put it, if I had to put it, on the rear "rear" of my house. This is problematical for a number of reasons. First, the rear of the house lacks a sufficiently deep footprint. The same applies to the left side of my house where my driveway is. And placing it on the left side of my house would mean that the neighbors on that side would see it, instead of Jay. This "not in my back yard" ("NIBBY") is not an acceptable criterion for an ARB decision. Parr's swing set is visible from houses in the same cul de sac (mine and Joan's) and

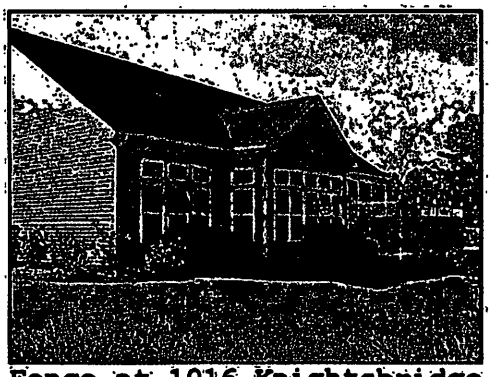
that establishes that swing sets can be placed adjacent to a cul de sac. Swing sets larger and of the same type that I desire to install have been approved and are in place - and all without fences. To deny placement where I desire to place it would be to deny my children the right to have a swing set (because of the foot print issue) - which is illegal. The ARB is reminded of the two other legal issues here: Waiver by prior approval and selective and capricious enforcement, which is also illegal.

I do in fact sympathize with the Cartman's and have made several attempts to negotiate. I have offered to allow their grand daughter to use the swing set with my children. The bottom line with Jay and Yvonne is that they say they don't like children around where they live, which is inappropriate outside of a retirement community.

I desire to install the play / swing set soonest so that my children can use it this summer.

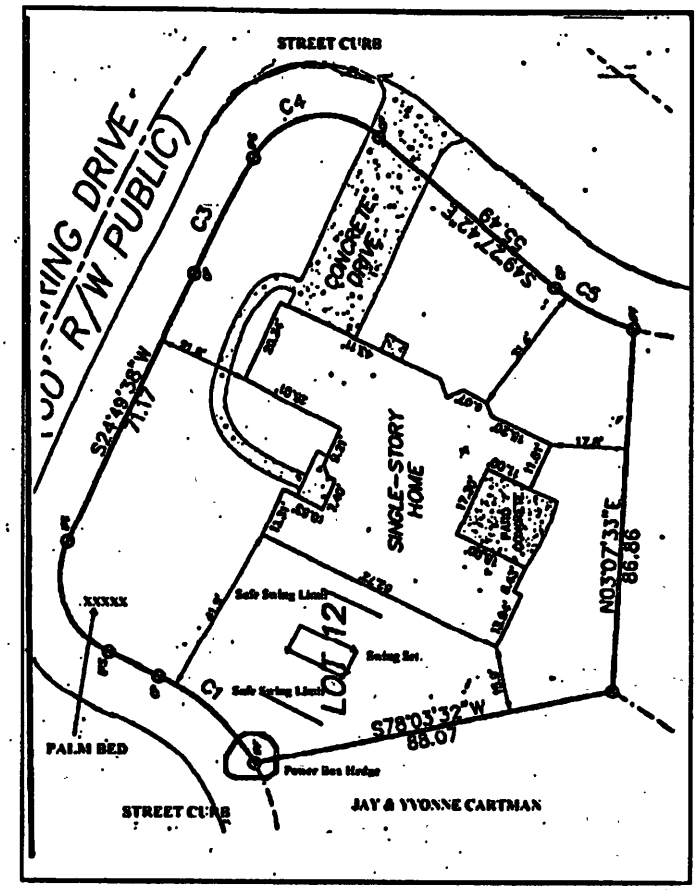
In an effort to be gracious I have offered the following solution: To extend (next March, when palms are again available) the palm tree bed I installed this past March to a point five or six feet from the hedge around the power box - but not as a requirement for the installation of the swing set (no fences or hedges were required to the three I have cited). That would give some ambiguity about the lot line and continue some sort of deception about Jay's lot size (it would also facilitate trimming that hedge). Next March I would likewise extend the palm tree bed along Pickering to block the view from the actual street - but likewise not as a condition of installing the play / swing set. A palm tree bed is approximately ten times more expensive than a hedge and five times more expensive than a fence.

In passing, I take the opportunity to identify the fence I would put up, if a fence was used instead of a palm bed. One such is found at 1016 Knightsbridge.



Fence at 1016 Knightsbridge

Plat Map:



Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC
843-314-4355



OUR BACKYARD - NO ROOM FOR SWING SET



SIDE YARD - ENOUGH ROOM FOR SAFE ZONES AROUND PAYSET

SOUTH CAROLINA HUMAN AFFAIRS COMMISSION

Post Office Box 4490 — Columbia, South Carolina 29240 — (803) 737-7800
2611 Forest Drive, Suite 200 — Columbia, South Carolina 29204 — Toll Free (800) 521-0725
Web address: http://www.state.sc.us/schac/ — Email address: information@schac.state.sc.us

NON-EMPLOYMENT INITIAL INQUIRY QUESTIONNAIRE

Complete all applicable portions.

Type or Print in ink only.

Do not write on the back of any page in this Questionnaire.

COMPLETION AND SUBMISSION OF THIS QUESTIONNAIRE DOES NOT IMPLY OR CONSTITUTE THE FILING OF A COMPLAINT.

Full Legal Name: RONALD EDWIN JARMUTH
(First) (Middle) (Last)

Mailing Address: 249 PICKERING DRIVE

City: MURRELLS INLET State: SC Zip: 29576

Telephone Number: Home (_____) 843 314 4355 Work: (_____) _____
(Area Code) *(Area Code)*

Cell: (_____) 843 314 4355 Beeper: (_____) _____
(Area Code) *(Area Code)*

E-mail Address: RONALDJARMUTH@HOTMAIL.COM

Social Security Number: [redacted]

Date of Birth: [redacted] Age: 65 Sex *(Circle one)*: (M) F

Race *(Circle one)*: Black White Asian/Pacific Islander American Indian/Alaskan Native Other

National Origin *(Circle one)*: Arab/Afghani East Indian Hispanic Mexican (Other)

Religion: N/A

Do you have a disability? ____ Yes ____ No If yes, what is your disability? N/A

Are you perceived as being disabled? ____ Yes ____ No If yes, explain: N/A

1. What business, organization or company allegedly harmed you? *(Give the South Carolina name and address)*

Business Name: International Club Homeowners Assoc Inc

Street Address: c/o KA Diehl ; 11740 Hwy 17 Bypass S

City: _____ Zip: _____

Telephone Number: (_____) 843-357-9888
(Area Code)

Discrimination on basis of familial status / failure to make reasonable accomodation. HOA refuses to permit erection of playset because various HOA Committee Members who live nearby have stated they can't stand the sound of kids playing and a playset will diminish their property values. Other homes elsewhere in HOA have been permitted to erect similar / larger playsets

2. Who allegedly harmed you?

Name: Intl Club Homeowners Assoc Inc & JOHN BIANCHI and JAY CARTMAN

Title: ARCH. REVIEW BOARD & HOA Board of Directors

Race: CAU Sex: MALE Age: 65 est National Origin: unknown Religion: unknown

3. Which of the following do you believe was the reason you were harmed?

_____ Race _____ Sex _____ Age (over 40)

_____ National Origin (Ancestry) _____ Color XX Familial Status

_____ Religion *(you were denied a reasonable accommodation for your religious beliefs)*

_____ Disability *(you were denied a reasonable accommodation for your disability)*

4. Provide a brief explanation of what happened and when it happened to you. Identify the people involved by name, race, and sex. (Attach additional pages as necessary - **DO NOT WRITE ON THE BACK OF THIS FORM**)

July 22. Discussed playset w neighbor Jay Cartman who is on ARB & his wife. Offered to plant palm bed to hide if from view. He stated he can't stand kids / playset will diminish his prooperty values / nothing will satisfy him. Saw him going to nearby houses (w other HOA committee members) to agitate against playset. July 24 Submitted ARB application SEE ATTACHED w photos. Aug 4 ARB Hearing - they insisted on calling it a buidling. They refused to allow me to listen to their discussion (supposed to be open meetings). Aug 11 HOA Board announced and approved results (6 approvals, 1 denial). They have ignored my request. I had stressed I needed to erect playset in summer as safe / appropriate activity for my children. No ARB member has resident child. This is not a retirement community. Playsets are not banned by covenants and by waiver / estoppel can't be banned. Sounds like illegal selective action to aid HOA committee members who don't like kids near them

5. Were you given any reason for the treatment you received? _____ Yes _____ No If yes, what was the reason?

COMMITTEE MEMBER JAY CARTMAN SAID HE WOULD ABSOLUTELY REFUSE TO ALLOW ANY PLAYSET NEARBY AND WOULD DO EVERYTHING HE COULD TO PREVENT ONE BEING INSTALLED NEAR HIS HOUSE, THAT HE BOUGHT HOUSE HE IS IN TO BE AWAY FROM KIDS AND THAT KIDS / PLAYSET NEARBY WOULD DIMINISH HIS PROPERTY VALUES. THE ARB COMMITTEE HAS IGNORED THE REQUEST -- THEY ARE TRYING TO MAKE IT GO AWAY BY WAITING UNTIL KIDS ARE BACK IN SCHOOL. 16 mo & 4 yr old are not in school; 6 yr old is.

6. Were other individuals treated better than you under the same or similar circumstances? XXX Yes _____ No If yes, complete the following information that applies to your situation:

Name	*Race*	*Color*	*Sex*	*Age*	*National Origin*	*Religion*
Steve & Kelly Allen 105 Pickering Dr	**Cauc**	**– rest unknown**				

House is away from any Board / Committee Member on periphery of development. The Alen's were allowed to erect a similar playset, without a fence, plus a Platic Kid's play cabin. See picture in ARB application pg 2. This was prior to current Board & Committee members.

Name	*Race*	*Color*	*Sex*	*Age*	*National Origin*	*Religion*
Jason & Elizabeth Boudreau 105 Keswick	**Unkown**					

Brief description of this individual's treatment

House is away from any Board / Committee Member on periphery of development. The Be=oudreau's were allowed to erect a much larger playset, without a fence. See picture in ARB application pg 2. This was prior to current Board & Committee members.

Name	*Race*	*Color*	*Sex*	*Age*	*National Origin*	*Religion*
Tom & Michelle Parr 239 Pickering Dr	**Cauc -**	**rest unknown**				

Parr's Playset was approved years prior to current Board / Committee members. Current Board tried to get them to remove playset; they refused insisting grandfathered. Committee members living nearby complain about noise of Parr children playing on their Playset situated similarly to the one I asked to install.

7. Have you filed this complaint in court or with another agency? _____ Yes XXX No If yes, complete the following about the individual in the court or agency to whom you complained:

Name: _____

Title: _____

Mailing Address: _____

City: _____ State: _____ Zip: _____

When did you file this complaint? _____

Contact Information

Provide the following information on how the Commission may contact you during the Commission's regular workday hours.

Home: (_____) 843 - 314 - 4355 Hours: Anytime

Work: (_____) 843 - 314 - 4355 Hours: Anytime

Provide the following information on a person who will know where you can be reached. This individual should be someone who DOES NOT LIVE with you.

Full Name: Mary Adamac

Address: 49 Stockett Rd

City: Morgantown State: WV Zip: 26508

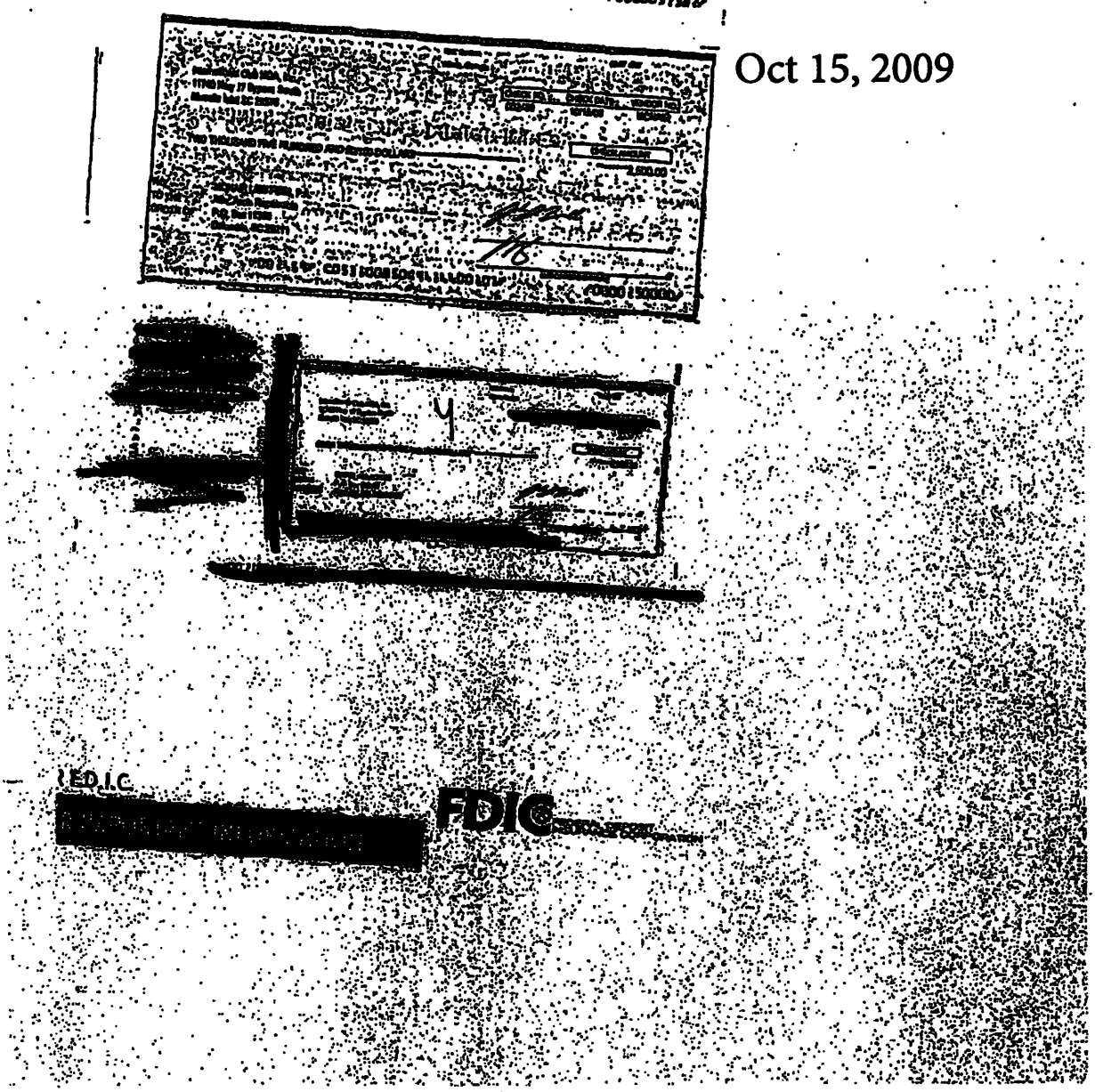
Telephone Number: Home (_____) 304-594-2642 Work: (_____)

Do you have an attorney representing you in this matter? _____ Yes XXX No If yes, your attorney must send a *Letter of Representation* to the South Carolina Human Affairs Commission. The Commission cannot discuss any matter pertaining to your complaint with the attorney until it receives the Letter of Representation.

It is your responsibility to immediately notify the Commission if you change your address or telephone number. If you cannot be contacted because you have not met these responsibilities, your complaint may be dismissed. You must provide a telephone number by which the investigator can contact you during the Commission's normal business hours (8:30 A.M. to 5:00 P.M. Monday through Friday).

I have read (or it has been read to me) this document and understand the above information. I understand that the South Carolina Human Affairs Commission makes no promises or guarantees to me as to the possible outcome or results of this complaint. I certify that all of the information contained in this questionnaire is true, accurate, and factual to the best of my knowledge, information and belief.

Signature of Complainant: Ronald Jarmuth Date: AUGUST 17, 2009


Oct 15, 2009
FDIC

GENERAL LEDGER TRIAL BALANCE

Starting account #: "First"
Ending account #: "Last"
*** Not a standard period ***
Profit center: "All"

Starting date: 01/01/09
Ending date: 12/31/09

Acct #	Description	Begin balance	Total DR	Total CR	Net change	End balance
621-000	Audit Services	.00	2,350.00	.00	2,350.00	2,350.00

DATE	SOURCE	REFERENCE	DR-AMOUNT	CR-AMOUNT	DESCRIPTION	A/P REFERENCE
06/04/09	AP0000	VH3543	2,500.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #49927
06/09/09	AP0000	VH3564	52.50		PATRICK & STATHOS, LLC	File #07-076
07/07/09	AP0000	VH3615	1,293.75		J. THOMAS MIKELL, PC	Legal services
07/15/09	AP0000	VH3647	2,241.50		MCCUTCHEN,MUMFORD,VAUGHT,	Legal service
07/15/09	AP0000	VH3648	2,220.00		MCCUTCHEN,MUMFORD,VAUGHT,	Legal services
07/15/09	AP0000	VH3649	60.00		MCCUTCHEN,MUMFORD,VAUGHT,	Legal services
07/31/09	AP0000	VH3700	2,980.00		MCCUTCHEN,MUMFORD,VAUGHT,	Legal services
07/31/09	AP0000	VH3701	260.00		MCCUTCHEN,MUMFORD,VAUGHT,	Legal Services
10/13/09	AP0000	VH3838	2,500.00		MCNAIR LAW FIRM, P.A.	Sept 09 legal services
11/18/09	AP0000	VH3919	2,500.00		PARKER, POE, ADAMS & BERN	File #IN769-114955 legal

Acct #	Description	Begin balance	Total DR	Total CR	Net change	End balance
622-000	Management Services	.00	54,498.34	6,787.20	47,711.14	47,711.14

DATE	SOURCE	REFERENCE	DR-AMOUNT	CR-AMOUNT	DESCRIPTION	A/P REFERENCE
01/05/09	AP0000	1	3,770.67		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
02/02/09	AP0000	1	3,770.67		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
03/02/09	AP0000	1	3,770.67		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
04/01/09	AP0000	1	3,770.67		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
04/30/09	GJ0138	NEWBUDG		4,524.80	R/C 30% mgmt fee	
05/01/09	AP0000	1	3,770.67		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
05/31/09	GJ0145	BUDGET		1,131.20	R/C Mgmt Fee 30% to ament	
06/01/09	AP0000	1	3,770.67		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
06/30/09	GJ0162	BUDGET		1,131.20	R/C 30% mgmt fee to amen.	
07/01/09	AP0000	1	2,639.47		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
08/03/09	AP0000	1	2,639.47		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
09/01/09	AP0000	1	2,639.47		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
10/01/09	AP0000	1	2,639.47		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
11/02/09	AP0000	1	2,639.47		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
11/18/09	AP0000	VH3918	15,037.50		K. A. DIEHL & ASSOCIATES,	Admins & mtg attendance
12/01/09	AP0000	1	2,639.47		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
12/31/09	GJ0231	697	1,000.00		To R/C to mgmt fee	

Acct #	Description	Begin balance	Total DR	Total CR	Net change	End balance
623-000	Insurance Expense	.00	2,268.25	165.00	2,103.25	2,103.25

DATE	SOURCE	REFERENCE	DR-AMOUNT	CR-AMOUNT	DESCRIPTION	A/P REFERENCE
01/31/09	RJ0001	INS SCH	58.32		Amort Ins Expense	
02/28/09	RJ0001	INS SCH	161.25		Amort Ins Expense	
03/31/09	RJ0001	INS SCH	161.25		Amort Ins Expense	
04/30/09	RJ0001	INS SCH	161.25		Amort Ins Expense	
05/31/09	RJ0001	INS SCH	161.25		Amort Ins Expense	

BOARD OF DIRECTORS MEETING
MINUTES

MAY 5, 2010 6:30 PM

The regular meeting of the Board of Directors was held on Wednesday May 5, 2010 at the International Club Amenity Center located at 1551 International Club Blvd. in Murrells Inlet, SC.

I. Pledge of Allegiance / Opening of Meeting
All members present stood for the pledge of allegiance before the meeting commenced. The meeting was called to order at 6:30 P.M. Board of Directors present were Rosemary Toth, Maureen Sullivan, Bill Freiboth, Camille Noonan and John Bianchi. Also present were Beckie Abel and Julie Case with K.A. Diehl & Associates.

II. Approval of Meeting Minutes
A. Board of Directors Meeting, February 4, 2010
A motion was made to approve the February 4, 2010 Board of Directors Meeting Minutes as written.
Motion made by: Maureen Sullivan
Seconded by: Bill Freiboth
Vote: Passed unanimously

B. Central Electric Power Meeting, April 19, 2010
A motion was made to approve the April 19, 2010 Central Electric Power Special Members Meeting Minutes as written.
Motion made by: John Bianchi
Seconded by: Bill Freiboth
Vote: Passed unanimously

III. Reports
A. Treasurer's Report – John Bianchi
Treasurer Bianchi reported on the current financial status of the community. This information can be found on the website under the DOCUMENTS tab, financials, audits, budgets, reserve study / Financial Statements & Budgets / Master Association Statements (and) P.A.C.E. Statements.

B. Secretary's Report – Camille Noonan
Camille commented on the first quarter reports that were submitted to the various contact forms on the community website. She shared that the contact forms online have been very successful for communication with the homeowners. She encouraged people to continue to use the site for information and to continue to send the Board reports, suggestions and commentary. This quarter statistics are listed below:

Contact the Board/Maintenance Requests 1/1/2010-3/1/2010

Contact the Board Requests:		***Maintenance Requests:***	
Amenity Center	34	Landscaping/Lighting	10
ARB	4	Amenity Center/Fitness	12
Web	6		
Pool	8		
Other	11		
	65		22

Total= 87

IV. Committee Reports

A. ARB
Mark Shaffer, Chairman of the ARB reported on the last quarter of ARB requests. In the month of March there were 5 submittals, in April 17 submittals and in May 16 submittals reviewed. He reported that the committee is currently working on revising the guidelines.

B. Building Committee
Dotty Payton shared numerous items that the Building Committee has been working on. Their full report is attached as **EXHIBIT A**.

C. Golf Course Committee
Bob Buller introduced the Golf Course Committee and their roles as well as provided an update on the upcoming Committee events. Their full report is attached as **EXHIBIT B**.

D. Neighborhood Watch
Bill Dear announced that Neighborhood Watch has been inactive but they plan to get it going again during May. He stated that they will be dedicating block captains for the community. They will be reconstructing their committee once the school season ends and threat becomes eminent.

E. Pool Committee
Joan Gray reported that Tom Bielli of the Pool Committee will be training the new pool attendant for the upcoming summer season. The pool attendant will start Memorial Day weekend. The storage box for the chemicals is in place and the door on the storage room can now be taken care of. Ms. Gray thanked everybody for their help and patience as they got everyone registered for the pool season. The Pool Committee previously obtained a bid to install a panic button for the pool gate and they recommended to the Board to accept the proposal.

F. Social Committee
Sandy Bianchi gave the report for the Social Committee and announced the Committees upcoming events. Their full report is attached as **EXHIBIT C**.

G. Welcome Committee
Cheryl Chmilewski reported on the Welcome Committee and their full report is attached as **EXHIBIT D**.

V. Old Business

A. Website update – Bill Freiboth

Bill Freiboth updated the owners on the progress of the website and the full report is attached as EXHIBIT E.

VI. New Business

A. Pond Algae & Mowing Resolution

Chairman Toth reported that there were many complaints regarding the algae in the ponds. Unfortunately, some of the ponds that were of issue were not maintained by the Association as they are golf course property. Algae in the ponds that the Association maintains have been treated. Due to the time of year it will take a while to get them up to standard.

She also shared an action without a meeting on the areas the Board approved to have maintained and is attached as EXHIBIT F. The pond banks that are adjacent to owners properties will be maintained, however, the banks that are not, will remain in their natural state.

B. ARB Appointment

Chairman Toth announced that ARB alternate, Jane Bowers, has been appointed to the ARB. There is an available seat as an alternate if anyone is interested in serving on the ARB.

C. New Violation Policy

Vice President Sullivan announced that as of May 1, 2010 a new violation policy was adopted. She shared the progressive steps in detail. The final notice will be a hearing scheduled with a hearing fine of $75.00.

D. Summer Newsletter

The Summer Newsletter will be sent out by the end of June.

A motion was made to accept the proposal from ADT to install a panic button at a cost of $495.00.

Motion made by: Maureen Sullivan
Seconded by: Bill Freiboth
Vote: Passed unanimously

A motion was made to have county installed metal post speed limit signs replaced with our community standard wood signs. The damaged curve sign will also be replaced. New signs are not to exceed $700.00.

Motion made by: Maureen Sullivan
Seconded by: John Bianchi
Vote: Passed unanimously

VII. Open Forum

The owners were given the opportunity to ask the Board of Directors and they were answered accordingly.

VIII. Schedule of Next Meeting

The next scheduled meeting of the Board will be held on Wednesday, August 4th at 6:30 P.M.

IX. Adjournment

A motion was made to adjourn the meeting at 8:00 P.M.

Motion made by: John Bianchi

Seconded by: Maureen Sullivan

Vote: Passed unanimously

Respectfully submitted by: Julie Case

Julie Case, Assistant Association Manager

Approved by: Camille Noonan

Camille Noonan, Secretary

RBC Bank

3320 HOLCOMB BRIDGE ROAD
NORCROSS, GEORGIA 30092
PHONE 770-242-8582
FAX 770-242-8253

AC

INTERNATIONAL CLUB 004334

GENERAL LEDGER TRIAL BALANCE

Starting account #: "First"
Ending account #: "Last"
*** Not a standard period ***
Profit center: "All"

Starting date: 01/01/10
Ending date: 12/31/10

Acct#	Description	Beginning Balance	Total DR	Total CR	Net change	Ending balance

06/09/10	AP0000	VH5044	2,500.00		MCNAIR LAW FIRM, P.A.	051490.00002	
06/09/10	AR0000	7898		992.34	atty p&s fees 104-H041		
06/30/10	AP0000	VH5079	325.00		MCCUTCHEN,MUMFORD,VAUGHT,	Legal services	
07/06/10	AR0000	AR06		250.00	Owner Expense Adjust.		
07/13/10	AP0000	VH5096	250.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #54033HC	
07/21/10	AP0000	VH5146	176.11		MCNAIR LAW FIRM, P.A.	Prof svcs thru 6/30/10	
07/30/10	AP0000	VH5163	325.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #53135HC legal svcs	
08/31/10	AP0000	VH5216	125.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #54447HC legal svcs	
09/29/10	AP0000	VH5272	250.00		MCCUTCHEN,MUMFORD,VAUGHT,	Re:Thomas Zegray	
10/08/10	AR0000	AR06		175.00	Owner Expense Adjust.		
10/12/10	AP0000	VH5311	175.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #54450HC legal svcs	
11/10/10	AP0000	VH5355	275.38		MCCUTCHEN,MUMFORD,VAUGHT,	File #54031HC legal svcs	
11/10/10	AP0000	VH5356	325.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #54444HC legal svcs	
11/10/10	AR0000	AR06		325.00	Owner Expense Adjust.		
11/10/10	AR0000	AR06		275.38	Owner Expense Adjust.		
11/17/10	AP0000	VH5382	913.90		MCNAIR LAW FIRM, P.A.	Matter #051490.00004	
11/30/10	AP0000	VH5403	325.00		MCNAIR LAW FIRM, P.A.	Matter #051490.00003	
12/08/10	AP0000	VH5412	5.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #55269HC	
12/17/10	AP0000	VH5443	562.95		MCNAIR LAW FIRM, P.A.	Matter #051490.00004	
12/17/10	AP0000	VH5444	275.00		MCNAIR LAW FIRM, P.A.	Matter #051490.00003	
12/17/10	AP0000	VH5445	250.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #55270HC	
12/17/10	AP0000	VH5449	325.00		MCCUTCHEN,MUMFORD,VAUGHT,	File #54446HC legal svcs	
12/20/10	AR0000	AR06		325.00	Owner Expense Adjust.		

621-000	Audit Services	.00	3,775.00	1,625.00	2,150.00	2,150.00

DATE	SOURCE	REFERENCE	DR-AMOUNT	CR-AMOUNT	DESCRIPTION	A/P REFERENCE
03/23/10	AP0000	4161		1,025.00	ANDREW C. THOMPSON, CPA	wrong community used
03/23/10	AP0000	VH4161	1,025.00		ANDREW C. THOMPSON, CPA	Fin stmts yr end
04/09/10	AP0000	VH4215	600.00		ANDREW C. THOMPSON, CPA	Rev of tax effects
04/30/10	GJ0284	VH4215		600.00	R/C A.Thompson-ease.exp	
07/01/10	AP0000	VH5091	2,150.00		ANDREW C. THOMPSON, CPA	Audit of fin stmts

622-000	Management Services	.00	34,120.80	.00	34,120.80	34,120.80

DATE	SOURCE	REFERENCE	DR-AMOUNT	CR-AMOUNT	DESCRIPTION	A/P REFERENCE
01/04/10	AP0000	1	2,773.40		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
01/27/10	AP0000	7	70.00		K. A. DIEHL & ASSOCIATES,	MGMT FEE ADJ FOR JAN
02/01/10	AP0000	1	2,843.40		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
03/01/10	AP0000	1	2,843.40		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
04/01/10	AP0000	1	2,843.40		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
05/03/10	AP0000	1	2,843.40		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
06/01/10	AP0000	1	2,843.40		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
07/01/10	AP0000	1	2,843.40		K. A. DIEHL & ASSOCIATES,	MANAGEMENT FEE
08/02/10	AP0000	1	2,843.40		K. A. DIEHL	MANAGEMENT FEE
09/01/10	AP0000	1	2,843.40		K. A. DIEHL	MANAGEMENT FEE
10/01/10	AP0000	1	2,843.40		K. A. DIEHL	MANAGEMENT FEE

RBC Bank™
3320 HOLCOMB BRIDGE ROAD
NORCROSS, GEORGIA 30092
PHONE 770-242-8582
FAX 770-242-8253

INTERNATIONL CLUB
C/O K A DIEHL & ASSOC
11740 HWY 17 BYPASS SOUTH
MURRELLS INLET, SC 29576-9335

Date: 6/30/10
ACCT# - 941 440-010-1

0 June 1, 2010 - June 30, 2010

Checking Detail — Deposits

		Amount
6/17	ASSN CR	666.00
6/17	Deposit	197.40
6/17	Deposit	5.00
6/18	ASSN CR	1,639.00
6/21	ASSN CR	2,502.96
6/21	IBTRANSFER	792.00
	Master dues	
6/21	Deposit	3,344.00
6/21	Deposit	274.00
6/22	ASSN CR	660.00
6/23	ASSN CR	528.00
6/23	IBTRANSFER	330.00
	XFER Misapplied pymt tckt 120757	
6/23	Deposit	5.00
6/24	ASSN CR	1,591.26
6/25	ASSN CR	2,055.00
6/28	ASSN CR	2,175.98
6/29	ASSN CR	2,529.97
6/29	Deposit	15.00
6/30	ASSN CR	3,090.05

Checks

Number	Reference	Amount	Date	Number	Reference	Amount	Date
274	1010640737	32.50	6/16	2730	9950026550	2,337.96	6/16
2654*	9950781698	15.94	6/07	2731	9950348532	150.00	6/21
2714*	1040490216	93.01	6/01	[redacted]			
2715	1040455081	19.41	6/01	2733	9950568678	175.00	6/23
2716	9950622917	2,514.17	6/03	2735*	1050685434	7,191.76	6/18
2717	1040490184	33.00	6/01	2736	9950445498	21.59	6/22
2718	9950492660	2,309.39	6/02	2737	1050657032	30.00	6/18
2720*	1040799804	473.01	6/03	2738	9950665908	1,367.89	6/24
2721	9950458616	86.81	6/02	2740*	9950294239	1,205.25	6/30
2722	1040121564	5,099.29	6/04	2741	9950182609	9,968.24	6/29
2725*	9950128396	2,453.05	6/08	2742	9950058359	100.00	6/28
2726	9950119917	5,386.99	6/08	2744*	1050052493	171.53	6/30
2727	9950270709	900.00	6/09	2745	9950033211	2,547.25	6/28
2728	1030878774	514.24	6/14	2746	9950143969	1,750.00	6/29
2729	1040600324	418.18	6/17	2747	9950018093	85.00	6/28

* Indicates one or more missing checks

International Club HOA, Inc.
11740 Highway 17 By-pass South
Murrells Inlet, SC 29576
(843) 357-9888

9/27/2010

Lot 12
Ronald E. Jarmuth
249 Pickering Drive
Murrells Inlet SC 29576

Re: 249 Pickering Drive

Dear Ronald E. Jarmuth: VIOLATION NOTICE #1

Please be advised the following covenant violation has been noted at your residence for which a $50 fine has been added to your association account in accordance with the ARB Guidelines:

Article VI, Use Restrictions, Section 7.2, Prior Review of All Plans is required before any modification to the property can be completed.

This violation requires: **Please submitt an application for the exterior modification of the landscape bed with curbing as well as the brick/stone addition to your side yard. Keep in mind that your property does have a utility easement, but it is still your property. The ARB will require a copy of the encroachment permit for our files.**

Failure to take corrective action will result in enforcement as defined in the Association By- Laws:

Section 11 (p) (CCR Owner Resolution Action Page 35): **"To assess daily fines and to terminate cable television service to Owners for non-compliance with the Declaration or By- Laws."**

Section 13.2 (page 44): **"Authority and Enforcement - Subject to the provision hereof, upon the violation of the Declaration, the By- Laws or any rules and regulations duly adopted hereunder, including without limitation the failure to timely pay any Assessments, the Board shall have the power: (I) to impose reasonable monetary fines which shall constitute equitable charge and a continuing lien upon the Unit, the Owners, occupants or guests of which are guilty of such violation; (II) to suspend an Owner's right to vote in the Association; or (III) to suspend any Owners's right (and the right of such Owner's families, guests and tenants) to use any of the Recreational Amenities, and the /Board shall have the power to impose all or any combination of these sanctions. An Owner shall be subject to the foregoing sanctions in the event of such a violation by such Owner, or such Owner's family, guests or tenants. Any such suspension of rights may be for the duration of the infraction and for any additional period thereafter, not to exceed thirty (30) days."**

Please provide a complete application to this office within 10 days of the date of this letter, and thank you for your prompt attention to this matter.

Very truly yours,

Julie Case
Assistant Association Manager
K. A. Diehl & Associates, Inc.
Managing Agent for International Club HOA
Julie.case@KADiehl.com
843-652-2164 - Direct Line

EXHIBIT I

Jarmuth Fence / Flower Bed Request

RECEIVED
SEP 3 0 2010
BY:

Architectural Review Board Modification "Information" Documentation

This document set is provided the ARB of the International Club HOA without waiving any objections as to the authority of said ARB or said HOA in this matter. This qualification is made so as not to implicate potential HOA assertions of "waiver" or "estoppel".

The actions addressed in this document set are aimed at diffusing, in a non-confrontational manner, conflict initiated and perpetuated by a certain neighbor of mine, which involves trespass, harassment, threatening behavior, damage to property, and false police reports by this neighbor. The HOA is on prior notice that said neighbor is more likely than not the reason why the leg of my sprinkler system covering the area of my lot adjacent to his lot has ceased to operate – which occurred after said neighbor stuck large poles in my yard, at a distance inside my yard from the boundary demarcation ranging from a few inches to a few feet. I have previously provided Diehl photographs of "no trespassing signs" aimed in my lot's direction implanted well INSIDE my yard, as well as marked up photos of said posts. Said posts began to be planted by said neighbor as long ago as March, 2010, and Diehl was provided photographs of same – and failed to do anything about it until very recently. Said neighbor planted a large bush "back then" inside the power box circle of hedges on the street side (on the projected property line) and this was ignored by Diehl from March right through the present. I have an audio tape of said neighbor making threats against me; he has stated that "he doesn't know who he is dealing with", "I have connections" and "I'll have him taken care of". He has falsely reported to the police that I invaded his house – was actually inside his house damaging property, and that he wasn't sure who I was. This neighbor is highly erratic and out of control. He has stated defamatory things about me.

This neighbor, after he moved in fairly recently and years after I did, removed property boundary markers set in place by ETS Surveyors.

The Horry County Police and my attorney have advised that since the nexus of his claims seems to be his attempt to "grab" my property and to make it appear that I am intruding on HIS property (even that when my bushes were trimmed I was destroying "HIS"), The police and my attorney agreed that the proper course of action was:

(1) Have the property resurveyed, videotaping the whole process to perpetuate the process and placement of markers; the surveyors would also establish where my property line ended and the area OWNED by Horry County – Pickering Drive (which ownership extends beyond the curb to the property stakes) so as to use an encroachment permit to mark the area from my property to the curb. This would establish the area that I would maintain, as a courtesy to the neighborhood (the covenants require me only to maintain the area within the property stakes – my lot). Note Bene: The HOA has accepted the argument of Gail Baggot and John Bianchi that they do not own the area between their rear property stakes and Pickering Drive, and the HOA has used this to justify maintaining that land instead at HOA expense.

(2) Immediately pull string lines between rebar property boundary markers set in place by the surveyors and install a brick line (instead of just property stakes) so as to set

EXHIBIT J

in place a boundary he could not readily move, remove, or destroy as he had done before;

(3) Use an encroachment permit (obtained from the Planning Commission) to install a flower bed whose left edger would be against the projected extension of the boundary between my neighbor and myself. The flower bed would be consistent with other beds installed by other neighbors (and myself) along curbs and would make it difficult for the neighbor to alter the boundary there – and defuse his arguments that I am mowing his property (actually, that area is not my property, his property, nor the HOA's property, and never was). I have the deeds and documents transferring ownership of Pickering Drive to Horry County and the unconditional acceptance of OWNERSHIP of the street by Horry County, not subject to any conditions or reservations.

(4) Immediately install dug in edger's along string lines (from property pins to pins), followed by a parallel line. This forms the foundation of a fence which will bring a halt to said neighbor's stalking behavior and incursions. This privacy fence, six feet high, is similar to other vinyl fences – also six feet high – noted on various lots in Pebble Creek.

I note that Amendment #1 of the Covenants removed all "Architectural Controls" as well as the requirement to seek prior approval from an ARB for any modification. I also note that the same Amendment explicitly deleted all controls over fences. The overall installation on my property boundary IS a fence. What is visible right now is an element of the foundation.

The following states the elements contained in an ARB Modification Application. The HOA is free to treat it and handle it as such, even though I am not "submitting it as such". It is provided to provide a conversation over resolving the problems stated above and to be a good neighbor.

Summary: Because of the erratic and threatening behavior of our neighbor, who has invaded our property and damaged our sprinkler system by placing HIS OWN "pseudo" property stakes, which he moves hither and yon from day to day, and because said neighbor tries to provoke a fight by making threatening gestures and words (never responded to) when we are in our yard on our property, we have been advised by the police and our legal counsel to erect a fence to demarcate our property and to hide any stalking conduct by neighbor from our view. By the time this has been considered by the ARB, ETS, the surveyor who platted the development, and who surveyed our property after neighbor moved in (but surveyor stakes mysteriously disappeared thereafter), will have re-surveyed the line and implanted additional rebar property pins which will have been further marked by surrounding concrete monuments so that said neighbor can not dispute the property line nor move the property markers into our property as he has done in the past.

Owner's Name:	RONALD JARMUTH
Home hone:	843-314-4355
Lot#:	12
Address:	249 PICKERING DRIVE

Jarmuth Fence / Flower Bed Request

What is the nature of the improvement that you propose?

6 foot high vinyl Side Yard Fence and Flower Bed; red brick edger's for both. Seasonal flowers planted in flower bed.

Submit one copy of drawings and or letter of description of revisions or improvements to the Developer / ARB for review.

See attached plats.

Location of Improvement (check application area):

XX Side of House

Note that the fence will stop some feet prior to the intersection of Bernstein / Jarmuth / neighbor lot lines, so as not to interfere with sprinkler access or operation.

Materials and colors that you will use for the proposed improvements:

Fence: White Vinyl Solid w White 4x6 (approx) Plastic Posts.

Fence posts touch property line. As a result fence panels will be approximately 1" to 2" inside my property from property line. The foundation under the fence between fence posts will be brick edger's under the fence along the actual property line (edger's IN my property; outside edge touching property line to demarcate the actual line for purposes of landscape maintenance. The fence will begin immediately behind the hedge surrounding the Power Box and proceed rearwards towards the point where the lots of Jarmuth, neighbor and Bernstein converge. The convergence point will NOT be covered by fence to allow the sprinklers of all 3 homeowners to be readily accessed / maintained.

Flower Bed and Edging: On county property, in front of the Power Box, projected into the power box area, extending where an imaginary line (the hedge) would be if it completely surrounded the Power Box (as it formerly did). The line from the power box to the curb is established by rebar set by the surveyor. Flower bed surrounded by same as on other plant beds.

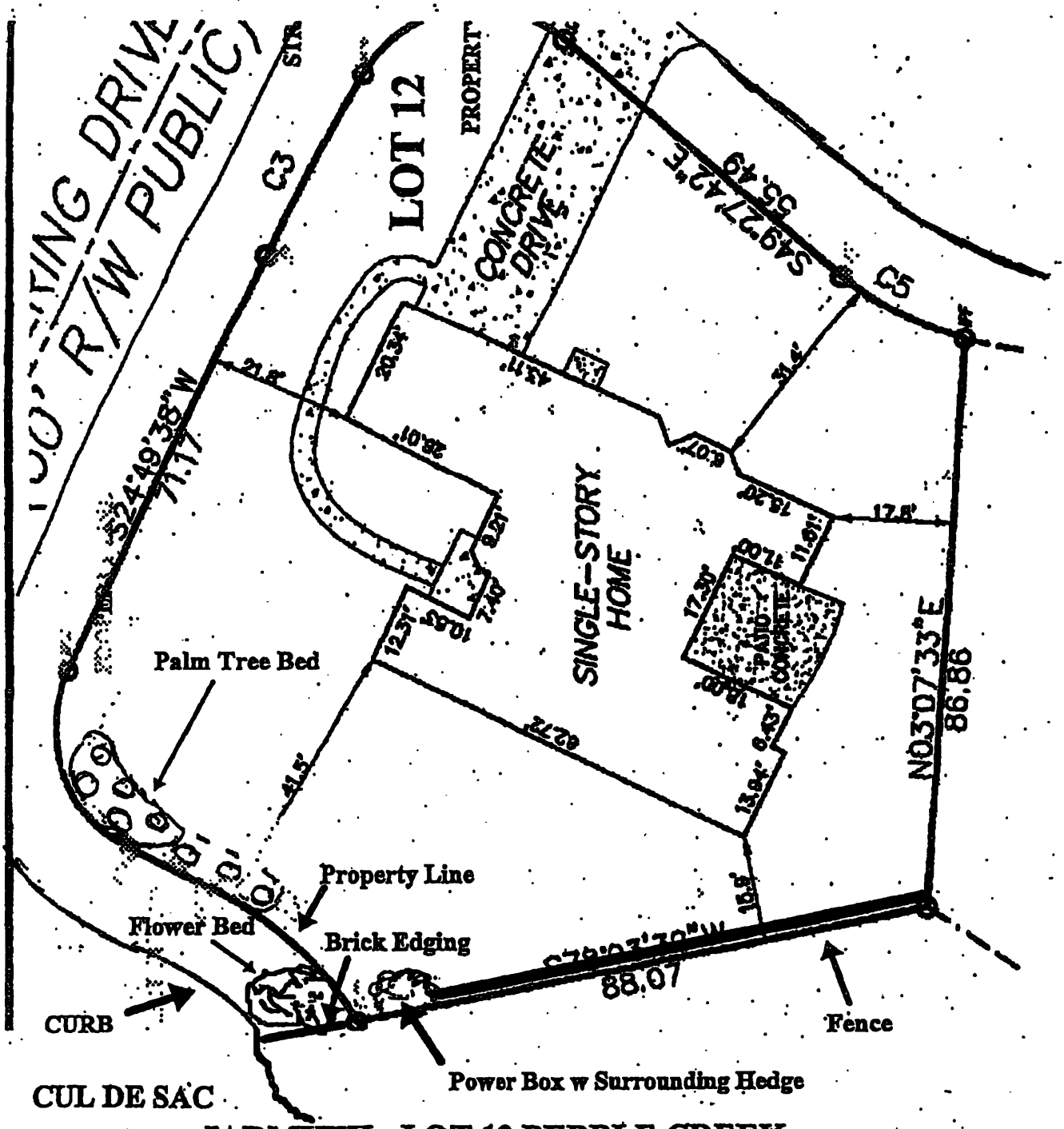
Date of Submission: September 30, 2010

Homeowner Signature: J

ARB Exterior Modification Submittal Check List

Before you drop of your exterior modification application, please take a moment and make sure that you have provided all of the information needed to assure there will not be a delay in the ARB making a decision. The more information the better; all examples cannot be included but the checklist below provides a good starting point. If you are not sure that you have included all needed information, please contact _____ at 843-_____ prior to mailing or dropping off your submittal.

XX	Copy of the plat of your lot, which also reflects the footprint of your house.
XX	**Fence:** Include a picture of the style of fence, note the type of material, indicate the location of the fence on the lot plat, note the height of the fence.
.	**Trash can enclosures:** Include the copy of the lot plat, indicate the location of the enclosure, include a picture of the style of fence, material and note the height and width.
.	**Landscape Improvements: Include copy of the plat of your lot and/or a landscape plan with the lot lines reflected on the plan indicating type of vegetation, location of vegetation, include pictures of the vegetation and trees. The more information the better**
XX	**Lawn edging:** Include copy of the plat indicating desired location of the edging, a picture of the material and color sample.
.	**Lawn lighting:** Include copy of the plat indicating desired location of the lighting and picture of the light fixture.
.	**House addition:** Include a copy of the plat of the lot and contractor's plans. Be sure that the roof line of the house ties into the addition's roof line. Include material types and colors; pictures help the ARB to visualize what the end result will be.



JARMUTH - LOT 12 PEBBLE CREEK

International Club ARB Meeting
October 5, 2010
Minutes

The regular meeting of the ARB was held on Tuesday October 5, 2010 at 1:00 P.M. at the office of K.A. Diehl & Associates located at 11740 Hwy 17 Bypass South in Murrells Inlet, SC 29576.

I. **Open Meeting**
The meeting was called to order at 1:00 P.M. ARB members in attendance were Bill Fletcher, Hank Hodges, Peter Warren and Board Liaison Bob German. Unable to attend were Jane Bowers and appointed liaison Roseanne Gillie. Also present were Julie Case and Beckie Abel with K.A. Diehl & Associates.

II. **Approval of Minutes**
A motion was made to approve the meeting minutes from September as written.
Motion made by: Peter Warren
Seconded by: Bill Fletcher
Vote: Passed unanimously

III. **Old Business**
- Palmieri – Disapproved trash enclosure
  Members of the ARB conducted a site visit to determine if an approval can be given based on their submittal. The addition was approved.

- Cairns – Pending removal of two trees *(Approved via email 9/21/10)*

IV. **Pending Reviews**
- Mahnke – Install a swing set in the backyard
  Approved (3-3)
- Welch – Install 2 October Glory Maple Trees
  Approved (3-3)
- Hodges – Various landscaping modifications install low voltage lights and add a flag pole.
  Approved (3-3)
- Hane – Install arbor
  Approved (3-3)
- Starinshak – Extension of existing patio and add small lattice fencing at patio for privacy as well as rearrange of two planting beds
  Denied (3-3) No Plot Plan
- Jarmuth – Add fencing and lawn edging
  Mr. Jarmuth attended the review of his application. Mr. Jarmuth recorded the review and had all active members present to state their name for the

record. Mr. Jarmuth presented his request and provided additional information on why it should be approved in conjunction with personal issues he is experiencing with a neighbor.

The fence was denied due to the direct violation it presents to the covenants. A letter will be sent to Mr. Jarmuth asking him to remove the already installed foundation for the intention of erecting the presented privacy fence. Disapproved (3-3)

- Fleishman – Install solar tube for kitchen
  Approved (3-3)
- Gallingane – Install pergola over existing patio
  Approved (3-3) – Need Deposit and Fee
- Corfield – Install satellite dish
  Approved (3-3)
- Thommen – Screen in patio (fee and deposit needed)
  Appoved (3-3)
- Bloechle – Change color of front door and shutters to dark brown from black
  Approved (3-3)
- Spruce – Enclose rear porch.
  Disapproved – Need additional information

V. New Business

The new members of the ARB took this time to inquire about ARB functions within the guidelines.

The members also discussed the desire to move the meeting time to the earlier part of the day in the future.

VI. Schedule of next meeting

The next scheduled meeting will be held on November 2, 2010 at 3:30 P.M.

VII. Adjournment

A motion was made to adjourn the meeting at 2:05 P.M.

Motion made by:	Hank Hodges
Seconded by:	Bill Fletcher
Vote:	Passed unanimously

Respectfully submitted by:_____
Julie Case, Assistant Community Manager

Approved by:_____
ARB Representative

STATE OF SOUTH CAROLINA) **COUNTY OF HORRY)**	**IN THE MAGISTRATE'S COURT**
Ronald Jarmuth) **249 Pickering Drive)** **Murrells Inlet, SC 29476)** **843-314-4355)**	**Case No.: 2010CV261072943** **COMPLAINT** **(NON-JURY)**
Plaintiff)	
vs)	
The International Club) **Home Owner's Association, Inc.,)** **c/o K.A. Diehl,)** **Registered Agent)** **11740 Highway 17S Bypass)** **Murrells Inlet, SC 29576)** **843-357-9888)**	
Defendant.)	

PARTIES 1
PROPERTY 2
CONTROLLING ISSUE OF FACT – "THE ASSOCIATION" 2
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The Plaintiff, complaining of the Defendant, would respectfully show and allege unto this Honorable Court as follows:

PARTIES

1. The Plaintiff is a citizen and resident of Horry County and at all times relevant to this action is the owner of a home identified as Lot #12 located in the Pebble Creek residential

subdivision of a planned unit development (PUD) denominated by the Horry County Planning Commission as the "International Club Planned Unit Development" The street address is 249 Pickering Drive; Murrells Inlet; SC 29576.

2. Defendant, **The International Club Home Owners Association, Inc. ("International HOA")**, is a non-profit corporation organized and existing under the laws of the State of South Carolina, on or about March 1, 2001.

PROPERTY

3. The property that is the subject of this action is located in Horry County, South Carolina.

4. The International Club PUD consists of multiple residential communities of which several are multi-family communities and the rest are single-family neighborhoods. It was originally approved by Horry County as the "Murrells Inlet Golf Plantation", with approval granted to the "Murrells Inlet Golf Plantation, LLC." ("Plantation LLC") on or about February, 1997. Subsequently Plantation LLC's successor, "Plantation AD LLC" ("Plantation AD") sought and received approval of modifications to the PUD approval plan, with the PUD referred to as "Lantana PUD" (September 14, 1999). Modifications were further sought as to the PUD under the name "International Club PUD" was sought and obtained under the name "International Club PUD" on or about July 30, 2001 by Plantation AD.

5. The Plaintiff is the owner of a home located in the Pebble Creek Subdivision of what the Covenants (Deed Book 2117 Page 1353) refer to as the "Murrells Inlet Golf Plantation" (PUD) or alternatively as "The International Club" (Deed Book 2258 Page 1453).

CONTROLLING ISSUE OF FACT – "THE ASSOCIATION"

6. The Association.

a. On or about February 8, 1999 covenants were recorded with the Horry County Recorder of Deeds beginning at Deed Book 2117 Page 1353. These applied to land originally denominated as the "Murrells Inlet Golf Plantation" PUD.

b. On Page 1353 (page 1 of) the Covenants contemplated that a South Carolina non-profit corporation denominated as the "**Murrells Inlet Golf Plantation Association, Inc**" would exercise the powers granted it, and only it, through the covenants.

c. On Deed Book Page 1356 (page 2 Section 1.3) the phrase "**Association**" is defined as the "**Murrells Inlet Golf Plantation Association, Inc.**" ("**MIGA**").

d. On Deed Book Page 1361 (page 7 Article III) the covenants provide that "the Association" (as denominated in the Covenants) will exercise all the powers of the developer and any others identified to the "Association" in the Covenants.

e. On Deed Book Page 1362 (page 8, Section 3.3) "Membership" the Covenants provide that "Every person who is an owner of any unit ... shall be a member of the Association".

f. Defendant has held itself out to be "The Association" as contemplated in the Covenants, although it is not the "**Murrells Inlet Golf Plantation Association, Inc**" as specified in the Covenants and one can not arrive at Defendant's name by any name transformation based on the Amendments to the Covenants, however tenuous.

Through acts which can only be likened to some form of extortion or exaction, Defendant has unilaterally contacted homeowners notifying them that Defendant is "The Association" as referred to in the Covenants and acting as a bully has demanded payment of sums to Defendant under putative "assessments" on pain of imposition of liens and other substantial penalties / costs on homeowners for non-compliance. The procedures used are not even in compliance with the Covenants or Defendant's purported Bylaws. Upon information and belief, Defendant has no legally enforceable bylaws although required to have same by statute.

g. Upon information and belief, no homeowner has ever voluntarily joined Defendant association. Membership in the ""**Murrells Inlet Golf Plantation Association, Inc**", however, is mandatory by Covenant. This plaintiff never voluntarily joined said association but exercised dependent reliance upon representation by Defendants that they are the legitimate mandatory association of the PUD with powers to compel submission to Defendant's will upon pain of severe monetary sanctions.

7. There thus exists two homeowners associations claiming pendency over the PUD: the "International Club **Home Owners** Association" incorporated by one of the developers and the "**Murrells Inlet Golf Plantation Association, Inc**" ("MIGA") incorporated by homeowners as a South Carolina non-profit corporation – as contemplated by the Covenants. The MIGA

association is on record with the Horry County Recorder of Deeds as doing business as (DBA) / alternately known as (AKA) the "International Club Association". Plaintiff is a willing member of the "**Murrells Inlet Golf Plantation Association, Inc**" and rejects involuntary membership in Defendant association. Plaintiff asserts that there is no legally sufficient contractual instrument creating any obligation by Plaintiff to Defendant nor giving Defendant any rights relative to Plaintiff or Plaintiff's property. Plaintiff asserts that the only legitimate homeowner association is the "**Murrells Inlet Golf Plantation Association, Inc**". Plaintiff asserts that Defendant has no representative capacity as to Plaintiff or Plaintiff's property to bind plaintiff in any way to the consequences of contracts entered into by Defendant.

ACTS BY DEFENDANT COMPLAINED OF FOR WHICH RELIEF IS SOUGHT

COUNT I – RETURN OF "CABLE TV ASSESSMENTS" UNLAWFULLY TAKEN FROM PLAINTIFF BY DEFENDANT BY FRAUD OR OTHERWISE

8. All of the preceding and succeeding paragraphs are incorporated as if stated within this Count.

9. Plaintiff demands the return of all cable tv charges ever collected by Defendant from Plaintiff or from the prior owner of Plaintiff's property, whose rights Plaintiff has inherited. For purpose of computation this sum is incorporated into a later demand for repayment of assessments, since the cable tv charges were aggregated into and collected as part of assessments levied by Defendant.

a. On October 30, 2002 Horry Telephone Cooperative, Inc ("HTC") entered into a contract with "**The International Club Master HOA**, Owner" ("Master HOA") which represented that "it is the sole owner or sole representative of "**premises**" "known as The **International Club Master HOA**". The contract provided "that service shall be made available to" homeowners. While it is not a controlling fact, the contract did not have a representation that the Master HOA would or could compel acceptance of cable tv services originated with HTC.

b. There is no such corporate or unincorporated entity as "The International Club Master HOA". There is no PUD approved by Horry County as "The International Club Master HOA".

c. Both HTC and Defendant have asserted, in writing on numerous occasions, that this contract for cable tv services is between HTC and Defendant; that HTC's customer is Defendant, and that homeowners are Defendant's customers. Defendant has asserted on numerous occasions that Defendant has the power to turn off cable tv service to homeowners.

HTC has asserted that homeowners are not entitled to return of "excess profits / capital contributions" which HTC otherwise returns to it's customers, since homeowners are not HTC's customers. Further, the cable tv channels provided through the contract are controlled by the contract's provisions and were not negotiated to or agreed to by homeowners. These all add up to the conclusion that Defendant is the cable tv provider,

d. Defendant does not hold a franchise or license to provide cable tv services. As a matter of law, entities and individuals are not entitled to demand payment for rendering of services they are not permitted to provide. Per the definitions of the FCC, defendant is an illegal cable tv provider.

e. Further, Defendants insist that homeowners must buy cable tv services through Defendant exclusively from HTC. This violates several FCC orders which holds that any contract for cable tv service which has an exclusivity provision is null, void, and unenforceable. This has been brought to the attention of Defendant by Plaintiff as long ago as 2007. Defendant asserted and continues to assert that FCC rulemaking does not pre-empt Defendant's Contract.

f. Defendant is not "The Association" specified by the covenants and thus has no representative capacity to enter into contracts on behalf of Plaintiff nor derivative contractual capacity to enforce contracts Defendant enters into upon Plaintiff.

g. Irrespective of the above, the contract is further unenforceable since Defendant is not a named party to the contract ("Master HOA"), since Defendant was never the owner of any building lot in the PUD, and since Defendant at all times lacked representative capacity to bind the homeowners.

h. Per SC Statute 33-31-612 (Non-Profit Corporation Act) homeowners are not **"personally liable for the acts, debts, liabilities, or obligations of the corporation",** If the cable tv contract is binding between Defendant and HTC, homeowners are not obligated to satisfy any debt arising under that contract.

10. Wherefore Plaintiff asks for the relief of return of all sums collected from Plaintiff or Plaintiff's predecessor owner of Lot 12 (Pebble Creek) for cable tv services; and for an Order barring Defendant from any future acts attempting to enforce said cable tv contract against Plaintiff.

COUNT II – RETURN OF "WASTE MANAGEMENT ASSESSMENTS" UNLAWFULLY TAKEN FROM PLAINTIFF BY DEFENDANT BY FRAUD OR OTHERWISE

11. All of the preceding and succeeding paragraphs are incorporated as if stated within this Count.

12. In a like manner Defendant entered into a contract with, upon information and belief, Waste Management Services for removal of garbage / trash from individual dwellings. In a like manner individual homeowners are not the customer of Waste Management Services and said services are billed directly by Defendant to the homeowners. Also as in the case of cable tv services, while not expenses for the maintenance of the common property or true common expenses, these expenses are billed as assessments with the threat of use of liens without bothering to go through court for a judgment for non-payment. Such a collection device is not available for non-payment for goods or services in general not otherwise specifically provided for by statute (e.g., mechanics liens). Also in a like manner, garbage collection services is regulated by Horry County and Defendant is not a licensed provider. In addition, if the contract is binding between Defendant and Waste Management, the provider, per SC Statute 55-51-612 the homeowners are not obligated to pay against that debt.

13. Wherefore Plaintiff asks for relief consisting of the return of all sums collected from Plaintiff or Plaintiff's predecessor owner of Lot 12 (Pebble Creek) for waste management services; and for an Order barring Defendant from any future acts attempting to enforce any obligation for waste management services against Plaintiff.

COUNT III -- RETURN OF ASSESSMENTS IN GENERAL

14. All of the preceding and succeeding paragraphs are incorporated as if stated within this Count. Defendant HOA lacks a basis founded in the covenants or an agreement consensually entered into by Plaintiff to entitle Defendant to demand the payment to Defendant of any assessment at all.

15. Assessments in General.

a. Since Defendant billed for cable tv and waste management services as part of the assessments, and since Defendant has no capacity to collect any assessments at all, computations include cable tv and waste management services.

b. On September 27, 2001 Plaintiff's lot was conveyed to his predecessor homeowner, the original occupant by the Developer, Sunbelt. Upon information and belief, it

was not until January 2004; however, that Defendant commenced to demand assessments from the homeowners. In 2004 the assessment rate was $65 per month in 2004 and 2005, thus Defendant collected by fraud; exaction, extortion or otherwise $ 780.00 per each of those two years as to Plaintiff's property.

c. In 2006 through 2008 Defendant likewise demanded and received from Plaintiff or his predecessor (through September, 2006) $ 70.00 a month, totaling $ 840.00 for each of those three years.

d. In 2009 Defendant likewise demanded and received from Plaintiff $ 75.00 per month, totaling $ 900.00 for 2009. In 2010 Defendant raised the assessments demanded to $ 88.00 per month, which will total $ 1,056 through the end of 2010.

e. The total assessments demanded and collected despite having no authority grounded in the covenants through the end of 2010 will be $ 6,036.00.

f. Defendant is not "The association" specified in the covenants. Defendant has no agreement or arrangement with "The Association" specified in the covenants to collect said sums on the proper association's behalf.

g. In communications from Defendant to the homeowners within the last two weeks, Defendant has threatened to impose liens, late fees, fines, and other costs against homeowner property if Plaintiff and other homeowners do not pay the sums demanded by Defendant, who lacks actual legal authority to make such demands or to take such actions in collection. Defendant has also threatened to "cut off" cable tv services if the sums demanded by Defendant are not paid to Defendant, who asserts the authority to demand such payment without having to first prove the debts in court.

h. After closely examining the minutes of Defendant association, the records of the Horry County recorder of deeds, and what Defendant asserts is it's corporate Bylaws, Plaintiff asserts that no Bylaws were ever legally adopted by Defendant corporation nor recorded with the Horry County Recorder of Deeds indexed to Defendant. Thus, arguendo, even if Defendant had the proper capacity, it has no mechanism permitting it to take the actions it attempts, nor even a structure for it's organization, elections, etc, rendering all acts of purported Directors not legally effective.

i. What Defendant represents are it's Bylaws provides for elections of the board to be held in March, as is stipulated by statute. The putative bylaws have a provision, permitted by

statute, to hold the annual meeting of an association at another date. For the last several years Defendant has held it's Annual Meeting in September. While elections for it's board may be held prematurely, the terms of office of the board begins and ends in March.[1] The recent actions of Defendant represent the decisions of a board including two individuals whose term of office does not begin until next March. Two board members who the "new two" will replace prematurely stepped down and have not participated in decisions of Defendant association's board. Thus until March, 2011, any actions of the current defendant board, including appointment of committee members, imposition of penalties, etc, are legally void because of the defect in board composition. Since at least as far back as the 2008 "Annual Meeting of Members" of Defendant HOA held in September, 2007 this scenario took place, thus the budgets / assessments for 2008, 2009, 2010 and 2011 have not been legally adopted and the consequence is that Defendant association, if arguendo it is "The association", can not collect assessments for those four years.[2]

j. From 2004 through 2008, Defendant collected Assessments made payable to the **"International Club Property Owners' Association"**[3] This fictitious name was never registered as being synonymous with "International Club Home Owners Association", and was certainly not the **"Murrells Inlet Golf Plantation Association, Inc"** ("MIGA"). Based upon accounting records of Defendant it is certain that the assessments unlawfully and involuntarily collected were deposited into Defendant's accounts and were used by Defendant for it's own purposes.

16. Wherefore Plaintiff asks for relief consisting of the return of all sums collected from Plaintiff or Plaintiff's predecessor owner of Lot 12 (Pebble Creek) for assessments in general; and for an Order barring Defendant from any future acts attempting to enforce any obligation by Plaintiff towards Defendant as to the payment of any assessments or charges of any nature.

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[1] The parallel is federal, state and municipal elections in November with successful candidates taking office in February. The date of an election is not necessarily the date the winner takes office.

[2] The budgets and rate of assessments have been adopted by Defendant's Board in September each year immediately after the annual meeting with election of board members for the following year.

[3] The payment coupons read **"International Club POA"**.

COUNT IV – UNLAWFUL IMPOSITION OF FINES BY DEFENDANT AGAINST PLAINTIFF FOR ALLEGED VIOLATION OF NON-EXISTENT COVENANT PROVISIONS AND NON-EXISTENT ARCHITECTURAL REVIEW BOARD RULES - INTERFERENCE WITH ALLOWED USES OF PROPERTY

17. All of the preceding and succeeding paragraphs are incorporated as if stated within this Count.

18. The "Violation" and "Fine".

a. On or about September 29, 2010 Defendant mailed Plaintiff a "Violation Notice" backdated to September 28, 2010, stating that **Defendant has "fined" Plaintiff $50 (fifty dollars)** for allegedly violating certain provisions of the Covenants which run with Plaintiff's house and for allegedly violating Defendant's By-Laws and Architectural Review Board ("ARB") Rules. [4]

b. On September 30, 2010 Plaintiff paid the "fine" under protest – **Defendant's receipt numbered 107443 "ARB Fine"**. Defendant lacks lawful authority to demand obedience to the restrictions Defendant asserts because amendments to the Covenants have explicitly deleted any restriction as to fences as well as any Architectural Controls. Defendant association has no legally effective By-Laws and arguendo, if they exist, they are not binding on Plaintiff. There are no legally effective Architectural Review Board Rules and, arguendo, if they exist at all they are pre-empted by the clear intent of the Covenants.

c. On October 5, 2010, Defendant association convened an ARB meeting at which it determined after – the – fine that Plaintiff was in violation of the non-existing covenant restrictions / requirements.

d. By letter dated October 8, 2010 the ARB, not Defendant's Board, determined to order this Plaintiff to remove the foundation of the fence and threatened Plaintiff with further "fines" of $100 (one hundred dollars) per month for non-compliance. Since MIGA is the controlling home owner association, this threat constitutes a form of exaction / extortion / fraudulent demand.

19. **Covenants.**

a. Original Covenants. The covenants as recorded on or about February 8, 1999 had a requirement that proposed modifications to grounds and buildings first be submitted to an

[4] Defendant stated that Plaintiff had built a flower bed along the curb and set in place the foundation of a fence without seeking prior ARB approval.

ARB: Section 7.2, Prior Review of All Plans (Section 7, Use Restrictions). Section 7.2 had a provision that none-the-less no restriction applied to any builder or developer, thus there was no need to delete this section if and when any builder or developer desired to proceed in any way at all.

b. Prior Review by ARB. On or about May 10, 2000 Paragraph #11 of Amendment No. 1 to the Covenants deleted Section 7.2. Defendants have argued that this deletion was done only to allow developers and builders to not be burdened by Section 7.2. This is none-sense because the last sentence of Section 7.2 as originally enacted explicitly waived this requirement as to builders and developers. Clearly the deletion expanded the waiver to all homeowners by deleting Section(s) 7.2 in their entirety.

c. Fence Restrictions. Section 7.4, Fences of the original covenants required prior approval of the ARB before erecting any fence. Paragraph #11 of Amendment #1 to the Covenants deleted Section 7.4 in it's entirety. If it was the desire of the Declarant to impose a lesser measure of control then Declarant (the developer), who had the benefit of the assistance of retained attorneys and years of experience in "the business" would have substituted alternative text for Section 7.4 instead of simply deleting it. It is clear that it was the intent of the Declarant to have no controls what-so-ever over fences.

d. It is clear that there is no provision in the Covenants requiring homeowners in general, and certainly not the Plaintiff, to seek prior ARB approval as to fences (or anything at all). The general rule adopted by the South Carolina Supreme Court of Appeals is that no restrictions on the free use of property will be enforced unless such restrictions are explicitly and unambiguously found in the Covenants. Covenants control the use of property. The authority of homeowners associations flows directly from covenants and is no more than is explicitly stated in the covenants. Restrictions on the free use of property can not be imposed by homeowner rule which go beyond those imposed in the covenants..

e. Defendant HOA lacks standing to enforce the use restriction provisions of the covenants, whatever they may be, since the covenants extend such authority only to MIGA.

f. The By-Laws putatively represented by Defendant as applicable has a provision in Section 13.2, Enforcement, which provides that only Defendant's Board of Directors may impose sanctions or enforce the provisions of the covenants. Further, Defendant's putative By-Laws provide, per it's Section 13.3, Enforcement, that no fine may be imposed until after

exhausting an extensive set of procedures which do not mention either the Association's contractor management firm nor an ARB. The "fine" was imposed unilaterally by the contractor and vetted by a meeting of Defendant's ARB approximately a week later, on October 5, 2010. Despite the explicit provisions of the South Carolina Non-Profit Corporation Act, the ARB conducted it's determinations as to the putative "violations" in secret (no attorney was present). Mr. xxxxxx, who was elected (to Defendant's Board) in September to the term beginning next March (2011), never-the-less was present and participated.[5] Numerous fences and flower beds exist around the PUD with the approval and "blessing" of Defendant.

g. Arguendo that Defendant had lawful authority to enforce (arguendo existent) restrictions on fences and requirements to proceed to an ARB in advance, Defendant's actions in instant respect is capricious, selective and arbitrary enforcement specifically banned by applicable case law determinations of the South Carolina Supreme Court and Court of Appeals, and waived by prior approvals of fences and flower beds.

20. **Bylaws.**

a. It has previously been shown that Bylaws can not impose a restriction on the use of property which use is not limited by the Covenants. Where the Covenants have been amended to delete any use restriction, this is controlling that a homeowners association may not re-impose the restriction by rule or By-Law.

b. It has been shown that Defendant association has no legally enforceable By-Laws at all nor legally enforceable authority to enforce it's By-Laws over the PUD and Plaintiff.

c. Arguendo if said Defendant has legally perfected By-Laws, they do not apply to the homeowners in the PUD, who are bound by the By-Laws of MIGA. Upon information and belief, MIGA has no provision at all in it's By-Laws for the operation of an ARB.

21. **ARB Rules**

a. At no time has Defendant provided Plaintiff with a set of the alleged current ARB

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[5] Mr. xxxxx and perhaps more ARB members were illegally present because the putative By-Laws prohibit a single household from being represented on more than one committee / and / or the Board. Defendant has represented that Mr. xxxxxx is a simultaneous member of the Board (although not legally seated) and at least two committees. Mr. xxxxxx participated as an ARB member although he is admittedly biased against this Plaintiff, having told at least one fellow homeowner (Mr. Lou Astorino) words to the effect that Plaintiff is a bad person and not to have anything to do with Plaintiff – apparently because Plaintifff has been exposing financial mis-

Rules. It is well settled that in a relationship founded in contract, all of the applicable controls must be explicitly known to the participants in advance of any attempt at enforcement.

b. Defendant maintains that it publishes it's rules on it's web site, but to use said web site requires that (1) a homeowner have access to the internet, which has never been a requirement of home ownership in the PUD; (2) a homeowner install on his computer certain software which has licensing restrictions and waivers of rights to which a homeowner might not want to agree, and which waiver is not a condition of home ownership; (3) a homeowner obtain a user-id and password from Defendant association's contractor in California, which requires that a homeowner waive certain rights and grant the contractor (Community Associates Institute, Inc) waivers of privacy rights of the homeowner and grant ownership of all data related to the homeowner found on contractor's server – which waivers / agreements are not conditions of home ownership. [6]

c. MIGA has no ARB rules.

d. The October 8, 2010 letter on behalf of Defendant signed by Julie Case, a contractor of Defendant (no employee or contractor of Defendant HOA is a licensed property manager nor realtor) stated:

> "This request has been denied due to it's **direct conflict with the covenants.** Any materials that exist on your property pertaining to this addition, specifically the brick foundation (to the fence), must be removed within 15 days from the date of this letter."

e. Defendant HOA's letter never stated what covenant provision Plaintiff's action was in "direct conflict" with. Materially, **Defendant never claimed that Plaintiff had violated any ARB guideline nor By-Law.**

22. The actions of Defendant constitute **harassment and tortious interference with Plaintiff's lawful use of his property.**

23. Wherefore Plaintiff asks for relief consisting of:

a. the return of the $50.00 (fifty dollar) fine;

b. for an Order barring Defendant from any future acts attempting to restrict

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management and apparent statutory violations of fiduciary duty by members of Defendant Board.

Plaintiff's use of his property or requiring him to have any dealings at all with Defendant regarding any matter; and

c. Contingent on any party appealing a judgment bearing on this Count to the Circuit Court / Court of Common Pleas, a demand for punitive damages in the amount of $25,000.00 (twenty-five thousand dollars). This demand for punitive damages is effectively waived before the Magistrate's Court because of statutory limits on jurisdiction, but is contingently stated to conform with rules of pleading, should the matter proceed to a higher court.

FURTHER REQUEST

24. Plaintiff further requests that the Court award the costs of this action as provided by statute and for such other and further relief as this Court may deem just.

I state under the penalty of perjury that the above is correct and truthful, except those based upon my information and belief.

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

October 12, 2010

[6] Community Associates Institute's server none-the-less has been provided by Defendant with private financial and other information relating to all homeowners in the PUD, regardless of whether or not said individual homeowner has agreed to the release to CAI of said private information.

INTERNATIONAL CLUB PROPERTY OWNERS ASSOCIATION, INC.

BOARD OF DIRECTORS MEETING
NOVEMBER 10, 2010
6:30 PM

MINUTES

The regular meeting of the International Club Board of Directors was held on November 10, 2010 at the International Club Amenity Center located at 1551 International Club Drive in Murrells Inlet, SC.

– PLEDGE OF ALLEGIANCE

I. Opening of Meeting
- Call To Order
  The meeting was called to order at 6:30 P.M. Board members in attendance were Bill Freiboth, Camille Noonan, Bob German and Roseann Gillie. Unable to attend was John Bianchi. Also present were Community Manager Beckie Abel and Assistant Community Manager Julie Case with K.A. Diehl & Associates.

II. Adopt the Agenda
A motion was made to adopt the meeting agenda as presented.
Motion made by Roseanne Gillie
Seconded by Bob German
Vote passed unanimously

III. Approval of Minutes
A motion to approve the meeting minutes from the Aug 4, 2010 Board of Directors Meeting as written.
Motion by Camille Noonan
Seconded by Roseanne Gillie
Vote passed unanimously

III. Treasurers Report
Management reported on the community's financial status as of September 30, 2010 that reflects nine (9) months activity.

IV. Secretary's Report
Secretary Noonan reported on the community's website reporting forms and there were three (3) reports of maintenance needs and one (1) contact the board submittal. The website continues to be a successful tool for communication and reporting for the community.

V. Committee Reports:
The Board thanked all committee members that have volunteered and shared that their help is appreciated and is essential to operations. The owners were asked to please hold comments until the Member Comment period at the end of the meeting.

A) ARB
Mr. Bill Fletcher reported on behalf of the Architectural Review Board for a Chairman has not yet been established since Roseanne Gillie had to resign when she was elected to the Board of Directors. In addition to his recent appointment to the ARB, Mr. Fletcher announced the additional ARB appointees: Hank Hodges, Pete Warren and Charles Roche. A new chair will be elected at the December meeting of the ARB during its new established time of 10:30 AM on the first Tuesday of each month.

B) Building
The Building Committee shared that an inspection is conducted on a weekly basis and any items in need of repair are submitted to the new Maintenance Committee or the proper vendor.

C) Communications (new)
Mr. Bob Masters reported on the newly developed Communications Committee and the full report is attached to these minutes as EXHIBIT A.

D) Golf Course
In mid November there will be a new program for Sunday golf and reduced rates will be offered.

E) Grounds (new)
Chairman Freiboth reported on the progress of the CEP project. They have installed plantings and irrigation, but there has been a problem with the pressure valve in the new irrigation system that was producing leakage. Since this problem was detected and repaired, a pressure monitoring station was installed. Mr. Freiboth also shared that there was a car accident that damaged this progressing area and had caused additional damage to the irrigation. A police report was filed and the owners insurance will be paying for the damages.

F) Maintenance (new)
Mr. Dave Jones has leaded this new committee and has been working closely with all of the committees for repairs needed around the community. The Maintenance Committee was commended for all of their hard work and ultimately saving the Association funds in contracting these kinds of jobs.

G) Neighborhood Watch
The Neighborhood Watch needs more volunteers. Their patrol hours have been reduced until the Spring time when they will be extended for the season. The committee is hopeful to have more members as of the by that time.

H) Pool – Joan Gray
Ms. Joan Gray reported for the Pool Committee and is attached to these minutes as EXHIBIT B.

I) Social Committee
Ms. Denise Fynmore shared with the membership the recent social events, upcoming events and the active members. The full report of the Social Committee is attached to these minutes as EXHIBIT C.

J) Welcome (re-activated)
Ms. Beth Templeton has taken over as chair for the Welcome Committee. She shared that they are working on a new objective to give a great warm welcome and inform all new owners and residents of the Association. They will be presented a gift with a personal visit to carry out these efforts. The committee has went back six (6) months to collect all new owners and residents in the community and K.A. Diehl will be providing a new owners re-sale report each month to keep them up to date.

IV. Old Business
- There was no old business to discuss at this time.

V. New Business

Budget – Discussion

The Association funds two separate budgets, one for the Master Association and one for the Pool and Amenity Center facility.

Important Factors Contributing to this year's budget:

- The Board increased the rate of contributions to reserves by about 5%.
- Bad Debt allowances were increased substantially: $10,000 master, $4,000 P.A.C.e as a number of accounts are in collection past 90 days, there are some foreclosures and the duration of the foreclosure process may increase next year.
- Cable Expenses are expected to go up 5%
- The community now pays a HWY 17 connector fee (tournament blvd) annually
- Insurance is up due to increased coverage amounts, replacement value insurance
- There have some irrigation leaks remaining to repair due to a failed pressure valve
- The Association can expect legal costs to continue to be incurred in 2011 for new suits
- The Board made great progress to paid back last year's master deficit.
- Much of budget cost is hard to reduce: P.A.C.e for example has about 68% its costs due to utilities. Other major costs include: contract vendor services, insurance, bad debt, reserve contributions (still building reserves as a new community)

2011 collection of assessments

2011 Assessments:

- P.A.C.e members (includes master and P.A.C.e fees)
- Master Association Only:

Coupons: The Board intends to return to a single coupon due monthly per member
- P.A.Ce – a single monthly coupon due January 2010
- master only – a single monthly coupon, Due January 2010
- Annual Budget and Coupon books to follow – official mailing of the community.

A motion was made to approve the proposed 2011 Budget.
Motion made by Roseann Gillie
Seconded by Bob German
Vote passed unanimously

Vendor Contracts:
The Board is reviewing existing contracts – to verify they reflect work actually performed. They will be selecting some key contracts to bid with timing dictated by contract expiration.

Lawsuits
- The Board has filled with the court a motion to compel mediation – Villas Suit; Goal, move suit to completion and press for mediation by a 3rd party complying with the Judge's requirements
- The Board recently received three new legal complaints. One we responded to, the other two are being reviewed by our attorney.
- They are awaiting completion of responses and confirmation from our attorney before additional release of information.

Board Direction for 2011
1. Greater Emphasis on Committees, return as much committee work as possible to committees, provided resources are available to take on work. (new volunteers)
2. Build Stronger Committees: involvement, monitoring their areas of responsibility
3. Formed and are building 3 new committees: Grounds, Maintenance, Communication
4. Restarting the Welcome Committee
5. Finish CEP Project landscaping
6. Move legal complaints towards resolution, respond as needed
7. Keep commitments in line with volunteer committees resources. We will continue to build committees and solicit volunteers –part of maturing the association.

VI. Member Comment
The membership was given the opportunity to address any questions or concerns with the Board at this time.

VII. Schedule of next meeting
The Next Quarterly Board meeting will take place on Wednesday February 2, 2010 at 6:30 p.m. in the Amenity Center meeting room.

VIII. Adjournment
A motion was made to adjourn the meeting at 7:39 PM.
Motion made by Bob German
Seconded by Camille Noonan
Vote passed unanimously

Respectfully submitted by:_____
Julie Case, Assistant Community Manager

Approved by:_____
Camille Noonan, Secretary

STATE OF SOUTH CAROLINA	IN THE MAGISTRATE COURT
COUNTY OF HORRY	CASE NO. 2010-CV-26-1072943
RONALD JARMUTH	
Plaintiff,	
vs.	ANSWER
THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.	
Defendants.	

The International Club Homeowners Association, Inc. (hereafter "Defendant"), specifically reserving its rights under its Motion to Dismiss, answers the Complaint filed by Ronald Jarmuth (hereafter "Plaintiff") as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified, or qualified is denied and strict proof demanded thereof.

2. The answering Defendants deny any and all allegations contained in the Complaint.

SECOND DEFENSE

3. Paragraphs 1-2 above are incorporated herein by reference and made a part and parcel to Defendant's Second Defense.

4. By answering this Complaint, Defendant in no way abandons the motion it filed on November 9, 2010 with this Court to dismiss the Complaint pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

5. The Defendant specifically reserves all rights and arguments set forth in its motion dated November 9, 2010.

6. This Court should dismiss the Complaint in its entirety in accordance with Rule 12(b)(8) of the South Carolina Rules of Civil Procedures because there is currently a pending civil action filed by the Plaintiff against the Defendant before the Court of Common Pleas for the County of Horry, State of South Carolina, Civil Action No.: 2009-CP-26-3596.

THIRD DEFENSE

7. Paragraphs 1-6 above are incorporated herein by reference and made a part and parcel to Defendant's Third Defense.

8. This Court should dismiss the Complaint in its entirety because this Court lacks subject matter jurisdiction to hear this dispute under section 22-3-10 of the South Carolina Code (2007), as the amount in controversy, or the relief sought in this case by the Plaintiff, exceeds seven thousand five hundred dollars and no/00 ($7,500).

FOURTH DEFENSE

9. Paragraphs 1-8 above are incorporated herein by reference and made a part and parcel to Defendant's Fourth Defense.

10. This Court should dismiss the Complaint in its entirety because this Court lacks subject matter jurisdiction to declare the contracts entered into by the Defendants as void and return any monies collected under the contracts to Plaintiff. See S.C. Code Ann. § 22-3-10(1) (stating the magistrate court has jurisdiction "in actions arising on contracts for the recovery of money only") (emphasis added).

FIFTH DEFENSE

11. Paragraphs 1-10 above are incorporated herein by reference and made a part and parcel to Defendant's Fifth Defense.

12. The Plaintiff lacks standing to bring the claims asserted in his Complaint, and therefore, his claims should be dismissed.

SIXTH DEFENSE

13. Paragraphs 1-12 above are incorporated herein by reference and made a part and parcel to Defendant's Sixth Defense.

14. The Plaintiff's claims should be dismissed because his Complaint and the causes of action asserted therein are barred by the doctrines of Res Judicata and Collateral Estoppel.

SEVENTH DEFENSE

15. Paragraphs 1-14 above are incorporated herein by reference and made a part and parcel to Defendant's Seventh Defense.

16. The answering Defendants assert the Doctrines of Estoppel, Waiver, and Laches as complete affirmative defenses to the allegations contained in the Complaint.

EIGHTH DEFENSE

17. Paragraphs 1-16 above are incorporated herein by reference and made a part and parcel to Defendant's Eighth Defense.

18. The Defendant has immunity as to the claims asserted by the Plaintiff as the Defendant has abided by its governing documents and South Carolina State Law in undertaking the actions complained of.

NINTH DEFENSE

19. Paragraphs 1-18 above are incorporated herein by reference and made a part and parcel to Defendant's Ninth Defense.

20. All actions of the Defendants were undertaken in good faith and in accordance with the business judgment rule.

TENTH DEFENSE

21. Paragraphs 1-20 above are incorporated herein by reference and made a part and parcel to Defendant's Tenth Defense.

22. The Plaintiff's claims are barred by the doctrine of equitable estoppel.

WHEREFORE, having answered the claims of the Plaintiff, the Defendants hereby prays as follows:

a. that the Complaint be dismissed; and

b. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

Henrietta U. Golding, SC Bar #2173
P.O. Box 336
Myrtle Beach, SC 29578-0336
Ph: (843) 444-1107
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Email: hgolding@mcnair.net
Attorney for the Defendant

Myrtle Beach, South Carolina
November 17, 2010

International Club ARB Meeting
December 7, 2010
Minutes

The regular meeting of the Architectural Review Board was held on Tuesday, December 07, 2010 at the office of K.A. Diehl & Associates, Inc. located at 11740 Hwy 17 Bypass South in Murrells Inlet, SC.

I. **Open Meeting**
The meeting was called to order at 10:30 AM. Members present with the ARB were Bill Fletcher, Peter Warren, Jane Bowers, Board Liaison Bob German and newly appointed member Robert Pierce. Members Hank Hodges and Charles Roche were unable to attend. Also present was Julie Case with K.A. Diehl & Associates, Inc.

II. **Approval of Minutes**
A motion was made to approve the November Meeting Minutes as written.
Motion made by Jane Bowers
Seconded by Peter Warren
Vote passed unanimously

III. **Old Business**

- Vote for ARB Chairman
  A nomination was made by Jane Bowers to elect Bill Fletcher as the International Club Architectural Review Committee Chairman and the nomination was seconded by Peter Warren.
  Mr. Fletcher accepted the nomination and it was put to a vote.
  All ARB members were in favor so the vote passed unanimously.
  **Charles Roche submitted his approval of Bill Fletcher serving as the ARB Chairman via email on December 7th, 2010.*

- Jarmuth – Fence foundation status
  After the November Meeting was adjourned, a site visit was conducted to inspect the status of the brick foundation that was to be removed after the denial of a 6 ft. privacy fence by the ARB. The foundation still exists on the property as of December 7, 2010 and action will continue until the unapproved modification is brought into compliance.

- Bianchi – Solar tube & attic fan (discussion of approved install)
  A Notice of Contingent Approval was sent to the owner on November 5, 2010 for the installation of the solar tube and attic fan. The contingency given in the notice specifically states, "Contingent approval is given if it is installed on the side or back of the home."

The ARB will conduct a site visit to inspect the completed installation and report the status of compliance.

- Spittel – Unapproved solar install
  During a property inspection it was noticed that there was an unapproved installation on the roof in the front of the home. It appears to be a solar tube or like object. The ARB will conduct a site visit to review this installation and report the status.

IV. Pending Reviews

- Jacques – Curbscapes
  Approval to be sent with reminder of guidelines (will send revised ARB Guidelines) – (3 approved - 1 abstained- Bill Fletcher)

V. New Business

- Welcome new ARB Member – Robert Pierce
  The ARB welcomed new member Robert Pierce to the ARB and thanked him for volunteering his time to serve the community.

VI. Schedule of next meeting

January 4th, 2011 at 10:30 AM.

VII. Adjournment

A motion was made to adjourn at 11:09
Motion made by Bill Fletcher
Seconded by Pete Warren
Vote passed unanimously

Respectfully submitted by:_____
Julie Case, Assistant Community Manager

Approved by: _____
Bill Fletcher, Chairman

SEVENTEENTH DEFENSE AND SECOND COUNTERCLAIM

49. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth Defenses are incorporated herein and made a part and parcel hereof.

50. The Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina.

51. Upon information and belief, the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina.

52. Upon information and belief, the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property").

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.

54. As the owner of the Property, the Plaintiff is subject to the Governing Documents.

55. The provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision.

56. Section 7.2 of the Declaration provides:

> "Prior Review of All Plans. No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement...shall be commenced, erected, or maintained upon any portion of the Subdivision, nor shall any exterior addition or change be made until the plans and specifications...showing the grading, filling nature, kind, size, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to the harmony of the exterior design and location in relation to the surrounding structures and topography by the Developer...Provided however, that upon Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association."

57. The Architectural Review Board for the Defendant HOA holds the architectural review rights pursuant to the Governing Documents. All Owners within the International Club apply to the Architectural Review Board for approval of plans and specifications for improvements constructed within the International Club.

58. The Defendant HOA enacted Architectural Guidelines in 2005 and has amended them from time to time.

59. Upon information and belief, the Plaintiff applied to the Architectural Review Board for approval of improvements on several occasions, and the Plaintiff's plans and specifications were approved.

60. Upon information and belief, the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.

61. The Defendant HOA, through its Architectural Review Board, sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.

62. Thereafter, the Plaintiff applied to the Architectural Review Board for approval of the brick wall and a fence, as well as a flower bed and edging.

63. Pursuant to Section 7.4 of the Declaration:

> "Fences. No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board in their sole discretion may require...No fences shall be permitted which obstruct the view of any stream or other body of water, golf courses or recreational amenity when viewed from inside any other Unit, or which interfere with the playing of golf on any nearby golf course or with the use of any Recreational Amenity."

64. The Architectural Review Board approved the Plaintiff's request for the flower bed and edging and denied the Plaintiff's request to construct the fence and wall, because the proposed construction violated the Governing Documents and the Architectural Guidelines and did not comply with the general scheme of development for the International Club.

65. The Architectural Review Board also demanded that the brick wall be removed from the Property within fifteen (15) days or he would be subject to monthly fines in the amount of One Hundred and 00/100 ($100.00) Dollars.

66. Upon information and belief, the Plaintiff paid a fine for constructing the brick wall in the amount of Fifty and 00/100 ($50.00) Dollars imposed by the Defendant HOA under protest several weeks later and threatened to sue the Defendant HOA.

67. Although the Plaintiff's application for the fence and the brick wall were denied and the Defendant HOA directed the Plaintiff to remove the brick wall, the Plaintiff failed and refused to remove the brick wall constructed.

68. The brick wall is a continuing violation of the Governing Documents and the Defendant HOA's Architectural Guidelines, and the Plaintiff has been fined accordingly.

69. Moreover, the Plaintiff has failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same.

70. Pursuant to the provisions of the Governing Documents, Plaintiff is responsible for paying assessments, fines, late fees, interest and other related charges to the Defendant HOA.

71. Provisions of 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, including reasonable attorney's fees, that are incurred by the Defendant HOA.

72. The Plaintiff, as owner of the Property, was and is assessed regular assessments, fines, late fees, interest and other related charges. As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 ($1,132.00) Dollars plus the costs of collections for his continuing violation of the brick wall, which the Plaintiff has not paid despite due demand being made upon him to pay said assessments and fines.

73. The Plaintiff, as current owner of the Property, continues to incur fines, fees and additional related charges throughout the pendency of this case during his continued ownership of the Property.

74. As a direct and proximate result of the Defendant HOA pursuing collection of these fees and costs, Defendant HOA has and will continue to incur attorney's fees and costs.

75. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, and therefore, the Defendant HOA is entitled to a judgment in an amount to be determined by this Court, together with costs and attorney's fees incurred in bringing this action as well as an order requiring the Plaintiff to comply with the Governing Documents and the Architectural Guidelines and to remove the brick wall from the Property.

WHEREFORE, having answered the Plaintiff's Complaint and the First Amendment to the Complaint, the Defendants hereby pray as follows:

a. the Plaintiffs' Complaint and First Amendment to the Complaint be dismissed with prejudice;

b. judgment against the Plaintiff in an amount to be determined by the Court;

c. an order requiring Plaintiff to comply with the Defendant HOA's Governing Documents and Architectural Guidelines and to remove the brick wall from the Property in violation of the Governing Documents and Architectural Guidelines;

d. this Court award reasonable attorney's fees and costs to the Defendant HOA; and

e. for such other and further relief as this Court deems just and proper.

McNair Law Firm, P.A.

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athompson@mcnair.net
Attorneys for the Defendants

Myrtle Beach, South Carolina
October 24, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26-3596
	)	
Ronald Jarmuth	)	
Plaintiff	)	PLAINTIFF'S ANSWER
	)	TO COUNTER-CLAIM
vs.	)	OF DEFENDANT'S AMENDED
	)	COMPLAINT
The International Club	)	
Homeowners Association, Inc.,	)	AND ASSERTION OF
et al	)	COUNTER – CLAIM BY
Defendants	)	PLAINTIFF
	)	

Plaintiff / Counter-Defendant Ronald Jarmuth (hereafter referred to as "C-Def") answers the Counter – Complaint stated in Defendants' / Counter – Plaintiff's (hereafter referred to as "C-Pl") Amended Answer with Counter-Complaint filed with the Court on or about October 24, 2011, which Counter – Complaint was addressed at a hearing held December 7, 2011 on C-Def's SCRCivP Rule 12(b)(6) Motion – and for which, as of the date of the filing of this pleading, no Order of Court has yet issued. [1]

The Counter – Complaint is set out in paragraphs 50 through 74 of the Amended Answer, thus no response is required to the allegations of the earlier paragraphs which are not part of the Counter – Complaint as stated. To the extent that any earlier paragraphs can be read as being part of the Counter – Complaint, the allegations of the earlier numbered paragraphs are denied.

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified, or qualified is denied and strict proof demanded thereof.

2. Plaintiff admits that "the Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina" as stated in paragraph 50 of the Counter – Complaint. Plaintiff admits the allegation of paragraph 51 that "the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South

Carolina". Plaintiff admits the allegation of paragraph 52 that "the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property")" but clarifies that said lot is within the "International Club Planned Unit Development, formerly known as Lantana Planned Unit Development, and formerly known and initially approved as the Murrells Inlet Golf Plantation. Plaintiff admits the jurisdictional allegations of paragraph 53.

3. Plaintiff admits the allegations of paragraph 54 that "as the owner of the Property, the Plaintiff is subject to the Governing Documents" but clarifies that the use of the property, not the person, is subject to the Covenants running with the land, as amended, specifically including those amendments to the Covenants which were properly enacted. C-Def explicitly rejects any allegation that the putative Bylaws of the International Club Homeowners Association have any legal effect, asserting that no Bylaws of C-Pl HOA exist with any legal effect, and further asserting that any acts of C-Pl HOA purporting to rely on any such Bylaws or rules are ultra-vires. C-Def asserts that Amendments two (2) through five (5) were enacted in violation of the South Carolina Non-Profit Corporation Act and of the Covenants, and are thus ultra-vires and ineffective.

4. C-Def denies and rejects the allegation of paragraph 55 that "the provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision" asserting instead that the Murrells Inlet Golf Plantation Association, Inc (MIGPA) is the HOA which properly governs the PUD per the legally effective covenants. C-Def demands strict proof.

5. C-Def denies the allegation of paragraph 56 that "Section 7.2 of the Declaration provides" for anything, since said Section was "waived" by the First Amendment to the Covenants (the only legally effective Amendment to the Covenants). Plaintiff states further that, per Black's Legal Dictionary, first and any later editions, "waived" equates to "deleted" and alternatively means that any rights or obligations anyone might suffer per Section 7.2 became ineffective and legally incapable of being raised as of the date of the First Amendment. C-Def demands strict proof.

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[1] The Court, from the bench, stated it's intention to deny C-Def's Rule 12(b)(6) motion – and directed that counsel for C-Pl prepare and submit to the Court an Order following the December 7, 2011 hearing. No such order has been served on C-Def to-date (December 20, 2011).

6. C-Def denies and rejects the allegations of paragraph 57, since those allegations depend on the legally non-existent Section 7.2 of the Covenants.

7. C-Def denies and reject the allegations of Paragraph 58 that Defendant HOA legally enacted any "Architectural Guidelines" prior to the dates of the events complained of in the Counter – Complaint: September through October, 2010 and demands strict proof.

8. C-Def admits the allegations of paragraph 59 to the extent that C-Def filed "Courtesy" applications to the C-Pl putative Architectural Review Board (ARB), said courtesy applications explicitly clarifying that there was no provision under the Covenants requiring such application. C-Def further states that the application in question began with the statement that

> "This document set is provided the ARB of the International Club HOA without waiving any objections as to the authority of said ARB or said HOA in this matter. This qualification is made so as not to implicate potential HOA assertions of "waiver" or "estoppel". ... I note that Amendment #1 of the Covenants removed all "Architectural Controls" as well as the requirement to seek prior approval from and ARB for any modifications. I also note that the same Amendment explicitly deleted all controls over fences".

9. C-Def denies the allegation of paragraph 60 that C-Def

> "constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board".

C-Def asserts that there is no "brick wall" upon the property and that the lawn edging was explicitly applied for and approved as "red brick edger's for both (the area upon which a fence would ultimately be erected, which did not happen, and in the flower bed, which was built. C-Def asserts that the landscape drawing overlaying a survey of the property, which was submitted as required, depicted a line of "Brick Edging" running from the curb to C-Def's rear property line. Said Brick-Edging was approved by C-Pl's ARB thus C-Pl is complaining about the erection of a line of Brick Edging which C-Pl approved and calling it a "Fence" because the "Fence" was not approved – disregarding that neither a wall nor a fence was ever built.

10. C-Def asserts that the allegations of paragraph 61 violate the requirements of SCRCivP Rule 9(f) in that no specific date of the alleged correspondence is stated in the counter – complaint. Answering further, C-Def denies that he received any letter relating to any "wall or fence" prior to the courtesy meetings of the ARB. C-Def asserts that the

situation on the ground remains the same as before that courtesy application and act of the ARB which on October 8, 2010 approved what is actually on the ground. C-Def denies that the ARB

> "sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.".

11. C-Def denies the allegations of paragraph 62 that he applied to the ARB for approval of anything, stating further that, as explained supra, a "courtesy" set of documents was submitted.

12. C-Def denies the allegations of paragraph 63, since that paragraph asserts the legal viability of Section 7.4 of the Covenants, which section was "waived" in paragraph #11 of Amendment #1 to the Covenants, dated May 10, 2000, at Deed Book 2258 Page 1454. C-Def demands strict proof.

13. C-Def admits the allegations of paragraph 64 to the extent that it states that "The Architectural Review Board approved the Plaintiffs request for the flower bed and edging". Again, paragraph 64 is defective in that if fails to allege the date of the alleged event as required by SCRCivP Rule 12(f). C-Def denies that the ARB denied any request to construct a "wall" as no such request was ever lodged. C-Def denies that he received, at any time, any correspondence which asserted that any disapproval was founded on the basis that any C-Def request of action "did not comply with the general scheme of development for the International Club." C-Def demands strict proof.

14. C-Def denies the allegation of paragraph 65 than C-Pl "demanded that the brick wall be removed from the Property". C-Def demands strict proof.

15. C-Def admits the allegations of paragraph 66 to the extent that he paid, "under protest", a fine so as to give C-Def "liquidated direct damages" under which he could sue C-Pl. C-Def further states that said "fine" was never demanded for constructing any "brick wall" or "fence". C-Def denies that he "attempted to sue the Defendant HOA", stating the he "did" sue the C-Pl.

16. C-Def denies the allegations of paragraph 67, in as much as they are directed at the existence of a disapproved "brick wall". C-Def further states that he never "refused" to do anything; he merely ignored C-Pl and sued to enforce his rights and to enjoin C-Pl from

asserting non-existent rights. Likewise C-Def denies the allegations of paragraph 68 because it too construes the approved "brick edging" as a "brick wall" which was never applied for nor disapproved.

17. C-Def admits the allegations of paragraph 69 that he has "failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same" which is not an actionable position but rather protected speech under the First Amendment to the United States Constitution and protects C-Def from allegations of "waiver and estoppel".

18. C-Def denies the allegations of paragraph 70 and demands strict proof.

19. C-Def denies any allegation of paragraph 71 that the Covenants provide for "attorneys fees" and "costs of collection" for anything other than the enforcement of an explicit provision of the covenants, and further explains that the rules which the Covenants provide for are limited to "regulations governing bodies of water, water courses and other Common Areas".

20. As to the allegations of paragraph 72, C-Def denies the capacity of C-Pl HOA to exercise any right granted by the Covenants to the Murrells Inlet Golf Plantation Association, the HOA for the PUD. Answering further, C-Def admits that the legitimate HOA has the authority under the Covenants to determine and collect assessments for the operation of the common property. As to any other matter, C-Def denies it and demands strict proof. C-Def denies any allegation that he owes C-Pl anything. C-Def likewise denies the allegations of paragraph 73. As to the allegations of paragraph 74, the prior and current Board of the C-Pl HOA is the direct cause of any expense to the HOA because it is frivolously attempting to enforce non-existent ("waived") covenants putatively prohibiting an action ("brick wall") which never took place and relating to "brick edging" which said C-Pl's ARB approved. C-Def asserts further that said former and current Board Members of the HOA should be held personally liable for said expenses.

21. C-Def denies the allegations of paragraph 75 that he "breached the terms of the Governing Documents" which are the legally effective covenants. C-Def further asserts that at the time of the alleged events there were no legally effective ARB Guidelines. C-Def demands strict proof to the contrary. That being the case, C-Def denies that "the

Defendant HOA is entitled to" anything.

SECOND DEFENSE

22. Res Judicata. C-Def demands that the Court dismiss the Counter – Complaint in it's entirety because the events complained of are part and parcel of Plaintiff's under-lying Complaint and the Rules provide that any damage which Defendant might have suffered from the same events must be plead as a Counter – Complaint at the time the original answer is filed, or shall be lost forever through res-judicata.

THIRD DEFENSE

23. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof. The C-Pl lacks standing to bring the claims asserted in the Counter- Complaint, in that the Defendant is not the HOA for the PUD per the covenants.

FOURTH DEFENSE

24. The allegations of the First through Third Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims should be dismissed because they are barred by the doctrines of Collateral Estoppel and further that the C-Pl has failed to follow it's own putative rules.

FIFTH DEFENSE

25. The allegations of the First through Fourth Defenses are incorporated herein and made a part and parcel hereof. The answering C-Def asserts the Doctrines of Estoppel, Waiver, Consent, and Laches as complete affirmative defenses to the allegations contained in the Counter - Complaint.

SIXTH DEFENSE

26. The allegations of the First through Fifth Defenses are incorporated herein and made a part and parcel hereof. There is no underlying contractual basis which grants the C-Pl any rights under the Covenants since what would have been the applicable covenants were "waived" through the First Amendment to the Covenants filed with the Recorder of Deeds on May 10, 2000 at Deed Book 2258 Pages 1453 et seq. Further, there is no relief which the Court can grant to the C-Pl because the alleged "brick wall" does not exist and thus the Court can nor require it's removal. The C-Pl has not plead for a restraining order either.

SEVENTH DEFENSE

27. The allegations of the First through Sixth Defenses are incorporated herein and made a part and parcel hereof. All actions of the C-Def were undertaken in good faith and in accordance with the Covenants. C-Def strictly complied with the existing and legally effective covenants and rules.

EIGHTH DEFENSE

28. The allegations of the First through Seventh Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims are barred by the doctrine of equitable estoppel.

NINTH DEFENSE

29. The allegations of the First through Eighth Defenses are incorporated herein and made a part and parcel hereof. The counter – claim is barred by the doctrine of Novation through the action of the First Amendment to the Covenants.

TENTH DEFENSE

30. The allegations of the First through Ninth Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims are barred by the doctrine of unclean hands.

ELEVENTH DEFENSE

31. The allegation of the First through Tenth Defenses are incorporated herein and made a part and parcel hereof. The Counter – Complaint is barred by the doctrine of laches.

TWELFTH DEFENSE

32. The allegation of the First through Eleventh Defenses are incorporated herein and made a part and parcel hereof. The Counter – Complaint was filed to harass the Plaintiff and for other improper purpose, in further violation of the South Carolina Rules of Ethical Practice applicable to Defense Counsel.

COUNTER – CLAIM BY PLAINTIFF

33. Plaintiff asserts a compulsorily counter – claim as required by SCRCivP Rule 13(a) and as allowed by Rule 15(a). Plaintiff was effectively served an Answer / Counter – Claim ("pleading") following the denial of Plaintiff's Rule 12(b)(6) Motion. Rule 15(a) provides that

"A party may amend his pleading ... within 30 days after a responsive pleading is served"

34. Through the service on April 13, 2009 of Plaintiff's Complaint styled Jarmuth v HOA et al in this Court, 2009-CP-26-3596, Defendants have been on actual notice of the deletion of those provisions of the Covenants upon which Defendants depend for the filing of their Counter – Complaint. Since at least 2006 the Defendants have posted that First Amendment to the Covenants on it's web-site and have referred to it on numerous occasions. The knowing assertion of rights through a Counter - Complaint which rights were obviously deleted years prior to the assertion of those rights constitutes a Frivolous Proceeding as defined by the South Carolina Frivolous Civil Proceedings Sanctions Act, Sections 15-36 et seq of the Code.

35. The Counter – Complaint was filed to harass the Plaintiff and for other improper purpose, in further violation of the South Carolina Rules of Ethical Practice applicable to Defense Counsel.

36. In accordance with SC Code 15-36-10(G) Plaintiff requests the following sanctions:

(1) an order for the Defendant to pay the reasonable costs and attorney's fees of the Plaintiff

(2) an order for the attorney to pay a reasonable fine to the court; and

(3) a directive of a no monetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

WHEREFORE, having answered the Counter - Claims of the Counter - Plaintiffs, the Counter - Defendant hereby prays as follows:

a. that the Counter - Complaint be dismissed;

b. sanctions as requested per paragraph 36 above.

c. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

Ronald Jarmuth
Plaintiff / Counter – Defendant Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355

CONTINUATION OF EXHIBITS:

Defendant's Exhibit Number 57
Email communication from Julie Case to all property owners security and higher regarding HTC response for credits dated June 24, 2009

Defendant's Exhibit Number 58
Jarmuth's Application to the ARB for a swing set dated July 21, 2009

Defendant's Exhibit Number 59
Notice of Disapproved Request from ARB dated August 5, 2009 to Jarmuth for swing set

Defendant's Exhibit Number 60
Email dated August 22, 2009 from John White to ARB Board and K.A. Diehl regarding denial of the swing set

Defendant's Exhibit Number 61
Letter dated August 24, 2009 from Horry County Engineering Department Infrastructure & Regulation Department to Michael Butryn

Defendant's Exhibit Number 62
Copy of International Club HOA Check #2469 dated October 15, 2009 in the amount of $2,500.00 to McNair representing insurance deductible

Defendant's Exhibit Number 63
State of South Carolina Human Affairs Commission Determination of No Reasonable Cause in Ronald Jarmuth v. International Club HOA dated December 11, 2009

CONTINUATION OF EXHIBITS:

Defendant's Exhibit Number 78
Notice of Approval from ARB dated May 10, 2010 of Jarmuth's Application for the bench

Defendant's Exhibit Number 79
Copy of International Club HOA Check #2732 dated June 10, 2010 in the amount of $2,500.00 to McNair representing insurance deductible

Defendant's Exhibit Number 80
Architectural Guidelines amended July 2010

Defendant's Exhibit Number 81
International Club HOA Board Action Without a Meeting dated August 11, 2010

Defendant's Exhibit Number 82
Violation Notice from ARB dated September 27, 2010 to Jarmuth for the landscape with curbing and brick addition to yard

Defendant's Exhibit Number 83
Letter to the ARB from Jarmuth dated September 30, 2010 enclosing application for fence and lawn edging

Defendant's Exhibit Number 84
International Club ARB Meeting Minutes - October 5, 2010

Defendant's Exhibit Number 85
Notice of Approval from ARB of Jarmuth's Application for flower bed and edging dated October 8, 2010

A: S-O-B-C-Z-Y-K.

Q: Was their swing set approved as being on the side of the house?

A: No, it was not.

Q: And where was the approvals for their swing set -- where is the location of the swing set?

A: We looked at that location and for that citing, we concluded that it was actually in the back.

Q: Now, I want you to look at Exhibit 63.

A: Yes,

Q: Exhibit 63 is a decision issued by the South Carolina Human Affairs Commission; is that correct?

A: That's correct.

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?

A: That's correct.

Q: And that defense that the Homeowners Association undertook was to enforce the covenants and the guidelines; is that correct?

A: That is correct.

Q: And did the Association have to pay two thousand,

five hundred dollars to an attorney to enforce the covenants as a result of this complaint with the South Carolina Human Affairs Commission?

A: Yes, we did.

Q: To your knowledge, did Mr. Freiboth ever apply to the ARB to have a swing set in the back of his yard?

A: I think the question was, did Mr. Jarmuth apply.

Q: Right.

A: To my knowledge, he did not.

Q: Did anyone prevent Mr. Jarmuth from making an application to have the swing set in the back of his yard?

A: No, they did not.

Q: Next, let's look at the fence application of Mr. Jarmuth, and I'm going to ask you to look at Exhibits, I think it starts with 82.

A: Okay.

Q: Now, Exhibit 82 is what?

A: That's a violation notice for having started his project without first submitting it for prior -- for, for review by the Architectural Review Board.

Q: And when was that violation notice issued?

A: September 27th, 2010.

thousand, five hundred dollars to enforce the swing set regulations, did the Association also have to pay two thousand, five hundred to enforce the covenants in this action?

A: Yes, we did.

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 what's the date, can you read the date on that check?

A: October 15th, 2009.

Q: And the amount of that check?

A: Twenty-five hundred dollars.

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.

Q: Those are attorney's fees to enforce the covenants?

A: Yes, they are.

Q: I want you to go to Exhibit 79.

A: All right.

I

Q: Defendant's Exhibit 79 is what?

A: That's another check for twenty-five hundred dollars.

Q: And who's it payable to?

A: McNair Law Firm.

Q: And the date of that check?

A: I'm having a little trouble seeing it, but I think it's August 10th, 2010.

Q: So how much in attorney's fees has the Homeowner's Association paid to the McNair Law Firm to enforce the covenants with respect to Mr. Jarmuth?

A: With those two checks, five thousand dollars.

Q: If you add up together the fines of two thousand, three hundred twenty-six dollars and five thousand dollars, that would be seven thousand, three hundred and twenty-six dollars?

A: That's correct.

Q: Is the Association seeking a judgment against Mr. Jarmuth for the sum of seven thousand, three hundred and twenty-six dollars?

A: Yes, we are.

Q: Is the Association seeking an Order of the Court requiring Mr. Jarmuth to remove the brick foundation that was not approved?

what change to my property resulted?

A: I, I believe that -- that's a long question. Could you give that back to me again?

Q: Well, I filed the South Carolina Human Rights Commission complaint, build swing sets?

A: Uh-huh (affirmative response).

Q: Sir?

A: You, you did file one, yes.

Q: When I filed that complaint, had I done any modification to my property?

A: You accused the ARB members of wrongdoing and we hired an attorney as we would for any proceeding like that.

Q: I think you can answer the question. Had I made any modification to my property?

A: I don't believe that ---

Q: Can I take that ---

A: No.

Q: --- as a no?

A: No. No.

Q: What particular violation of the covenant can you cite that entitles you to get money because you prevailed in the South Carolina Human Rights complaint?

A: I believe you were challenging our authority to

J

-- of, of, of how we were enforcing the covenants.

Q: True or false, didn't I say simply that one of the ARB members had stated that he hates children, that being Mr. Cartman, and he was a member of the ARB official, and that was my belief that the denial of my swing set was because that it was related to my familial status; isn't that what I told them?

A: I'm not sure what you told them in that case, but I believe that your suit was more because your swing set was denied and that your belief about it being -- it shouldn't have been.

Q: Well, let's talk about the Civil Rights aspect. Do you know anything about Civil Rights complaints?

A: Not extensively, no.

MR. JARMUTH: I THINK I'D BE WASTING MY TIME PURSUING THIS. I THINK THE COURT CAN TAKE JUDICIAL NOTICE OF THE POINT I'M MAKING.

Q: Now, let's look at the next one. What was the next twenty-five hundred dollars for?

A: Well, first of all, you added, I believe, to this

lawsuit your ARB violation that, that is still running, lawsuit itself, but mostly I think we're enforcing the covenants.

Q: Let's go back to this originally captioned case, 2009-CP-26-3596. By filing that lawsuit where I alleged that the Board was in violation of the covenants, what violation of the covenant did I commit?

A: I believe you were challenging its authority to enforce its own covenants in many aspects.

Q: But please answer the question, what violation of the covenants did I make that would entitle you to collect attorney's fees to enforce the covenants.

A: For the original, for the original lawsuit.

Q: Original lawsuit.

A: I don't have the text of all the details. There were a lot of them there, and I would stick to the answer that I have, you were challenging our authority as an Association to be here and to enforce covenants.

Q: Have you read the Answer to the original Complaint?

A: A long time ago.

Q: Isn't it true that the only Counter-Complaint

which was, I believe, at the tenth defense where it said, "And we want attorney's fees," and that did not cite any covenant violation?

A: I don't recall.

MR. JARMUTH: THE COURT IS -- I'D ASK THE COURT, IN ITS DISCRETION, TO READ THAT, AND I'D PROFFER THAT IT DID NOT -- THAT AT THE TIME OF THE ORIGINAL COMPLAINT, THE DEFENDANT DID NOT CITE ANY VIOLATION OF COVENANTS.

Q: Now, let's turn to the last twenty-five hundred dollars. Now, looking at the palm tree application, did I actually install any palm trees?

A: No, and we didn't deny your request. We, we tabled it.

Q: But wouldn't you agree that in conjunction with the palm tree which you -- I just heard a few minutes ago as a basis for attorney fees, I -- true or false, I did not violate any covenants?

A: It wasn't for the palm trees, it was for the ARB

violation for your fence. The palm tree hasn't been decided. All that was done was to table it.

MR. JARMUTH: I'D LIKE FOR THE COURT TO TAKE THAT AS A NO, THE DEFENDANT IS UNABLE TO CITE A VIOLATION OF THE COVENANTS IN CONJUNCTION WITH THE PALM TREE. I BELIEVE THE COURT WE WILL FIND THAT THE DEFENDANT CITED TO THE PALM TREES.

Q: Now, let's look at -- that leads to the, the, the fence. Now, in your Counter-Complaint, did you say that I laid paver bases or did you say I built a wall?

A: I don't remember what was in, in the Counter-Complaint. I remember the instance of how it started and evolved.

Q: Isn't it true that Ms. Golding, the defense counsel, a little while ago led you through answering yes or no when she referred to walls, not edges?

A: No. I'm very familiar with that history.

Q: Now, have you ever personally installed a fence or had a fence installed for you at any property

described that your inquiry would follow with someone filing an appeal as the next step?

A: People can -- it's not a true or false. Let me explain a little bit. People can file an appeal. If we see something wrong, such as several years ago when you were given a violation for putting a garbage can out and we looked at it and said, "Wait a minute, we can't see that garbage can from the street, remove that violation and issue an apology to Mr. Jarmuth," we saw something wrong and we stepped in. We could do it either way. We would normally -- if nothing happened, we would certainly let you know you had a right to appeal or contact you, but you, you contacted us first and said it was fruitless to have an appeal. I fully expected you to come to an appeal, to want to have an appeal.

Q: True or false, the inquiry you described is dependent on someone telling you they're appealing?

A: No, an appeal is, is dependent on there being a violation, period, not, not on someone saying they want an appeal or not.

Q: Stipulating that there was some event which you considered a violation and stipulating that you

had told them, "You're in violation," and someone had concluded that it was a violation, and stipulating that you said there should be an appeal, is the inquiry stage dependent on someone filing that appeal, which you have suggested?

A: Not necessarily. I, I might add that -- aren't you discussing this appeal as part of Section 13? Is that ---

Q: That was not my question.

A: Isn't that what this is part of?

Q: I won't go beyond my question now. Now, assuming someone filed the appeal and you did the inquiry, what comes next?

A: The Board would then discuss the situation and determine what the next step is, whether -- yours is a hypothetical `cause there -- it wasn't appealed by you and you indicated no need to, to have the appeal, but if it was a landscape violation, if we saw that people were doing most of the work and having a minor problem, we'd cut them a little slack and give them a little more time, if it was someone that simply refused to do it, then we might impose a sanction, or if we were wrong, we would back it out.

Q: Assuming that your inquiry resulted in your

concluding that it's a violation, and assuming you heard nothing that said it was to be remedied, what is your next step as a Board?

A: I'm trying to wrap my hand around your question here.

Q: Okay. So far all you've done is the -- you've told them to make an appeal, they haven't appealed or end of story, you impose -- so the end of story, then you impose a fine? You said appeal, they don't appeal, you impose a fine?

A: We could. We would discuss it first to decide -- we wouldn't just do anything automatically in that case. We would -- we -- if there was to be a hearing on that, we would discuss the particulars and decide what to do before -- we would discuss it before moving. If, if we, we were in a hearing state -- in your case, there was already a violation and I, I think it was clear that there was and you didn't want to appeal it.

Q: Now, assuming I had appealed it, you did an inquiry, decided that it was a violation, I refused to agree, what is the next step that you would follow, according to your procedures?

A: Well, this is, this is hypothetical, because I'm

only one Board member and you never did appeal it, and I don't know what you would've had to say at that time.

Q: So hypothetical since you're responsible to establish the procedures and follow for all these homeowners who may possibly do a violation. So someone has -- let me, say, I've done this violation, you told me to appeal, if I would've appealed -- I won't fix it, you say, "It's a violation, we'll fix it," true or false, you next call a Board meeting?

A: We would -- false. We would call a Board meeting if you said, even if you said you wouldn't fix it, but you waived your right. We, we would call a Board meeting in a case where we were afforded the opportunity to do that, and we would make sure, first of all, that we understood the facts and that we, we were doing -- we were behaving properly.

Q: Upon reconsideration, it's your statement I didn't -- you said this many times, I didn't appeal.

A: You said the appeal was -- I'm not sure what the word is, unnecessary, useless, that it wouldn't -- you didn't want to appeal.

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph Stroman, Special Referee

Case No. 2009-CP-26-3596
Consolidated with
2010-CP-11320

Ronald Jarmuth
Plaintiff, Pro Se — **Appellant**

v.

Rosemary Toth,
International Club Homeowners Association, Inc,
K.A. Diehl, Inc.
Defendants — **Respondents**

NOTICE OF APPEAL

Ronald Jarmuth appeals the Final Order of the Honorable Ralph P. Stroman, Special Referee, dated September 10, 2012, stayed by virtue of Appellant's Motion for Relief from Judgment, to Amend, or for New Trial filed September 19, 2012, denied by Order of Court entered March 11, 2013.

Appellant received written notice from the Clerk of Court by US Mail of entry of Order Denying Motion to Amend on March 14, 2013.

April 3, 2013

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STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc., Rosemary Toth, And K.A. Diehl & Associates, Defendants.	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S RULE 60(b)(2) and (3) MOTION FOR RELIEF FROM JUDGMENT**
STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-26-11320
Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc. Defendant.	

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HORRY COUNTY
CLERK OF COURT

Defendants, The International Club Homeowners Association, Inc. (hereinafter "Association"), Rosemary Toth, and K.A. Diehl & Associates (hereinafter "Defendants"), by and through their undersigned counsel, submit this Memorandum in Opposition to the Rule 60(b)(2) and (3) Motion for Relief from Judgment filed on January 22, 2016 and the Amended Addition to Rule 60(b)(2) and (3) Motion for Relief from Judgment filed on February 1, 2016 (collectively hereinafter referred to as "Rule 60(b) Motion") by the *pro se* Plaintiff, Ronald Jarmuth (hereinafter "Jarmuth").

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INTRODUCTION

The Rule 60(b) Motion seeks to alter the Final Order dated and filed September 10, 2012 (hereinafter "Final Order") in the above captioned actions (hereinafter "Consolidated Cases"). The motion asserts that the Association and the undersigned attorneys committed fraud by admitting testimony at trial and mischaracterizing evidence to prove that his International Club property in the Pebble Creek subdivision is subject to the Declaration of Covenants and Restrictions for the International Club (hereinafter "Declaration") and to prove the Association's damages for attorneys' fees and fines. The alleged fraud includes testimony and/or mischaracterizations of the evidence that the payment of an insurance deductible for the undersigned attorneys' fees was in connection with the Consolidated Cases, that the Association affirmed the fines rendered against him, and that the deed for the Pebble Creek tract subjected Jarmuth's lot to the Declaration. Jarmuth also argues that the Association intentionally withheld evidence during the discovery process that affect the findings in the Final Order. As a result of these alleged acts, Jarmuth requests that the judgment against him in favor of the Association for attorneys' fees and fines be set aside. He also requests that "any provision in the final order which holds that Pebble Creek is subject to the Covenants" be vacated. Jarmuth's Rule 60(b) Motion is completely without.

Jarmuth contends that the following alleged "newly discovered" evidence is proof that the Association committed fraud that warrants this Court's alteration of the Final Order: 1) General ledgers produced by the Association in the above captioned action (Rule 60(b) Motion, Exhibits C, E); 2) Minutes of the Association's meetings made available to Jarmuth for review some of which were produced by Association upon request and that were posted to the Association's website (Rule 60(b) Motion, Exhibits I, K, N, O, P); 3) Association Architectural Review Board (hereinafter "ARB") Reports produced by Association (Rule 60(b) Motion, Exhibits L, M); 4)

Trial exhibits (Rule 60(b) Motion, Exhibits B, D, R, S); 5) Excerpts from the trial transcript (Rule 60(b) Motion, Exhibits G, H, J) 6) Correspondence from Association's insurance agent enclosing the insurance declaration made available to Jarmuth for review (Rule 60(b) Motion, Exhibit A); 7) Association 2010 bank statement made available to Jarmuth for review (Rule 60(b) Motion, Exhibit F). His argument is that the minutes of the Association's ARB and Board meetings do not reflect that the Board moved to approve the fines against him.

None of this evidence is "newly discovered" or evidence of "fraud" as asserted by Jarmuth. Most of these documents were produced by the Association as reflected by the bates range numbers on the Jarmuth's Exhibits and were made exhibits at trial. The other documentation was made available for Jarmuth's review and/or was available on the Association's website. Jarmuth's Exhibits are consistent with the evidence that was presented at the trial of the Consolidated Cases and the findings in the Final Order, and accordingly, the Rule 60(b) Motion should be denied.

FACTS

This case has a tortured procedural history as result of Jarmuth's various pleadings, motions, appeals and other filings in the Consolidated Cases, Civil Action No. 2009-CP-26-3596 (hereinafter "2009 Case") and Civil Action No. 2010-CP-26-11320 (hereinafter "2010 Case"). Jarmuth filed the 2009 Case against the Association, as well as related defendants, on April 7, 2009 asserting generally a declaratory judgment action that the Declaration does not apply to his property, that the Declaration and the Bylaws of the Association are invalid, and to the extent that the Association is a party to the Declaration, that the Association violated the Declaration. Several amendments to the Complaint have been filed, asserting additional causes of action, including but not limited to, defamation, violation of the South Carolina frivolous proceedings act, and

misappropriation. The Association filed a counterclaim seeking attorneys' fees and expenses "associated with the defense of the action"[1] on May 13, 2009.

Upon receipt of the 2009 Complaint, the Association filed a claim with its insurance carrier under its director's and officer's insurance policy, 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 and the other defendants in the 2009 Case. (Exhibit 1, Defendants' Trial Exhibit 62, Check to McNair).

Thereafter, on July 21, 2009, Jarmuth filed an application with the ARB for a swing set. (Exhibit 2, Defendants' Trial Exhibit 58, Swing Set Application). The Association sent a Notice of Disapproved Request for the swing set due to its proposed location. (Exhibit 3, Defendants' Trial Exhibit 59, Disapproval of Application). In response, and while the 2009 Case was pending, Jarmuth 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. At issue in the SCHAC matter was whether the Association properly denied the application in accordance with the Declaration and Bylaws in an evenhanded and non-discriminatory manner. McNair and the undersigned attorneys were hired to defend the SCHAC Complaint. On January 11, 2010, SCHAC determined that there was no reasonable cause for

[1] 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 of such Unit or Units in breach thereof." 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 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 Owner."

Jarmuth's Complaint as set forth in correspondence to the Association. (Exhibit 4, Defendants' Trial Exhibit 63, SCHAC letter).

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 $2,500.00 deductible for the SCHAC matter was paid directly to McNair. (Exhibit 5, Defendants' Trial Exhibit 79, Check to McNair).

On September 27, 2010, Jarmuth was noticed a violation for a curbing/stone addition along his property line, wherein he was assessed a $50.00 fine and was asked to submit a modification request to the ARB for the curb/stone addition. (Exhibit 6, Defendants' Trial Exhibit 83, Violation Notice). Thereafter, Jarmuth submitted a modification request for fence with a brick base on September 30, 2010. (Exhibit 7, Defendants' Trial Exhibit 84, Modification Request). The ARB denied his modification request on October 8, 2010, directed that the improvement be removed, and provided notice that he would be fined $100.00 per month for any continuing violation. (Exhibit 8, Defendants' Trial Exhibit 86, Denial of Modification Request). Jarmuth sent a written reply disputing the authority of the ARB to deny his Modification Request and the validity of any fines and waiving his right to a hearing. (Exhibit 9, Defendants' Trial Exhibit 87, Jarmuth's Objections). The Board of Directors affirmed the decision of the ARB by sending additional letters to Jarmuth on October 14, 2010 and November 15, 2010 indicating that the improvement must be removed and providing notice of fines. (Exhibit 10, Jarmuth's Trial Exhibit 379, 10/14/2010 Letter from the Board; Exhibit 11, Jarmuth's Trial Exhibit 381, 11/15/2010 Letter to Jarmuth). As reflected in the December 10, 2010 ARB meeting minutes, the ARB confirmed that Jarmuth had not removed the improvement on his property line and approved the continued fines for his non-compliance. (Exhibit 12, Defendants' Trial Exhibit 88, 12/7/2010 ARB Minutes).

After Jarmuth was unsuccessful in the proceeding before SCHAC, and on the heels of the denial of his Modification Request for a fence, Jarmuth filed the 2010 Case challenging the Association's authority to enforce the architectural restrictions in the Declaration against his property and the denial of his swing set application on October 12, 2010. The Association filed a counterclaim seeking a declaratory judgment that Jarmuth is subject to the Declaration pursuant to S.C. Code Ann. 15-53-10 *et seq.* and a breach of the Declaration claim seeking damages related to fines incurred, injunctive relief, and attorneys' fees and costs. The breach of the Declaration claim sought fines imposed against Jarmuth for constructing the unapproved addition on his property line.

The Consolidated Cases were tried without a jury before special referee Ralph Stroman from August 8, 2012 through August 12, 2012. At the trial, the Association presented evidence, through Freiboth's direct examination testimony, that it paid two insurance deductibles in the amount of $2,500.00, for a total of $5,000.00, to McNair in connection with its enforcement of the Declaration against Jarmuth. (Exhibit 13, Excerpts of Record on Appeal, Freiboth's Trial Testimony, pp. 2761-2774). The Association's checks to McNair were admitted into evidence as Defendants' Exhibits 62 and 79. (Exhibit 1, and Exhibit 5). The Association also admitted the Swing Set Application, the Disapproval of Application, and the SCHAC letter (Exhibit 2, Exhibit 3, and Exhibit 4) into evidence to rebut Jarmuth's testimony that the Association's denial of the application was improper and as proof of the Association's efforts to enforce the Declaration against Jarmuth.

Freiboth explicitly testified to the following regarding the insurance deductible was paid by the Association to defend the SCHAC Complaint:

> Q: Exhibit 63 is a decision issued by the South Carolina Human Affairs Commission; is that correct?

A: That's correct.
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?
A: That's correct.
Q: And that defense that the Homeowners Association undertook was to enforce the covenants and the guidelines; is that correct?
A: That is correct.
Q: And did the Association have to pay two thousand, five hundred dollars to an attorney to enforce the covenants as a result of this complaint with the South Carolina Human Affairs Commission?
A: Yes, we did.

(Exhibit 13, pp. 2762-2763).

Freiboth also testified about the fines levied against Jarmuth by improving his lot without approval in breach of the Declaration. Freiboth testified as follows:

Q: And what is Exhibit 87?
A: It's a letter from Mr. Jarmuth to the Homeowners Association through our registered agent related to a putative appeal of the October 8, 2010—it's related to the disapproval of the fence.
Q: And in that letter that Mr. Jarmuth sent, did he exercise his right to appeal? What does he say about appealing the decision?
A: He disputes the necessity to make any appeal.
Q: Now, I want you to take a look at Exhibit 88, and what is Exhibit 88?
A: It's the minutes of a ARB meeting.
Q: And did the ARB meeting discuss the denial of the fences request of Mr. Jarmuth?
A: Yes.
Q: Now to your knowledge, did Mr. Jarmuth appeal the denial of the fencing to the Board of Directors?
A: No. I expected him to, but he never did.
Q: And as a result of Mr. Jarmuth not appealing the denial of the fences, was he entitled to any type of hearing by the Board of Directors?
A: We expected, after his denial, that he would want to have a hearing, and in the denial letter, it literally said "That your fence is denied unless you successfully appeal this denial to the Board of Directors." So I was expecting there, there would be an appeal. Did I, did I answer your question?

> **Q: Yes. So because he did not appeal, was there a hearing in front of the Board of Directors?**
> **A: We discussed the fence.**
> **Q: And did the Board of Directors affirm the ruling of the ARB?**
> **A: Yes, we did.**
> Q: Now, as a result of the Board of Directors affirming the disapproval issue by the ARB, was any fines assessed to Mr. Jarmuth?
> A: He would have the—as specified in the Architectural Guidelines, he would have a hundred dollar a month fine, which is separate from his original fine, which was install—starting a project without prior review of the plans.

(Emphasis added) (Exhibit 13, pp. 2766-2768). In addition to the testimony provided regarding the fence, the Association admitted into evidence the Association's Notice of Violation regarding the property line improvement (Exhibit 6), Jarmuth's Modification Request for the fence with brick foundation (Exhibit 7), the ARB's Denial of the Modification Request (Exhibit 8), Jarmuth's Objections to the Denial of the Modification Request and Waiver of a hearing (Exhibit 9), and the ARB minutes approving the continued violation for failure to remove the brick foundation (Exhibit 12). Jarmuth admitted as exhibits the Association Board's notices in October and November 2010 affirming the ARB's decision to fine Jarmuth for his violation. (Exhibit 10 & Exhibit 11).

The Final Order held in favor of the Defendants on all counts and awarded the Association attorneys' fees in the amount of $5,000.00 and the fines levied for the unapproved improvement on his property line in the amount of $2,326.00. (Exhibit 14, Final Order). The Final Order also specifically found that the Association's disapproval of the fence was proper and that he was not entitled to a hearing. In response, Jarmuth filed a complaint with the Office of Disciplinary Counsel alleging that Judge Stroman conducted the trial in an unfair manner. As a result, Judge Stroman had no other choice but to recuse himself from that matter. Post-Trial Motions were filed by Jarmuth on September 19, 2012 challenging various finding in the Final Order, including the

award of attorneys' fees and the judgment against Jarmuth for the fines; however, Jarmuth did not seek sanctions against Freiboth, the Association, or its attorneys in connection with the testimony presented at trial or allege that any fraud was made upon the Court. (Exhibit 15, Post-Trial Motions (excluding exhibits)). The Honorable Steven H. John denied the Post-Trial Motions (Exhibit 16, Order denying Post-Trial Motions), and Jarmuth filed a Notice of Appeal of the Final Order with the South Carolina Court of Appeals on April 3, 2013. (Exhibit 17, Notice of Appeal).

Jarmuth extensively briefed numerous issues in his appellate brief, including the issue of whether this Court erred in awarding attorneys' fees upon the grounds that one of the insurance deductibles was paid in connection with the SCHAC matter and whether this Court erred in awarding the Association a judgment for the fines rendered. He also argued at length that his International Club property is not subject to the Declaration. The South Carolina Court of Appeals denied Jarmuth's appeal and affirmed the Final Order in the Unpublished Opinion No. 2015-UP-111 (hereinafter "Unpublished Opinion"). (Exhibit 18, Unpublished Opinion). Jarmuth filed a petition for reconsideration on March 12, 2015 and Contempt Motions on March 17, 2015 against Freiboth and the undersigned attorneys, whom represent the Respondents in the appeal. The petition for reconsideration sets forth grounds that the Association and its attorneys' acted fraudulently by admitting evidence that the deductibles were paid in connection with enforcing the Declaration. (Exhibit 19, Motion for Reconsideration; Exhibit 20, Reply to Return of Defendants). Jarmuth's petition for reconsideration was denied by the South Carolina Court of Appeals on April 24, 2015. (Exhibit 21, Order Denying Petition for Reconsideration).

On May 12, 2015, Jarmuth filed a Petition for Writ for Certiorari with the South Carolina Supreme Court appealing the Unpublished Opinion. (Exhibit 22, Petition for Writ of Certiorari). Defendants as Respondents filed a Return to the Petition on June 11, 2015. The Supreme Court

denied Jarmuth's Petition for Writ (Exhibit 23, Denial of Petition for Writ); the remittitur was issued on January 21, 2016,. Upon the issuance of the remittitur, Jarmuth filed his Rule 60(b) Motion dated January 22, 2016 and the amended the Rule 60(b) Motion dated February 1, 2016.

STANDARD OF REVIEW

In determining whether to set aside a judgment under Rule 60(b), the trial judge should consider the following relevant factors: 1) the promptness of the relief sought; 2) the reasons for failure to act promptly; 3) the existence of a meritorious defense; and 4) the prejudice to the other parties. McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). The granting of relief under Rule 60(b) is within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Although the trial court has wide latitude in granting relief under Rule 60(b), that discretion is limited by the above factors and the deadlines contained in Rule 60(b), S.C.R.C.P. See McClurg, 380 S.C. at 571, 671 S.E.2d 87; Coleman, 306 S.C. at 494, 413 S.E.2d at 17. "Furthermore,...when considering whether to grant relief from final judgments, a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute." Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 20, 594 S.E.2d 478 (2004), citing Chewning v. Ford Motor Co., 345 S.C. 72, 579 S.E.2d 605 (2003). South Carolina courts have "recognized a longstanding policy towards final judgments" and that "important benefits are achieved by the preservation of final judgments". Id.

ARGUMENT

I. The Rule 60(b), S.C.R.C.P., Motion is Untimely.

Jarmuth's Rule 60(b) Motion was filed more than a year from the entry of the Final Order, and therefore, his motion is untimely and must be denied.

A Rule 60(b)(2) motion "shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." Southeastern Hous.

Found. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008), citing S.C.R.C.P., Rule 60(b)(2). Although Rule 60(b)(1) through (3) states that a motion seeking relief from a judgment must be made within a reasonable period of time, the one year deadline is non-discretionary and acts as an absolute bar to any Rule 60(b) motion filed after that date. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). The trial court has the sound discretion to determine what time period is "reasonable" under Rule 60(b) within one year of the entry of any judgment, however, no relief may be granted after the one year deadline to file a motion has run. Id. The one year deadline is tolled during the pendency of a Rule 59 motion, because the judgment is not "final" due to the court's reconsideration of the judgment, and it begins to run from the entry order denying the Rule 59 motion. Southeastern Hous. Found. Smith, 380 S.C. 621, 641, 670 S.E.2d 680 (Ct. App. 2008). Unlike the tolling period under Rule 59, the deadline is not tolled during the pendency of any appeal. Id.

Jarmuth's Rule 59 motion was ruled upon on April 3, 2013, thereby making the Rule 60(b) Motion due on or before April 3, 2014. Although the appeal was pending and the trial court did not have subject matter jurisdiction to hear the Rule 60(b) motion, the proper procedural vehicle for raising any Rule 60(b) motion during the pendency of an appeal is to seek leave from the court of appeals to pursue the motion at the trial court level. Southeastern Hous. Found. Smith, 380 S.C. 621, 641, 670 S.E.2d 680 (Ct. App. 2008), citing S.C.R.C.P., Rule 60(b). Jarmuth did not move for Rule 60(b) relief or seek leave from the court of appeals within the one year deadline, and therefore, his motion for relief from the judgment is barred.

As a result, Jarmuth's Rule 60(b) Motion must be denied based upon the expiration of the deadline to file the motion on April 3, 2014.

II. No Newly Discovered Evidence Warrants An Alteration to the Final Order.

According to Jarmuth, the general ledgers and the minutes of the Association were not provided to him until March and June 2015. None of this evidence is "newly discovered" under Rule 60(b)(2), and therefore, Jarmuth's motion for relief from the judgment must be denied.

"A trial court may relieve a party from a final judgment, order, or proceeding if 'newly discovered evidence which by due diligence could not have been discovered in time to move from a new trial under Rule 59(b)' is presented to the trial court." Southeastern Hous. Found. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008), citing S.C.R.C.P., Rule 60(b)(2). Evidence is "newly discovered" if it was not known to the party or in his possession at the time of the trial. Lanier v. Lanier, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005). To receive a new trial based on newly discovered evidence, the moving party must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. Id.

First, the evidence is not "newly discovered" under Rule 60(b)(2), SCRCP. Most of the Association's records attached to Jarmuth's Rule 60(b) Motion are bates numbered or were admitted as exhibits at the trial of the Consolidated Cases, evidencing that the records were in his possession at the time of 2012 trial of this case. Furthermore, the other Association's records were made available to Jarmuth for review during the discovery process and were posted on the Association's website before the date of trial. (See Exhibit 13, pp. 2865-2866; Rule 60(b) Motion, pp. 3-4). Jarmuth has failed to produce any evidence that the documents were discovered since the date of trial.

To the extent that any of these documents were not in Jarmuth's possession on the date of trial, which is specifically denied, Jarmuth would have discovered this to be the case with "due

diligence". Jarmuth filed motions to compel dated April 30, 2009, August 25, 2009, which were denied by orders dated July 13, 2009 and October 11, 2011, however he never asserted that the documents attached to his Rule 60(b) Motion were not produced. To the extent that any documents were not produced or made available for review during the discovery process, those arguments have now been waived and are not grounds for altering the Final Order.

Furthermore, the documents submitted would not change the result if a new trial was granted, are merely cumulative or duplicative of other evidence presented at trial, and are not material to the issues decided by the trial court. The Association presented evidence to support the judgment against Jarmuth for attorneys' fees and costs and to support the findings in the Final Order that his International Club property is subject to the Declaration. These issues were presented to the South Carolina Court of Appeals and the Supreme Court of South Carolina in Jarmuth's numerous filings with those courts, and Jarmuth's arguments were rejected. Likewise, the alleged "new" records (those not bates numbered or marked as exhibits at trial) include Association minutes and correspondence from the Association's insurance agent, which present absolutely no evidence that is material to the findings in the Final Order.

Because Jarmuth failed to present "new" evidence in the Rule 60(b) Motion that has any bearing on the findings in the Final Order, his request for Rule 60(b) relief must be denied.

III. No Fraud Exists to Justify the Disturbance of the Final Order.

No evidence of extrinsic fraud is present in the Consolidated Cases that justifies the reversal of the Final Order.

In order to obtain equitable relief from a judgment based on fraud, the fraud must be extrinsic. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 19, 594 S.E.2d 478 (2004). "Generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determined in the action in which the judgment was rendered;

intrinsic fraud is not sufficient for equitable relief." Id., citing Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951). Extrinsic fraud is fraud that induces a person not to present a case or deprives a person the opportunity to be heard. Raby Constr., L.L.P. 358 S.C. at 19; 594 S.E.2d 478. On the other hand, intrinsic fraud misleads the court in determining issues and induces the court to find for the party perpetrating the fraud. Id. The classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial. Id. Allegations that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic, fraud. Chewning v. Ford Motor Co., 345 S.C. 72, 579 S.E.2d 605 (2003).

The records attached to the Rule 60(b) Motion do not evidence extrinsic fraud and are not grounds for altering the Final Order under Rule 60(b)(3), SCRCP. The documents that are not bates numbered and/or were not made as exhibits at the trial of this case include correspondence from the Association's insurance agent and minutes of the Association's meetings. These documents do not evidence that the Defendants "deprive[ed]" Jarmuth "the opportunity to be heard". Jarmuth was given a full and fair opportunity to present arguments in opposition to the judgment for attorneys' fees and fines and the findings regarding his property being subject to the Declaration, and made those arguments at length and repeatedly, at every stage of the litigation.[2]

Due to the complete absence of evidence of fraud in the Consolidated Cases, Jarmuth's Rule 60(b)(3) Motion should be denied.

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[2] The alleged fraud raised by Jarmuth is intrinsic in nature and does not give rise to Rule 60(b) relief. Jarmuth alleges that Freiboth committed "perjury" and failed to produce documents. He further alleges that the undersigned attorneys mischaracterized evidence presented. Additionally, he asserts that the Association failed to produce documents in this case. Although none of these allegations are true, the allegations amount to intrinsic fraud, which is not grounds for an alternation of a final order under South Carolina law. See Raby Constr., L.L.P. 358 S.C. at 19; 594 S.E.2d 478; Chewning, 345 S.C. 72, 579 S.E.2d 605.

IV. No Meritorious Defense Exists.

No meritorious defenses have been raised by the Rule 60(b) Motion that support an alteration to the Final Order.

Our courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1) through (3), the movant must make a proper showing he is entitled to the relief based upon one of the specified grounds and make a prima facie showing of a meritorious defense. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991) (affirming the denial of a motion to set aside a portion of an order pursuant to Rule 60(b)(3) based solely on the movant's failure to present a meritorious defense). A meritorious defense raises some question of law deserving some investigation or a real controversy as to real facts arising from conflicting or doubtful evidence. Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989).

Despite Jarmuth's arguments that no evidence exists that the Association rendered fines, the Association admitted several letters and corporate documents through Freiboth's testimony showing that the fines were assessed against him. Evidence was also admitted that the fines were rendered consistent with fine policy contained in the ARB Guidelines adopted by the Association's Board. The ARB minutes submitted to the Court (without affidavits in support) do not negate the fact that the fines were rendered. Although Jarmuth asserts that no motion was made at an ARB meeting to assess fines, the ARB minutes reflect that the fines "will continue until the unapproved modification is brought into compliance". (Exhibit 12).

Additionally, the award of $5,000 for deductibles for attorneys' fees to the Association was proper. Under the Declaration, as the prevailing party, the Association is entitled to attorneys' fees incurred in connection with this matter. At trial, testimony was presented that the deductibles were paid in connection with enforcing the Declaration against Jarmuth in the Consolidated Cases and the SCHAC matter. (Exhibit 13, pp. 2762-2763). Jarmuth appealed the judgment for

attorneys' fees based upon the grounds that the deductible was paid in connection with the SCHAC matter, and the Court of Appeals affirmed. No meritorious defense is presented by the evidence and arguments asserted in the Rule 60(b) Motion that justifies the alteration of this finding in the Final Order.

Lastly, Jarmuth argues that the undersigned attorneys mischaracterized the contents of Trial Exhibits 544 and 545. On cross examination, the undersigned counsel asked Jarmuth to admit that the deed from Plantation A.D., LLC to Sunbelt Associates, LLC, the developer of Jarmuth's International Club property in the subdivision Pebble Creek, subjected the Pebble Creek tract to the Declaration. The property description attached to Exhibit 545 sets forth that it is subject to the Declaration. Jarmuth argued ad nauseam on appeal that his property was not subject to the Declaration in reliance of Trial Exhibits 544 and 545, and the Court of Appeals affirmed the Final Order. Accordingly, Jarmuth fails to raise any meritorious defense that his property is not subject to the Declaration in arguing that Exhibits 554 and 545 were mischaracterized by the undersigned counsel.

Because the evidence presented does not support any meritorious defenses, the Rule 60(b) Motion should be denied.

CONCLUSION

The Defendants respectfully request that Jarmuth's Rule 60(b) Motion be denied without a hearing for the foregoing reasons.

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March 3, 2016

STATE OF SOUTH CAROLINA COUNTY OF HORRY Ronald Jarmuth Plaintiff vs. The International Club Homeowners Association, Inc., Et Al Defendants	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT Civil Action No. 2009-CP-26-3596 PLAINTIFF'S RULE 12(b)(1) / RULE 60 MOTION TO DISMISS COUNTER CLAIM FOR LACK OF SUBJECT MATTER JURISDICTION

1. Plaintiff Ronald Jarmuth, Pro Se, MOVES this Court to DISMISS the Defendant International Club Homeowners Association ("IHOA") Counter-Claim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and Rule 60, SCRCivP.

2. On October 24, 2011 Defendant filed a Counter – Claim through it's Amended Answer (Exhibit A) which implied but did not sufficiently plead

a. That an enforceable contract existed between the parties in the form of a covenant running with Plaintiff's property;

b. That the IHOA Counter – Plaintiff Board of Directors did in fact determine that Plaintiff had violated the usage restrictions in the covenant, and that the IHOA Counter – Plaintiff had satisfied all the procedural requirements of its Bylaws in doing so;

c. That the IHOA Counter – Plaintiff Board of Directors did in fact impose a fine upon Plaintiff, and that the IHOA Counter – Plaintiff had satisfied all the procedural requirements of its Bylaws in doing so;

d. That Jarmuth, the Counter – Defendant (Plaintiff), owed a certain sum on his account due to the imposition of said fines by the IHOA Counter – Plaintiff.

BACKGROUND FACTS

3. Defense of Lack of Subject Matter Jurisdiction over the Counter – Claim was never raised before.

a. At trial the lack of subject matter jurisdiction was never raised.

b. It was never raised prior to this date in any post-trial motion.

c. It was never on appeal.

4. The violation of alleged Usage Restrictions raised in the Counter – Complaint has long ago been mitigated.

THE COUNTER CLAIM

5. The Counter Claim is stated in the IHOA's "Second Counter Claim" paragraphs 49 through 75 (Exhibit A).

a. The Counter – Claim did not assert facts relating to the existence of a contract between the parties. The only assertion is at Paragraph 54 which reads:

> "54. As the owner of the Property, the Plaintiff is subject to the Governing Documents."

The Counter – Claim does not allege any facts needed to establish that the Governing Documents are in the form of a covenant, that (and how) the covenants are properly invoked by Plaintiff's deed, that the contractual relationship between the parties satisfies the Statute of Frauds, that the Covenant is properly recorded, that (and how) the declarant of the covenants had privity to impose the covenants or that Plaintiff consented to the covenants. The pleading failed to state with peculiarity – or even at all – the dates of the execution deed of Plaintiff's vertical predecessor (or any date at all) and the date of the recording of the Covenants (or any date at all). Without such a allegations there is no subject matter jurisdiction because the existence of the underlying covenant pursuant to which the IHOA Counter – Plaintiff is proceeding has not been properly plead – if at all.

b. The Counter – Claim did not allege that predicate procedural requirements had been satisfied which preclude filing suit if not satisfied.

The Bylaws of the IHOA Defendant provide a procedural predicate which must be satisfied before a Covenant Use Restriction Violation "ripens" and before a fine for violating a use restriction becomes "ripe" for collection. This procedural predicate acts in the same manner of state and municipal rules and statutes which impose administrative procedures which must be followed before a claim can be adjudicated in court. They are as effective at barring a court from hearing a claim as a provision which requires arbitration, or a provision which requires prior notice to the attorney general of a pending suit against the state or predicates to malpractice suits. The predicate procedural provision in the Bylaws is:

> 13.2 Authority and Enforcement.
> 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:
>
> 13.3.1 Written demand to cease and desist from an alleged violation shall be served upon the Owner responsible for such violation specifying:
> 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 of the same provision of the Declaration, ... may result in the imposition of sanctions after notice and hearing.
>
> 13.3.2 ... if the violation continues past the period allowed ... 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
> 13.3.2.4 The proposed sanction to be imposed.
>
> 13.3.3 The hearing shall be held ... 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 ... The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction imposed, if any.

While the Counter claim contains a skeletal allegation that it satisfied Bylaws Section

13.3.1, it did not allege compliance with the rest of the predicate procedure.

> 65. The Architectural Review Board also demanded that the brick wall be removed .... or he would be subject to monthly fines ... "

Paragraph 65 alleges only the possibility of fines and does not allege that the IHOA's Board actually imposed such a fine. Both paragraph 65 of the Counter – Claim and Section 13.3.1.3 of the predicate Bylaws provide only the possibility of a fine.

The Counter – Claim alleges that the violation continued, paragraph 68

> "68. The brick wall is a continuing violation of the Governing Documents and the Defendant HOA's Architectural Guidelines, and the Plaintiff has been fined accordingly."

but it never alleges that any of the predicate requirements after the initial notice had been satisfied. The Counter – Complaint is silent about what Bylaws Sections 13.3.2.2 and 13.3.2.3 require, specifically, that a written notice of hearing had been sent, that a hearing had been held, and that the IHOA Board had voted "on the record in the minutes" that a violation had actually occurred (and not been mitigated) and that a specific fine had actually been imposed. The date of such hearing is important because it tolls the computation of when a fine would begin to run and hence the amount. Lacking such affirmative pleading the Court lacks subject matter jurisdiction. Absent pleading compliance with the predicate procedures of the Bylaws, the IHOA Counter –Plaintiff is precluded by its own Bylaws from filing a claim to mitigate damages, to collect fines, and for consequential attorney fees, and the Court lacks subject matter jurisdiction through lack of a well plead complaint.

c. The Counter – Claim did not adequately plead sufficient facts to support its allegation of the amount on the account of Plaintiff; it does not satisfy the pleading requirement of SCRCP Rule 9(i). The Counter – Claim states only that

> "72. As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two ... Dollars plus the costs of collection."

The Answer (and Counter – Claim) is not verified. There is no "copy of the account (attached)

to the pleading" verified or not.

6. The Counter – Claim does not satisfy the "well plead" complaint provision of the SCRCP and thus the Court lacks subject matter jurisdiction over the Counter – Claim.

APPLICABLE LAW

7. Civil Rules.

a. 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 ...

b. SCRCP Rule 9(i) Pleading Special Matters – Verification of Account – provides that

> 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

c. SCRCP Rule 12(b)(1) Defenses and Objections – Subject Matter Jurisdiction – provides that

> the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter,

Subsection (h)(1), Waiver or Preservation of Certain Defenses, does not include "lack of jurisdiction over the subject matter" among the defenses which must be plead in the Answer or even at trial. There is no time limit on pleading this defense. Subsection (h)(3) goes on to state that

> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

8. Case Law.

a. Verification and itemization of account.

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 SCRCP Rule 12(b) Motion to Dismiss for

Lack of Subject Matter Jurisdiction. The Court stated what elements must be present to qualification 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. The verification in the present case states:
>
> PERSONALLY APPEARED before me, Lamar W. Dawkins, who being duly sworn, deposes and says: that he is one of the Plaintiffs, in the foregoing action, that he has read the within Complaint, and that the facts are true of his own knowledge, except those matters and things therein alleged upon information and belief, and as to those, he believes them to be true.

In Dawkins v Fields, 580 S.E.2d 433, 354 S.C, the SC. Supreme Court agreed with the above determination of the SC Court of Appeals. The Supreme Court noted that the issue was "novel" when reviewed by the Court of Appeals. 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.

b. Lack of Specificity in Pleading precludes subject matter jurisdiction.

(1) Subject Matter Jurisdiction is achieved solely through the actual textual allegations of the Counter – Claim.

> 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 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.

Prior Judgements are void if it is later determined that the trial court lacked subject matter jurisdiction.

> The jurisdiction of a court over the subject matter of a proceeding is fundamental. Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." Id. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal in this Court. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972). Furthermore, "[t]he acts of a court with respect to a matter as to which it has no jurisdiction are void." Funderburk, 259 S.C. at 261, 191 S.E.2d at 522.

Subsequent pleadings, testimony, or evidence presented at trial do not expand a court's subject matter jurisdiction; subject matter jurisdiction is determined solely by what is explicitly stated in the counter-claim.

> "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)

There is no time limit on when a Motion to Vacate based on lack of subject matter jurisdiction can be raised. The subject matter jurisdiction exception is a corollary to the even more basic rule that a judgment rendered by a court without subject matter jurisdiction is void and can be attacked at any time, either directly or collaterally.

> In re Marriage of Morton, 11 Kan App 2d 473 474, 726 P.2d 297, 298 "judgment is void if court lacked subject matter jurisdiction; motion to set aside void judgment may be made at any time; Fredman Bros Furniture Co v Department of Revenue, 109 Ill 2d 202, 215, 486 N.E. 2d 893 898 (lack of subject matter jurisdiction can be raised at any time, in any court, either directly or collaterally; 7 J Moore & J Lucas Moore's Federal Practice 60.25 2d ed Jurisdiction over subject matter

This motion is a "Direct Attack", not a collateral one, as it is filed within the case itself and between the case parties.

> Direct attack is defined as an attack within the framework of the original case, either in the trial court, or on appeal, and either pre or post judgment. ... A motion made under Rule 60(b) is a direct attack because it is filed in the same proceeding. 7 J Moore & J Lucas Moore's Federal Practice 60.25(2) 2d ed 1985.

8. Limitations of Actions precludes re-litigating the Counter – Claim.

a. The alleged covenant usage violation ceased on September 10, 2012 when the trial court entered it's order.

b. Actions to enforce a covenant are actions upon a contract, and are governed by SC Code 15-3-530, which reads

"Three years. Within three years: (1) an action upon a contract ..."

c. The three year period expired September 10, 2015 (last year).

Conclusion

9. It is concluded that:

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

b. The judgment in favor of the IHOA as to its Counter – Complaint is void and should be vacated and dismissed;

c. The dismissal of the counter – claim should be "with prejudice" because of the expiration of the applicable limitations of actions.

10. WHEREFORE the Court is asked to enter an order

Vacating and dismissing the IHOA Defendant's Counter – Claim with prejudice.

Ronald Jarmuth, Plaintiff Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
March 11, 2016

SEVENTEENTH DEFENSE
AND SECOND COUNTERCLAIM

49. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth Defenses are incorporated herein and made a part and parcel hereof.

50. The Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina.

51. Upon information and belief, the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina.

52. Upon information and belief, the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property").

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.

54. As the owner of the Property, the Plaintiff is subject to the Governing Documents.

55. The provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision.

56. Section 7.2 of the Declaration provides:

> "Prior Review of All Plans. No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement...shall be commenced, erected, or maintained upon any portion of the Subdivision, nor shall any exterior addition or change be made until the plans and specifications...showing the grading, filling nature, kind, size, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to the harmony of the exterior design and location in relation to the surrounding structures and topography by the Developer...Provided however, that upon Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association."

A

57. The Architectural Review Board for the Defendant HOA holds the architectural review rights pursuant to the Governing Documents. All Owners within the International Club apply to the Architectural Review Board for approval of plans and specifications for improvements constructed within the International Club.

58. The Defendant HOA enacted Architectural Guidelines in 2005 and has amended them from time to time.

59. Upon information and belief, the Plaintiff applied to the Architectural Review Board for approval of improvements on several occasions, and the Plaintiff's plans and specifications were approved.

60. Upon information and belief, the Plaintiff constructed a brick wall on the Property without obtaining the approval of the Defendant HOA or the Architectural Review Board.

61. The Defendant HOA, through its Architectural Review Board, sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.

62. Thereafter, the Plaintiff applied to the Architectural Review Board for approval of the brick wall and a fence, as well as a flower bed and edging.

63. Pursuant to Section 7.4 of the Declaration:

> "Fences. No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board in their sole discretion may require...No fences shall be permitted which obstruct the view of any stream or other body of water, golf courses or recreational amenity when viewed from inside any other Unit, or which interfere with the playing of golf on any nearby golf course or with the use of any Recreational Amenity."

64. The Architectural Review Board approved the Plaintiff's request for the flower bed and edging and denied the Plaintiff's request to construct the fence and wall, because the proposed construction violated the Governing Documents and the Architectural Guidelines and did not comply with the general scheme of development for the International Club.

65. The Architectural Review Board also demanded that the brick wall be removed from the Property within fifteen (15) days or he would be subject to monthly fines in the amount of One Hundred and 00/100 ($100.00) Dollars.

66. Upon information and belief, the Plaintiff paid a fine for constructing the brick wall in the amount of Fifty and 00/100 ($50.00) Dollars imposed by the Defendant HOA under protest several weeks later and threatened to sue the Defendant HOA.

67. Although the Plaintiff's application for the fence and the brick wall were denied and the Defendant HOA directed the Plaintiff to remove the brick wall, the Plaintiff failed and refused to remove the brick wall constructed.

68. The brick wall is a continuing violation of the Governing Documents and the Defendant HOA's Architectural Guidelines, and the Plaintiff has been fined accordingly.

69. Moreover, the Plaintiff has failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same.

70. Pursuant to the provisions of the Governing Documents, Plaintiff is responsible for paying assessments, fines, late fees, interest and other related charges to the Defendant HOA.

71. Provisions of 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, including reasonable attorney's fees, that are incurred by the Defendant HOA.

72. The Plaintiff, as owner of the Property, was and is assessed regular assessments, fines, late fees, interest and other related charges. As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 ($1,132.00) Dollars plus the costs of collections for his continuing violation of the brick wall, which the Plaintiff has not paid despite due demand being made upon him to pay said assessments and fines.

73. The Plaintiff, as current owner of the Property, continues to incur fines, fees and additional related charges throughout the pendency of this case during his continued ownership of the Property.

74. As a direct and proximate result of the Defendant HOA pursuing collection of these fees and costs, Defendant HOA has and will continue to incur attorney's fees and costs.

75. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, and therefore, the Defendant HOA is entitled to a judgment in an amount to be determined by this Court, together with costs and attorney's fees incurred in bringing this action as well as an order requiring the Plaintiff to comply with the Governing Documents and the Architectural Guidelines and to remove the brick wall from the Property.

WHEREFORE, having answered the Plaintiff's Complaint and the First Amendment to the Complaint, the Defendants hereby pray as follows:

a. the Plaintiffs' Complaint and First Amendment to the Complaint be dismissed with prejudice;

b. judgment against the Plaintiff in an amount to be determined by the Court;

c. an order requiring Plaintiff to comply with the Defendant HOA's Governing Documents and Architectural Guidelines and to remove the brick wall from the Property in violation of the Governing Documents and Architectural Guidelines;

d. this Court award reasonable attorney's fees and costs to the Defendant HOA; and

e. for such other and further relief as this Court deems just and proper.

McNair Law Firm, P.A.

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Myrtle Beach, South Carolina
October 24, 2011

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