**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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

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

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

**v.**

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

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**APPENDIX VOLUME 2**

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S.C. SUPREME COURT

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| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth,<br>Plaintiff,<br>vs.<br>The International Club Homeowners Association, Inc.,<br>Rosemary Toth,<br>And K.A. Diehl & Associates,<br>Defendants. | **DEFENDANT INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM** |
| STATE OF SOUTH CAROLINA<br>IN THE COURT OF COMMON PLEAS<br>COUNTY OF HORRY | FIFTEENTH JUDICIAL CIRCUIT<br>CASE NO.: 2010-CP-26-11320 |
| Ronald Jarmuth,<br>Plaintiff,<br>vs.<br>The International Club Homeowners Association, Inc.<br>Defendant. | |

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HORRY COUNTY
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MELANIE HUGGINS-WARD
CLERK OF COURT

Defendant, The International Club Homeowners Association, Inc. (hereinafter "Association"), by and through its undersigned counsel, submits this Memorandum in Opposition to Plaintiff's Motion to Dismiss Counterclaim for Lack of Subject Matter Jurisdiction pursuant to Rules 12(b)(1) and 60 dated April 11, 2016 and filed March 11, 2016 (hereinafter referred to as "Motion to Dismiss") by the *pro se* Plaintiff, Ronald Jarmuth (hereinafter "Jarmuth").

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## INTRODUCTION

The Motion to Dismiss seeks the dismissal of Association's breach of the Declaration claim filed on October 24, 2011 (hereinafter "Counterclaim") in Civil Action No. 2010-CP-26-11320 (hereinafter "2010 Case"). Jarmuth asserts that this Court did not have subject matter jurisdiction to enter into the 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"). Although Jarmuth, the Association and the individuals Jarmuth sued agreed to refer the above captioned actions (hereinafter "Consolidated Cases") to a Special Referee for trial by a consent order (hereinafter "Order of Reference"), Jarmuth now argues that the Association failed to sufficiently plead a cause of action under Rule 8 that provided the Special Referee with jurisdiction to try the Counterclaim. As a result, Jarmuth argues that the Final Order in the Consolidated Cases awarding the Association attorneys' fees, costs, and fines is void pursuant to Rule 60(b), S.C.R.C.P. Because the unappealed Order of Reference conferred jurisdiction on the Special Referee to enter the Final Order, and the Final Order affirmed, on appeal, specifically found that the Special Referee had jurisdiction, Jarmuth's Motion to Dismiss is without merit and should be denied without a hearing.

## PROCEDURAL HISTORY

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 its Amended Answer and Counterclaim 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 permitted by the Declaration.[1] The Counterclaim sought fines imposed against Jarmuth for constructing an unapproved addition on his property line.

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.
- " . . . this Court has jurisdiction over [Jarmuth's Lot 12 of Pebble Creek at the International Club] 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

Jarmuth admitted paragraph 53 establishing that this Court has jurisdiction over the Counterclaim. Exhibit A, Jarmuth's Reply to Amended Answer and Counterclaim.

The Consent Order referring this matter to Ralph Stroman as Special Referee (Exhibit B, Order of Reference) 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.

The Consolidated Cases were tried in 2012 by the Special Referee, who entered into a Final Order awarding the Association attorneys' fees, costs, and fines. The Final Order found "[t]he

[1] The Association also filed a counterclaim for attorneys' fees and costs in enforcing the Declaration against Jarmuth in Civil Action No. 2009-CP-3596, however, he does not contend that the Special Referee did not have subject matter jurisdiction over that counterclaim.

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". The Special Referee recused himself from hearing the Post-Trial Motions as a result of the Plaintiff's accusations that he was biased. As a result, the Consolidated Cases came before the Circuit Court pursuant to an Order dated and filed October 12, 2012. Exhibit C, Order of Recusal. Jarmuth appealed the Final Order which was affirmed on appeal in 2015. The remittitur was issued on January 21, 2016. As admitted by Jarmuth in his Motion to Dismiss, lack of subject matter jurisdiction has not been previously raised.

**STANDARD OF REVIEW**

"[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). South Carolina courts have "recognized a longstanding policy towards final judgments" and that "important benefits are achieved by the preservation of final judgments". Id. The movant must also seek relief "within a reasonable time". S.C.R.C.P., Rule 60(b). 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).[2] Although the trial court has wide latitude in granting relief under Rule 60(b), that discretion is

[2] Jarmuth has waited almost 4 years to bring his Rule 60(b) motions, an unreasonable amount of time under the circumstances. These motions are being made to further delay the finality of the Final Order and to avoid collection efforts on the part of the Association for its attorneys' fees, costs, and fines. To allow Jarmuth to raise these issues after the Association has spent 7 years litigating the case, would severely prejudice the Association.

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. 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). "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, 404 S.C. at 10.

## ARGUMENT

### I. Law of the Case

Both the Final Order and the Order of Reference, holding that the Special Referee had jurisdiction to render final judgment with respect to the Counterclaim, is the law of the case and cannot be disturbed.

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., 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). "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).

Because the findings in the Final Order were affirmed on appeal, they became the law of the case once the remittitur was issued. The Order of Reference finding that the Special Referee has jurisdiction is also the law of the case, because it was not appealed. Accordingly, Jarmuth cannot raise lack of subject matter jurisdiction as grounds to void the Final Order due to the law of the case doctrine.

II. Order of Reference

The Final Order is not void for lack of subject matter jurisdiction, because the Order of Reference confers jurisdiction on the Special Referee to enter the Final Order.

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. "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. Issues involving subject matter jurisdiction may be raised at any time, including on appeal. Id.

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.

Similar to the order in Normandy Corp., the Order of Reference signed by Jarmuth referred the "above entitled actions" in their entirety to the Special Referee. 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 Counterclaim 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

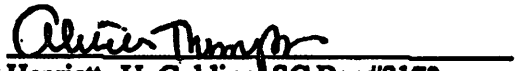
any limitations, he had authority to enter the Final Order awarding the Association fines, attorneys' fees and costs.

As a result, the Final Order is not void for lack of subject matter jurisdiction.

**CONCLUSION**

The Association respectfully requests that Jarmuth's Rule 60(b)(4) Motion be denied without a hearing for the foregoing reasons.

McNair Law Firm, P.A.



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April 1, 2016

**HOA MEMO**

**EXHIBIT "A"**

**JUNE 13, 2012 CONSENT ORDER OF REFERENCE**

**SEE R-O-A EXHIBIT #9 P.13**

**HOA MEMO**

**EXHIBIT "B"**

**DECEMBER 20, 2011**
**PLAINTIFF'S ANSWER TO**
**AMENDED COUNTER - CLAIM**

**SEE R-O-A EXHIBIT #39 P.248**

# HOA MEMO

## EXHIBIT "C"

## OCTOBER 17, 2012

## SPECIAL REFEREE'S ORDER OF RECUSAL

SEE R-O-A EXHIBIT #11 P.67

## MISSING FROM COUNTER CLAIM

**"Well Plead Complaint" - With everything taken as true is there sufficient facts plead to grant the relief sought?**

**Player v Chandler as to Covenants**

**Statute of Frauds as to Contracts**

| | Examples |
|---|---|
| **FORMATION OF CONTRACT** | |
| * Nothing on formation of contract | "On January 29, 1999 Plantation AD sold Pebble Creek (where Plaintiff's house is located) to Sunbelt Development. The deed of sale included a provision that "the property is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation"." |
| * Nothing as to recording of covenants | "Covenants were filed with the Horry County Recorder of Deeds on February 8, 1999 in Book 2117 at Page 1353" |
| * Nothing that the IHOA is a party to the Covenants | "The IHOA was named in the Covenants as 'The Association' with the authority to enforce the Covenants" |
| * Nothing as to proper reference to covenants in deed | "The deed states that "the Declaration (was) recorded in Deed Book 2117 at Page 1354 of the Real Property Records of Horry County"" |

**NO SUBJECT MATTER JURISDICTION EXHIBIT 1A Page 1**

| BYLAWS PRECLUSIVE PROVISIONS | |
|---|---|
| * No Noting to show Satisfaction of Preclusive Provisions of IHOA Bylaw Section 13.3 (Enforcement) and IHOA Board decision May 5, 2010 relating to Covenant Violation Allegations "The final notice will be a hearing scheduled". | |
| No Notice Requirement of Bylaws 13.3.2 | "As required by IHOA Bylaws 13.3.2, on October 10, 2010 the IHOA mailed Jarmuth an invitation to attend a hearing of the Board to be held November 10, 2010 relating to an alleged violation of the Covenants and the potential imposition of a fine. " |
| No Hearing Requirement of Bylaws 13.3.3 | "As required by IHOA Bylaws 13.3.3, on November 10, 2010 the IHOA held a hearing relating to the alleged violations. At the hearing Jarmuth failed to appear despite the notice. The IHOA Board determined that Jarmuth had violated the Covenant's restriction on walls and imposed a fine of $100 a month until the wall is removed. The hearing and determination are recorded in the minutes of the IHOA Board meeting dated November 10, 2010." |
| No Notice of IHOA Board Decision | "On November 15, 2010 the IHOA Board sent a letter to Jarmuth informing Jarmuth of the outcome of the |

| AFFIRMATION OF AMOUNT | |
|---|---|
| No affirmation satisfying SCRCP Rule 9i / 56e Verification of Amount Demanded or Verified Copy of Account [No affirmation or Verification at all] | "Personally appeared before me William Freiboth who being duly sworn, deposed 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 PERSONAL KNOWLEDGE, and that he is competent to testify to the matters stated therein" |

**NO SUBJECT MATTER JURISDICTION EXHIBIT 1A Page 2**

| October 24 2011 Counter Claim | | | |
|---|---|---|---|
| Claim para | Claims Plead | Order para | Conclusions of Law |
| 33 | Jarmuth violated Governing Documents and ARB Guidelines by building a brick wall | | |
| | {no claim} | C10(1) | *ARB* is not part of the IHOA (established by covenants, not bylaws). *{ARB not a party to the lawsuit!}* |
| | {no claim} | C10(2) | *IHOA committees* have no decision making authority |
| | {no claim} | C11 | ARB Guidelines are valid |
| | | | |
| 44 | Jarmuth owes $1132 as of August 26, 2011 | C24(2) | Jarmuth owes $2326 in fines ARB assessed |
| | | | |
| 47c | Wall must be removed | C25 | Jarmuth must remove the brick foundation |
| | | | |
| 47d | Attorney fees | C24(1) | IHOA entitled to $5000 attorney fees for *defending* "enforceability of the Declaration" ("issues raised were numerous") |
| | | C24 | Jarmuth owes IHOA $7326 |

## NO SUBJECT MATTER JURISDICTION - EXHIBIT 1B

## Counter - Claim Facts Alleged Relating to Contract

| Counter Claim Para | Facts Alleged |
|---|---|
| 26 | Jarmuth's lot is subject to Governing Documents |
| 27 | IHOA is a party to the "Governing Documents" |
| 28 | Section 7.2 of "Declaration" |
| 29 | ARB acts for the IHOA |
| 30 | HOA set ARB Guidelines |
| 32 | Jarmuth built a brick wall |
| 33 | Letter from ARB saying Jarmuth violated "Governing Documents" |
| 35 | Section 7.4 of "Declaration" |
| 36 | ARB disapproved a wall / fence |
| 37 | ARB demand to remove wall w threat of fine |
| 42 | Per "Governing Documents" Jarmuth is subject to fines and assessments in general |
| 43 | "Governing Documents" authorize demand for attorneys fees |
| 44 | Jarmuth owes $1132 as of August 26, 2011 |
| 46 | IHOA incurred legal costs as a result of violation |
| 47 | Jarmuth breached "Governing Documents" |

## NO SUBJECT MATTER JURISDICTION EXHIBIT 1C

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth,<br><br>Plaintiff,<br><br>vs.<br><br>The International Club Homeowners Association, Inc.,<br>Rosemary Toth,<br>and K.A. Diehl & Associates,<br><br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **DEFENDANTS' THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.'S AND ROSEMARY TOTH'S AMENDED ANSWER TO COMPLAINT AND FIRST AMENDMENT TO COMPLAINT AND COUNTERCLAIM** |

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The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth, answering the Complaint and the First Amendment to the Complaint would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation contained in the Complaint and the First Amendment to the Complaint not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations contained in Paragraph 1 of the Complaint are admitted except that Plaintiff's International Club property is subject, without qualification, to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (later amended to the Declaration of Covenants and Restrictions for International Club) (hereinafter "Declaration") filed in the Horry County Register of Deeds Office, Deed Book 2117, Page 1353 on February 8, 1999 and the Defendant HOA's Bylaws, as amended (collectively hereinafter referred to as "Governing Documents").

3. The allegations contained in Paragraphs 2, 3 and 4 of the Complaint are denied as stated, but it is admitted that the Defendant, The International Club Homeowners Association, Inc. (hereinafter referred to as "Defendant HOA") is non-profit corporation, organized under the laws of the State of South Carolina, the Defendant, Rosemary Toth was the elected President of the Defendant HOA and she is a co-owner of International Club property subject to the Declarations, and that said property is located in Horry County.

4. The allegations contained in Paragraphs 5, 6, 7, 8 and 9 of the Complaint are denied and strict proof demanded thereof.

5. The allegations contained in Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the Complaint are denied in that the documents referred to therein speak for themselves.

6. The allegations contained in Paragraphs 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87 of the Complaint are denied and strict proof demanded thereof.

7. The allegations contained in Paragraphs 88 and 89(a) of the First Amendment to the Complaint are admitted.

8. In answering Paragraph 89(b) of the First Amendment to the Complaint, the answering Defendants admit the address of the Defendant K.A. Diehl & Associates, Inc., that it is a corporation in good standing and that it has contracted with the Defendant The International Club Homeowners Association, Inc., but the remaining allegations are denied and strict proof demanded thereof.

9. With respect to the allegations in Paragraph 90 of the First Amendment to the Complaint, the Answering Defendants admit only that venue in Horry County is proper.

10. The allegations contained in Paragraphs 93, 95 and 98 of the First Amendment to the Complaint are admitted.

11. The allegations contained in Paragraphs 91, 92, 94, 97, and 99 of the First Amendment to the Complaint are denied and strict proof demanded thereof.

12. In answering Paragraph 96 of the First Amendment to the Complaint, it is only admitted that the Answering Defendants' Attorney did email a letter to the Plaintiff and the letter speaks for itself.

13. In answering Paragraph 100 of the First Amendment to the Complaint, the Answering Defendants do not have sufficient information as to the date the web-page became operational and therefore deny the same.

14. The allegations contained in Paragraphs 101, 102 and each of the 103 paragraphs, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 149, 151, 152, and 154 of the First Amendment to the Complaint are denied and strict proof demanded thereof.

15. With respect to the allegations contained in Paragraphs 130, 131, and 132 of the First Amendment to the Complaint, it is admitted that a letter was sent to homeowners in the International Club Community by K.A. Diehl and Associates.

16. In answering Paragraph 142 of the First Amendment to the Complaint, the said allegations therein constitute a legal conclusion but it is admitted that the Declaration of

Covenants and Restrictions, as amended, constitutes a contract with the homeowners in the International Club community.

17. In answering Paragraphs 148 and 153 of the First Amendment to the Complaint, the statutory provisions referenced therein speak for themselves.

18. In answering Paragraph 150 of the First Amendment to the Complaint, the Answering Defendants admit that a letter dated April 28, 2008 was emailed to Plaintiff and the letter speaks for itself.

SECOND DEFENSE

19. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

20. The Answering Defendants assert the applicable statutes of limitation as a complete defense to Plaintiff's claims.

THIRD DEFENSE

21. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

22. The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims.

FOURTH DEFENSE

23. The allegations of the First, Second and Third Defenses are incorporated herein and made a part and parcel hereof.

24. Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule.

FIFTH DEFENSE

25. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

26. The Answering Defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

27. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

28. The Answering Defendants assert consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

29. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

30. 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

31. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

32. Any and all matters asserted as to the Plaintiff are absolutely privileged in that all matters published are contained in Court decisions and opinions.

NINTH DEFENSE

33. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eight Defenses are incorporated herein and made a part and parcel hereof.

34. Any and all communications regarding the Plaintiff were made in good faith and thereby are privileged.

TENTH DEFENSE

35. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight and Ninth Defenses are incorporated herein and made a part and parcel hereof.

36. Any and all statements with respect to the Plaintiff were fair comment and thereby protected.

ELEVENTH DEFENSE

37. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth and Tenth Defenses are incorporated herein and made a part and parcel hereof.

38. Any and all statements with respect to the Plaintiff is neutral reportage and thereby protected.

TWELFTH DEFENSE

39. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth and Eleventh Defenses are incorporated herein and made a part and parcel hereof.

40. Any and all facts relating to litigation involving the Plaintiff is privileged.

THIRTEENTH DEFENSE

41. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh and Twelfth Defenses are incorporated herein and made a part and parcel hereof.

42. The First Amendment to the Complaint should be dismissed for the Plaintiff has failed to add indispensable and necessary parties.

FOURTEENTH DEFENSE

43. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defenses are incorporated herein and made a part and parcel hereof.

44. Certain governing documents relating to the International Club community may be ambiguous and therefore, the answering Defendants assert ambiguity as a defense.

FIFTEENTH DEFENSE

45. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Defenses are incorporated herein and made a part and parcel hereof.

46. The Plaintiff's claims are barred, in whole or in part, by the Plaintiff's payment of assessments and fines to Defendant HOA.

SIXTEENTH DEFENSE
AND COUNTERCLAIM

47. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth Defenses are incorporated herein and made a part and parcel hereof.

48. 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.

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.

Henrietta U. Golding, SC Bar #2173
Alicia E. Thompson, 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
athompson@mcnair.net
*Attorneys for the Defendants*

Myrtle Beach, South Carolina
October 24, 2011

# NOTICE OF APPEAL IN A CIVIL CASE

**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**

---

**Ronald Jarmuth**
**Plaintiff, Pro Se** — **Appellant**

**v.**

**International Club Homeowners Association, Inc,**
**Rosemary Toth, and**
**K.A. Diehl, Inc.**
**Defendants** — **Respondents**

## NOTICE OF APPEAL

---

**Ronald Jarmuth appeals the order of the Honorable Benjamin H. Culbertson dated April 27, 2016. Appellant received written notice of entry of this order on May 2, 2016.**

**May 17, 2016**

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

**Other Counsel of Record:**

**Henrietta U. Golding**
**Alicia Thompson**
**McNair Law Firm, P.A.**
**2411 Oak Street; Suite 206**
**Myrtle Beach, SC 29577-3164**
**843-444-1107**
**Attorney for all Respondents**

# AMENDED NOTICE OF APPEAL IN A CIVIL CASE

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

---

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

**Benjamin H. Culbertson, Circuit Court Judge**

---

**Appeal Case No. 2016-001063**

**Lower Court Case No. 2009-CP-26-3596**

---

**Ronald Jarmuth**
**Plaintiff, Pro Se** — **Appellant**

**v.**

**International Club Homeowners Association, Inc,**
**Rosemary Toth, and**
**K.A. Diehl, Inc.**
**Defendants** — **Respondents**

## AMENDED NOTICE OF APPEAL

---

**Ronald Jarmuth appeals**

**the Form 4 order of the Honorable Benjamin H. Culbertson signed, filed and docketed April 27, 2016, received by Appellant on May 2, 2016, and**

**the Supplemental (Long Form) Order signed May 31, 2016, "Clocked" June 6, 2016, Filed and Docketed June 14, 2016, and never mailed to Appellant by the lower court.**

**June 24, 2016**

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

**Other Counsel of Record:**

**Henrietta U. Golding**
**Alicia Thompson**
**McNair Law Firm, P.A.**
**2411 Oak Street; Suite 206**
**Myrtle Beach, SC 29577-3164**
**843-444-1107**
**Attorney for all Respondents**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
FEB 10 2017
SC Court of Appeals

Appeal No. 2016-001063

---

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
# VOLUME 2

---

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

Henrietta U. Golding
Alicia F. Thompson
McNair Law Firm, P.A.
2411 Oak Street; Suite 206
Myrtle Beach, SC 29577
Attorneys for Respondent

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY | )<br>)<br>) | IN THE MAGISTRATE COURT<br>FIFTEENTH JUDICIAL CIRCUIT<br>CASE NO.: 2010-CV261072943 |
| Ronald Jarmuth,<br><br>Plaintiff,<br><br>vs.<br><br>The International Club Homeowners Association, Inc.<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | ORDER TRANSFERRING CASE TO CIRCUIT COURT |

Plaintiff filed this action in Magistrate Court asserting four claims against the Defendant. The Plaintiff's claims are premised upon the legality of the Defendant Association to contract for such things as cable television and garbage collection, as well as to assess the Plaintiff as a homeowner in the International Club community. The Plaintiff seeks to recover monies he and his predecessor in title paid to the Defendant, as well as injunctive relief seeking to bar the Defendant from future assessments and fines.

The Defendant filed a Motion to Dismiss, as well as an Answer. One basis of the Motion to Dismiss is that there is an action pending in the South Carolina Court of Common Pleas, Civil Action No.: 2009-CP-26-3596 in which the Plaintiff and the Defendant are parties and the Plaintiff asserts claims in this action that are the same claims in the Civil Action pending in the Court of Common Pleas for Horry County. Additionally, the Defendant contends that this Court does not have jurisdiction for the Plaintiff seeks injunctive relief and his claim is in excess of $7,5000.00.

Based upon the arguments made before Court and the pleadings in this action, I find that the above entitled action must be transferred to the Court of Common Pleas in that the Magistrate

Court does not have jurisdiction. Further, before any Court can determine if the Plaintiff is entitled to the relief he is seeking, Plaintiff's claim in the Civil Action No.: 2009-CP-26-3596 must be decided. Therefore,

IT IS ORDERED, ADJUGED AND DECREED that the above entitled action is hereby transferred to the Court of Common Pleas for Horry County.

IT IS SO ORDERED.

Magistrate Court Judge

Dated: 11/30/10

Conway, South Carolina

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | )<br>) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth,<br>Plaintiff,<br>vs.<br>The International Club Homeowners Association, Inc.,<br>Rosemary Toth,<br>And K.A. Diehl & Associates,<br>Defendants. | ) | **ORDER GRANTING DEFENDANT'S MOTION TO CONSOLIDATE CASES** |

2011 SEP 16 PM 1:14
FLANIE HUGGINS-WARD
CLERK OF COURT
COUNTY

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | )<br>) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CASE NO.: 2010-CP-26-11320 |
| Ronald Jarmuth,<br>Plaintiff,<br>vs.<br>The International Club Homeowners Association, Inc.<br>Defendant. | ) | |

This matter came before the Court on August 11, 2011 upon the motion of the Defendant, The International Club Homeowners Association, Inc. (hereinafter "Defendant"), in Civil Action No. 2010-CP-26-11320 to consolidate the above captioned matters pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure. Present at the hearing were the Plaintiff, Ronald Jarmuth ("Plaintiff"), and the attorney for the Defendant, Alicia B. Thompson.

The Plaintiff is a property owner in Pebble Creek, a residential subdivision located within the International Club community. As a property owner, Plaintiff is a member of the Defendant.

The aforementioned cases arise out of disputes between the Plaintiff and the Defendant regarding the validity of the Declaration of the Covenants and Restrictions for the International Club ("Declaration") and the amendments to the Declaration, as well as the validity of assessments levied by the Defendant against the International Club homeowners. Plaintiff asserts other causes of action against the Defendant in Civil Action No. 2010-CP-26-11320 and against the Defendant, Rosemary Toth, and K.A. Diehl & Associates in Civil Action No. 2009-CP-26-3596.

"[C]onsolidation may be ordered whenever actions involving a common question of law or fact are pending before the court." *Ellis v. Oliver*, 415 S.E.2d 400, 401 (1992); *see also Creighton v. Coligny Plaza Ltd.*, 512 S.E.2d 510, 522 (Ct. App. 1998), *reh'g denied*, (1999), *Keels v. Pierce*, 433 S.E. 2d 902 (Ct. App. 1993). Rule 42 (a) of the South Carolina Rules of Civil Procedure addresses consolidation and specifically states: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." The above actions involve common questions of law and fact. The claims in both actions are dependent upon the legal issue of whether the Declaration is valid. Accordingly, under South Carolina law, these two cases should be consolidated for the sake of judicial economy.

**THEREFORE, IT IS ORDERED** that Civil Action Number 2010-CP-26-11320 is consolidated under Civil Action No. 2009-CP-26-3596 pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure, meaning that Civil Action Number 2010-CP-26-11320 shall be tried at the same time and in the same proceedings as Civil Action No. 2009-CP-26-3596.

**IT IS SO ORDERED.**

The Honorable Larry B. Hyman, Jr.
Chief Administrative Judge

Dated: 8-29-2011
Conway, South Carolina

FILED
HORRY COUNTY
11 OCT 11 PM 1:11
MELANIE HUGGINS-WARD
CLERK OF COURT

**STATE OF SOUTH CAROLINA**
**COUNTY OF HORRY**

**IN THE COURT OF COMMON PLEAS**

**Civil Action No. 2009-CP-26-3596**

**Ronald Jarmuth**

**Plaintiff,**

**vs.**

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

**Defendant.**

**Order**

This matter came before the Court on October 10, 2011 by way of various motions filed by the parties. Each Motion is addressed accordingly below. Appearing at the hearing was Ronald Jarmuth, Plaintiff Pro Se, and Henrietta Golding, Esquire, on behalf of Defendants International Club Homeowners Association, Inc. ("HOA") and Sunbelt Homes.

**I. Defendant HOA's Motion to Compel Plaintiff's Responses to Discovery of Defendant HOA**

Defendant HOA moves before this Court seeking an Order compelling Plaintiff's answers to Defendant HOA's Interrogatory numbers 4, 5, 6, 7, and 8 dated May 27, 2009. On July 22, 2009, Plaintiff provided Defendant HOA with a supplementation answering Interrogatory numbers 4 thru 8. Therefore, Defendant's Motion to Compel is now moot thus DENIED.

**II. Plaintiff's Motion for Discovery Conference and For Rule 26(c) Protective Order**

Plaintiff asks this Court, pursuant to SCRCP Rule 26(f), to direct the attorneys for the parties to appear before it for a conference on the subject of discovery. Also, Plaintiff seeks protection from certain discovery demands made by Defendants KA Diehl and HOA. Taking into consideration arguments on both the written record and those offered at the hearing, Plaintiff's Motion for Discovery Conference and for a Protective Order is respectfully DENIED.

**III. Plaintiff's Motion to Compel D.R. Horton to Obey Subpoena Duces Tecum**

No one on behalf of D.R. Horton attended the hearing. Therefore, Plaintiff's Motion to Compel is hereby GRANTED.

#1
2WB

**IV. Plaintiff's Motion to Compel Sunbelt Homes to Obey Subpoena Duces Tecum**

On July 23, 2009, Plaintiff served a Subpoena Duces Tecum on Sunbelt requesting certain documents pursuant to SCRCP Rule 45. At the hearing, it was brought to the Courts attention that this matter has been complied with thus the motion is now moot therefore DENIED.

**V. Motion to Compel Defendants HOA and Diehl and their Counsel H. Golding to Comply with Overdue Requests**

Plaintiff moves before this Court requesting that Defendants HOA and KA Diehl and Counsel Henrietta Golding cease and desist from refusing to respond to any discovery demand and to provide satisfactory responses to various overdue discovery demands. Based on arguments presented at the hearing, this Court concludes that Defendants complied with Plaintiff's requests. Thus, Plaintiff's Motion to Compel is DENIED.

**VI. Motion to Dismiss Counterclaim of Defendant HOA**

Plaintiff moves to dismiss Counterclaims of Defendants HOA and Rosemary Toth for attorney's fees and any costs beyond those assessed as a matter of law upon a non-prevailing party in a civil action. Based upon arguments presented at the hearing and arguments on the written record, this Court finds that Plaintiff's Motion to Dismiss Defendant's Counterclaims is DENIED. Attorney's fees and costs will be handled, if necessary, at the appropriate time pursuant to Rule 11 SCRCP.

**VII. Motion to Compel Association Voice, Inc. to Obey Subpoena Duces Tecum**

No one on behalf of Association Voice, Inc. attended the hearing. Therefore, Plaintiff's Motion to Compel is thereby GRANTED.

**VIII. Motion for Protective Order for Non-Party Association, Inc. from Plaintiff's Subpoena Duces Tecum and to Appear for Plaintiff's Motion to Compel**

No one on behalf of Association Voice, Inc. attended the hearing. Therefore, Plaintiff's Motion to Compel is thereby GRANTED.

**IX. Motion to Amend Answer to the Complaint and the First Amendment to the Complaint and Counterclaim (2009)**

Defendant HOA moves pursuant to Rule 15 of the South Carolina Rules of Civil Procedure to amend its Answer to the Complaint and Counterclaim and the First Amendment to the Complaint and Counterclaim to assert an additional counterclaim and the Defense of Payment and to combine the Answers into one pleading. SCRCP Rule 15(a) states that a party may amend his pleading by leave of court or by written consent of the adverse party. Moreover, leave to amend shall be freely given when justice so requires and does not prejudice any other party. A motion to amend is within the sound discretion of the trial judge and the opposing party has

the burden of establishing prejudice. *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44, 47 (Ct. App. 1999). Pursuant to SCRCP Rule 15, supporting case law, and arguments presented at the hearing, this Court hereby GRANTS the Defendant's Motion to Amend.

**X. Motion to Amend Answer to the Complaint (2010)**

Defendant moves pursuant to SCRCP Rule 15 to amend its Answer to the Complaint to assert a counterclaim, to remove the Third and Fourth Defense seeking dismissal of the Complaint due to the Magistrate's Court lack of subject matter jurisdiction, and to add the additional Defenses of Payment and Unclean Hands. "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250, 253 (Ct. App. 1998). Taking into consideration arguments on the written record and arguments offered at the hearing, this Court hereby GRANTS the Defendant's Motion to Amend.

**IT IS SO ORDERED.**

William H. Seals, Jr., Judge

Twelfth Judicial Circuit

Horry County, South Carolina

October 11, 2011

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth,<br>Plaintiff,<br>vs.<br>The International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, Inc.<br>Defendants. | **ORDER DENYING PLAINTIFF'S POST-TRIAL MOTIONS** |
| Ronald Jarmuth,<br>Plaintiff,<br>vs.<br>The International Club Homeowners Association, Inc.<br>Defendant. | CIVIL ACTION NO.: 2010-CP-26-11320 |

FILED
HORRY COUNTY
13 MAR 11 PM 12:08
MELANIE HUGGINS-WARD
CLERK OF COURT

On February 4, 2013 the Court held a hearing on the post-trial motions dated September 19, 2012 filed by the *pro se* Plaintiff Ronald Jarmuth ("Plaintiff"). His motions seek a new trial and relief from the Final Order dated September 10, 2012 ("Final Order"). The Final Order dismissed Plaintiff's claims and awarded judgment against him in the amount of $7,326.00 as well as granted injunctive relief.

Appearing at the February 4, 2013 hearing were Henrietta U. Golding and Alicia E. Thompson, counsel for the Defendants International Club Homeowners' Association, Inc. (the "HOA"), Rosemary Toth, and K.A. Diehl & Associates, Inc. ("K.A. Diehl") (collectively

10/13

hereinafter "Defendants"), and the Plaintiff. Having duly considered the record of the trial, being the trial transcript and the numerous exhibits admitted, the briefs filed by the parties, and after listening to the arguments presented at the February 4, 2013 hearing, I hereby conclude as follows and issue the following Order.

## PROCEDURAL HISTORY

Consolidated Civil Action Numbers 2009-CP-26-3596 ("2009 Lawsuit") and 2010-CP-26-11320 ("2010 Lawsuit") (collectively hereinafter "Consolidated Cases") were filed by the Plaintiff seeking declaratory judgments that the HOA does not have the authority to perform a plethora of functions, including enforcing the Declaration of Covenants and Restrictions for the International Club ("Declaration") and the Bylaws of the HOA as well as the HOA's other governing documents. A Consent Order referred the Consolidated Cases to a special referee, Ralph Stroman ("Special Referee"), and scheduled the non-jury trial for August 8, 2012 through August 10, 2012.

The trial began, as scheduled, on August 8, 2012 at 9:00 a.m. and concluded on August 10, 2012 at 5:30 p.m. At the beginning of the trial, the Special Referee ruled that all evidence would be entered subject to the parties' objections, including the parties' trial exhibits. The Special Referee also stated that, at the conclusion of the trial, the parties must submit proposed orders and that he would sign one order. No objections were made to the Special Referee's rulings. After the trial, the parties submitted proposed orders as instructed.

The Final Order was signed and filed on September 10, 2012 and the Plaintiff was served with a copy. On September 19, 2012, the Plaintiff filed his Post-Trial Motions. The Special Referee recused himself from hearing the Post-Trial Motions as a result of the Plaintiff's

accusations that he was biased. As a result, the Consolidated Cases came before me, as the Chief Administrative Judge, by an Order dated and filed on October 17, 2012.

In his Post-Trial Motions, the Plaintiff sets forth the following grounds for setting aside and/or amending the Final Order and for a new trial: (1) the Defendants' proposed order constituted fraudulent material and ex parte communications with the trial court, and the Special Referee was biased by executing the Defendants' proposed order; (2) the award of attorneys' fees to the Defendants was improper; (3) the trial court lacked subject matter jurisdiction over the 2010 Lawsuit; (4) the HOA's Architectural Review Board ("ARB") cannot be awarded a judgment, because it was not a party to the Consolidated Cases; (5) procedural irregularities warrant a new trial; and (6) Defendants' exhibits were not produced in discovery.

## LEGAL CONCLUSIONS

**Plaintiff's Argument Regarding Procedural Irregularities Is Not Grounds For Altering The Final Order.**

1. The Plaintiff seeks to set aside the Final Order and requests a new trial based on the following procedural irregularities: a) taking the Defendants' witnesses out of order; b) not permitting summation; c) the time limitation on trial barring Plaintiff from calling Defendant Ms. Toth; d) the Defendants' revision of their first pre-trial brief submitted in January to include additional witnesses and exhibits; and e) Plaintiff did not receive hard copies of the Defendants' exhibits before trial.

2. The Plaintiff did not object to the Special Referee's ruling on taking all but one of Defendants' witnesses out of order, not permitting summation, and the time limitation on trial. Because the Plaintiff is raising these arguments for the first time, even though he had an opportunity to object at the time of trial, the arguments are not preserved. See South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 380

S.C. 349, 380, 669 S.E.2d 899, 915 (Ct. App. 2008), overruled on other grounds, 390 S.C. 418, 702 S.E.2d 246 (2010). A party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

3. With respect to the Plaintiff's objections regarding the Defendants' revision to their January 2012 pre-trial brief listing witnesses and exhibits, the Defendants listed all witnesses called and previously produced all exhibits to the Plaintiff. During discovery, the Plaintiff was provided CDs with electronic copies of the Defendants' documents some of which became exhibits. The Plaintiff also did not object to the Defendants' witnesses at the time that they were called. Because all of Defendants' exhibits and witnesses were disclosed before the initiation of trial, this Court declines to amend the Final Order based on discovery issues.

4. Additionally, the Special Referee's ruling that the Defendants' witness, Chris Sullivan, be taken out of order was not in error and did not prejudice the Plaintiff. The Defendants' direct examination of Chris Sullivan was brief and did not limit the Plaintiff's ability to present his case. Although Plaintiff argues that he did not have enough time to call Defendant Ms. Toth as a result of Mr. Sullivan's testimony out of order, the record reflects that Plaintiff made no attempt to call Ms. Toth; nor did the Plaintiff make any objections to not having sufficient time to present his case when he rested. It should also be noted that Plaintiff presented Ms. Toth's deposition to the Special Referee.

**The Special Referee's Execution Of The Final Order Does Not Evidence Bias.**

5. The Plaintiff contends that the Defendants' proposed Final Order constitutes an ex parte communication, includes fraudulent material, and evidences the Special Referee's bias towards the Defendants.

6. The Plaintiff was copied on the cover letter to the Special Referee enclosing the Final Order. Because the Plaintiff was copied on the letter to the Judge, the Final Order is not an ex parte communication.

7. The Plaintiff argues that the Final Order is fraudulent because: a) the findings of fact do not conform to the evidence; and b) the Final Order includes new post-trial arguments and case citations.

8. The findings of fact challenged by the Plaintiff are supported by the evidence. Additionally, the Final Order is consistent with the record, the pleadings, the legal arguments made at trial and in the parties' pre-trial and post-trial briefs. The Court notes a typographical error in Paragraph 19, wherein the Plaintiff's attendance at Board of Director meetings should be since 2009, not 2007.

9. Because the Final Order accurately reflects the evidence, I decline to amend the Final Order or grant a new trial based on the Special Referee's execution of the Defendants' proposed Final Order.

**The Trial Court Has Jurisdiction Over The 2010 Lawsuit.**

10. The Plaintiff states that the trial court does not have jurisdiction over the 2010 Lawsuit because the magistrate transferred the case to the circuit court in violation of S.C. Code Ann. § 22-3-30 (2007), which requires the magistrate to transfer cases to the circuit court that exceed the civil jurisdictional limit of $7,500.

11. S.C. Code Ann. § 22-3-20 specifically provides that the magistrate court does not have jurisdiction over any case where real property title may come into question. Because the Plaintiff's lawsuit deals with restrictive covenants in his chain of title, the magistrate properly

determined that he did not have jurisdiction to hear the matter and transferred the case to this Court.

12. The Plaintiff also consented to the transfer of the Consolidated Cases to the Special Referee. Therefore, the Special Referee had jurisdiction to hear this case.

**The Trial Court's Judgment Against The Plaintiff Is Proper.**

13. At the February 4, 2013 Motions hearing, Plaintiff contended that the Final Order erred because: a) if you accept the Defendants' argument that the ARB fined the Plaintiff, an award of fines is to the ARB instead of the HOA, which is not a party to the Consolidated Cases; and b) the attorneys' fees are not recoverable under the Declaration, because they were not incurred in enforcing the Declaration.

14. The Final Order does not hold that the ARB is a separate legal entity from the HOA, nor does it refer to the ARB as a Defendant. The ARB is an arm of the HOA, and therefore, it was proper for the trial court to award fines to the HOA levied by the ARB.

15. The award of attorneys' fees to the HOA was also proper. Sections 8.1 and 8.9 of the Declaration and Section 13.4 of the Bylaws provide that the HOA is entitled to attorneys' fees for enforcing the Declaration. In the Consolidated Cases and the complaint filed with the South Carolina Human Affairs Commission, Plaintiff disputed the validity of the Declaration. As a result, the HOA was forced to pay $5,000 in attorneys' fees to enforce the architectural restrictions contained in the Declaration against the Plaintiff. Therefore, an award of attorneys' fees was proper in the Consolidated Cases. See Sea Pines Plantation Company v. Wells, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987).

**Plaintiff's Property Is Subject To The Declaration.**

16. The Plaintiff's Post-Trial Motions dispute the Special Referee's holding that Plaintiff's Pebble Creek lot is subject to the Declaration.

17. The Plaintiff's deed states that his property is subject to the Declaration. Consequently, the Special Referee did not err in holding that the Plaintiff's Pebble Creek property is subject to the Declaration. See Charping v. J.P. Scurry Co., Inc., 296 S.C. 312, 315, 372 S.E.2d 120, 122 (Ct.App.1988) (holding that a restrictive covenant is enforceable if there is "an indication that the parties intended for the covenant to run with the land").

**The HOA Is The Governing Body Of The International Club.**

18. Another ground for amending the Final Order, according to the Plaintiff, is that the true association under the First Amendment to the Declaration is International Club Association, not the HOA. He requests that the Final Order be amended to hold that the International Club Association, a South Carolina corporation incorporated by the Plaintiff, is the appropriate governing body.

19. The record reflects that the HOA was incorporated in 2001 by the original developer, and since that time, the HOA has continually acted as the governing organization for the International Club. The HOA provides services, levies assessments, and owns the Common Area within the neighborhood. As a result, I decline to amend the Final Order to hold that the entity formed by the Plaintiff is the governing body of the International Club, since the Defendant HOA is the proper association for the International Club community.

**The Declaration Is Consistent With The Non-Profit Corporation Act.**

20. At the February 4, 2013 hearing, Plaintiff argued that the Declaration's requirement that all homeowners within the International Club be members of the HOA violates

the South Carolina Non-Profit Corporation Act, S.C. Code Ann. § 33-31-620 stating that members may resign at any time.

21. The Plaintiff may resign from the HOA at any time by selling his International Club property. Because the Plaintiff has the ability to resign, the Declaration is not in violation of the South Carolina Non-Profit Corporation Act.

**Plaintiff Does Not Have Standing To Challenge The HOA's Actions That Occurred Before October 23, 2006.**

22. The Plaintiff argues that the Special Referee erred by holding that the Declaration and Bylaws filed in 1999 as well as amendments thereto filed between 2000 and 2004 and the Declaration of Special Covenants for the Highway 17 Connector Road Maintenance District filed in 1998 are valid. He also asserts that the Waste Industries Contract dated May 24, 2001, the HTC Contract dated October 30, 2003, and the Golf Course Agreement dated November 20, 2003 are invalid.

23. These transactions were entered into before the Plaintiff purchased his International Club property on October 23, 2006. Accordingly, the Plaintiff does not have standing to challenge these arrangements. Furthermore, the evidence presented shows that the Waste Industries Contract of May 24, 2001, the HTC Contract of October 30, 2003, and the Golf Course Agreement of November 20, 2003 were properly entered into by the representative body, the Defendant International Club Homeowners Association, Inc. Therefore, I decline to amend the Final Order to hold that the above documents are invalid.

**The Special Referee Did Not Err By Holding That The Streets Are Subject To The Declaration.**

24. Next the Plaintiff contends that the Final Order's reference to the Janet Carter letter stating that Horry County does not interfere with a homeowners' association's enforcement

of restrictive covenants in the chain of title of dedicated roads is inappropriate because the letter is not in evidence.

25. Ms. Carter's letter was admitted as Defendants' Exhibit Number 92. Because the letter was in evidence, the Special Referee did not err by referring to the letter in the Final Order.

26. The record also reflects that the roads in the International Club community were dedicated to Horry County. Therefore, I decline to amend the Final Order to state otherwise.

**The HOA's Grant Of An Easement To Central Electric Power Was Not An Ultra Vires Act Under Sections 4.10 And 7.23 Of The Declaration.**

27. The Post-Trial Motions contend that the Special Referee erred by holding that the HOA had the power to grant an easement to Central Electric Power to install above ground utilities.

28. Pursuant to Sections 4.10 and 7.23 of the Declaration, the Board has the power to grant easements for above ground utilities. Therefore, I decline to amend the Final Order to hold that the HOA was outside of its authority by granting the easement to Central Electric Power.

**The Board Members Did Not Violate The Non-Profit Corporation Act By Refunding Assessments To Its Members.**

29. At the February 4, 2013 hearing, Plaintiff asserted that the HOA's payment of $75.00 to each member of the HOA was an unlawful distribution and violated S.C. Code Ann. § 33-31-1301. He also argues that the trial court erred in failing to hold liable the board members who voted in favor of the transaction.

30. The record reflects that the funds were paid to the HOA members to return an overcharge for services, and accordingly, the payment is not a distribution pursuant to S.C. Code Ann. § 33-31-1302.

**The ARB Did Not Waive Its Architectural Review Rights.**

31. The Special Referee was correct in holding that the ARB did not waive its right to exercise architectural control under Article VII of the Declaration and the Architectural Guidelines. Plaintiff's argument is two-fold: a) the First Amendment to the Declaration waives architectural review rights; and b) the ARB inconsistently applied the restrictions and guidelines by allowing fences and swing-sets.

32. Although South Carolina courts strictly construe restrictive covenants in favor of free use of the property, 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, 864 (1998). The fact that the Developer, the drafter of the First Amendment, continued to exercise architectural review powers is convincing evidence that it did not intend to waive all rights under Article VII when it filed the amendment. Id. ("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.")

33. Secondly, the HOA's consistent disapproval of fences on the property line since the early 2000's supports the conclusion in the Final Order that the HOA did not waive its right to enforce Section 7.4. Additionally, the ARB's approval of a swing-set on one owner's property while denying the Plaintiff's application for a swing-set based on aesthetic reasons was proper under Section 7.2 of the Declaration and does not waive the ARB's right to deny Plaintiff's application. See Sea Pines Plantation Company, 294 S.C. at 271, 363 S.E.2d at 894 (holding that a refusal to approve plans for aesthetic reasons will be upheld where the covenant has provided guidelines for enforcement and expressed the purpose of the covenant); see also, Palmetto Dunes Resort v. Brown, 287 S.C. 1, 2, 336 S.E.2d 15, 16 (Ct.App.1985) (holding that the Board has a

right to disapprove plans that would mar the general appearance of the subdivision and thus diminish the overall quality of the development).

34. This Court declines to amend the Final Order to hold that the HOA waived its right to enforce Article VII of the Declaration.

**K.A. Diehl Did Not Violate Plaintiff's Privacy Rights.**

35. The Plaintiff contends that the Final Order should be amended to hold that K.A. Diehl violated his invasion of privacy rights by disclosing his account information and past violations to the ARB.

36. As an arm of the HOA, the ARB is entitled to information related to the Plaintiff's violations and fines. Accordingly, K.A. Diehl did not publicize the Plaintiff's private affairs justifying an amendment to the Final Order. See Meetze v. The Associated Press, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956).

**The ARB's Deferral Of Plaintiff's Application Was Proper.**

37. Next, the Plaintiff asserts that the ARB's deferral of his 2012 application for improvements was improper for the following reasons: a) the ARB does not have the authority to defer applications; and b) Charles Roche, the Defendant Ms. Toth's husband, voted in favor of the deferral making it a conflict of interest transaction under S.C. Code Ann. § 33-31-831.

38. The record reflects that the ARB had no choice but to defer the Plaintiff's application because a quorum did not exist without Mr. Roche's vote. Because the result would have been the same whether Mr. Roche voted or not, the deferral was "fair" as defined by the Act and cannot be the basis for imposing liability. See S.C. Code Ann. 33-31-831 ("[a] conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into ...").

**The ARB Has The Authority To Enforce The Architectural Restrictions And Impose Fines Without A Hearing.**

39. The Plaintiff argued that the HOA violated § 13.3 of the Bylaws by imposing fines on him without a hearing.

40. Section 13.3 of the Bylaws states that the Board "may" hold a hearing before imposing fines. Further, I find that the Plaintiff waived his right to a hearing. Accordingly, Plaintiff's argument that the HOA violated Section 13.3 of the Bylaws by failing to hold a hearing is not a basis for amending the Final Order.

**The HOA Used And Accounted For The Capital Contributions In Accordance With The Declaration.**

41. Plaintiff argues that the Final Order is in error because it does not hold that the Board's use of the contributions was an ultra vires act under the Declaration.

42. First, Plaintiff attacks the use of capital contributions for allegedly paving the amenity center parking lot. Although the record is devoid of evidence that the funds were used for this purpose, Section 6.2 specifically grants the HOA the authority to assess for improvements to the Common Area. Therefore, the HOA would have been within its authority if it paid for the paving of its Common Area with capital contributions.

43. Secondly, the Plaintiff argues that the HOA maintained the entranceway to the Community with capital contributions in violation of Section 1.6 of the Declaration, which defines Common Area as property owned by the HOA. Even if the HOA maintained the entranceway before it owned the property, it is within its rights to do so pursuant to Section 3.1 of the Declaration.

44. Accordingly, the Special Referee did not err by holding that the capital contributions were properly used by the HOA.

**The Defendants Did Not Defame The Plaintiff.**

45. The Plaintiff argues that the Special Referee erred by holding that the letter and attachment from Defendants' attorney to the homeowners is not defamatory. Because the Plaintiff stipulated at trial that the letter is not defamatory and the letter was sent for litigation purposes, I decline to amend the Final Order to hold Defendants liable for defamation.

46. The Plaintiff also failed to prove that the HOA slandered the Defendant when William Fletcher allegedly called the Plaintiff a child molester. No evidence exists that Mr. Fletcher was an agent of the Board at the time of the alleged statement.

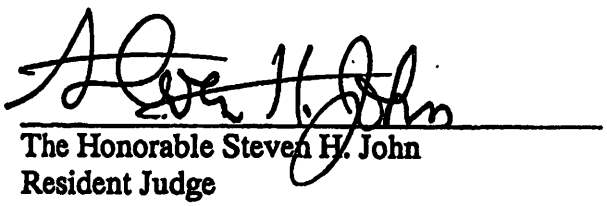
**K.A. Diehl Properly Performed Its Duties As Property Manager.**

47. Plaintiff testified that his Exhibit Numbers 701, 703, and 704 evidence that K.A. Diehl stole $16,063.00 in capital contributions. Based on the testimony of the HOA president and property manager, K.A. Diehl did not steal funds. As result, I decline to amend the Final Order to hold that K.A. Diehl misappropriated the HOA's funds.

## CONCLUSION

Therefore, it is

Ordered that the Plaintiffs' Post-Trial Motions are denied.



The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

March 11, 2013
Conway, South Carolina

| | | |
|---|---|---|
| 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. | ) | |
| | ) | |
| The International Club | ) | |
| Homeowners Association, Inc., | ) | |
| and | ) | |
| Rosemary Toth | ) | |
| | ) | |
| Defendants | ) | |
| | ) | |

1. Ronald Jarmuth ("Jarmuth") Plaintiff Pro Se, and COUNTER-DEFENDANT, ANSWERS Defendant's Counter-Claim stating the following Defenses and Objections:

2. In paragraph 19 of Defendants' "Answer and Counter-Claim" they demanded

> "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 they sought "a judgment against the Plaintiff for all attorney's fees, costs and expenses incurred in this action to defend the claims of the Plaintiff".

3. Plaintiff <u>denies</u> committing any actionable tort against Defendants or failing to take any action (causing harm to Defendants) which Plaintiff was obligated to take. Defendants have not even alleged that Plaintiff committed any actionable tort nor failed to take any action Plaintiff was required to take relating to Defendants nor have they alleged that they have been harmed by such "not plead" "non-event".

4. Plaintiff states as a Defense the SC Rule of Civil Procedure mandatory Defense 12(b)(6), that Defendants' Counter-Claim Rule 12(b) failed "*to state facts sufficient to constitute a cause of action*".

5. There is no contractual basis providing for Plaintiff to pay attorney fees,

even if Plaintiff were to lose all aspects of this case. The only contracts which exist between the Parties is the putative Homeowners' Association (HOA) Covenants[1] and the HOA Bylaws.

a. The Covenants provides that the HOA is entitled to attorneys fees and court costs ONLY in conjunction with a successful lawsuit to collect unpaid assessments. The Defendants have not asserted such a counter-complaint and Plaintiff denies owing any unpaid HOA assessments. The operational part of the Covenant is quoted below:

> "ARTICLE VI - COVENANT FOR MAINTENANCE ASSESSMENTS
>
> Section 6.1. Creation of the Lien and Personal Obligation of Assessments. ... 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".

b. In exactly the same manner the HOA Bylaws likewise provide a basis for a homeowner to bear the attorney and court costs ONLY for lawsuits to collect unpaid assessments. The operational part of the Bylaws is quoted below:

> "12.2 Creation of Lien and Personal Obligation of Assessments.
>
> ...any such Assessments, together with late charges in an amount to be determined by the Board, from time to time, together with interest, court costs and reasonable attorneys' fees incurred to enforce or collect such Assessments"
>
> "12.7 Liens.
>
> ... all sums assessed against any Unit pursuant to the Declaration, together with court costs, reasonable attorneys' fees, ... The continuing lien and equitable charge of such Assessment shall include ... all costs of collection (including reasonable attorneys' fees and court costs) and any other amounts provided or permitted here under

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[1] Which Plaintiff's complaint argues ceased to exist as of November 3, 2003 per a signed agreement between the Declarants Plantation AD and the successor developers DR Horton and Sunbelt (Charles Flynn). Plaintiff's Complaint asks the Court to so rule in a Delcaratory Judgment.

or by law."

"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 ... 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"

6. There is no statutory or common law basis to obligate Plaintiff to pay Defense attorneys fees and costs. SC Rule of Civil Procedure Rule 8(a) requires Defendants, in their Counter-Claim, to provide "(2) a short and plain statement of the facts showing that the pleader is entitled to relief". Defendants instead have asserted a demand bare of any grounds, facts, or legal basis. Lacking any "meat", this demand fails even to state a new and untested legal theory for relief.

a. Defendants have not alleged that Plaintiff's complaint constitutes a frivolous lawsuit, and thus they have no entitlement to costs per SC Statute 15-36. They have not denied that a contract exists to which the parties to this lawsuit are parties to the contract (Covenants), and the very existence of the Declaratory Judgment Statute is proof per se that the Legislature has deemed a request that the Court interpret a contract to be "non-frivolous". Unlike Defendants' answer, the Complaint in detail states facts with exactitude, including time and place.

b. Attorneys fees are not allowable costs to the prevailing party per South Carolina Statute 17-37. Since Plaintiff initiated this case, he has already paid the initial court costs. Even if Plaintiff were to lose through summary judgment, there are no costs taxable to him under 17-37. The taxable costs are exclusively amounts paid into court or to non-parties.

c. The Common Law (which adopts the "American System" of litigation costs) lacks a basis to tax such costs on Plaintiff. The exceptions are where there is a contractual provision – lacking here – or a statutory provision – also lacking.

**WHEREFORE, having answered the Counter-Claim, the Plaintiff / Counter-Defendant prays that the same be dismissed, and for such further relief as this Court may deem just and proper.**

**By:** _____

**Ronald Jarmuth, Plaintiff**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**

**May 15, 2009**

| | | |
|---|---|---|
| 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 | ) | (AND EQUITABLE RELIEF) |
| Homeowners Association, Inc., | ) | |
| | ) | (DERIVATIVE ACTION BY SHAREHOLDERS) |
| Rosemary Toth | ) | |
| | ) | (DEFAMATION AND INVASION OF PRIVACY) |
| Henrietta Golding | ) | |
| | ) | |
| And | ) | |
| | ) | |
| K.A. DIEHL & ASSOCIATES INC | ) | |
| | ) | |
| Defendants | ) | |
| | ) | |

FIRST AMENDMENT TO COMPLAINT

In accordance with Civil Rule 15(a), the Original Complaint of Plaintiff Ronald Jarmuth is INCORPORATED BY REFERENCE AND ADDITIONALLY AMENDED as follows:

88. The Original Defendants served their Answer and Counter-Claim on Plaintiff on May 13, 2009, thus this amendment is amended "within 30 days after a responsive pleading is served".

89. Additional Defendant.

a. The additional Defendant Henrietta Golding ("Golding") works in Horry County with a business address of "McNair Law Firm, P.A; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164 (843) 444-1107;

b. The additional Defendant K.A. Diehl & Associates, Inc ("Diehl") has an office at 11740 Highway 17S Bypass, Murrells Inlet, SC 29576 which is in Horry County (843-357-9888). Diehl was chartered by the South Carolina Secretary of State on March 1, 2002, and is a domestic "for profit" corporation "in good standing". Vicki Gallagher is the Vice President of Diehl and directly supervises Rebecca "Beckie" Abel, who in turn

supervises Julie Case ("Case"). Diehl is under contract from the HOA defendant to provide community management [1] services to the Homeowners' Association. Abel is the Diehl employee with primary responsibility for this task. Case is also responsible for HOA community management. Abel and Case are co-conspirators and joint tort-feasors with Golding as to the added Allegations / Claims. Because Abel and Case are employed by added defendant Diehl, complete relief can be afforded without separately adding Abel and Case. The corporate defendant Diehl is responsible for the acts of Abel and Case either because they were negligent in supervising Abel and Case or because Diehl actively supported and endorsed the effort. All acts of Abel and Case were done in their capacities as Diehl employees and depended on the extensive use of Diehl's resources.

Abel is the Diehl employee who has direct responsibility

90. The events that form the basis for the additional claims took place in Horry County, South Carolina.

91. The additional claims are for

a. Defamation;

b. Invasion of Privacy;

c. Intimidation / Harassment with the objectives of

(1) inflicting emotional distress; and

(2) intimidation to interfere with occupation, expression of political opinion, exercise of political rights and privileges;

d. Breach of the Contract constituting the HOA Covenants because of breach of the implied contractual obligation to "act in good faith and with fair dealing".

e. Failure to Produce the Voter / Member list of the HOA.

## ADDITIONAL RELIEF SOUGHT

92. Additional Relief Sought.

a. For Defamation. $ 1000 in direct damages per publication by any form of

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[1] Diehl holds itself out on it's web site and on the sign on the front of it's Murrells Inlet Office as a Provider of Property Management Services although neither Diehl, it's President Kellie Diehl, it's CEO Robert E Barlow, it's CFO Jack Boselli, it's Vice President Vicki Gallagheer, nor Abel or Case hold ANY license issued by the SC Board of Realtors. Upon information and belief, Diehl, by advertising Property Management, as well as Abel and Case by stating they are property managers, are in violation of SC law by illegally using the term Property Maanager or Property Management without holding a license for same.

technology and $ 1000 in punitive damages per publication counted the same way. That is, if the same defamatory material was sent to 100 individuals by mail that is counted as 100 publications of the defamatory material.

b. For Invasion of Privacy. $ 1000 in direct damages per publication and $1000 in punitive damages per publication counted the same way as for Defamation.

c. For Intimidation / Harassment. $50,000 in direct damages and an amount to be determined by the finder of fact for punitive and exemplary damages.

d. For Failure to Produce the Owner / Voter List: Assessing against defendants individually or collectively the cost of bringing and supporting this lawsuit.

e. For Breach of the implied contractual obligation to "act in good faith and with fair dealing an Order of the Court that the Plaintiff is no longer bound by the contract (covenants) and punitive and exemplary damages of $ 50,000 awarded to Plaintiff and $1.00 (one dollar per) to the non-profit HOA for each homeowner separately subject to the covenant to be assessed against and paid by each of the putative HOA board members claiming board status on the date this Amended Complaint was filed.

f. The removal of any material relating to Plaintiff from any web page or publication under the ownership, access or control of any Defendant and an Order requiring said Defendants to provide this Plaintiff an advance copy of anything dealing with this Plaintiff at least 2 business days prior to it's publication.

g. An Order requiring Defendants to fully comply with the records disclosure provisions of the S.C. Non-profit Corporation Act, and the HOA covenants and bylaws.

## ADDITIONAL GENERAL FACTS

### Refusal to Provide HOA Owner / Voter List

93. On April 13th, 2009 a copy of the Summons and Complaint was served on each original Defendant.

94. On April 28, 2009 (at 1:39 PM), citing SC Code Sections 31-720, 1601(c), 1602, and 1604, which continue to be applicable and enforceable while litigation is in progress, Plaintiff demanded a copy of the HOA Voter list incorporating e-mail, postal, and telephone information so that Plaintiff could communicate to his fellow homeowners in exactly the same manner as the board continued to do, particularly to gather information in support of this lawsuit AND in support of a campaign to impeach the putative board and

to replace them with a new board. This Plaintiff was a named candidate for the replacement board. This demand was served by email on Rebecca ("Beckie") Abel, lead Property Manager for K.A. Diehl, the company which by contract manages the HOA and which is also the corporate registered agent for the HOA. The request stated, by data element, what information was requested.

95. On that day no attorney had filed an appearance on behalf of the Defendants.

96. On that same day, April 28, 2009, at 3:58 PM, [2 hours and 19 minutes later] this Plaintiff received a response (by email) from Carole Koerner, assistant to Defendant Henrietta Golding which read:

> "My name is Carole Koerner, legal assistant to Henrietta U. Golding. With regard to the above subject matter, attached is a letter dated April 28, 2009 from Attorney Henrietta Golding"

Goldings's letter said in part:

> "this firm has been retained to represent the International Club Homeowners Association, Inc. and Rosemary Toth with respect to the above legal action. ... I have been provided a copy of an emailed letter dated April 28, 2009 with the subject being "Request for Copy of HOA Voter List".
>
> "Due to the allegations in your Complaint, I question whether your demand is made in good faith, and further, you do not set forth with reasonable particularity the purpose. Additionally, in your letter you are seeking information other than the membership list, such as email address, telephone numbers, etc, and you want to know the "arrears" status. Obviously, you are seeking information which is beyond the statutory provisions relating to a membership list and this, of course, is additional evidence that your request is not in good faith. In conclusion, your request for the membership list is denied.

97. The statutes I cited in the letter to the HOA provide that, if a request for a voter / member list are denied, this Court has the jurisdiction and the obligation to expeditiously and summarily order the defendants to produce said list, and to assess all costs in accomplishing same to the defendants.

Conspiracy to Commit Defamation, Invasion of Privacy, and Intimidation / Harassment resulting in Breach of Contract

98. The Answer and Counter – Claim of the Original Defendants was served on May 13th, 2009.

99. Upon Information and Belief, on or before May 8th, 2009 the original defendants, their contractor KA Diehl ("Diehl") and Diehl's employees Rebecca "Beckie" Abel

("Abel") and Abel's Diehl subordinate, Julie Case ("Case") and additional defendant Golding entered into a conspiracy to disregard the law as to Harassment (SC Statute 16-17-560), the Rules of Attorney Ethical Practice (Rules 3.6, 3.7, 4.1, 4.4, and 8.4), and the Common Law as to Defamation and Invasion of Privacy with the objectives of intimidating the Plaintiff (a) from occupation as a Member of the HOA Board, (b) on account of political opinion, (c) from the exercise of political rights and privileges in violation of SC Statute 16-17-560. Golding framed a plan of attack on Plaintiff concentrated on embarrasing, humiliating, and defaming Plaintiff before his neighbors in the Homeowner Association (HOA) so as to intimidate Plaintiff. Upon information and belief, their purpose was to get Plaintiff to sell his house and move away, thus losing standing in this complaint.

100. On that date Golding (and perhaps her subordinate employees at Golding's law firm) began searching for "dirt" on Plaintiff – specifically searching subscription sources unavailable to Plaintiff's fellow homeowners (Westlaw) because of the requirement for a paid subscription (and because said homeowners would have no reason to subscribe to Westlaw) search services, and to use Westlaw results to facilitate Web Searches to find additional matters involving Plaintiff using phrases which would not occur to ordinary homeowners regarding Plaintiff. Golding also initiated a plan which involved Diehl, Abel and Case and which was authorized and paid for by the original defendants which plan included –

a. Building or altering a web page ("Documents") on the HOA web site (where owners must go to determine their account status, to learn about HOA events, and to obtain contact information about fellow homeowners) anticipating posting defamatory material unrelated to the litigation in such a way that it would be thrust at homeowners who had not sought said material. The caption settled on was "Lawsuit" but it was never intended (and to date does not) that this would contain any of the pleadings in this or the parallel law suit filed by The Villas at International Club HOA against the original defendants.

b. As defamatory material was found or written by Golding, providing short titles to the web builders (upon information and belief working under the direction and control of Abel, and certainly of Diehl and thus the original defendants) to use in setting up the web page and building (URL) web links to where the documents would be found

(requiring establishing a data structure to make the links work);

c. Golding authoring material construed with in such a manner so as to intentionally convey a defamatory meaning to a homeowner reader; and Golding providing the summary and defamatory material to the web builder in a manner appropriate for a web site data source (that is, a part of the web site with material not directly reachable but accessible only by "clicking" on a web page "hotlink".) In anticipation of publishing this defamatory material by actual mail, Golding also endeavored to provide the material she authored or collected in "hard copy".

d. Golding authored the material (1) with utter disregard for the truth or accuracy of what she wrote, especially with regard to the document she authored titled "Jarmuth associated List of Lawsuits" and (2) with the intent to enflame Plaintiff's neighbors against Plaintiff by instilling a false fear of Plaintiff and to cause said neighbors to disassociate themselves from Plaintiff and to inflame them into, in turn, making further defamatory statements against Plaintiff based on an false assumptions and outright lies.

e. The enterprise made Golding and her firm a co-conspirator against Plaintiff, and the use intent put the works outside attorney work product and it's intended publication deprives everything around it of attorney – client privilege. The project involved Abel and Case who are not direct employees of Golding or the HOA, and unknown futher web authoring technicians with an even more tenousou relationship to Golding.

f. Sometime between May 8th and well before May 27th, 2009 Golding wrote a letter ostensibly dated May 27th, 2009 and ostensibly to the original defendants, in an attempt to hide liability behind attorney – client privilege, but it's intent was publication to every homeowner by email (estimated at approximately 450 separate emails) and by US first class mail to all households / neighbors in the HOA (an estimated 700 separate publications) besides having the material thrust at homeowners on the web page of the homeowner web site. Upon information and belief the letter was provided the web site builders long before May 27th so that they could incorporate it into the web page linkage system, and so that an email could be prepared for release on May 28th with "hot links" built into the email (leading to the web page) and with the Golding May 27th letter AND ALL OTHER MATERIAL available in "hard copy" in over 700 copies for a mass mailing

on May 28th.

g. The web page, the email to approximately 450 individuals, and the mass mailing to over 700 households is nothing that could have been accomplished between sometime on May 27th and noon on May 28th. Many homeowners in "The Villas" who over years had never received a single mailing from the HOA (although paying members) received the mass mailing.

h. Sometime before May 28th Golding authored the aforementioined email and postal mail for Abel to sign. The email was constructed so that if a recipient chose to "reply to" the reply would be sent to Julie Case, Abel's assistant at Diehl.

i. The publication included phrases or statements about Plaintiff that are so inflamatory that they are defamatory per se and the publication of one such defamation has already been held by the US District Court for the Northern District of West Virginia to be so in inflamatory that it is defamatory per se as a matter of law – and Golding read that holding of law prior to deciding to publish the material unredacted. The publication included other outright lies about what Plaintiff had done or about government decisions relating to Plaintiff which lies were made with outright disregard for their truth and which were calculated to give the false impression that Plaintiff had committed "bad" acts – the whole to embarrass and humilate Plaintiff and to inflame his neighbors against him.

j. In the entire enterprise, Diehl, Abel, and Case (not employees of Golding's law firm and not under any contractual relationship with Golding in the endeavor they jointly participated in) were acting under the guidance and control of Golding.

100. Upon information and belief, the web page became operational on May 27th, 2009.

101. On May 28th, 2009 at 12:55 pm the email was sent directly to the approximately 450 neighbors of Plaintiff by the conspirators, ostensibly from Diehl but prepared under the direction and control of Golding and upon information and belief, authored by her.

a. The email contains the banner "FOR THE BOARD OF DIRECTORS" implicating their approval, sponsorship, culpability, and responsibility for damages, to each homeowner.

b. The email was sent from "International Club HOA (Messenger@AssociatoinVoice.com)".

c. The email had Goldling's putative May 27th letter to the board attached.

d. The email had the byline of "*Beckie Abel*" (italics / bold in original) with the autority line beneath her name "Senior Community Manager, K.A. Diehl & Associates, Inc".

e. At the bottom of the page is the statement: "This message has been sent to ronaldjarmuth@msn.com" – which is Plaintiff's email address. Upon information and belief, each recipient's email was customized so as to have the individual recipient's email address substituted on the bottom – a fancy piece of programmng requiring pre-planning.

f. Upon information and belief, no homeowner is known to have requested Defendants to send them any material regarding Plaintiff, as homeowner or otherwise.

g. The email includes an area in red with very oversize font, many times the size of any other words on the email, which invites a recipient to "CLICK HERE", and which is preceded by the phrase "For all associated infromation to this lawsuit" – but clicking on the phrase / hot spot leads to the offending web page which has NO information about either lawsuit – except for the Golding letter which was already provided as an enclosure to the email – thus linking to the webpage for that was unnecessary. The link leads to the defamatory / inflamatory material regarding Plaintiff.

102. Also on May 28th, 2009 the defendants mailed a paper copy of all material assembled and authored by Golding to an estimated 700 neighbors of Plaintiff.

a. They had already pre-printed over 700 9" x 12" OVERSIZE flat white envelopes with individual names and addresses of Plaintiff's neighbors.

b. Well over 100 of these neighbors (homeowners in "The Villas") had never, over many years, ever gotten a single mailing. At the time of the mailing the enclosures had also been pre-printed and "stuffed".

c. Upon infomration and belief, this mailing was commercially out-sourced, meaning the defamatory material was available for additional unknown people to read and spread.

d. The envelopes were preprinted with the following provision for postage: "PREPAID 1st Class US POSTAGE PAID Permit #21 Murrells Inlet SC 29576" at an estimated postage cost of $ 1.39 per envelope; together with the cost of envelopes, paper, printing, assembly (separate stapling of many enclosures) and envelope stuffing, this required expending a substantial amount of money and the pre-approval, hence pre-

**plannng, of the Defendants.**

**e. The letter, upon information and belief authored by Golding, was signed "FOR THE BOARD OF DIRECTORS" and bore the italicized – printed byline of "*Beckie Abel*".**

**f. For all prior mailings to homeowners made by Defendants (and received by Plaintiff) defendants have used "peel off" labels pre-printed with homeowner names and addresses. This is the first time pre-printed large envelopes have ever been used to mail material to homeowners in the HOA.**

**g. The letter stated that the following were enclosed:**

**(1) "Attorney letter to International Club Directors";**

**(2) "List of associated lawsuits with Ronald Jarmuth";**

**(3) "Jarmuth vs. Cox";**

**(4) "Jarmuth vs. Frinzi";**

**(5) "Jarmuth vs. Reynolds";**

**(6) "Jarmuth vs Waters".**

**g. Upon information and belief, the entire enterprise wasted thousands of dollars of scarce HOA money, was spent with utter disregard for the board's fiduciary duty to expend monies responsibly, brought no benefit to the homeowners, and the publication of same was made with disregard to bringing infamy to the neighborhood.**

**<u>THE HOA BOARD ELECTION</u>**

**103. On or about May 18th, 2009 a committee of "Concerned Homeowners" of which Plaintiff was one began circulating a Petition which demanded a Special Meeting of the Homeowners whose stated purpose was (a) to recall / impeach the (Defendant) HOA Board and (b) to elect a replacement HOA Board. The Petition was presented to the putative HOA Board / defendant on May 22nd, 2009. The clear intent of the initiative included removing Diehl as the HOA contract management company.**

**a. Plaintiff was listed as one of the homeowners (there were five listed).**

**b. The defamatory material authored, prepared, and published by the Defendants was published by email, webpage, and US Mail between May 27th and May 28th, 2009, and upon information and belief was seen by almost all of Plaintiff's neighbors no later than May 30, 2009. While the purported intent of the publications was to**

"inform" about the lawsuits advocated by this Plaintiff (this suit) and The Villas at International Club, the timing and content make it clear that It's purpose was to interfere with the first amendment, political and civil rights of Plaintiff to complain and petition about grievance in the quasi-governmental structure and to exercise Plaintiff's occupational rights to a fair chance on the board of directors of the HOA.

c. The publications of Defendants were calculated to impart a false and very negative notion of Plaintiff to his neighbors, and to do so incorporated material which would be so taken as well as material which is defamatory per se as a matter of law.[2]

> "A statement may be defined as defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Jarmuth v Frinzi, USDC-ND-WV, August 25, 2006 at p12. citing Crump, 320 S.E.2d at 77, also citing the Second Restatement of Torts at 558 (1977).

The Order went on to hold that

> "'publication' applies to both slander and libel and means any form of intentional or negligent communication of a defamatory statement to a third person"

which by the common law applies to republication of defamatory material. The text of the Order of August 25, 2006 included a provision that "the Docket remain SEALED from public view" which was agreed upon by all litigants and representatives from the US Department of Justice and the US Federal Bureau of Investigation (who appeared at a hearing which led to the Order) to avoid a future defamatory impact on this Plaintiff by the public reading the defamations (in the case documents) which the Court had found had been made by the defendants in that case.

d. Defendants had no legitimate purpose to republish this document. In that document which Defendants can be presumed to have read, and which they republished with the very defamatory phrases.

e. The publications had the intended effect and did indeed have the effect on Plaintiff's neighbors which the WV federal court quoted from Crump.

f. On May 28, 2009 on the HOA discussion "blog" fellow homeowner Tom

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[2] Jarmuth v Frinzi, #1:04CV63 in the USDC-ND-WV at pp 12-13 the same document which Defendants circulated with the defamatory statements against Plaintiff and which statements were held to be defamatory per se as a matter of law.

Reagan wrote:

> "Julie, my hope is that Mr. Jarmuth's lawsuit does not involve individual homeowners. I do not expect to have to help fund such an asinine action on behalf of a person who spends half his life suing people (just do a Google on him). ..." [clearly implicating the invective of Julie Case of Defendant Diehl].

The chain leading back to Julie Case included another blog later that same day from homeowner Ron Bolka, which read"

> "Tom - I totally agree. He will not get any money from me either. I am so tired of all this crap he has nothing better to do with his time than to stir up controversies"

Later on May 28th Aine Hukezalie another homeowner continued the thread started by Defendants in their defamatory e-mail of that same day, May 28th, writing –

> "...I agree with both you and Tom...surely they have medication for people like him??? I'm sorry if that seems like a somewhat personal thing to say but his constant stirring and trouble making behaviour has caused so many people so much stress. Why does he not take all his negative energy and do some good for some people could use his help?"

The following day homeowner Carl Dilorenzo picked up the thread, writing –

> "Sorry to be the bearer of bad news but our HOA insurance has a $2500 deductible for legal fees so, Mr. Jarmuth's lawsuit will probably cost us at least that much ... I have also been informed by a Realtor that if you are planning to sell your home you must notify the buyer that there is a lawsuit pending against the HOA. Guess how well that news will be received by the buyer. ... if we vote for Ron Jarmuth and company the lawsuit will go away. Does this sound like blackmail to you?"

Based on how it was received, the Defendants documents imparted the negative notion (when one is running for an HOA board seat, that Plaintiff was a non-resident of the HOA he sought to be on the board for. Homeowner Kathie Reagan later on May 29th chimed in (again on the thread leading back to the Defendnats) writing:

> "Is Mr. Jarmuth a full-time resident? I was under the assumption that you had to be a full time resident of the community to be on the board. Could someone clue me in on this matter?"

g. This reaction from certain neighbors clearly was brought on by Defendants' Defamations. For many weeks Plaintiff had purposely been silent on the "blog". During that period Plaintiff sent several emails announcing that he had negotiated special reduced price season pass prices for the homeowners (which was answered with thanks and acclaim by many homeowners and back through May 11, Plaintiff had only published a satellite

picture of a wooded area (as requested) where a supplementary swimming pool was being considered for location. Clearly Defendants' defamations, and nothing else, brought on the responses from the neighbors.

h. On May 29th, 2009, Plaintiff observed and was so advised by his fellow candidates (to replace the putative board) that because of the defamations Plaintiff's continued candidacy would harm the efforts of the other candidates, and that Plaintiff's chances of success were harmed. On May 30th, 2009 Plaintiff issued a statemend that he was withdrawing from candidacy, taking care to state that he was compelled to do this because of the misconduct of Defendants, Plaintiff writing in part

> "I take this step because Henrietta Golding and Beckie Abel have been misusing the resources of the HOA to raise bogus issues and defamatory claims involving me to create a "strawman" so as to confuse the issue of installing fiscally and operationally sound and responsible management for the HOA. The issue at hand is to hold the existing board accountable for what they have or have not done and to install a board which will hold itself accountable to the electorate. Thomas Jefferson said that when the population fear their government you have tyranny, and when the government fears the people you have democracy. It is not hard to find neighbors who have horror stories to tell about how they have been mis-treated by the Board or by it's employees working for KA Diehl. In coming to the conclusion to cease running for the Board I noted that after Henrietta Golding and Beckie Abel published their defamations on May 27th, both directly to every homeowner using a list they have refused to share with anyone else (in blatant violation of law, covenants and bylaws) and on an expensively created (at your expense, several thousand dollars for their web site page) many homeowners "took the bait" and focused their comments on the Golding / Abel strawman instead of the serious issues which have been raised by many homeowners over a period of two years, not just by me, and which the putative board has steadfast refused to answer or fix."

i. The defamations had done so much damage that even this did not bring a halt to the invective from neighbors inflamed by Defendants' defamatory and inflamatory tortious behavior. Prior to this Plaintiff had never met, did not know of, had never spoken to, or written to homeowner Aine Hukezalie and had never mentioned her by name. Yet on May 31, even after Plaintiff withdrew, neigbor Aine Hukezalie continued the dialog on the HOA blog initiated by Defendants conduct, writing –

> "... why not go door to door and found out just how much stress and anguish he has caused a huge portion of our community. Life is way too short to have someone as negative, vindictive and combative as him. He has finally pushed me to the limit, and I certainly have enough going on without contending

with him. I and 25 others are now going to take action against him in person, but come hell or high waters, I will not have a big bully do this to me and my son. How dare he...surely they have medication or clinics for people like him! How dare he cause such pain and stress to people he has not ever even met. Enough is enough!!!

j. Clearly the defamations caused Ms. Hukezalie to behave irrationally, because she conceded Plaintiff had "not ever even met" her; yet she was so stirred by what Defendants published that she was led to make a threat to gather a mob and to do something to Plaintiff "in person". Plaintiff was so afraid for his person and property that he found it necessary to file a police report about Hukezalie's threat, turning a copy of her e-mail over to the Police.

ADDITIONAL COUNT: DEFAMATIONS

103. All of the preceding as well as the Original Complaint are incorporated into this Count of Defamation.

104. A "Google" Search using the phrase "Jarmuth v Frinzi" brings up two trial court cases captioned, on the results page, "Jarmuth v Waters et al". The other results are all benign citations of proceedings at the appeallate level. Both relate to a case in the US District Court for the Northern District of West Virginia, whose proceedings no neighbor would have any reason to inquire into and about which Plaintiff had every expectation would remail private from his South Carollina neighbors.

a. One result is an order dated August 31, 2005. That order was not used by Defendants in their enterprise against Plaintiff, and is believed to be Docket # 60 in that trial court. The other order which the Google results discloses is dated July 19, 2006, and is Docket # 310 at the trial court. No other trial court order resulted from that search.

b. Neither the docket nor any of the interlocutory orders are available to Plaintiff's neighbors through the "free search" legal engines, such as Lexis. In any event, the docket to the "Jarmuth v Waters" case is benign. That case was initiated on April 6, 2004 and ended by final order on August 11, 2006, docket #322. The only common access to interlocutory orders is through a subscription service.

c. As has been noted, Defendants published by web page, email and US first class mail an Interlocutory Order dated July 25, 2006, Docket # 313 at the trial court.

d. In her letter of May 27, 2009, Golding professed an interest in counting the number of cases Plaintiff advoccated Pro Se, and she stataed she wanted to identify the

**outcome (win / lose) of those cases. In point of fact in her letter she claimed that every case where Plaintiff was a litigant Plaintiff was pro se – and lost every one (a lie).**

**e. The outcome status of prior cases involving Plaintiff has no relevance to instant case. It was also irrelevant to the question of fiscal and operational management skills which would have been an appropriate dialog in the context of a board election.**

*- BEGIN SECTION FILED UNDER SEAL –*

**"Jarmuth v Frinzi" Defamation**

**105. The facts and assertions stated above are incorporated here.**

**106. The selection of this document was made for it's defamatory messages specifically identifiable against Plaintiff. The document was not requested by the persons to whom Defendants published this (republished to many of said recipients three times using three forms of media) and it's existence was unlikely to ever be known to said recipients. The Defendants selected recipients for it's most negative impact on Plaintiff. Defendants, because of the USDC-ND-WV's commentary, knew that this document contained statements which were defamatory per se as a matter of law because of the impact of such statements and accusations (against Plaintiff) of the stataements. Defendants exercised editorial control over the overall project and had the opportunity to redact out offensive phrases if the true objective of publication was to prove the two premises of the letter written by Golding on May 27th, to wit, (a) that Plaintiff always advocated his cases pro se and (b) that Plaintiff never won a favorable judgment in the cases to which he was a party. In point of fact, the final order of August 11, 2006 would have been more appropriate to prove either, or better yet, just the docket of 1:04CV63 (USDC-ND-WV). And there was no legitimate reason to copy and publish 12 faces (pages) of this interlocutory document.**

**107. The Defendants intentionally republished statements of others with a defamatory meaning which accusations were clearly made identifiable against this Plaintiff. The republication was unprivileged and served no legitimate purpose. The accusations were false. The Defendants republished the accusations recklessly and made no attempt to verify the truth of the accusations. From the source document the Defendants knew that various law enforcement agencies had looked into the accusations against this Plaintiff and found no basis to those accusations. The Defendants can not pretend that they were acting in good faith to warn their neighbors about the supposed danger to them from Plaintiff since (a) Golding, Abel, and Case are not the neighbors of any of the recipients of the defamatory material; (b) the publication was represented as part of a status report on this case prior to it's amendment; no claim of privilege was made and the republication was made to neighbors and not to law enforcement authorities. In addition, Defendants have**

**absolutely no knowledge of any fact which would lead them to believe that the accusations they republish have any basis in truth or presented a clear and pressent danger to those to whom they republished the defamatory accusations.**

**108. The statements that Defendants republished which "tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" (Crump, ob cit)) are:**

**a. <u>From Page 2</u> of the document –**

**"a. Having sex between him and the mother in plain view of the child.**

**b. Freely walking around nude in front of the child (accusation raised in October, 2000).**

**c. Teaching the child to masturbate, and gratifying himself with her doing so.**

**d. Exposing the child to sexually inappropriate material on TV, and imparting an inappropriate knowledge of sexuality. e. Being a hazard to the child's mental and physical health."**

**"RON ADMITTED TO REGULARLY HAVING SEX WITH ANGELA IN THE SAME BED WITH [the Frinzis' child]".**

**b. <u>From Page 7</u> of the document**

**"RON ADMITTED TO REGULARLY HAVING SEX WITH ANGELA IN THE SAME BED WITH [the Frinzis' child" [statement written three times].**

***- END SECTION FILED UNDER SEAL –***

"List of Lawsuits Associated with Ronald E. Jarmuth"

109. This document must be viewed under the proposition which Golding, the admitted author, states on page 5 (top) of her letter of May 27, 2009:

> "he was pro se in each one .. he was not ultimately successful in any of the thirteen (13) lawsuits".

This document must also be read in the context it is presented . The web page ostensibly purports to provide information on the status of THIS case and the parallel one filed by The Villas. As such the Defendants meant to convey a defamatory meaning to Plaintiff's neighbors – that Plaintiff filed THIS lawsuit pro se because it is so friviolous that no attorney would take it; that this Plaintiff is frivolously injuring the finances and reputation of the HOA; and that no homeowner should assist Plaintiff because he has no chance of success. The "list" document conveys absolutely no information about the status, aspects of, or chances of success of THIS lawsuit. It does not solicit information from the public to aid in the defense of THIS suit. It does not offer the details of THIS suit. It is a publication Golding is prohibited from making under Attorney Ethics Rule 3.6, Advocate – Trial Publicity and is actionable as a separate tort agamst Defemdamt Golding. Plaintiff asserts such a cause of action against Goldling.

110. Defendants listed the same case twice to inflate their count and to support their defamatory proposition.

a. Cases #1 and #10 are the same case, #1 in the trial court and #10 in the appellate court.

b. The text Golding wrote describing Case #1, "Fourth Circuit confirms dismissal of all Jarmuth's claims", obviated any informational value which separately stating the appeal as Case #10 might have.

c. This case was known to Goldiing as the progeny of a case of the same caption filed in the USDC for the Middle District of Pennsylvania – since the case Golding printed from Westlaw says not only that, but that Plaintiff was represented in that case by Mr. Joseph Schwerha III, who was at the time an Assistant Pennsylvania Prosecutor (allowed under PA rules to advocate civil cases outside of his prosecutorial territory). Relating this, of course, would diminish the false picture Defendants sought to "paint" about Plaintiff.

111. Case #2 on the list, "Jarmuth v Krolczyk ...and the Monongalia County Board of Education.

a. Plaintiff was represented by attorney Pamela Folickman, so the general statement of pro-se representation in all cases is a LIE.

b. The Board of Education was not a defendant, so this is a LIE. It is a defamatory lie because it is made to impute that Plaintiff recklessly sues Boards of Education and is a problem to the community at large.

c. A further search by Goldling would have brought up that the West Virginia Board of Examiners of Psychologist (administrative law tribunal) held that Krolczyk had committed unlicensed practice of psychology, and had falsely claimed expertise where it was lacking[3] – and in the only known instance ever, this finding was published (available over the internet) in the official West Virginia State Register. [4]

112. Case #3 on the List, "Jarmuth v Tara Patterson, Esq.

a. It is noteworthy that Defendants were unable to provide any citation. This is because Plaintiff never sued Patterson. This case was listed to "inflate" Defendants' list of cases.

b. Patterson's connection with this Plaintiff is through the "Frinzi" case, 1:04CV63, USDC-ND-WV. Patterson is a Pennsylvania attorney who filed motions in the "Frinzi" case in West Virginia, although not admited "pro hac" and likewise having failed to pay the West Virgina bar the required fees. She also failed to disclose to the federal court her unlicensed status (in West Virginia). This Plaintiff reported Patterson to the bar for the bar, not this Plaintiff, to take appropriate action against Patterson.

113. Case #4 on the List, "Jarmuth v Reno".

a. There is no difficulty finding the abstract in a web search. Here is the text of the abstract:

> "dismisses case without prejudice to the right of the plaintiff to exhaust his administrative remedies with respect to a waiver of the fees associated with his FOIA request and attorney fees"

b. This case does not prove Golding's premise under which it is presented, that Plaintiff "was not ultimately successful in any of the thirteen lawsuits". A dismissal without prejudice is not a final decision – and the citation itself indicates that an attorney was involved, because the citation notes attorney fees were requested. In point of fact, a

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[3] June 3, 2003, Ethics Inquiry #42, Ronald Jarmuth v Brian Krolczyk which Plaintiff WON.

group of attorneys were working with Plaintiff on a qui tam investigation of contracting corruption in the US Department of Justice's contracting section – which the investigation ultimately (through FOIA) found proof of (corrupt contracting official).

c. The FOIA nature of the proceeding should have been a "red flag" to attorney Golding that a legitimate inquity was involved, which actually reflected positively on this Plaintiff. Neither the case citation (which took less than 5 seconds to find) nor the true nature of the proceeding was related to Plaintiff's neighbors. The count, not the meaning of the case, was what Defendants sought.

114. Case # 6 on the List, "Jarmuth v McLemore" (Civil Action #93-MISC-293 (D.D.C.).

a. The premise of the Defendants was that every case on the list they editorially compiled (the list was a complete creation of the Defendants) was a separate case which was related to their premises and thus belonged with the cumulative count of cases they alleged fit the premises. Their defamatory message depended on creating an image in the minds of Plaintiff's neighbors that the premises were both true and carried a negative message as to Plaintiff.

b. The admitted author, Henrietta Golding, had sufficient technical knowledge of law to know that this was not the situation as to this particular case. The inclusion was a LIE.

c. A Google web search on June 8, 2009 brought back five result pages of which only the first page had results for both "Jarmuth" and "McLemore". The results did not show any true case where Jarmuth had sued McLemore.

d. The first case result, which was omitted completely, which could not possibly be overlooked because of it's numerous citation on the internet, and which would have devasted the premise of Defendants, was "Jarmuth v Turetsky" in the US DC-DC because (1) Plaintiff was represented by attorney Ern Reynolds; (2) Plaintiff prevailed; (3) the primary allegations were identity theft, forged power of attorney, theft of money and valuable goods; (4) it was decided by a federal jury; (5) it was sustained by the US Court of Appeals in DC; (6) it survived a number of consecutive bankruptcy filings by Defendant Turetsky, with a decision that it could not be discharged in bankruptcy because the verdict related to intentional torts. The February 25, 1993 final order, made available in the first

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[4] Volume XX, Issue 30, July 25, 2003,pages 1551-1554.

Google result, noted that McLemore was a co-defendant.

e. The third Google search result was "JARMUTH, RONALD E. v. NATALIZ MCLEMORE, Civil Action No. 93-Misc-293 (D. D.C.)". No other search results (in the five Google Pages) related to "Jarmuth" and "McLemore".

(1) First it is noted that this is the caption cited by Defendants on THEIR LIST as case #6.

(2) Following the Google link would have "brought up" a list titled "LIST OF FREEDOM OF INFORMATION ACT CASES RECEIVED IN 1993." As an experienced Attroney, Golding can be presumed to know two things:

(a) a "MISC" case identified would not have been used if Plaintiff had sued "McLemore". A "MISC" identifier is typically used to oppose a subpoena which has been issued in a "primary" case – and in this instance the "primary" case was "Jarmuth v Turetsky", the subpoena having been issued by Plaintiff's ATTORNEY!.

(b) In such a case the "MISC" case picks up the caption from the originating case in which the subpoena was issued. Thus in this case it was actually McLemore who brought the case to oppose a subpoena which had been issued (not on McLemore) but upon information and belief (it has been many years) to gather financial records (in accounds to which McLemore was a signatory) where "money laundering" of stolen funds was believed to be taking place.

(c) Thus "Jarmuth v McLemore" was not a case (1) brought by Plaintiff and was included for non-legitimate purposes – to defame Plaintiff.

f. Since Defendants asserted their use of powerful tools, WestLaw and Google, the Westlaw search would certainly have brought up another relevant case which would have also devastated their premise – "Jarmuth v McLemore" in USDC-ED-PA. In that case Plaintiff won a "by consent" order whereby McLemore was prohibited from participating in any way, forever, from money laundering activities or from having any financial dealings what-so-ever with Turetksy (McLemore's sister) who was found responsible by a federal jury of using forged documentes to steal from Plaintiff and hiding the funds through money laundering activities (in accounts with McLemore's name on them). The inclusion of this other easily found case was adverse to Defendants second premise, Plaintiff always loses his cases.

g. This should have inevitably led to "Jarmuth v Turetsky" in the Circuit Court for Prince George's County, MD where the federal case originated. The case was originated on Plaintiff's behalf by attorney John Beckman. While the complaint was decided in federal court, the counter-complaint remained in state court, and Plaintiff WON dismissal of all counts of the counter-complaint.[5]

115. Case # 7 in the List, "Jarmuth v Cox".

a. This was a West Virginia, not Virginia STATE case which was ultimately removed by Defendant Cox to federal court. The final orders of federal and state courts are easily available, but citing to those documents and providing them would have demonstrated the need and reasonableness of bringing suit.

b. More importantly, the editorial Defendants wrote, by omission, misrepresents the case. The state court docket would (and state orders carry over to federal court upon removal) relate that Plaintiff almost immediately won a "by consent" order that Cox turn over to Plaintiff all records relating to Cox' "examination" of Plaintiff.

c. Defendants purposely and with malicious intent provided an inaccurate narrative. An accurate case description would have stated that (1) In what should have been a simple procedure to merely check Plaintiff's occular pressure and do a vision field test, Cox was so careless that he seriously injured (and infection of) one of Plaintiff's eyes, requiring emergency treatment at a hospital and follow-up treatment by a retinal specialist; (2) that to assist in receiving appropriate treatment, Plaintiff requested and was refused a copy of Cox' records which would have shed light on how the injury; (3) Cox had signed an agreement guaranteeing the release to Plaintiff of the records – prior to Plaintiff allowing treatment, and Cox reneged on this written agreement (out of fear of malpractice suit); (4) in addition to documents Plaintiff sought reimbursement of ACTUAL medical costs; (5) Plaintiff sought to destroy NOT Cox's records but other medical records relating to Plaintiff that mysteriously were found in Cox's possession (perhaps to defend against a malpractice suit) – and which Plaintiff had never provided Cox; (6) the dismissal was not on merit but because Cox claimed an immunity (doing work for US-DOL) which the US-DOL never asserted on his behalf, and which was believed by the Court.

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[5] Upon information and belief (this was many yeas ago) Turetsky wanted to be paid a management fee for her efforts in managing the money she stole and never returned.

116. Case #8 on the List. "Jarmuth v Verizon". This was NOT a court case at all, but a Public Service Commission request for a technical decision as to whether an incumbent phone company could install bandwidth multiplexing equipment on a voice line [6] (never asserted a party line request) which made it impossible to install a DSL circuit – in a location where cable internet was also unavailable.[7] Further, since no proceedings, discovery, or participation by a complainant is permitted, a non-malicious presentation would have omitted this case because an attorney is irrelevant in a commission petition such as this. The case was not included nor presented in a legitimate way, but was done so for malicious purposes.

117. Case #10 on the list, "Jarmuth v Frinzi".

a. This is the SAME case as #1, being the appellate follow-on. It is not legitimately a "separately brought case" as the premise would lead Plaintiff's neighbors to believe.

b. More importantly, Defendants did not QUOTE from the case pleadings but editorialized and are thus responsible for every word they wrote, for false statements (LIES) and for defamatory meanings taken from said lies.

c. DEFAMATION / LIE: "Jarmuth ... alleged defamation by some of his co-employees at the FBI". (emphasis added)

(1) None of the defendants were Plaintiff's co-employees ANYWHERE ANYTIME.

(2) None of the defendants were ever "employees at the FBI" ANYWHERE ANYTIME, or even federal employees. Upon information and belief, they were never employees of ANY government entity.

(3) The clear intent was to paint Plaintiff as someone who can not get along with his co-employees. The implied message is that one does not get to work at the FBI unless one is reputable, and to make such an accusation against multiple FBI employees is an implied accusation of mental unfitness.

(4) Because the Defendants had an undeniable record of the true

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[6] This allowed Verizon to use the half of the bandwidth normally used for DSL to carry another subscriber's voice line, saving Verizon having to "string" another copper wire.

[7] Verizon ultimately pulled the multiplexing equipment out and provided DSL service, apparently

circumstances – they provided Plaintiff's neighbors an electronic and paper copy of an interlocutory order which addressed this in depth – these editorial LIES must be presumed to be intentionally made.

(d) DEFAMATION LIE: That Plaintiff's conduct led to "termination of his employment with the FBI on 4/21/01".

(1) The assertion by Defendants that Plaintiff was terminated by the FBI under the circumstances they presented in their editorial comment is a defamation by innuendo. It meets the Crump definition cited by Hon. Judge Keeler as to defamation per se as a matter of law. It is well known that federal employees can not be terminated except for cause, and that such termination is extremely difficult – termination must follow a significant really bad deed by an employee. In the federal system inadequate performance must be adressed by an "improvement effort" where the burden is on the supervisor to make it happen, not on the employee to figure it out. See further on "Jarmuth v Weiss".

(2) This Plaintiff has NEVER been terminated from any position by any employer. After the date asserted by Defendants, "4/21/01", Plaintiff continued to be a federal employee.

(3) The matter is irrelevant to the issue of the HOA "lawsuit" but served the illegitimate purpose of defaming an individual attempting to unseat the HOA defendants for waste, fraud, and abuse of fiduciary duty and to the Diehl co-defendant whose contract would likely be terminated after such a successful impeachment. The Defendants had motive, opportunity, and unquestionably published this "Crump" defamation. It was done with utter disregard for it's consequences and was written recklessly.

118. Case # 11 on the LIST, "Jarmuth v Reynolds".

a. The editorial description in "The List' is written with, and conveys, a defamatory meaning – to wit, that Plaintiff was so reckless in managing his finances that he had to file for bankruptcy protection, and thus can not be trusted with the affiars of the HOA.

b. Since the Defendants had the case abstract, they knew that –

(1) The case was actually the involuntary bankruptcy of the same

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due to embarrasment over this issue.

Turetsky who had stolen funds (per a federal jury) from Plaintiff;

(2) Reynolds was Plaintiff's attorney in the Turetsky case, and the nominal "defendant" Reynolds endorsed the appeal. This action was also endorsed by the attorneys for all other creditors which included Sears, several banks, and at least one stock brokerage firm – all with Turetsky unpaid debts.

(3) A fair report would have stated what was appealed – the refusal of the bankruptcy judge to honor the unanimous vote of the Creditors' Committee on their selection of a Bankruptcy Trustee. The judge ignored the vote and appointed an individual from what was known as the "bankruptcy bar".

(4) While the editorial caption says "the appellate Court's decision is attached", it is not attached or "hot linked" to the version of Defendant's List available through the web page (and it is tenousou to claim that they expect that all 700 or so recipients of the package by mail will read both the list and some "meaningless" case of several pages. As set forth in what Defendants wrote, the meaning conveyed is that the bankruptcy case is that of Plaintiff, which is a false meaning recklessly conveyed.

119. Case # 12 on Defendants' List, "Jarmuth v Weiss".

a. The false premise of the editorially written description is that a federal jury agreed that Plaintiff files frivolous cases, as, according to what Defendants wrote, a "Jury found against Jarmuth ... and the appellate Court confirmed the jury verdict". Since Golding downloaded (and separately provided) the appellate order, it is undeniable that Defendants wrote their description recklessly and with utter disregard for the truth.

b. Defendant's statement contains several BIG DEFAMATORY LIES:

(1) The case never went to the jury.

(2) The appellate court never "confirmed the jury verdict".i

c. The intent of the Defendants is to tell neighbors of Plaintiff that Plaintiff recklessly brings cases. Reading the case material (available from Pacer) would have brought out the fact that Plaintiff was ORDERED by the Solicitor General of the US Department of Labor to file the lawsuit against Weiss, and that the US Department of Labor and the US Department of Defense found that Weiss has in fact done everything he was accused of.

d. Having found "Jarmuth v Weiss", it is inexplicable – except for improper

purpose – that Golding omitted "Weiss v Jarmuth and Fuller" where Jarmuth and Fuller were represented by the Attorney General of the US, where the accusation was that Defendants improperly assisted (by testifying) the US Government in firing Weiss for attacking Jarmuth AND for attacking a more senior official (and for failing an improvement period). The representation by federal counsel is destructive to the defamatory premise of ALWAYS proceeding pro se, and that Jarmuth and Fuller won both at trial and in the appellate courts is likewise destructive to Defendants' depiction of Plaintiff to Plaintiff's neighbors.

120. Case #13 on Defendants' List, "Jarmuth v Turetsky" (interlocutory appeal).

a. The Defendants represented, through Golding's May 27th letter, that the 13 cases are all they could find in the period between May 8 [8] and May 27, 2009.

b. Performing a Lexis search, the "removal" appeal was not found. Likewise with a Google search on June 8, 2009. The very first case found by Google was, upon information and belief, the actual removal case, with a citation 986 F.2d 1413, referring to two interlocutory appeals (Nos. 92-2193 and 92-2218). These were the appeals relating to removal from the Circuit Court of Prince George's County, MD based on a "federal question or right". Defendants claim they are summarizing the appellate order (they recite that "Jarmuth appeals ..."),

c. The actual Order – which Google brings "straight up" – reads:

> "Both Ronald E. Jarmuth <u>and</u> Oxana Turetsky appeal from the district court's order dismissing Jarmuth's 28 U.S.C.s 1442(a)(1) (1988) petition for removal and remanding the case to the Prince George's County Circuit Court. ... we dismiss these appeals for lack of appellate jurisdiction".

d. That both sides appealed the matter gives the appeal a different (more reasonable) twist and presents it in a more favorable light than the slant that Defendants present – frivolous proceedings.

e. The removal proceedings were irrelevant to this case as well as to the HOA impeachment proceedings, and were not mentioned for any legitimate purpose.

e. What is readily found is Jarmuth v Turetsky in the USDC-DC, (discussed in a prior paragraph) where Jarmuth was represented by counsel before a federal trial jury

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[8] Golding was searching at least as far back as May 8th, based on the day at the bottom of the "Cox" case extract she published.

and prevailed, and subsequently prevailed in the appelate court and in a subsequent bankruptcy case where Turetsky was the individual seeking protection. The omission of the major case and substitution of an interlocutory case which the Fourth Circuit wrote should not be cited (4th Circuit Rule OP 36.6) by a seasoned attorney, Golding, demonstrates the malicious intent of the Defendants.

The "Golding" May 27th Letter

121. No later than May 28th, 2009 the conspirators (the Defendants) published a letter signed by Defendant Golding, whose preparation and integration into a three – media publication effort has already been described and is incorporated by reference. As explained, it was written with Plaintiff's neighbors as the intended audience.

122. As Golding admitted on page 4 of the letter, she was intent on finding and publishing – to Plaintiff's neighbors – any defamatory she could find "primarily relating to his background" which was both irrelevant to this case and prohibited by Rule of Ethical Behavior Rule 3.6. In point of fact Golding's involvement in the entire scheme was prohibited by Rule 3.6 (as well as Rules 3.7, 4.1, 4.4 and 8.4). The information, if collected and kept private (it was not) was not likely to lead to any admissible evidence, even for impeachment, since the original allegations and requests for relief are expressed largely through documents which largely come straight from the Recorder of Deeds.

123. On page five (5) of the letter she stated with utter reckless disregard and malicious intent two lies (the basis for this statement having been demonstrated previously) -- that

> "Plaintiff in at least thirteen (13) different claims / lawsuits (not counting this lawsuit) and it appears that he was *pro se* in each one. It also appears that he was not ultimately successful in any of the thirteen (13) lawsuits"

and this statement was made to intimidate, harass, defame Plaintiff and interfere with his efforts to seek a seat on the HOA board. The defamatory effects of the combined materials defendants published is seen by it's effects, already cited. The Golding letter was "shoved" at neighbors who did not request it (using postal and e-mail), put out in front (attached to the email and in plain view in print) with the imprimature of Golding in her letter mis-used to give everything the look of truth and legitimacy,

The Diehl / Abel Email

124. On May 28, 2009 at 12:55 in the afternoon (as set forth previously, all reference above are incorporated herein for demonstrations of defamation or other improper

tortious conduct) "Beckie Abel", "For the Board of Directors", in her stated capacity as "Senior Community Manager, K.A. Diehl & Associates", using the Diehl controlled mechanism "Messenger@AssociationVoice.Com", sent an email to every homeowner in the HOA for whom they had an email address. All Defendants had previously refused this Plaintiff access to this list in violation of law.

125. The email was sent separately to each homeowner. Each homeowner's copy was customized with his email address on the page bottom (not done by the homeowner's own email agent) in addition to using the homeowner's email address for the "send to".

126. The email was, upon information and belief, written by Golding and Golding orchestrated the identification, preparation, and integration of all components to carry this off.

127. Abel stated that the reason she was writing was

> "We wanted to make sure that the membership gets the correct information on this matter and begin to dispel some of the speculation that has been started throughout our community". "Hopefully, this information will answer the many questions that we have been asked and to date, have not been able to answer"

a. The Defendants used "bait and switch" to tantalize Plaintiff's neighbors / fellow homeowners to read Golding's May 27th letter (attached) and to navigate to the web site "Click Here".

b. The email was titled "Litigation Details". None of the information about Plaintiff was "litigation details".

c. Upon information and belief, no HOA member had asked Diehl about Plaintiff's litigation history. What many homeowners HAVE asked for in "ICBuzz" was to see a copy of BOTH actual complaints and the HOA's answer – since the homeowners ARE the homeowner association, bear the costs of litigation, are impacted by the publicity (spread only by Defendants). Another reason that the homeowners have asked to see a copy of the pleadings is that the Board has tried to "spin" the allegations and it wold be appropriate for the homeowers to see how the published claims of the HOA stack up against the facts recited in the complaint.

d. On June 5, 2009 the Defendants sent out an email using the "Assocation Voice" mechanism controlled by Diehl (the same one used by Abel) titled "HOA Updates". In it they denied that they were providing information on the litigation and then proceeded

to address some of the issues raised in the original version of this complaint: (1) Board secrecy – documents and meetings; (2) Abuse of fiduciary duty by waste, fraud and abuse – spendng HOA money to landscape and maintain private property; (3) Election / Replacement of Board Members; (4) Financial unaccountability / mismanagement.

128. The May 28th email clearly was not sent for legitimate purpose but rather as the vehicle to induce Plaintiff's neighbors to see material prepared for it's expected defamatory and injurious effect --- not for the purported purpose for which neighbors were induced to enter the site.

Defendants' May 28, 2009 Letter

129. On May 28, 2009 Beckie Abel mailed a package to each homeowner by US First Class Mail. All prior references to this and to the contents thereof are incorporarred by reference, as are allegations made in previous text.

130. Each publication was mailed in a separate envelope addressed to a specific homeowner / neighbor.

131. The letter implicated the Defendant Board because it was signed "FOR THE BOARD OF DIRECTORS". Upon information and belief, the Defendant Board was aware of and consented to this enterprise.

132. The letter was signed by "Beckie Abel" in her capacity of "Senior Community Manger; KA Diehl & Associates" and thus implicated Defendand Diehl, who had a responsibility to supervise and control Abel. Upon information and belief, the selection, preparation / production and mailing of the letters was done with the knowledge, support and consent of Defendant Diehl management.

133. The publication was aimed at defaming and harming this Plaintiff and had the intended consequence of stirring up neighbors against this Plaintiff based on holding this Plaintiff in a false and negaitve "light".

134. The letter campaign had been coordinated with the email and contained text identical to the email:

> "Hopefully, this information will answer the many questions that we have been asked and to date. ... We wanted to make sure that the membership gets the correct information on this matter "

Plaintiff's comments and assertions relating to the same text contained in the email, willful disregard and intent apply to the publication by mail.

135. The contact information was Diehl's email server, it's phone numbers, and it's office address. Clearly this was not an independent initiative by rogue employees.

Defendants' / "Association Voice" Website

136. The website to which Plaintiff's neighbors were sent to by a link on the email and by an invitation on the letter was under the ownereship, access and control of Diehl, is paid for by the HOA, and is ultimately built, maintained, and controlled by the HOA defendants. The address of the "front end" web page is "http://wwww.internationalclubhoa.com/doc" whick associates it to the HOA Defendant. The page has the logo and name (at the bottom) of "KA Diehl & Associates, Property Management Services" which ties it to the Diehl defendant. The web page instructs homeowners who have been brought to the page that

> "You can open any folder or document simply by clicking on the item. When you reach the document of interest, you can download it to your computer, print it, or view it on-line!"

clearly demonstrating that it was intended that the defamatory messages not be susceptible to "damage control" (by deleting offending material) as the material will have been replicated – as instructed by Defendants on this page – on the pc's of neighbors of Plaintiff. This is consistent with the additional mailing of the hard copy material published on the web page by defendants.

INVASION OF PRIVACY

137. All of prior material in this Complaint are incorporated by reference.

138. The publication to Plaintiff's neighbors, without their request or other legitimate purpose, constituted an invasion of the Privacy of Plaintiff in that it exposed to said neighbors an area of his life (and did it falsely) that Plaintiff had a reasonable expectation would remain private from said neighbors.

a. The invasion was done purposely, recklessly, and with disregard for Plaintiff's rights and was done with the intent of harming Plaintiff in occupation (as a prospective HOA board member) and to intimidate Plaintiff into withdrawing this lawsuit or into moving away and thus losing standing in this case.

b. As to Defendant Goldling, it was done in violation of the Rules of Attorney Ethical Behavior.

c. As to the Diehl defendant, it was done for a monetary purpose – to perpetuate their contract with the current putative board.

d. The material disclosed was not readily available or, for all practical purposes, was inaccessible to Plaintiff's neighbors.

e. Much of the "private material" presented was, in fact, either inaccurate or completely false, and this distortion was purposely done for malicious purpose.

INTIMIDATION AND HARASSMENT

139. Plaintiff incorporates by reference all the material preceding in this Comlaint.

140. The Intimidation and Harassment was initiated and carried out by all defendants acting as a joint conspiracy with the objectives of (a) inflicting emotional distress; and (b) intimidation to interfere with (1) the occupation of prospective board member and (2) because of (and to interfere with) the expression of political opinion (regarding the governance of the quasi-governmental HOA, (3) to interfere with the exercise of political rights guaranteed in the South Carolina Non-Profit Corporation Act, and (4) to interfere with the privileges of membership stated in that same statute, and in the HOA covenants and bylaws.

BREACH OF CONTRACT

141. Plaintiff incorporates by reference all the material preceding in this Complaint.

142. The Covenants constitute a Contract between this Plaintiff as owner of property within the Planned Unit Development subject to the Covenants (if they were not previously abolished).[9]

143. The HOA Defendant exercises the rights and obligations of the other parties to the Contract and is the "other" party to the contract (covenant). It has the power to act on the contract in the name of the HOA, and all other homeowners must act derivatively in the name of the HOA to enforce the contract.

144. Both parties to the Covenants have an implied contractual obligation to "act in good faith and with fair dealing".

a. The HOA Defendant's conduct of bad faith and unreasonable action impaired Plaintiff's exercise of his rights under the covenant and was so intended.

b. The HOA Defendant used the resources involuntarily collected from Plaintiff

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[9] This lawsuit asks the Court to declare that the Covenants were abolished on May 11, 2003 by agreement of the entities entitled to amend same that being Plantation AD, DR Horton, and Sunbelt.

to tortiously injure Plaintiff, which is an unreasonable and bad faith use of the assessments.

c. There was an intentional failure on the part of the HOA party to the contract (covenants) to exercise an honest and informed judgment in dealing with Plaintiff, the other party to the contract. The HOA Defendant acted in bad faith because there was no reasonable basis to support it's decision to injure this Plaintiff.

d. The HOA Defendants have acted in a manner which is fraudulent, oppressive and unfairly prejudicial.

e. The duty of good faith and fair dealing is a fiduciary duty and the HOA Defendants acted outside that fiduciary standard.

f. There existed no reasonable basis to indicate to the Boarsd that their actions against this Plaintiff were "good faith" acts – the "Business Judgment Rule" has no place here.

g. The actions of all Defendants were aimed at interfering or preventing Plaintiff from exercising his rights under the contract and are so outrageous that they constitute a major and significant breach of the contract, justifying more than just the award of monetary damages – they justify severing the contractual relationship between the parties under the Covenant.

h. Plaintiff recognizes that in severing the contract he will have an obligation to pay his fair share of the operational and reserve costs of the recreational facility to which he has an independent right of use and claim of a degree of equity ownership in.[10]

i. Plaintiff demands that his obligations and rights under the contract between the parties styled as a Covenant be terminated, and that provision be made that Plaintiff pay the same annual charge for use of the Recreational Complex that is charged all other homeowners entitled to use the facility.

FAILURE TO PRODUCE THE VOTER / MEMBER LIST OF THE HOA.

145. Plaintiff incorporates by reference all the material preceding in this Complaint.

146. Plaintiff has been illegally refused access to the complete voter / owner / member HOA data base used by the HOA to communicate with the members by phone, mail, and email.

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[10] Plaintiff inherited the equity stake in the Amenity Center acquired independent of the HOA. See relevant portions of Original Complaint.

147. Plaintiff is entitled to full access to said data through the operation of SC Code 33-31-1601 (a) Permanent Records of a non-profit corporation; and SC Code 33-31-1602 Inspection of Records by Members of a non-profit corporation.

148. SC Code 33-31-1604 Court Ordered Inspection gives this Court authority to so order.

149. On April 28, 2009 Plaintiff served a written demand on the HOA's registered agent, KA Diehl, to inspect and copy the list of members as it exists in the permanent records of the corporation. This request satisfied the demand requirements of the Non-Profit Corporation Act, 33-31-1601 and 1602.

150. Within hours Plaintiff was emailed a reply from attorney Henrietta U. Golding stating

> "... this firm has been retained to represent the International Club Homeowners Association and Rosemary Toth with respect to the above legal action. ... your request for the membership list is denied."

151. Golding made the self-serving determination that the demand to inspect and copy was not made "in good faith" or for "proper purpose".

152. Golding wrote further, with the authorization of all Defendants, that

> "Neither the Association, nor Ms. Toth, will engage any further in communications with you until the litigation has ended".

which illegally interfered with Plaintiffs rights as a matter of law and covenants independent of this litigation to inspect and copy the records of the HOA, to discuss the status of his account, and to acquire a copy of the database of members. This decision was a further breach of the contract as well as a violation of the South Carolina Non-Profit Corporation Act.

153. SC Code 33-31-1604 vests subject matter jurisdiction over this matter in this Court, and also provides the authority for this court to summarily and expeditiously dispose of this matter. The statute also provides that if the Court finds that the applicant is entitled to a copy of the list of members, the corporation shall bear the complete expense of inspection and copying, and as well -- all court costs.

154. The Court is asked to Order the immediate Inspection and Copying of all elements of the list of members (electronic) as maintained by the HOA non-profit corporation at the expense of the HOA, plus court costs attributable to their illegal refusal. For the purpose

**of this, all court costs borne by Plaintiff up to and terminating with an Order for Inspection and Copying are requested to be considered as taxable costs against the Defendant HOA.**

**By:** _____

**Ronald Jarmuth, Plaintiff**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**

**June 9, 2009**

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|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY ) | CIVIL ACTION NO.: 2009-CP-26-3596 |

FILED
HORRY COUNTY
2009 JUN 19 PM 12:44
MELANIE HUGGINS
CLERK OF COURT

Ronald Jarmuth,

Plaintiff,

vs.

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

Defendants.

DEFENDANTS THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC. AND ROSEMARY TOTH ANSWER TO FIRST AMENDMENT TO COMPLAINT

The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth, hereby answering the First Amendment to 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 Paragraphs 88 and 89.(a.) are admitted.

3. In answering Paragraph 89.(b.), the answering Defendants admit the address of the Defendant K.A. Kiehl & Associates, Inc., that it is a corporation in good standing and that it has contracted with the Defendant The International Club Homeowners Association, Inc., but the remaining allegations are denied and strict proof demanded thereof.

4. With respect to the allegations in Paragraph 90, the Answering Defendants admit only that venue in Horry County is proper.

5. The allegations of Paragraphs 93, 95 and 98 are admitted.

6. The allegations of Paragraphs 91, 92, 94, 97, 99 are denied and strict proof demanded thereof.

7. In answering Paragraph 96, it is only admitted that the Answering Defendants' Attorney did email a letter to the Plaintiff and the letter speaks for itself.

8. In answering Paragraph 100, the Answering Defendants do not have sufficient information as to the date the web-page became operational and therefore deny the same.

9. The allegations of Paragraphs 101, 102 and each of the 103 paragraphs, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 149, 151, 152, and 154 are denied and strict proof demanded thereof.

10. With respect to the allegations in Paragraphs 130, 131, and 132, it is admitted that a letter was sent to homeowners in the International Club Community by K.A. Diehl and Associates.

11. In answering Paragraph 142, the said allegations therein constitute a legal conclusion but it is admitted that the Declaration of Covenants and Restrictions, as amended, constitutes a contract with the homeowners in the International Club community.

12. In answering Paragraphs 148 and 153, the statutory provisions referenced therein speak for themselves.

13. In answering Paragraph 150, the Answering Defendants admit that a letter dated April 28, 2008 was emailed to Plaintiff and the letter speaks for itself.

SECOND DEFENSE

14. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

15. The Answering Defendants assert the applicable statutes of limitation as a complete defense to Plaintiff's claims.

THIRD DEFENSE

16. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

17. The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims.

FOURTH DEFENSE

18. The allegations of the First, Second and Third Defenses are incorporated herein and made a part and parcel hereof.

19. Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule.

FIFTH DEFENSE

20. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

21. The Answering Defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

22. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

23. The Answering Defendants assert consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

24. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

25. 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

26. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

27. Any and all matters asserted as to the Plaintiff are absolutely privileged in that all matters published are contained in Court decisions and opinions.

NINTH DEFENSE

28. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eight Defenses are incorporated herein and made a part and parcel hereof

29. Any and all communications regarding the Plaintiff were made in good faith and thereby are privileged.

TENTH DEFENSE

30. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight and Ninth Defenses are incorporated herein and made a part and parcel hereof

31. Any and all statements with respect to the Plaintiff were fair comment and thereby protected.

ELEVENTH DEFENSE

32. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth and Tenth Defenses are incorporated herein and made a part and parcel hereof

33. Any and all statements with respect to the Plaintiff is neutral reportage and thereby protected.

TWELFTH DEFENSE

34. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth and Eleventh Defenses are incorporated herein and made a part and parcel hereof.

35. Any and all facts relating to litigation involving the Plaintiff is privileged.

THIRTEENTH DEFENSE

36. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh and Twelfth Defenses are incorporated herein and made a part and parcel hereof.

37. The Amended Complaint should be dismissed for the Plaintiff has failed to add indispensable and necessary parties.

FOURTEENTH DEFENSE

38. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defenses are incorporated herein and made a part and parcel hereof.

39. Certain governing documents relating to the International Club community may be ambiguous and therefore, the answering Defendants assert ambiguity as a defense.

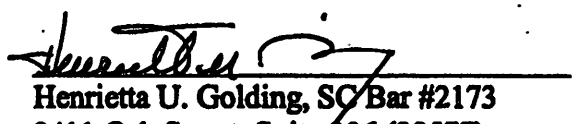
FIFTEENTH DEFENSE
AND FIRST COUNTERCLAIM

40. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Defenses are incorporated herein and made a part and parcel hereof.

41. 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 First Amendment to Complaint, the Answering 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.



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*The International Club Homeowners Association, Inc. and Rosemary Toth*

Myrtle Beach, South Carolina
June 19, 2009

| | | |
|---|---|---|
| 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 REPLY |
| | ) | TO DEFENDANTS' ANSWER |
| vs. | ) | TO AMENDED COMPLAINT |
| | ) | |
| The International Club | ) | |
| Homeowners Association, Inc., | ) | |
| and | ) | |
| Rosemary Toth | ) | |
| | ) | |
| Defendants | ) | |
| | ) | |

1. Ronald Jarmuth ("Jarmuth") Plaintiff Pro Se, replies to "Defendants The International Club Homeowners Association, Inc And Rosemary Toth Answer to First Amendment to Complaint" stating the following as to Defendants' Defenses and Objections:

2. The Authority is SC Rule of Civil Procedure (SCRCP) Rule 8(c) which provides that "A party may file a reply to any of the foregoing affirmative defenses".

3. Prefatory. Rules of Pleading Affirmative Defenses in Answer which Defendants' Answer ignored.

a. Time. SCRCP Rule 9(f) requires that, when asserting anything depending on time (and place), the time and place is material and must be stated with specificity. Limitations of actions are among the defenses requiring the pleading of what specific causes of action are dependent on time, the times such events occurred, the applicable limitations with a citation to the controllling statute, and when the time for the particular cause of action expired.

b. Law and Facts. SCRCP Rule 12(b) requires that mandatory defenses be supported by citations to applicable law and FACTS.

c. Facts Required to Support Affirmative Defenses. SCRCP Rule 8((b) (Defenses; Form of Denials) )requires that

> "A party shall state in short and plain terms the facts constituting his defense to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies
>
> ... Denials shall fairly meet the substance of the averments denied. "

4. Regarding the Second Defense – Statute of Limitations (Def Para 14). In Paragraphs 8 of their Answer Defendants state that "the applicable statute of limitations is a complete defense to Plaintiff's Claims.

a. Defendants have failed to state which claims are governed by which limitations and which specific action (with dates) by Defendants are outside the limitations of actions. The defamation related claims in the Amended Complaint refer to events which occurred at most months, not years, before the amended complaint was filed. Asserting a statute of limitations against a defamation claim for events occurring less than a year before the filing of the complaint is a frivolous defense subject to Rule 11 and the Frivolous Lawsuit statute – especially when the pleading has been signed by an attorney.

b. Applicable Statutes of Limitations.

(1) SC Statute 15-3-550 provides a two (2) year statute of limitations on actions for libel and slander. Clearly the limitation is not applicable here.

(2) SC Statute 15-3-530(1) provides a three (3) year statute of limitations on actions upon a contract. The Covenant and Bylaws are in the nature of a contract. Demands for documents under the South Carolina Non-Profit Corporation Act are contractual in nature. All cited unsatisfied document demands were made within the last three years, thus this limitation is inapplicable.

(3) Subsection (2) likewise provides a three (3) year limitation on actions against directors – which this can be construed as – but that is limited to actions relating to

> "a monied corporation or a banking association to recover a penalty or forfeiture imposed or to enforce a liability created by law"

and Defendant HOA is not a "monied corporation ..." but a non-profit corporation. The statute is instructive because it echoes the rule that limitations of actions can not be plead as a defense by defendants who actively hide facts / documents which would have revealed the existence of tortious conduct, or whose published

documents lie about the facts. This statute states the "cause of action in the case not considered to have accrued until the discovery by the aggrieved party of the facts". Also, the ADDITIONAL acts cited in the Amended Complaint occurred less than three years ago.

(4) Defendant Rosemary Toth and the current putative Board took office no earlier than September, 2007, which is less than two (2) years prior to the filing of this Complaint.

(5) The misconduct of Defendants is NOT a contract issue but a tort created by statute. The Non-Profit Corporation Act states obligations of non-profit corporations towards their members and imposes standard of performance and conduct for the entity and the directors. These are thus subject to a different statute of limitations. South Carolina Statute 15-3-600 (Action for other relief) provides that

> "An action for relief not provided for in this chapter must be commenced within ten years after the cause of action shall have accrued."

Since the earlier cited 3 year limitation of Section 15-3-530(9) on actions against directors "of a monied corporation" does not apply to suits against directors of a non-profit corporation, such suits are governed by the ten (10) year statute of limitations.

5. Regarding the Third Defense – Waiver, Laches, Estoppel. In paragraph 17 of Defendants' Answer they state that "The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims."

a. As plead by Plaintiff supra, a bald faced assertion of these affirmative defenses without reference to specific acts (with dates and times) of Plaintiff is insufficient and should be disregarded by the Courts. This is clearly another Rule 11 violation by Defense Counsel for improper purpose, to delay or otherwise increase the cost of ligitation. It fails to meet the requirements of pleading already cited.

b. Waiver in general is the

(1) Expressed or implied voluntary and intentional relinquishment or abandonment of a legal advantage, claim, requirement, or right.

**(2) Document (instrument) by which such abandonment or relinquishment is effected.**

**In pleading Waiver Defendants are required to cite what specific acts of Plaintiff are relied upon so that Plaintiff can adequately counter such an assertion. Rather than assert that Defendants' Answer constitutes an insufficient pleading, Plaintiff sees this claim by Defense Counsel on behalf of Defendants as having incorporated all the facts known or suspected by Defendants – which are none. Since Defense Counsel can not cite a single actual Plaintiff act or document constituting "waiver", the Court must reject this defense. Reference to the Complaint will adequately document that Plaintiff has doggedly sought to enforce the rights of the Homeowners, rather than undertaking any act to waive same. Since this action is plead as a class action, Defendants defense argues that each and EVERY homeowner "waived" his / her rights, which quite frankly is absurd.**

**c. Defendants have failed to assert what ACTs (including time and place) of Plaintiff constituted a "waiver" of rights to recover against Defamation, Invasion of Privacy, Intimidation / Harassment, A Breach of the Contract because of failure to act in Good Faith and with Fair Dealing, and failure to produce records.**

**d. <u>Estoppel</u> in general is the**

**Legal rule of evidence (and not a cause of action) which**

***(1) prevents a party from making an allegation or denial that contradicts what it had previously stated, or what has been legally established, as the truth,***

***(2) supports a claim for damages of the party that had a good-faith reliance on a misleading representation of another party.***

**In pleading "estoppel" Defendants are required to state what contradicts a prior legal finding to which Plaintiff<u>s</u> [1] were / are a party.**

**(1) Upon information and belief, there has never been any prior litigation involving the parties OR the causes resulting in findings of fact or of law announced in an Order of Court or Judgment. The only "truth" is that which this forum will find in this case. In addition, in a Complaint a Plaintiff is allowed to argue**

contradictorily "in the alternative" – however Defendants have not shown any of this. If anything, the second definition of Estoppel supports the Plaintiff claims against Defendants, because the homeowners have not been required to execute due diligence but, since the Defendants are fiduciaries, the homeowners have been allowed to rely on that fact and to accept as true the bald faced lies stated by Defendants.

(2) Defendants have failed to assert what prior legal proceedings invoke Estoppel (including actual Orders of Court – there are none) estopping Plaintiff from recovering against Defendants on the Defamation, Invasion of Privacy, Intimidation / Harassment, A Breach of the Contract because of failure to act in Good Faith and with Fair Dealing, and failure to produce records causes of action.

e. Laches in general is

> Neglect and unreasonable delay in the assertion of one's claims or rights. Courts expect reasonable diligence from a claimant, in addition to conscience and good faith. Under the legal doctrine of laches, they may refuse to enforce or recognize an individual's rights if he or she waits more than a reasonable length of time to assert them. Unlike the statute of limitations this doctrine, however, does not define 'reasonable time' but leaves its determination to the courts.

It can be seen from the chronological history set out in the Amended Complaint that Plaintiff has exercised due diligence in promptly asserting Plaintiff's rights. Defendants have not asserted what alternative actions Plaintiff(s) were available to Plaintiff and which would have been effective to enforce his rights.

6. Regarding the Fourth Defense – "Good Faith".

a. In paragraph 19 of their Answer to the Amended Complaint Defense Counsel wrote, for Defendants, that

> "Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule".

b. The Business Judgment Rule, in general, is the

> "Legal presumption that the management of a firm is acting in the firm's best interest and, therefore, its decisions are protected from judicial review. It protects the management from decisions that result

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[1] Plaintiffs as a class.

> in loss or turn out to be wrong. If the management is found, however, to be in violation of its fiduciary duties, the rule does not apply and its activities come under the scrutiny of the courts."

c. The Business Judgment rule applies to derivative suits by shareholders to recover losses to a business entity. It is an "inside loss" concept. It is inapplicable to "outside injuries" – wrongs and injuries inflicted by Directors / Officers / or the Corporation on outsiders. Defamation, Invasion of Privacy, Intimidation / Harassment, A Breach of the Contract because of failure to act in Good Faith and with Fair Dealing, and failure to produce records are torts inflicted on an "outsider". The rule is clearly inapplicable and is frivolous.

d. "Good Faith" applies only if limited immunity existed as a matter of law, such as when an INDIVIDUAL reports TO POLICE a suspicion of a crime (or a psychologist or an attorney reports that his client is likely to commit a crime). In the action at bar the acts complained of were not reports to police, did not apply to contemporaneous acts, and the defendants had no independent knowledge of any facts to support their allegations. Also, "good faith" does not apply to a corporation, only to individual actors. A sustained campaign of defamation involving numerous persons and resources of several corporations (KA Diehl & McNair) does not qualify. The concept is inapplicable to invasion of privacy, and harassment.

7. Regarding the Fifth Defense – "Unclean Hands of Plaintiff.

a. In paragraph 21 of the Answer (to the Amended Complaint) Defense Counsel writes, for Defendants, that

> "The answering defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims."

b. The Unclean Hands Doctrine is also known as the Dirty Hands Doctrine. In general this is the

> Legal principle that a participant in a wrongful act may not recover damages resulting from it (may not sue the other participants in the wrongful act).

The problem with Defendants pleading this is that Plaintiff "never had the power" and was never consulted in any decisions or acts by the defendants as to the Added Counts – or as to any act by Defendants at all. Defendants never plead, in their

answer, which wrongful act Plaintifff was "unclean". To plead this Defense Counsel must describe with specificity as to time and place the facts. Since Defendants are not appearing pro se but have learned counsel, the Court is entitled to presume that the absence of such facts in their pleading is proof that they have no such supporing facts and that pleading this doctrine as an Answer is frivolous.

c. Unclean Hands is sometimes mistakenly cited where the "in pari delicto doctrine" applies, which is related. That doctrine is the

> Legal principle that if two parties in a dispute are equally at fault then the party in possession of the contested property gets to retain it (courts will not interfere with the status quo). It implies that if a party whose action (or a failure to act) precipitates breach of a contract, or which fails to take appropriate action (or takes inappropriate action) to limit or recoup a loss, may not claim damages.

It is noted that the Counter-complaint is silent as to any accusations that Plaintiff defamed Defendants or invaded their privacy. The Civil Rules require all counter-claims which might be raised, where the circumstances are known to Defendants – to be raised. To state the defense specific acts must be known when the defense is stated – they can't state it up front and hope they will find something later. The "Unclean Hands" defense is friviolous.

8. Regarding the Sixth Defense – "Consent and / or Novation".

a. In paragrpah 23 of their Answer Defense Counsel wrote for Defendants that they "assert consent and / or novation is a complete defense to Plaintiff's claims".

b. Consent. In general, consent is the doctrine that a plaintiff made an informed decision to agree to a specific act by a defendant which could / would potentially injure the Plaintiff in some way. As with the other defenses, Defense Counsel has not met her burden to plead with specificity what this consists of and the absence of plead facts must be taken by the Court as an absence of facts, meriting the disregard by the Court of this defense. It is noted that Plaintiff never agreed to any of the terms of use applicable to the Diehl / HOA "Association Voice" web site.

c. Novation in general is

The substitution of a new contract for an old one; or the substitution

of one party in a contract with another party.

(1) No "new contract" has been proposed in place of the old Covenants and Restrictions (CC&R's) Plaintiff has never signed any document with Defendants which could constitute permission to defame him, intimidate him, invade his privacy, ignore obligations under the Non-Profit Corporation Act. If Defendants are referring to Plaintiff "stepping into the shoes" of the original owner of Plaintiff's residence, this is equally inapplicable because the CC&R's gave no right to the Defendants to abuse the original owner in the same manner they have abused Plaintiff.

(2) The Rules of Pleading requires such specificity. There are no facts stated to support this defense – which is one based on documents, if applicable at all. It is a frivolous defense.

9. Regarding the Seventh Defense – Immunity.

a. In paragraph 25 of the Answer Defense Counsel writes that

> "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".

b. First, it is a matter of disputed fact whether Toth is legally even a board member. Another parallel suit, The Villas v International Club Homeowenrs Association Inc (same defendant) also alleges that the board is illegally seated and all acts are "void or ultra vires".

c. The phrase "immune" (or variants) is absent from the covenants and bylaws. Defamation (a crime in South Carolina), invasion of privacy, intimidation / harassment (a crime in South Carolina) are by definition intentional torts not dischargable in bankruptcy and they are likewise "wilful" and "wanton". The immunity from suit is a limited immunity stated in SC Statute 33-31-834, and is inapplicable if the act was one which is one "arising from the conduct of the affairs of (the) ,,, corporations". It does not apply if the acts are not legitimately and demonstrably central to the purposes of the non-profit corporation. Clearly defmaation, invasion of privacy, and intimidation are not among the purposes of a homeowner association. The statute explicitly states that under the present

circumstances, said immunity does not apply because the "This immunity from suit is removed when the conduct amounts to wilful, wanton, or gross negligence."

d. Neither the bylaws nor the covenants provide any "power" or "authority" to misuse the resources of the HOA for private purposes – defamation, intimdation / harassment, invastion of privacy. The acts complained of are not functions or acts which a homeowners association can legitimately perform and is outside of the functions of the non-profit. The authority to expend HOA resources is not absolute; in this instance the misuse of resources is an abuse of fiduciary responsibility – and a crime under the non-profit act. If an officer acted outside of their authority the act then is a financial crime (SC Statute 16-13-xx), one which is likewise never immunized and which is a misdemeanor or felony.

e. It is noted that Defense Counsel has not asserted "immunity" for the second Defendant, the HOA itself. The statute explicitly precludes this as a defense to the non-profit HOA, the statute reading:

> "Nothing in this section may be construed to grant immunity to the not-for-profit cooperatives, corporations, associations, or organizations."

10. Regarding the Eighth Defense – "Privilege".

a. In paragraph 27 of their Answer defendants assert that "*Any and all matters asserted as to the Plaintiff are absolutely privileged in that all matters published are contained in Court decisions and opinions* "

b. Defendants published by postal mail, by email, and by web page a document entitled "List of Lawsuits Associated with Ronald E. Jarmuth". This was not a court document. It was admittedly created, authored and edited by Henrietta Golding at the expense of the HOA defendants and was published using the resources and assistance of the Diehl and HOA defendants, with the approval of the management of the HOA (the putative board) and Diehl.. It is not a "Court decision and opinoin". Defendants are completely responsible for insuring the accuracy of the contents. It contained lies and defamatory innuendo. For example, Plaintiff was never "terminated" from any job. The "List" is not privileged. As stated in the Amended Complaint, the "facts" are wrong so many times that it is clear that the author, an attorney, acted intentionally to defame by false statement and by

omission.

c. The law of republication is well established with regard to newspapers which have a broader immunity than private individuals. Even they must exercise care when republishing material from any other source ; it is well taken that they must use qualifiers such as "alleged" when repeating defamatory material found elsewhere – and the material must be newsworthy and applied to a public figure in a public context. In a suit alleging defamation it is necessary to repeat the phrases which the tort-feasor has stated which are alleged to be defamatory. These are simply allegations unless the defendant has proven the truth of the matter. Where no such proof has been sustained the allegations remain defamatory, no matter where published – even in court proceedings.

d. There is no privilege to repeat, without qualification, an unproven defamatory statement of another. That is why a republication from any source is subject to a suit in defamation. In instant situation there is no legitimate purpose to repeat, unqualified, the earlier defamations – the publications were obviously meant to defame Plaintiff. In many jurisdictions the publication of a complaint whose words are defamatory to a defendant is actionable when the answer of the defendant has not been made available so that readers can see both sides of the situation. In the "cases" selectively reported on by defendants there was no publication of any pleading from those cases which would demonstrate the falsity of the defamatory assertions. Defendants are not a news organization thus they can not be claiming they were researching sources to report "news". They simply republished an earlier defamatory set of statements which had never been even remotely proven and which a court had ruled were defamatory towards Plaintiff as a matter of law.

11. Regarding the Nineth Defense – A "Privilege of Good Faith".

a. In paragraph 29 of their Answer to the Amended Complaint defendants write "*all communications regarding the Plaintiff were made in good faith and thereby are privileged*".

b. There is no "good faith" privilege with regards to defamation, harassment / intimidation, or invasion of privacy.

c. The Defense of "good faith" is applicable to fraud, which has not been

alleged here.

> "good faith on the part of the person is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the person to prove his good faith, of course, since he has no burden to prove anything. The Government must establish beyond a reasonable doubt that the person acted with specific intent to defraud as charged. One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent."

d. The defense of "good faith" is raised in CRIMINAL cases to defeat the requirement to find "mens rea" – the criminal mind. Mens Rea is inapplicable to a civil proceeding. In instant case the question is whether the acts were in and of themselves defamatory, intimidation / harassment, and / or an invasion of privacy. If so, the only remaining question is damages. The "mind" of the defendant enters only in the question of punitive damages; actual damages flow from the act, whether intentional or not.

e. The defense of "good faith" exists in the context of defamation only in circumstances where it is related to an immunity "as a matter of law" – as discussed earlier with regard to reporting suspicion of crime to law enforcement authorities (e.g., psychologists, attorneys, psychiatrists; and not to the public at large). In such circumstances it is only a limited immunity. It is not present here. The defense is frivolous.

12. Regarding the Tenth Defense – "Fair Comment"

a. In paragraph 31 of their answer to the amended complaint defendants write that "*Any and all statements with respect to the Plaintiff were fair comment and thereby protected.*"

b. Plaintiff is not a public figure. Defendants are not a newspaper. Defendants were not commenting on a statement made by Plaintiff regarding the homeowner association.

c. What defendants chose to write about was not a matter of public interest for the target audience, Plaintiff's neighbors. It was not matters of legitimate interest or with which neighbors would be legitimately concerned about.

d. Defendants' publications contained imputations of corrupt or dishonorable motives, and said imputations went far afield of HOA matters.

e. The comments were made maliciously and the inclusion of the selected details did not comment on HOA matters but were chosen to comment on alleged (false) private conduct of the Plaintiff.

f. The "good faith" assertion does not meet the standard set out in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), (U.S. Supreme Court).

g. Plaintiff refers to further exposition in end notes as to why this defense is inapplicable. [A].

13. Regarding the Eleventh Defense – "Neutral Reportage"

a. In paragraph 33 of their answer to the Amended Complaint Defendants wrote: *"Any and all statements with respect to the Plaintiff is neutral reportage and thereby protected"* Plaintiff is not a public figure and Defendants are not a news reporting organization and the media they chose is not even a news publication or periodical. They chose a letter, an email, and a web site (dedicated not to news reporting, or even to gossip, but to the presentation of HOA documents and homeowner private accounts).

b. In South Carolina the "Neutral Reportage" defense has only been recognized when asserted by actual newspapers in defense of publications regarding actual and provable public figures on matters of public importance. The two cases on point on this are Marvin Boone, v. Sunbelt Newspapers, Inc., d/b/a The Times and Democrat, filed November 19, 2001 in the SC Court of Appeals, and Wayne Elder v.The Gaffney Ledger in the SC Supreme Court, filed June 19, 2000. The defense is not recognized in all states and all courts.

c. The Association of the Bar of the City of New York, Committee on Communications and Media Law states that "a limited privilege exists to report important accusations made by prominent and responsible organizations against public figures.

d. In a major blow to the earlier and limited recognition by the federal second circuit of the "Neutral Reporting Privilege" – to news organizations, the California Supreme Court in Khawar v Globe International Inc, declined to

recognize a neutral report privilege for journalists who republish the defamatory statements of others. Khalid Khawar sued the Globe, a supermarket tabloid, for libel after it republished allegations by author Robert Morrow that Khawar was Robert Kennedy's actual assassin. The Court ruled that Khawar was a private figure and therefore the privilege did not apply. The story summarized allegations, in a book by former CIA agent. The Globe claimed that the neutral reporting privilege--first articulated by the U.S. Court of Appeals for the 2nd Circuit and recognized in a handful of jurisdictions--should protect the story as an accurate report of allegations about a public controversy made in a book written by an authoritative source. It also argued that Khawar had become a public figure because of the book, The California Supreme Court said that publication of the book, which sold very few copies and attracted no media attention other than the Globe's story, had not turned Khawar into a public figure. Once the court decided that Khawar was a private figure, the Globe could not argue that its nonjudgmental report about the book should be protected by the neutral reporting privilege

e. The U.S. Supreme Court has never held that the First Amendment requires recognition of the privilege, the California court noted. Whatever merits the privilege might have in encouraging dissemination of information about public controversies, it wouldn't justify defamatory remarks about private figures. Khawar's right to a good reputation outweighed any public interest in learning about allegations made by a source.

f. The defense is only available when it is made by (1) a responsible, prominent organization or individual; (2) it makes a serious charge on a matter of great public interest; (3) it is made against a person who is actually a public figure or public organization; and (4) the charge is accurately and dis-interestedly reported. None of these necessary elements are available to the defendants.

g. Examples where the defense has been sustained are: (1) A newspaper report that a state auditor accused a town trustee of faking a snow emergency to gain access to emergency funds. Watson v. Leach, 1996 Ohio App. LEXIS 2474 (Ohio Ct. App. 1996); (2) A newspaper report that a political campaign brochure accused the county's Italian-American judges of having mafia connections.

Celebrezze v. Netzley, 1988 Ohio App. LEXIS 3153 (Ohio Ct. App. 1988); (3) A newspaper report of a land developer calling another developer "unscrupulous" during a town meeting – McCracken v. Gainesville Tribune, Inc., 146 Ga. App. 274, 275 (Ga. Ct. App. 1978).

14. Regarding the Twelfth Defense – "Litigation Privilege"

a. In paragraph 35 of their answer to the amended complaint the defendants wrote: *"Any and all facts relating to litigation involving the Plaintiff is privileged."*.

b. Each and every publication complained of was outside the pleadings. None of the publications recited a single word or communicated a single document of an actual pleading. What is complained of did not state the claim, offense, or defense involved but had no direct bearing on the litigation. The publications gave an implied "warning of danger concerning the behavior of Plaintiff" but the defendants had no reason to believe that there existed the likelihood of harm to an individual or to the public interest in the matters that were published.

c. In instant case there is no counter-claim for tortious conduct. A demand for attorney fees is not such a claim. The matter at hand at the time of the defamations / invasion of privacy / harassment was a set of claims by this Plaintiff against defendants for declaratory judgment as to covenants and contracts, for access to records, for a decision as to equitable ownership of property, and for derivative recovery of losses suffered by the HOA on account of the conduct of the putative board payable to the HOA itself. As a result of the putative "legal inquiry / research" by Golding no refereral was made to law enforcement and the "inquiry" did not direct itself at potential choses in action available to the defendants against plaintiff. It strictly was a "hunting expedition" to find and publish "dirt" on the Plaintiff and to harass Plaintiff into moving away and losing standing in the original complaint.

d. The publications objected to did not constitute any request for information from the homeowners to whom it was published nor did it consitute direct communcation with potential witnesses on the torts asserted against defendants.

e. The limits of the use of the "litigation privilege" to attempt to excuse defamation was addressed by the Supreme Court of Appeals of WV. In Collins and Southworth v Red Roof Inns Inc, Filed June 7, 2002, Certified Question from the US District Court for the Southern District of WV, the Court wrote: The litigation privilege

> "does not give free reign to attorneys to defame; rather the litigation privilege applies only when the communication is (1) relevant or has some relation to a proposed proceeding and (2) circumstances surrounding the communication have some relation to the proposed proceeding." *Samson Inv. Co. v. Chevaillier*, 1999 OK 19, 988 P.2d 327, 330 (citation omitted). *See also Simon v. Navon*, 951 F. Supp. 279, 282 ("[A] party cannot exploit the privilege as an opportunity to defame because the privilege is only available when the challenged remarks are pertinent to the [proposed] judicial proceeding. . . . [T]he privilege may be lost if publication of the defamatory information is unnecessary or unreasonable."); *Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386, 393 (Ala. Civ. App. 1999) (concluding that libelous statements to state attorney general were not privileged because they were not material to proposed litigation); *Harris v. NCNB Nat'l Bank of North Carolina*, 85 N.C.App. 669, 675, 355 S.E.2d 838, 843 (noting, in applying absolute privilege to pre-litigation publication of defamatory matter, that "[t]he statements were clearly relevant to the issues and subject matter of the anticipated litigation, as disclosed by the unfiled complaint, in that the statements expressed the legal and factual reasons for NCNB's position with respect thereto.").
>
> "Lastly, we note that, in addition to the aforementioned constraints on a pre-litigation absolute privilege, the privilege attaches only when it is demonstrated that the defamatory matter was indeed published in anticipation of seriously considered litigation. The Restatement defines what is meant by its reference to communications "preliminary to a proposed judicial proceeding" as follows:
>
> As to communications preliminary to a proposed judicial proceeding, the rule stated in this Section applies only when the communication has some relation to a proceeding that is *contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.*" Restatement (Second) Torts § 587, cmt. *e* (emphasis added). "

f. In litigation in South Carolina *Crowell v. Herring*, 301 S.C. 424, 392 S.E.2d 464 (1990) is instructive because the defamatory comments actually led to the investigation into Crowell's conduct that he had acted unlawfully. The court in

**Crowell held that " utterance arising out of the judicial proceeding and having any reasonable relation to it, *including preliminary steps leading to judicial action of any official nature* provided those steps bear reasonable relation to it." adding that the statements must "initiate legitimate investigations or inquiries into others' supposed wrongdoings". The defamatory publications have no relation to this standard. and fits the glove of conduct excluded per the explanation given by the West Virginia court in Collins (op.cit.).**

**g. The defense is frivolous.**

**15. Regarding the Thirteenth Defense – "Indispensable and Necessary Parties".**

**a. In paragraph 13 of their answer, Defendants wrote: "*The Amended Complaint should be dismissed for the Plaintiff has failed to add indispensable and necessary parties*".**

**b. This is the sort of pleading which is insufficient to state a defense. Defendants have failed to state who the "indispensable and necessary parties" are and why they are indispensable TO PLAINTIFF obtaining complete relief. It may well be that they need to be joined BY DEFENDANT in third party practice – so that the defendants may recover in turn. That does not make them "indispensable and necessary parties" to Plaintiff's obtaining complete relief.**

**c. This defense may not be raised unless defense counsel has actual knowledge which she evidently has not shared – if such facts exist at all. The failure to state the necessary elements at the time the defense is raised waives this defense, as Plaintiff is entitled to "cure" the disability.**

**16. Regarding the Fourteenth Defense – "Ambiguity".**

**a. In paragraph 39 of their answer defendants write "Certain governing documents relating to the International Club community may be ambiguous and therefore, the answering Defendants assert ambiguity as a defense."**

**b. The governing documents are irrelevant to the additional torts raised in the amended complaint. The CC&R's are a contract for the use of land. The principal of "Good Faith and with Fair Dealing" is a concept which is independent of any provision of the CC&R's. Defamation, intimidation, invasion of privacy, and harassment are not subjects of sections of the CC&R's. The records access**

provisions of the Non-Profit Corporation Act are unambiguous and well established.

c. "Ambiguity" may be applicable to what the covenants actually consist of, given the multiple amendments and a letter of 2003 possibly vacating the covenants as a whole – thus Plaintiff's request that the Court assist in clarifying this entire matter (of the CC&R's). But that is inapplicable to the tortuous conduct of Defendants.

d. In the matter of the defamatory words cited in the Frinzi court papers, the observations of the federal court that writing the objected to phrases is defamatory per se is completely unambiguous.

e. Defendants have not stated with particularity what is "ambiguous", which tort it relates to, and how it affected their conduct. "Ambiguity" is a frivolous defense in instant case.

17. Regarding the Fifteen Defense – None. Paragraphs 40 and 41 state an inapplicable "counter-claim" for attorney fees, without explanation of what theory of law entitles them to this. See Plaintiff's separate Answer to Counter-Claim raised in Answer to Amended Complaint.

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^ END NOTE RELATIVE TO "GOOD FAITH" Defense

*Gatley on Libel and Slander* adopts the following words to describe fair comment -- "... a defense to an action of libel or slander that the words complained of are fair comment on a matter of public interest. ... There are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters, it is desirable that all should be able to comment freely and even harshly, so long as they do so honestly and without malice."

In the *Law of Defamation in Canada*, author R. Brown comprehensively sets the defense out as follows:

"Everyone is entitled to comment fairly on matters of public interest. "Such comments are protected by a qualified privilege if they are found to be comments and not statements of fact, and are made honestly, and in good faith, about facts which are true on a matter of public interest.

"In order to be fair, it must be shown that the facts upon which the comment is based are truly stated and that the comment is an honest expression of the publisher's opinion relating to those facts. Where a comment imputes evil, base or

corrupt motives to a person, it must be shown that such imputations are warranted by, and could reasonably be drawn from those facts."

"The comment must be made on a matter of public interest. It could be of public interest because of the importance of the person about whom the comment is made, or because of the event, occasion or circumstances that give rise to the opinion."

"The protection may be lost if it is shown that the comment was made maliciously, in the sense that it originated from some improper or indirect motive, or if there was no reasonable relationship between the comment that was made and the public interest that it was designed to serve."

In *Creative Salmon Co. v Staniford*, Justice Gerow adopted these words:

"To be fair, a comment must be based on facts truly stated and must not contain imputations of corrupt or dishonorable motives on the person whose conduct is criticized, save insofar as such imputations are warranted by the facts."

"The onus is on Mr. Staniford (the Defendant) to prove that the statements were made honestly and fairly. In order to do so, he must satisfy both a subjective and objective test: subjective honesty of belief in the defamatory statement, that is, the comment is one which a fair minded person would honestly make on the facts proved; and objective fairness, in the sense that the comment is one which a person could honestly make on the basis of all the facts known to the defendant."

Lord Denning, in *London Artists Ltd. v. Littler*, added:

"In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter."

The defense of "fair comment" in the U.S. since 1964 has largely been replaced by the ruling in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), (U.S. Supreme Court). This case relied on the issue of actual malice, which involves the defendant making a statement known at the time to be false, or which was made with a "reckless disregard" of whether the statement was true or false.

Each state writes its own laws of defamation, and the laws and previously decided precedents in each state vary. In many states, (including Alabama where the case of Times v. Sullivan originated), the "fair comment" defense requires that the "privilege of 'fair comment' for expressions of opinion depends on the truth of the facts upon which the comment is based" according to U.S. Supreme Court Justice Brennan who wrote the ruling in Times v. Sullivan.

If the facts are not absolutely true then the defendant could be sued by the plaintiff for damages, although the plaintiff would need to establish to the satisfaction of a jury that the statements were defamatory, and that the defendant published or made them.

"Actual malice" removes the requirement of being faultless in the reporting of the facts by the defendant.

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**The "actual malice" standard only applies when the statement is about a "public official", or a "public figure", or in some cases about a "matter of public interest".**

---------- **End of End-Note** ----------

**WHEREFORE, Plaintiff having considered each and every Defense asserted by Defense Counsel on behalf of Defendants, and having shown that for various reasons they are either without merit or are legally insufficient, the Plaintiff prays that the same be disregarded and that this case proceed.**

**By:** _____

**Ronald Jarmuth, Plaintiff**
**249 Pickering Drive**
**Murrells Inlet, SC 29576**
**843-314-4355**

**June 30, 2009**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CIVIL ACTION NO.. 2009-CP-26-3596 |
| Ronald Jarmuth,<br>Plaintiff,<br>vs.<br>The International Club Homeowners<br>Association, Inc.,<br>Rosemary Toth,<br>and K.A. Diehl & Associates,<br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **DEFENDANTS' MOTION TO AMEND ANSWER TO THE COMPLAINT AND THE FIRST AMENDMENT TO THE COMPLAINT AND COUNTERCLAIM** |

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Defendant, International Club Homeowners Association, Inc., will move pursuant to Rule 15 of the South Carolina Rules of Civil Procedure to amend its Answer to the Complaint and Counterclaim and the First Amendment to the Complaint and Counterclaim in Civil Action No. **2009-CP-26-3596** to assert an additional counterclaim and the Defense of Payment and to combine the Answers into one pleading.' The basis of this motion is that the Plaintiff, Ronald Jarmuth, has breached the Declaration of Covenants and Restrictions for International Club and owes the Defendant, International Club Homeowners Association, Inc., funds pursuant to his breach_ Attached hereto as Exhibit "A" is Defendant's proposed Amended Answer to the Complaint and First Amendment to the Complaint and Counterclaim in Civil Action No. 2009-CP-26-3596.

Pursuant to Rule 11, SCRCP, Defendant's counsel certifies that consultation with the Plaintiff would serve no useful purpose.

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August Z 2011
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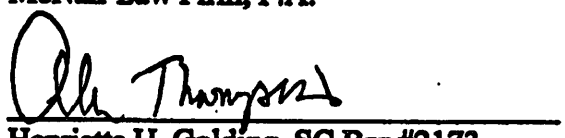
| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CIVIL ACTION NO.: 2009-CP-26-3596 |
| Ronald Jarmuth,<br><br>Plaintiff,<br><br>vs.<br><br>The International Club Homeowners Association, Inc.,<br>Rosemary Toth,<br>and K.A. Diehl & Associates,<br><br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **DEFENDANTS' MOTION TO AMEND ANSWER TO THE COMPLAINT** |
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CASE NO.: 2010-CP-26-11320 |
| Ronald Jarmuth,<br><br>Plaintiff,<br><br>vs.<br><br>The International Club Homeowners Association, Inc.<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | |

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Defendant, International Club Homeowners Association, Inc., will move pursuant to Rule 15 of the South Carolina Rules of Civil Procedure to amend its Answer to the Complaint in Civil Action No. 2010-CP-26-11320 to assert a counterclaim, to remove the Third and Fourth Defense seeking dismissal of the Complaint due to the Magistrate's Court lack of subject matter

jurisdiction, and to add the additional Defenses of Payment and Unclean Hands.[1] The basis of this motion is that the Plaintiff, Ronald Jarmuth, has breached the Declaration of Covenants and Restrictions for International Club and owes the Defendant, International Club Homeowners Association, Inc. funds pursuant to his breach. Attached hereto as Exhibit "A" is the proposed Amended Answer and Counterclaim in Civil Action No. 2010-CP-26-11320.

Pursuant to Rule 11, SCRCP, Defendant's counsel certifies that consultation with the Plaintiff would serve no useful purpose.

McNair Law Firm, P.A.



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Myrtle Beach, South Carolina
August 26, 2011

[1] Civil Action Nos. 2009-CP-26-3596 and 2010-CP-26-11320 were consolidated pursuant to this Court's oral Order at a hearing on the Defendants' Motion to Consolidate the aforementioned cases on August 11, 2011. A proposed order consolidating the cases has been submitted to this Court but not yet executed and filed.

| | |
|---|---|
| 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, ) | **DEFENDANTS' THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.'S AND ROSEMARY TOTH'S AMENDED ANSWER TO COMPLAINT AND FIRST AMENDMENT TO COMPLAINT AND COUNTERCLAIM** |
| vs. ) | |
| The International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, ) | |
| Defendants. ) | |

HORRY COUNTY 11 OCT 24 PM 1:13 CLERK OF COURT C. WARD

The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth, answering the Complaint and the First Amendment to the Complaint would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation contained in the Complaint and the First Amendment to the Complaint not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations contained in Paragraph 1 of the Complaint are admitted except that Plaintiff's International Club property is subject, without qualification, to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (later amended to the Declaration of Covenants and Restrictions for International Club) (hereinafter "Declaration") filed in the Horry County Register of Deeds Office, Deed Book 2117, Page 1353 on February 8, 1999 and the Defendant HOA's Bylaws, as amended (collectively hereinafter referred to as "Governing Documents").

3. The allegations contained in Paragraphs 2, 3 and 4 of the Complaint are denied as stated, but it is admitted that the Defendant, The International Club Homeowners Association, Inc. (hereinafter referred to as "Defendant HOA") is non-profit corporation, organized under the laws of the State of South Carolina, the Defendant, Rosemary Toth was the elected President of the Defendant HOA and she is a co-owner of International Club property subject to the Declarations, and that said property is located in Horry County.

4. The allegations contained in Paragraphs 5, 6, 7, 8 and 9 of the Complaint are denied and strict proof demanded thereof.

5. The allegations contained in Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the Complaint are denied in that the documents referred to therein speak for themselves.

6. The allegations contained in Paragraphs 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87 of the Complaint are denied and strict proof demanded thereof.

7. The allegations contained in Paragraphs 88 and 89(a) of the First Amendment to the Complaint are admitted.

8. In answering Paragraph 89(b) of the First Amendment to the Complaint, the answering Defendants admit the address of the Defendant K.A. Diehl & Associates, Inc., that it is a corporation in good standing and that it has contracted with the Defendant The International Club Homeowners Association, Inc., but the remaining allegations are denied and strict proof demanded thereof.

9. With respect to the allegations in Paragraph 90 of the First Amendment to the Complaint, the Answering Defendants admit only that venue in Horry County is proper.

10. The allegations contained in Paragraphs 93, 95 and 98 of the First Amendment to the Complaint are admitted.

11. The allegations contained in Paragraphs 91, 92, 94, 97, and 99 of the First Amendment to the Complaint are denied and strict proof demanded thereof.

12. In answering Paragraph 96 of the First Amendment to the Complaint, it is only admitted that the Answering Defendants' Attorney did email a letter to the Plaintiff and the letter speaks for itself.

13. In answering Paragraph 100 of the First Amendment to the Complaint, the Answering Defendants do not have sufficient information as to the date the web-page became operational and therefore deny the same.

14. The allegations contained in Paragraphs 101, 102 and each of the 103 paragraphs, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 149, 151, 152, and 154 of the First Amendment to the Complaint are denied and strict proof demanded thereof.

15. With respect to the allegations contained in Paragraphs 130, 131, and 132 of the First Amendment to the Complaint, it is admitted that a letter was sent to homeowners in the International Club Community by K.A. Diehl and Associates.

16. In answering Paragraph 142 of the First Amendment to the Complaint, the said allegations therein constitute a legal conclusion but it is admitted that the Declaration of

Covenants and Restrictions, as amended, constitutes a contract with the homeowners in the International Club community.

17. In answering Paragraphs 148 and 153 of the First Amendment to the Complaint, the statutory provisions referenced therein speak for themselves.

18. In answering Paragraph 150 of the First Amendment to the Complaint, the Answering Defendants admit that a letter dated April 28, 2008 was emailed to Plaintiff and the letter speaks for itself.

SECOND DEFENSE

19. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

20. The Answering Defendants assert the applicable statutes of limitation as a complete defense to Plaintiff's claims.

THIRD DEFENSE

21. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

22. The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims.

FOURTH DEFENSE

23. The allegations of the First, Second and Third Defenses are incorporated herein and made a part and parcel hereof.

24. Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule.

FIFTH DEFENSE

25. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

26. The Answering Defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

27. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

28. The Answering Defendants assert consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

29. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

30. 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

31. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

32. Any and all matters asserted as to the Plaintiff are absolutely privileged in that all matters published are contained in Court decisions and opinions.

NINTH DEFENSE

33. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eight Defenses are incorporated herein and made a part and parcel hereof.

34. Any and all communications regarding the Plaintiff were made in good faith and thereby are privileged.

TENTH DEFENSE

35. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight and Ninth Defenses are incorporated herein and made a part and parcel hereof.

36. Any and all statements with respect to the Plaintiff were fair comment and thereby protected.

ELEVENTH DEFENSE

37. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth and Tenth Defenses are incorporated herein and made a part and parcel hereof.

38. Any and all statements with respect to the Plaintiff is neutral reportage and thereby protected.

TWELFTH DEFENSE

39. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth and Eleventh Defenses are incorporated herein and made a part and parcel hereof.

40. Any and all facts relating to litigation involving the Plaintiff is privileged.

THIRTEENTH DEFENSE

41. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh and Twelfth Defenses are incorporated herein and made a part and parcel hereof.

42. The First Amendment to the Complaint should be dismissed for the Plaintiff has failed to add indispensable and necessary parties.

FOURTEENTH DEFENSE

43. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defenses are incorporated herein and made a part and parcel hereof.

44. Certain governing documents relating to the International Club community may be ambiguous and therefore, the answering Defendants assert ambiguity as a defense.

FIFTEENTH DEFENSE

45. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Defenses are incorporated herein and made a part and parcel hereof.

46. The Plaintiff's claims are barred, in whole or in part, by the Plaintiff's payment of assessments and fines to Defendant HOA..

SIXTEENTH DEFENSE
AND COUNTERCLAIM

47. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth Defenses are incorporated herein and made a part and parcel hereof.

48. 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.

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;

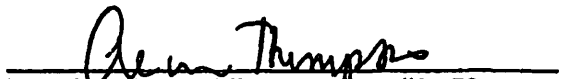
b. judgment against the Plaintiff in an amount to be determined by the Court;

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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*Attorneys for the Defendants*

Myrtle Beach, South Carolina
October 24, 2011

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CASE NO.: 2010-CP-26-11320 |
| Ronald Jarmuth,<br><br>Plaintiff,<br><br>vs.<br><br>The International Club Homeowners Association, Inc.<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **DEFENDANT'S AMENDED ANSWER TO COMPLAINT AND COUNTERCLAIM** |

The International Club Homeowners Association, Inc. (hereinafter referred to as "Defendant HOA"), answers the Complaint filed by Ronald Jarmuth (hereinafter referred to as "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 Defendant HOA denies any and all allegations contained in the Complaint.

**SECOND DEFENSE**

3. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

4. 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 HOA before the Court of Common Pleas for the County of Horry, State of South Carolina, Civil Action No.: 2009-CP-26-3596.

**THIRD DEFENSE**

5. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

6. The Plaintiff lacks standing to bring the claims asserted in his Complaint, and therefore, his claims should be dismissed.

**FOURTH DEFENSE**

7. The allegations of the First, Second, and Third Defenses are incorporated herein and made a part and parcel hereof.

8. 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.

**FIFTH DEFENSE**

9. The allegations of the First, Second, Third, and Fourth Defenses are incorporated herein and made a part and parcel hereof.

10. The answering Defendant HOA assert the Doctrines of Estoppel, Waiver, Consent, and Laches as complete affirmative defenses to the allegations contained in the Complaint.

**SIXTH DEFENSE**

11. The allegations of the First, Second, Third, Fourth, and Fifth Defenses are incorporated herein and made a part and parcel hereof.

12. The Defendant HOA has immunity as to the claims asserted by the Plaintiff as the Defendant HOA has abided by the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (later amended to the Declaration of Covenants and Restrictions for International Club) (hereinafter "Declaration") filed in the Horry County Register of Deeds Office, Deed Book

2117, Page 1353 on February 8, 1999 and the Defendant HOA's Bylaws, as amended (collectively hereinafter referred to as "Governing Documents") and South Carolina State Law in undertaking the actions complained of.

**SEVENTH DEFENSE**

13. The allegations of the First, Second, Third, Fourth, Fifth, and Sixth Defenses are incorporated herein and made a part and parcel hereof.

14. All actions of the Defendant HOA were undertaken in good faith and in accordance with the business judgment rule.

**EIGHTH DEFENSE**

15. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Defenses are incorporated herein and made a part and parcel hereof.

16. The Plaintiff's claims are barred by the doctrine of equitable estoppel.

**NINTH DEFENSE**

17. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Defenses are incorporated herein and made a part and parcel hereof.

18. The Plaintiff's claims are barred, in whole or in part, by the Plaintiff's payment of assessments and fines to Defendant HOA.

**TENTH DEFENSE**

19. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Defenses are incorporated herein and made a part and parcel hereof.

20. The Plaintiff's claims are barred by the doctrine of unclean hands.

**ELEVENTH DEFENSE**
**AND FIRST COUNTERCLAIM**

21. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Defenses are incorporated herein and made a part and parcel hereof.

22. The Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina.

23. Upon information and belief, the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina.

24. Upon information and belief, the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property").

25. The Property is located in Horry County, South Carolina, and this Court has jurisdiction over both the Property and the parties to this action.

26. As the owner of the Property, the Plaintiff is subject to the Governing Documents.

27. The provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision.

28. 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."

29. 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.

30. The Defendant HOA enacted Architectural Guidelines in 2005 and has amended them from time to time.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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."

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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 claims of the Plaintiff, the Defendants hereby prays as follows:

a. that the Complaint be dismissed;

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.

**Respectfully submitted,**

***McNAIR LAW FIRM, P.A.***

***PROPOSED***

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athompson@mcnair.net
*Attorneys for the Defendant HOA*

Myrtle Beach, South Carolina
August _____, 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, <u>and</u> 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.

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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**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | Civil Action No. 2010-CP-26-11320 |
| | ) | |
| Ronald Jarmuth | ) | |
| | ) | |
| Plaintiff | ) | PLAINTIFF'S ANSWER |
| | ) | TO COUNTER-CLAIM |
| vs. | ) | OF DEFENDANT'S AMENDED |
| | ) | COMPLAINT |
| The International Club | ) | |
| Homeowners Association, Inc., | ) | AND ASSERTION OF |
| | ) | COUNTER – CLAIM BY |
| Defendant | ) | PLAINTIFF |
| | ) | |

Plaintiff / Counter-Defendant Ronald Jarmuth (hereafter referred to as "C-Def") answers the Counter – Complaint stated in Defendant / 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 22 through 47 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 22 of the Counter – Complaint. Plaintiff admits the allegation of paragraph 23

[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).

that "the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina". Plaintiff admits the allegation of paragraph 24 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 25.

3. Plaintiff admits the allegations of paragraph 26 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 27 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 28 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.

6. C-Def denies and rejects the allegations of paragraph 29, 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 30 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 31 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 32 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, <u>and</u> 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 33 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 34 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 35, 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 36 to the extent that it states that "The Architectural Review Board approved the Plaintiffs request for the flower bed and edging". Again, paragraph 36 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 37 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 38 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 39, 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 40 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 41 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 42 and demands strict proof.

19. C-Def denies any allegation of paragraph 43 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 44, 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 45. As to the allegations of paragraph 46, 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 47 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.

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**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, Second, Third, Fourth, Fifth, Sixth, and 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, Second, Third, Fourth, Fifth, Sixth, Seventh, and 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, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and 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 - Plaintiff, 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**

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|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | )<br>) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Ronald Jarmuth,<br>Plaintiff<br>vs.<br>The International Club<br>Homeowners Association, Inc..<br>et al<br>Defendants | )<br>)<br>)<br>)<br>)<br>)<br>) | NO. 2009-CP-26-3596<br>CONSOLIDATED FOR TRIAL WITH<br>BELOW CASE |
| Ronald Jarmuth<br>Plaintiff<br>vs<br>The International Club<br>Homeowners Association, Inc.<br>Defendant | )<br>)<br>)<br>)<br>)<br>) | NO. 2010-26-11320<br><br>PLAINTIFF'S CONSOLIDATED<br>POST-TRIAL MOTION<br>RULE 50, RULE 52, RULE 59, RULE 60 |

**PLAINTIFF'S CONSOLIDATED POST-TRIAL MOTION:**

**RULE 50 FOR JUDGMENT NOT WITHSTANDING THE VERDICT / JUDGMENT AS A MATTER OF LAW**
**RULE 52 FOR AMENDMENT OF FINDINGS BY THE COURT**
**RULE 59 FOR NEW TRIAL AND TO ALTER OR AMEND JUDGMENT**
**RULE 60 FOR RELIEF FROM JUDGMENT**

1. Plaintiff Ronald Jarmuth, pro se, moves this court for an Order or Orders relating to this Court's Order of September 10, 2012 following a prematurely terminated trial:

a. Granting a Judgment Not Withstanding the Verdict / Judgment as a Matter of Law (JAML) per Rule 50;

b. Amending the Findings and Making Additional Findings of Fact and Conclusions of Law per Rule 52;

c. Granting a New Trial or Amending Judgment per Rule 59;

d. Granting Relief from Judgment per Rule 60.

**Major Grounds**

2. The most significant justifications for this are:

a. Ignored Declaratory Judgment Demand – Trial is incomplete. The Court chose to refuse to make findings of fact and conclusions of law on almost every question before it for Declaratory Judgment, including refusing to interpret certain specific statutes put before it.

b. Unconstitutional preventing Plaintiff from putting on full case. The Court arbitrarily limited Plaintiff's trial presentation to two – and – one half days, of which half a day was then given to the Defense to call two of it's witnesses out of sequence in violation of the "ground rules" [1] set by Hon Chief Judge Steven John at a hearing on January 17, 2012, The Special Referee arbitrarily ordered at trial that, despite the fact that Plaintiff was not presenting inadmissible, or superfluous material or wasting the court's time in any way, he must complete his case by noon the third day. Arrangements had been made with the Clerk of Court for the court room to be available on Saturday and Sunday, with court officers present, and the Special Referee had agreed to hold court Saturday and Sunday if necessary. The Special Referee's explanation was that he had made arrangement for personal activities which he intended to keep. The judicial officer put his personal agenda ahead of his judicial duties. The Court's June 13, 2012 Order of Reference stated that the trial "shall continue until concluded" and did not limit the length of trial. As a result Plaintiff was unable to call Defendant Rosemary Toth, who was in the courtroom and who had been subpoenaed to testify at trial, and Plaintiff's subpoenaed witness Charles Ferrera. It also meant that Plaintiff had to exclude from his presentation entire counts of this Complaints. Plaintiff was thus limited to two days of trial instead of the five days he consistently told the court were needed.

c. Depending on fraudulent material presented by Defense Counsel outside the record of proceedings. The Court allowed Defense Counsel to put before it post - trial arguments, citations to law, references to evidence not in the record, hearsay purported statements, and entirely new topics never placed before the Court in a complaint and more importantly, not in trial testimony. This included allowing Defense counsel to provide it, outside the record and post – trial, arguments against the case presented by Plaintiff in the courtroom at trial. These post – trial , off the record supplementations by Defense Counsel were adopted by the Court in it's order "word for word" from the first word of the 49 page document to the last, and this deprived Plaintiff of his constitutional right to due process, to confront and counter purported "evidence", witnesses, and case law, and to impeach anything presented by Defense Counsel. When Plaintiff learned that this was going on he went "on the record" and filed (with the Clerk of Court) and served the special referee a

[1] All parties agreed to Hon. Judge John's direction that no party would be allowed any variance of accommodation if a witness was not available for testimony at trial in the

letter (on August 21, 2912) which alerted the Special Referee that much of the material submitted by Defense Counsel was blatantly fraudulent and grossly mis-stated the evidence, testimony, case law, and even the nature of the complaint. The Court was alerted that the Defense material was not just a restatement of that side's case presentation but an entirely new presentation, outside the proceedings, off the record of proceedings, and that this violated Plaintiff's constitutional rights.

d. Bias by the Court. The Court's final order creates an extreme impression of judicial bias, gross errors creating the impression of judicial incompetence and the impression that the Court advocated for the Defense. The order is filled with legal arguments on behalf of Defendants Defense Counsel did not make at trial, case citations favorable to Defendant Defense Counsel did not cite to at trial, allegations of fact never placed before the court by Defense counsel at trial, and outright unfavorable mis-quotes of the actual text of covenants, case citations, and testimony. In one instance, concerning roads, the Court quoted a snip of a document's text omitting the following sentences which were unfavorable to the Court's decision – which read that Horry County's Attorney was not offering any legal opinion and the IHOA should consult an attorney (the Court's Order writing that the Horry County Attorney had written that the covenants could be enforced on the roads, which could be taken as a fraudulent mis-representation of the evidence by the author of that paragraph of the order) and omitted the associated letter from Horry County (Engineering and Planning) which said that the roads ARE owned by Horry County. The order further included topics which never came before the court at trial which topics are clearly advantageous to Defendants, and was totally silent on topics placed before the court by Plaintiff for which large quantities of evidence were presented with supporting testimony sufficient to meet the burden of "more likely than not". In addition, the Order in multiple places and topics fraudulently asserted that "no evidence" was presented by Plaintiff on various topics when the list of evidence and the record of proceedings is that for each, at least several uncontested exhibits and in some, dozens of exhibits were presented. In the topic of assessment payments by the Golf Course the Court Order says that the Golf Course has always been current in assessments, ignoring the

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normal order of business.

IHOA's general ledgers which showed [2] that there has never been a year that the Golf Course paid even half it's assessments due, and ignoring the admission by IHOA current president William Freiboth that the IHOA sued the Golf Course in this very courthouse, alleging that in 2010 the Golf Course paid only one month's assessments and none at all for 2011 and 2012 -- this being a clearly fraudulent mis-representation of the uncontroverted (at trial) evidentiary record. While these frauds all originated with Defense Attorney, who wrote 100 percent of the final order, the judicial officer is 100 percent accountable for the text of any order he signs and is obligated to have done "due diligence". Plaintiff's August 21, 2012 letter alerted the judicial officer to the need for due diligence, which creates the impression that the fraudulent content of the order and its other infirmities are not errors but intentional.

e. Adapting findings contrary to the Order's own internal controlling findings of fact and of law. Perhaps eighty percent (80%) of the causes of action depends on the answer to "What HOA did Amendment #1 to the Covenants name as "The Association" defined in the Covenants" with rights and obligations under the covenants. Because the covenants affect title to the land and restrict the use of the land, this area of law is subject to the principle that the interpretation must arise from explicit and unambiguous text of the contract or deed. "Usage" does not overcome this requirement that contracts and deeds to land be subject to a stricter rule of construction than ordinary contracts. Whatever Association is not named as "The Association" lacks standing to context any further interpretation of the Covenants nor to seek to compel compliance with the Covenants. The case opened with one hour of testimony, argument, and presentation of evidence by Plaintiff on this question and it was brought to the Court's attention that this was first because it controls almost everything else. The alternatives were the "Murrells Inlet Golf Plantation Inc", a non-profit which exists chartered under SC Code 33-31-xx; the "International Club Association, Inc", likewise existing and so chartered, the "International Club, LLC" which is the 'for profit" golf course corporation, and the "International Club Home Owners Association, Inc" which is likewise extent and so chartered – the Defendant IHOA. All parties agreed that the interpretation of Amendment #1's change to the name controls this matter. On page 12 of it's order the

[2] Comparing golf course assessment payments to the putative golf course agreement, which requires much less in assessments than the covenants.

Court made a controlling finding of fact and conclusion of law which reads:

> "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"." "

The Court having declared that "The International Club Association Inc" (ICA) is "The Association for all purposes under the covenants then ignored this controlling decision. This controlling finding mandates revision of the rest of the order and renders a judgment against Plaintiff for alleged rule violations inconsistent because Plaintiff thus owes no duty or obligation towards the defendant and the defendant has no rights under the covenants which it may enforce. The Court also held that the Architectural Review Board is not a sub-entity of the Defendant, yet the Court's Order reads as if the ARB is a party, enforcing a non-party's purported cause of action for violation of the non-party's ARB rules, and an another inconsistency which flaws the order, awarding judgment for the damages to the HOA party defendant for a "fine" it did not impose, according to the same order.

f. Depending on an irrelevant and inapplicable statute. Plaintiff had argued that since the IHOA is chartered under 33-31-xx of the code (Non Profit Corporation Act) homeowners can not be compelled to be members no matter what any covenant or contract might provide. Plaintiff had cited 33-31-601 Admission which provides that "(b) No person may be admitted as a member without his consent.". Page 4246 of the April 12, 1994 SC House Journal states the intent of the legislature as being that it

> *"prevents corporations from admitting people as members unless they consent to becoming members. .... Until they had manifested this consent they would not be "members" as that term is defined in section 1.40(21)."*

And subparagraph *"(a) A member may resign at any time."* which the legislative journal reported as intending that

> "A nonprofit organization cannot force a person to belong to it ... This provision had no counterpart in former statutory law.."

The Court's Order held that Plaintiff is required to be a member of the IHOA and to also be a member of the Amenity Center (owned by the IHOA) whether or not he uses it. In doing so the Court's Order stated that the controlling South Carolina statute is § 27-31-190 and that this is further supported by the "Restatement (Third) of Property (Servitudes) §

**6.5". These arguments and citations were not raised by Defendant at trial and appear for the first time in the Court's Order. They are also clear errors of law and raise the appearance of bias or fraudulent intent by the judicial officer.**

**(1) Title 27 is the Horizontal Property Act and applies to apartment houses which are condominiums, specifically those where (per 27-31-30)**

> **"a lessee, sole owner, or the co-owners of property expressly declare, through the recordation of a master deed or lease, which shall set forth the particulars enumerated in Section 27-31-100,"**

**(2) The IHOA is incorporated under 33-31-xx of the code (an exhibit in evidence). There is no proper way that an unbiased judicial officer could cite to 27-31-190, because it reads:**

> **SECTION 27-31-190. Expenses shall be shared. The co-owners *of the apartments* are bound to contribute pro rata in the percentages *computed according to Section 27-31-60* ...**

**g. The award of attorneys fees is contrary to the rule of "strict construction" which awards such fees only when there is a clear, applicable, and unmistakable contractual provision, and where the fees have been expended for the purposes cited in the contract. The Court's Order itself recognizes this requirement. The Court's order said:**

> **"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.

**In one of the cases, 2010-CP-26-11320, the IHOA's $2,500 was spent asking the court to dismiss that case, when it originated in Magistrate Court. There was no counter-claim at the time and the IHOA's Answer did not allege any violation of covenants or rules. The IHOA did not pay a single penny for anything that happened thereafter in that case, even when it added (two years later) a counter – claim for violation of ARB rules. In the 2009-CP-26-3596 case the exact circumstances exist, $2,500 spent defending against a suit for Declaratory Judgment with no Answer containing a counter-claim for violation of covenants or rules until three years later, and no IHOA money spent to support that contention. This was admitted in testimony at trial by IHOA President William Freiboth**

who admitted this about each $ 2,500.

h. Lack of subject matter jurisdiction over the 2010-CP-26-11320 case.

When the 11320 case was filed the Defendant's $ 2,500 was filed ONLY to ask the magistrate court – where it originated – to dismiss that case as it was then captioned. It was not spent to "enforce" anything or even to prosecute the case.

In the case originating in magistrate court (11320) there was no counter – complaint for almost two years. In Magistrate Court Defense counsel's November 9, 2010 Motion to Dismiss alleged that Plaintiff's claim exceeded the magistrate's subject matter jurisdiction. Neither party asked for a transfer to the Court of Common Pleas. The magistrate did so on his own. The record is that immediately thereafter, in the docket of the 11320 case, Plaintiff filed a "precipe" on December 14, 2012 alerting the court that this was procedurally defective.. The document was titled "Plaintiff's Precipe of Objections to Order Transferring" and began with the phrase

> "Plaintiff, Ronald Jarmuth, pro se, perpetuates his objections to certain content in the order of the Magistrate Court entered November 30, 2010, transferring this case to this Court."

In Frierson v In-Town Suites, No. 2007-UP-549 Filed December 14, 2007 the Court of Appeals observed that the power to transfer a case to Circuit Court when the statutory limit is exceeded occurs only when there is a counter – claim whose amount, when added to the claim, exceeds the statutory limit. There was no counter – claim here so the limited authority of the magistrate court to transfer the 11320 case was not applicable. The appellate court wrote:

> "The jurisdiction of the magistrates' court is statutorily limited by South Carolina Code section22-3-10 (2007). Although we note there are limited circumstances where the legislature has allowed magistrates to transfer a case to the circuit court, such as when a counterclaim is filed pursuant to South Carolina Code section 22-3-30 (2007), we believe the legislature intentionally limited the scope of a magistrate's power to transfer cases to the circuit court. In addition to Rainey, we find the statutory guidelines that govern magistrates' court support this view by not expressly authorizing magistrates to transfer any type of case to the circuit court."

This conclusion of law was repeated by the Court of Appeals in the controlling case of Mosseri, Mosseri, Castro v Austin's at the Beach, Inc. and Paris, Inc., Opinion No. 4215 Filed March 12, 2007 which was an appeal from Horry County (this court) with further explanation. The Court wrote that

> "In cases that do not fall under Section 22-3-10 (12) of the South Carolina Code [w]hen a counterclaim is filed which if successful would exceed the civil jurisdictional amount as provided in Section 22"

A case exceeding the jurisdictional threshold must be dismissed if the case does not involve the ownership of land. In such an instance the case still will not be transferred but will be retained in the Magistrate Court.

A Circuit Court can not obtain subject matter jurisdiction by the consent of the parties; it is statutory. The 11320 case required dismissal per the insistence of Defendant as a matter of law. The magistrate court transfer was without authority. No judgment may be entered as to a case in which the Circuit Court lacks subject matter jurisdiction, thus the $2,500 award of attorneys fees is further contrary to the law.

i. Adjudicating a claim by a non-party and awarding a judgment on the non-party's claim; awarding that judgment to a party which did not allege it had a claim to the judgment. The Court's Order stated that the ARB is not a creation or entity of the IHOA, that the ARB imposed a $ 100 a month fine, that the ARB as being separate from the IHOA is not subject to the Bylaws of the IHOA which prohibit any fine or sanction until after a hearing per the provisions of Section 13.3 of the Bylaws, and that the ARB's fine will be supported. The Court then entered judgment in favor of the IHOA for the ARB's claim, to which the IHOA has no equitable claim based on anything in the record and to which the IHOA is not entitled per the language of the Court's order. The Court's Order made the following Conclusion of Law:

> The ARB is a separate Board ... created by Article VII of the Declaration. 3 ... 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 in paragraph 24 of the Order, the Court wrote the following conclusion of law which identifies the fines as arising from non-party ARB but payable to party IHOA:

> "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

[3] The "Declaration" is "The Covenants". "The Articles" is the form provided by the South Carolina Secretary of State to be used when incorporating non-profit corporations. The "Covenants" are NOT "The Articles". The "Bylaws" are neither covenants nor articles. Neither the Bylaws nor the Articles mention the ARB – only the Covenants.

assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00."

No party may sue for injury or debt associated with another party or entity and no party may have judgment for a debt arising from such a non-party. The Court's

Additional Issues Mandating New Trial or Amendment or Relief from Judgment

3. Procedural Irregularities Violating Plaintiff's Constitutional Due Process Rights.

Allowing Defense to Present It's Witnesses Prior to Plaintiff's Case.

Since this involved the questioning of witnesses, presentation of related argument, and submittal of evidence this had the effect of allowing Defense to present it's case prior to Plaintiff. Their testimony had nothing to do with Defendant's counter – claim and had the effect of introducing areas of testimony not put before the court by Plaintiff. Because the judicial officer did not allow the trial to proceed to the "natural" end of evidence, testimony, argument and the presentation of all issues, but instead well into the trial set an absolute time limit on the trial which was contrary to the order of reference, this "out of order" witness presentation further reduced the time the judicial officer allowed Plaintiff. It was also contrary to the ground rules set by the Chief Judge.

a. On January 25, 2012 Hon Chief Judge Steven John entered an Order which provided for the use of transcripts of depositions at trial in lieu of taking the testimony of such a witness at trial. As a consequence the depositions several witnesses were taken including:

(1) R Scott Pyle, President of Plantation AD and the signer of the Covenants and of Amendment #1 (no other witness was alleged to have personal knowledge of the circumstances of the creation and signing of the Covenants, of the creation of the bylaws, and of the filing of the bylaws);

(2) Rosemary Toth, defendant and former president of the IHOA.

(3) Julie Case, an employee of co-defendant KA Diehl.

(4) William ("Bill") Freiboth, current President of the IHOA.

b. Prior to the commencement of trial, Plaintiff had asserted (since as far back as December, 2011, in filings of record) that he would require five (5) trial days so that all his witnesses could be heard and evidence addressed.

Limiting the Trial to Three Days Irrespective of the Conduct of the Trial

c. The Order of reference was signed by Hon. Chief Judge Steven John on June

15, 2012. It included the provision that "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." At the beginning of the trial Plaintiff again asserted his need for five (5) days and had been told that the trial would continue on Saturday August 13th and Sunday August 14th, 2012. Plaintiff, of course, has no control over how much time would be used by the Defendants to argue their case nor how much time he would need for impeachment. On Thursday August 11, 2012, based on the pace of trial, the Special Referee stated that he needed to have Saturday and Sunday for himself and asked if the parties could accommodate that. Based on the pace of trial Plaintiff observed that IF the transcripts were read by the Special Referee in their entirety as if at trial using the same standard of admissibility, Plaintiff would try to finish his case by Friday August 12th. However, later on Thursday August 11th Defense Counsel introduced Defense witnesses "out of turn" by Order of the Court and Plaintiff observed that he would need an extra day for rebuttal and impeachment, which was refused, thus Plaintiff presented an abbreviated case on Friday August 12, 2012.

Not Permitting Summation / Court Depending on Off The Record Post Trial Defense Material

d. The Court did not allow any Summation by the Parties but instead directed that "briefs" be filed within ten (10) days with proposed orders. The Court did not ask the Parties to consent to this. The trial was declared "over" at nearly Six PM (6:00 PM) on Friday based on the Judicial Officer's schedule and not based on the finishing of presenting cases. The lack of a summation is a procedural error. There would be no opportunity to rebut opposing briefs and, as is the rule for summation, no additional evidence or argument may be made. One "sums up" what is already argued and supported by the evidence. No new cases may be mentioned or relied on. No new theories or explanations presented. While this is so, the lack of a verbal Defense "summation" in the presence of the Plaintiff deprived Plaintiff of opportunities to object to material being more than just summation – new evidence, theories, explanations – which are procedural errors. Plaintiff cites this as a prejudicial error meriting a new trial. The Court specifically directed that these "briefs" reflect the order and material that was presented at trial and stated that the Court would also rely on the transcripts. Plaintiff was the only party to hold depositions and to file transcripts. Clearly the testimony adduced would be unfavorable to Defendants and thus not relied on in the Defense Counsel's "brief". No length was set. Plaintiff filed a

brief as directed and a proposed order. The Defense Counsel did not file a brief but instead filed a proposed Memorandum Order which the court adopted in it's entirety, from "word one" through "word last", including errors in the text. The spacing of the words is such that the text was not even retyped.

Ignoring that Part of the Record Favorable to Plaintiff

e. Defense Counsel did not relate to any material from the depositions and thus the Order adopted by the Court has ignored all of the testimony AND EXHIBITS from the depositions – particularly the testimony of R. Scott Pyle, THE ONLY WITNESS with actual knowledge of the circumstances of the Covenants. All testimony relating to this subject from any other witness is speculative and not evidence. The statements of Freiboth and King (an "expert witness") referred to in the final order relating to the covenants are not hearsay because they do not attempt to quote Pyle – they are simply not evidence.

Permitting Defense Evidence At Trial Never Previously Provided Plaintiff in Discovery

f. At the beginning of the Trial Defense Counsel presented a set of evidence never given Plaintiff in the form submitted to the Court as evidence. Plaintiff discovered and complained to the Court that twenty (20) out of Defendants' one hundred four (104) exhibits were never given to Plaintiff in Discovery nor were they listed on any evidence list submitted by Defense Counsel (Rule 16) prior to the day of trial. They were placed by Defense Counsel on the Plaintiff desk in court minutes before the trial began. Plaintiff protested this was "Trial By Ambush" and the Court did not address the issue, instead admitting them all into evidence because the Order did not address evidence admissibility. The same situation applies to two of the ten "Plats" Defense Counsel submitted for evidence, both of which Defense Counsel actually used at trial.

Court's Mis-Characterization of the Defense and Counter – Claim put on By Defense Counsel at Trial

g. If a person were to envision the case put on by Defense Counsel based on the Court's Order, to the extent that it purports to represent the arguments, evidence, cases, and testimony Defense Counsel put on at trial, one would envision an active defense and counter – claim, with brilliant citations to evidence and cases. In point of fact this is 100 percent fraudulent, as Defense Counsel failed to put on a counter – claim presentation at all – not one word – and in almost the entire case sat mute through Plaintiff's presentation of his case. Through the entire trial Defense Counsel made only one citation to a case. The only time Defense Counsel left the seating posture was when she jumped up waving two

documents and fraudulently stated that Plaintiff had two copies of the Pebble Creek Deed to Sunbelt Developer, one with a citation to the Covenants and one blank, when in fact the one with the citation was the Golf Course Deed – thus she defrauded the court (to which she did not show the deed in her hand). This is a critical point because the one without the citations – the only deed in evidence – was critical to the point that the Covenants did not exist until two days after Pebble Creek had been sold thus the Declarant, Plantation AD, had now equitable interest / horizontal privity in Pebble Creek such as to subject them to the Covenants. The Court's Order depends on this fraud by Defense Counsel.

Exclusion of Plaintiff's Evidence From Consideration

h. At trial Defense Counsel did NOT CONTROVERT a single document actually introduced as evidence used by Plaintiff. Before trial Defense controverted certain pieces of evidence – most of which were not used at trial – but the Court never ruled on the record as to the admissibility or use of any of the over 700 exhibits presented by Plaintiff, thus presumably all were admissible – but to read the Order Plaintiff presented no evidence in many matters, which is untrue, indicates the court ignored Plaintiff's evidence, and merits a new trial. Examples are "intentional infliction of emotional distress" which was never argued and "Federal Communications Commission" regulations, statutory law, and case decisions of which NOT ONE WORD was said nor one exhibit referred to. This is more than prejudicial, because the inclusion of and reliance on the new material to support a decision deprived Plaintiff of an opportunity for rebuttal, argument, exhibits, testimony. It is more than prejudicial, however, because it presents the appearance of bias by the judicial officer which is even worse because the case was tried by the Court without a jury.

Ignoring the Record of the Case Taken By The Court

i. At Court there was the appearance that the Court was taking close notes relating to testimony and evidence, and this is supported by the Court's direction to make the summation "briefs" follow the order of presentation and refer to the exhibits and testimony offered at trial (and in depositions). Thus the Court exercising appropriate attention to the testimony and evidence did or should have been aware of the introduction of material which was "foreign" to the proceeding, no matter how relevant, admissible, or controlling it might be in retrospect. It simply is the Court's duty to police the introduction of testimony and evidence and the burden is on the party, not the court, to advocate for a

party. In adopting argument, evidence, and cases "foreign" to the trial the Court stepped over the line – a prejudicial material error of law.

## Conclusion

4. Plaintiff attaches a marked up copy of the Order of September 10, 2012 (Exhibit A); the two letters from Horry County referred to by the Order of Court, one dated April 16, 2009 and the other dated August 24, 2009, both in evidence at trial (Exhibit B). the IHOA November 17, 2010 Answer to Magistrate Court Case 2010CV-26-1072943, Jarmuth v IHOA, (Exhibit C); the IHOA's November 9, 2010 Motion to Dismiss the Magistrate Case (Exhibit D), the November 20, 2010 Transfer Order (Exhibit E), and Plaintiff's August 21, 2012 Letter to the Court filed with the Clerk (Exhibit F).

It is concluded that there are sufficient irregularities, instances of fraud by defense counsel, violations of constitutional due process, internal contradictions, appearance of bias by the court, and conclusions of law and findings of fact unsupported by any evidence, the failure of the court to address all issues before it, and personal and subject matter jurisdiction issues to merit a new trial, amendment of the order, and relief from judgment.

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, Sc 29576
843-314-4355

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | CASE NO. 2010-CP-26-11320 |
| | ) | |
| Ronald Jarmuth, | ) | CONSOLIDATED WITH |
| Plaintiff | ) | |
| | ) | CASE NO> 2009-CP-26-3596 |
| vs | ) | |
| | ) | |
| The International Club Homeowners | ) | AFFIDAVIT OF |
| Association, Inc., Et Al, | ) | SERVICE OF |
| Defendants | ) | MOTION |
| | ) | |

**CERTIFICATE OF SERVICE OF "PLAINTIFF'S CONSOLIDATED POST-TRIAL MOTION:**

I certify that on September 19, 2012, I served a copy of the attached "Plaintiff's Consolidated Post Trial Motion" upon:

(1) Defendant by mailing same to Defendant's attorney, Henrietta U. Golding McNair Law Firm, P.A., 2411 Oak Street; Suite 206, Myrtle Beach, SC 29577-3164 by United States Mail with first class postage prepaid.

(2) The Judicial Officer, Hon. Robert Stroman, by serving a copy upon him in the chambers of the Master in Equity at the Courthouse, which he uses to perform his duties as Special Referee for the Master in Equity; and by mailing a copy to him at his office, that being "Ralph P. Stroman, Attorney; 8 Red Squirrel Ln.; Pawleys Island, SC 29585-5239.

Ronald Jarmuth, Plaintiff Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
September 19, 2012

# EXHIBIT A – Mark Up of September 10 2012 Order

**Notes:**

**Text which is bolded and underlined is material in order referred to by adjacent "Plaintiff's Notes"**

**Material in Order is double spaced unless a quote contained in order, then single spaced and indented.**

| | | |
|---|---|---|
| **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. | ) | |
| | ) | FINAL ORDER DISMISSING |
| The International Club Homeowners | ) | PLAINTIFF'S CLAIMS AND |
| Association, Inc., | ) | AWARDING JUDGMENT AGAINST |
| Rosemary Toth, | ) | THE PLAINTIFF IN THE AMOUNT |
| and K.A. Diehl & Associates, Inc. | ) | OF $7,326.00 AND GRANTING |
| Defendants. | ) | |
| | ) | INJUNCTIVE RELIEF |
| | ) | CIVIL ACTION NO.: 2010-CP-26-11320 |
| Ronald Jarmuth, | ) | |
| Plaintiff, | ) | |
| vs. | ) | |
| The International Club Homeowners | ) | |
| Association, Inc. | ) | |
| Defendant. | ) | |

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 Registrar 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.

**Plaintiff's Notes: (1) R Scott Pyle who signed the covenants (the Declarant) and President of Plantation AD, the original developer, in his deposition testified that he had no such intention and knew nothing of this "limited applicability" argument. Pyle testified that he**

**wanted to change the PUD name and that developers and master builders, such as the Villas developer was, were exempt from the start from restrictions and did not need any "waiver" on their behalf.**
**(2) There is a major contradiction not raised at trial because if Plantation continued to own the roads and streets, how could Horton "dedicate" them to Horry County. The observation was not made at trial. However, Defense Counsel says that no use restriction applies to land not within a "Unit" (applying this to the golf course) but this also applies to the streets which clearly belong to Plantation who is NOT the developer and which are NOT UNITS thus there are no restrictions on use of the private roads.**

- 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

**Plaintiff's Notes: (1) The transition committee was not addressed at trial and no evidence was referred to relating to it.**
**(2) Whether or not Plaintiff "ran for election" was not reflected in one word of testimony nor was any reference made to any evidence about this. This "fact" was never raised or depended on at trial. If not material why mention it. Mentioned, it is procedurally erroneous.**
**(3) At trial Plaintiff cited that per the 2003 BoD Minutes there was never an approval to contract with Waste Management which voids any such decision (see SC 33-31-821 Pl #232 Action without meeting. The testimony in depositions is that there is no formal Waste Management Contract.**
**(4) If Amendment #2 retained ownership of roads in Plantation AD how could Horton convey anything related to the roads to Horry County. There is an material and controlling internal contradiction here justifying revisiting the whole subject.**

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

**[Plaintiff Note: June 18, 2009 NOT in October, 2003. This is a materially fraudulent representation falsely giving the impression that Horton provided additional value – which it did not at the time of the golf course agreement, the subject of the paragraph.**
**Also, the paragraph gives the fraudulent impression that the HOA only maintained HOA owned land, and fraudulently omits that through 2009 the Horton owned front entrance was maintained at HOA expense.**
**Also, since Amendment #1 did not void Riparian Rights, it is a material omission to leave out that the HOA owns the water in the ponds and is paying for water it owns.**
**This is a materially controlling matter of evidence and testimony at trial which is contrary to the Order.]**

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 <u>or who live in a multi-family development that does not have separate amenity facilities</u>. <u>According to Section 6.5 of the Declaration, members</u>

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.

**[Plaintiff's Notes:**
**(1) Amendment #1 paragraph 5 reads "*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.*" which supersedes the ambiguity in the original covenants relating to presence or absence of separate amenities which Defense Counsel and the Court depend on. The revision is absolute and unqualified.**
**(2) The testimony at trial by William Freiboth and Maureen Sullivan and in depositions by Rosemary Toth was that The Glens are single family homes called "town homes". The first mention of "or which do not have their own amenities" is in Henrietta Golding's Draft Order, introducing an entirely new line of argument and new "facts". This is a prejudicial error entitling a new trial, because Plaintiff had no opportunity to rebut this and it was neither in evidence nor argued at trial. The court has adopted, in it's order, material outside the proceedings which is absolutely forbidden. This argument also is invalid because it ignores the absolute limiting qualification of Amendment #1**
**(3) The evidence in the Planning Commission documents referred to The Glens and it's site as "MULTI-FAMILY" and never used the phrase "townhome". Any statement by Sullivan is "argument" and not evidence. No objection was raised to the description of The Glens at trial as "multi-family". Throughout this Henrietta Golding was silent.**

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 Plaintiffs 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 Plaintiffs 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

**[Plaintiff's Note:**
**There was no mention of 2006. Maureen Sullivan testified that she saw one occasion in 2010, and there was no evidence or even opinion offered whether Plaintiff was a guest of another homeowner, which is allowed. There was no mention of attendance at board meetings, certainly not with a date positive "2007" attached. This is a creative addition by Defense Counsel in the Court's final order engendered by blindly adopting a self-serving and fraudulent draft order provided by Defense Counsel. A date positive has to be supported by evidence.**

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.

**Plaintiff's Note:**

**The testimony and evidence at trial was that the web site was a partial list of homeowners, omitted many owners, included renters, and had unverified addresses and that it was what homeowners chose to put on the web site, and was NOT the list of names, addresses, and numbers of votes which might be case which is used by the IHOA for voting purposes.. The testimony of William Freiboth was that the IHOA had once provided the web list, not the homeowner "voter" list as described in the statute.**

**"Unbudgeted Revenue" was never in anyone's testimony at trial nor in any document – those being the minutes of the special meeting and the announcement of the special meeting, both of which merely stated they were giving homeowners $ 75.00 each. At trial Maureen Sullivan was unable to state what the $ 75.00 was for. The "unbudgeted revenue" is a creative addition by Defense Counsel unsupported by evidence or testimony.**

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 Plaintiffs 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**

**Plaintiff's Note: Toth's 11/8/2009 Pl #603 statement in evidence to the Commission is that the IHOA NEVER allows a swing set on the side of a house. Testimony of Pete Pizzi at trial and photographs show his daughter's house is the same model as Plaintiff's and that they have a swing set at the exact side location that Plaintiff requested – meaning that Toth lied to the Commission to obtain their decision. Her Commission statement included that there are no covenant restrictions on swing sets and the ARB guidelines only require to securely anchor a play set against high winds. The Commission had no reason to think they had been lied do.**

**9/27/2010 "ARB Letter" – Fraudulent mis-statement by Defense Counsel of material fact. The letter was from the IHOA which imposed the fine and NOT from the ARB. Plaintiff's Exhibit #627. The evidence is that the IHOA Diehl employee identifies "violations" and the IHOA enforces it. The ARB does not get involved in enforcement, only applications.**

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 Plaintiffs 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

**Plaintiff's Note:**

**"Refused" is an actual act a conclusion not supported by testimony or evidence. The evidence is that Plaintiff ignored the demands and through three (3) separate letters each demanded the appeal hearing provided by Bylaws Section 13.3. All correspondence was between the IHOA and Plaintiff. The only "ARB" letter was the October 8 2010 "Approval" and "Disapproval" letters.**

**Attorneys Fees. The testimony of Freiboth at trial is the HOA paid two $ 2,500 deductibles when they were required to answer the two complaints and at that time they had no claim to enforce any covenants. When they added the counter – claim there was no additional cost to them so it has cost the IHOA nothing to attempt to enforce the covenants.**

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 fmd 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 Plaintiffs claims are without merit.

**Plaintiff Notes: R Scott Pyle / Plantation AD signed the Covenants on January 30 1999. Pyle's deposition testimony and the evidence, Pl #552 is that on March 1, 2001 two years later Ken Grover, a person Pyle did not acknowledge knowing, incorporated the IHOA. That the developer incorporated the IHOA is a prejudicial material fraud contrary to the evidence and the testimony of Plaintiff and Pyle – entitling retrial or Amendment.**

**The citation was not offered at trial or in evidence by anyone and was added post-trial in violation of rules of procedure. The Articles merely say IHOA and are irrelevant to the name change.**

**The Order as written by Defense Counsel omits the requirement of the Non-Profit Corporation act 33-31-206 PL#214 uncontroverted at trial which requires the Incorporator or the Board to adopt the Bylaws – with no exceptions. Defense counsel was silent when this argument was made.**

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".

**Plaintiff's note: (1) In this portion of the Order the Court has made a finding of fact and conclusion of law that the effect of Amendment #1 is that the non-profit corporation with rights and obligations under the covenants is NOT the defendant International Club Home Owners Association, Inc, but the "International Club Association, Inc" which also exists.**

**(2) The original text read:**

**The Developer has or will cause to be incorporated under South Carolina law "Murrells Inlet Golf Plantation Association, Inc." ("the Association")**

**(3) The finding of fact that Amendment #1 makes the "International Club Association, Inc" the "the Association" renders every single finding of fact and conclusion of law following void, for it means the Defendant IHOA has no rights or obligations under the covenants – although it continues to own the property deeded to it.**

**(4) As a result Plaintiff is entitled to JAML on every count.**

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.

**Pl Note: A corporation "comes into existence" when Articles filed with Sec of State. SC 33-31-203 Pl#211 in evidence and uncontroverted at trail. Pl entitled to Judgment as a matter of law on the matter. Judgment clearly contrary to the evidence. Covenants pre-empted by law. See also 333-31-206 Pl#213 Corp governed only by properly adopted bylaws.**

**King admitted under oath that the practice of Developer stating Bylaws is pre-empted by**

**and prohibited by the SC Non-Profit Corporation Act and admitted it is done only because developers get away with it.**

**The evidence and testimony of the developer Pyle who signed the Covenants, is the Developer DID NOT the incorporate the IHOA – prejudicial fraudulent material mis-statement of facts by Defense Counsel.**

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

**Plaintiff's Note: "SECTION 33-31-206. Bylaws. (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation." "Shall" has NO DISCRETION. The Court's Order mis-states a material and controlling statute. Defense**

**Counsel did not make the "discretion" argument at trial – it was added post-trial and entitles Plaintiff to a JAML or new trial.**
**"Properly signed, recorded, indexed" argument not made at trial – Golding was silent on this. The evidence, testimony and law is against this. See SC 30-07-10 & -20 Pl#209 & 262 uncontroverted at trial. Entitles Plaintiff to JAML**
**Case citations not raised at trial so Plaintiff denied opportunity to challenge it.**

A.D., LLC. The **Plaintiff introduced two deeds, Plaintiffs 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 Plaintiffs contention that his home in Pebble Creek is not subject to the Declaration is without merit.

As to Plaintiffs 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.

**Plaintiff's Note: Plaintiff introduced the January 29, 1999 Pl#545 Sunbelt / Pebble Creek deed which was signed two days prior to the date the covenants were signed and ten days prior to the covenants being recorded. This deed had a blank for Covenant books / page and the Covenants did not exist when Plantation sold to Sunbelt – the uncontroverted evidence and testimony. At trial Defense Counsel Golding rushed up to Plaintiff in a frenzy and waived Pl #544 which was the GOLF COURSE Deed and had nothing to do with Pebble Creek. Plaintiff testified if someone wrote in a book page on the golf course deed it was fraudulent because a document signed on January 29, 1999 couldn't have a book page which was assigned on February 8, 1999. The key was that when Plantation AD declared covenants on February 8, 1999 he had no property interest in Pebble Creek – no horizontal privity which was uncontroverted. Defense Counsel WAS SILENT through this.**

**Plaintiff's Deed: Upon cross examination by Golding Plaintiff testified that the seller to him lacked vertical privity from one with horizontal privity to assert the covenants. Plantation AD lacked privity in Pebble Creek when he declared the Covenants February 8, 1999. Sunbelt never declared the covenants and thus the line of owners from sunbelt lacked vertical privity with someone who was a party to the declaration of covenants. This was UNCONTROVERTED at trial by Defense Counsel. Plaintiff is entitled to JAML. At the minimum it is a prejudicial and fraudulent mis-statement by Golding adopted by the Court perhaps unwilling to believe that Defense Counsel would behave so unethically.**

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

**Plaintiff's Notes: Freiboth had no actual knowledge of what went on in 2003. Horry County Ordinances 18-0004 Pl #254 in evidence required more parking than Horton had provided. The swimming pool already existed and the photos and testimony are that it is in the originally deeded area. The 5/16/2003 Developer's Agreement in evidence Pl #557 is that Horton not the IHOA had to buy the parking at Horton's expense. Defense counsel was silent when it was argued with supporting evidence that Horton not the IHOA was obligated to buy / provide the added parking lot.**

**Plaintiff argued that the HOA holds riparian rights if Section 4,17 was not deleted AND the Court ruled it was not deleted. Plaintiff NEVER stated the HOA could use the Golf Course's irrigation system – in cross examining Chris Sullivan the issue was what would it cost the HOA to build it's own water distribution system sourcing the ponds for the IHOA's exclusive use. This is a material mis-statement by Defense Counsel of the testimony and evidence.**

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 Assn 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 Notes: (1) Omits evidence and testimony that the Minutes of the BoD in 2003 agreed only to waive three months of assessments and arrears through December 2003 – that the agreement was entered into by a Horton employee without board approval. Also, SC 33-31-830 & 831 Pl #235 & 236 absolutely bar transactions where a director has a direct or indirect (through an employer interest in the transaction and voids it as a matter of law unless the minutes record recognizing the conflict and approvals – which they do not. Minutes from 2003 Pl #302 & 303. The argument and case citations were not made at**

**trial. Defense counsel was silent through this all. Materially prejudicial mis-statements by Defense Counsel adopted by Court entitling new trial, amendment, or JAML.**

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.

**Plaintiff's Notes: (1) Defense Counsel never argued waiver or laches at trial or otherwise relating to the Golf Course Agreement. (2) The testimony and evidence is that the Golf Course Agreement because known to Plaintiff in 2009, was not recorded, and was not even in the BoD Minutes. This was uncontroverted at trial and is raised post-trial by Defense Counsel outside the proceedings. Same for the citations. Limitations only runs from when something hidden is discovered and Plaintiff sued within 60 days of discovering this. (3) Plaintiff testified and it was uncontroverted, and sample checks were in evidence that he has paid "under protest" and even made a motion in 2009 mentioned at trial to pay under protest into the Clerk of Court. This is contrary to the text of the order which has material prejudicial errors of fact. (3) Freiboth never testified at trial that the Golf Course had always been current and admitted that the Golf Course paid nothing in 2011 and 2012 and almost nothing in 2010. Confronted by IHOA General Ledgers from 2003 on he admitted that at no time has the Golf Course ever paid even half what it owes under the agreement and has "breached" the contract – why it should not be honored. Also he admitted at trial that the IHOA has sued the Golf Course for at least $ 45,000. Clearly erroneous order as to these issues.**

**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 coowner 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.

**Plaintiff Notes: (1) Plaintiff's contention at trial was that payments for country club type facilities are personal service contracts which expire on sale of property and not proper covenants touching and running with the land. Plaintiff cited case law to support this. It was UNCONTROVERTED. Plaintiff did not base this on uses of the facility.**
**(2) The citations and arguments were not raised by Defense counsel at trial or otherwise.**
**(3) Plaintiff never argued that Section 6.5 had anything to do with payments for the Amenity Center. Relating to capital contributions Plaintiff argued and testified and cited cases that the contribution amendment imposed an unequal burden between single family and multi-family homes. The assertion to the contrary constitutes unmitigated fraud.**
**(4) Section 6.5 has nothing to do with whether compulsory membership in a country club / amenity center is a proper covenant or instead a personal services contract.**
**5) SC 27-31-190 never mentioned by anyone and is inapplicable since it is not from the SC Non-Profit Corporation Act 33-31 et seq BUT is from the Horizontal Property Act limited to condominiums and is a fraudulently cited statute. Defense Counsel in relying on this commits a fraud on the Court and the Court in depending on it has made a prejudicial error of law.**

**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.

**Plaintiff's Notes: On cross examination Ambuhl admitted that the IHOA is a "reseller" of services and can charge up to the non-contract individual customer rate; that homeowners**

**are NOT customers of HTC and that the IHOA is THE customer and that homeowners have no obligation to HTC or HTC to homeowners under the contract. Ambuhl admitted that when Dish TV service is compared to HTC's service including the set top boxes Dish TV is far cheaper to Homeowners than HTC and thus homeowners get no economic benefit from the contract. She admitted that the IHOA is reselling services and that resellers must have a franchise from Horry County – from whom HTC is franchised. Freiboth admitted under oath that the IHOA does not hold a franchise to resell cable tv services to end users. Further, Freiboth admitted under oath that the golf course, The Vistas homes, and The Cambridge homes are not required to buy these cable services although they are "under the covenants" and "within the PUD" and within the area described by the contract: " every Unit located on the Premises".. Thus the enforcement was shown at trial to be selectively and unevenly applied. Plaintiff cited case law which voids such enforcement and the citations and argument were unrefuted. Defense counsel sat silent through this – as through most of the trial.**

**This is clearly an example why there is the appearance of bias on the part of the judicial officer, whether or not it exists, because of the extreme disconnect between what went on at trial, including arguments and evidence, and the alternative reality depicted in the final order written 100 percent from word one to word last by defense counsel. The over – whelming appearance of bias is sufficient for a new trial.**

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.

6a. 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.**

**Plaintiff's Notes: (1) Whether the HTC contract is an "exclusivity" contract and it's effect on enforcement was never argued by Plaintiff and no evidence was cited relating to this. It is a mystery why the Court would even comment on this. The issues are (a) who is the contracting party because the IHOA's name is not on the Contract, something the Court has chosen to ignore because it is an inconvenient controlling FACT as is the SC Code's 33-31-821 prohibition on the validity of acts outside of meetings not recorded in the minutes. The first board meeting per the minutes was on September 10, 2002, Pl #300 and there has never been an approval of the Waste Management Contract in the minutes which was the unrefuted testimony at trial. Plaintiff believes the 2001 date was first mentioned in the Court's order as written by Defense Counsel unsupported by a single piece of evidence or the testimony of anyone with personal knowledge (not rumor) of the matter. The 2001 date is worse than hearsay.**
**(2) 21 CJ.S. Covenants § 42 was never mentioned at trial and may not be raised post trial, denying Plaintiff an opportunity to refute, a prejudicial procedural error. (3) The actual cases that were cited and never controverted hold that services are personal services contracts and do not "touch and run with the land". The Queens Grant case did not deal with services. The uncontroverted testimony at trial is that true covenants deal with obligations ON one's land and RIGHTS OFF one's land; and obligations OFF one's land are personal service contracts. This is the established case law and there was nothing at trial to the contrary. Defense Counsel sat silent through it all. Her draft order attempts a "another bite at the apple".**

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 Assn 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. 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.

**Plaintiff's Notes: (1) It is obvious that Defense Counsel wrote her draft order before the trial based on what she expected the argument to be. Not one word relating to FTC matters or federal regulatory cases was raised at trial – not one case mentioned. Plaintiff did not cite to one regulation nor one case. Yet Defense Counsel's Order supposedly reflects what was argued and the evidence depended on at trial. The fact that the Court adopted this which included material totally absent from trial raises serious questions about the appearance of bias on the part of the Court and about undue influence. Accidental inclusion based on a honest belief that Defense Counsel would not "play dirty" and fraudulently slip in material not at trial raises questions about the competence of the Judge and whether he paid any attention to anything. Such appearance is further supported by the adoption of every word in Defense Counsel's proposed order. There is a constitutional issue of whether due process and a fair trial occurred. It is the appearance not the fact, which will never be known, which is important to protect the sanctity of the judicial process and to preserve respect for the judiciary.**
**(2) The phrase "exclusivity" was never argued at trial. Plaintiff argued (a) the IHOA did not actually contract with HTC because the IHOA's name is not on the contract; (b) Doug Brown, a Horton employee and putative HOA board member, didn't have the authority to enter into the contract since it was not approved by the board in the minutes; (c) a cable contract a personal services contract instead of a real covenant that touches and runs with the land. Cases were presented which support the later. This was uncontroverted and nothing was offered in opposition. Defense Counsel Golding sat silent. (3) Plaintiff never argued that the HTC contract violates public policy.**

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.

**Plaintiff's Notes: (1)The FCC case was never referred to at trial. There was no "record before us". Denise Ambuhl, on cross examination, admitted that the true cost to a homeowner with multiple televisions far exceeds the same services obtained from Dish TV who offers better service because Dish TV is 100 percent digital high – def, and HTC is not, requiring a set top box on every tv at additional cost. The total cost of Dish TV was uncontroverted at $ 19.99 and the HTC cost for four televisions was admitted by Anbhul to be far more than $ 40.00 – no consumer benefit.**
**(2) The Court was never asked to prohibit "bulk billing". Defense Counsel "snuck this one in" after trial because it was a winnable but non-existent argument. The final order is suspect because it adopted Defense Counsel's post-trial argument and issue never made at trial, and this is supportive of a new trial.**

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.

**Plaintiff's Notes: (1) Plaintiff never argued that the HOA's assessments violate public policy; Plaintiff never depended at trial on any FTC Order.**
**(2) Defense counsel fraudulently invented what was testified to and the Court blindly adopted this. Plaintiff filed a letter with the Court immediately after receiving Defense Counsel's draft order suggesting that the Court order the transcript since almost every material alleged fact or purported testimony was from an "alternate universe" and didn't reflect what went on in the Courtroom. The Court was put on notice to exercise due**

**diligence because of problems of truth and procedure – including raising arguments and cases after trial to which Plaintiff could not respond.**
**(3) Plaintiff raised the issue that the HOA raised rates January 1 of each year while HTC raised rates in April of each year, which Ambuhl admitted was inconsistent and not a "pass through". She testified that the contract does not link what the HOA charges homeowners to what HTC charges the HOA – just a maximum price cap for the HOA to charge homeowners. She admitted the contract is not bulk billing because the homeowners are NOT customers of HTC.**
**(4) Ambuhl admitted that the HOA receives and is billed for telephone service and should have received capital credits for that the evidence presented was that these were never on the HOA's general ledgers. After Ambuhl recited her "line of business" routine, Ambuhl to admitted on cross to intimate knowledge of HTC's bylaws and the governing statutes which she was required to read aloud and which relate capital credits to how much a customer spends relative to all HTC's sales and requires dividing up capital credits based on percentage of total purchases, and that the statute and HTC's bylaws do not provide an alternative of dividing income and profits into arbitrary "lines of business". Her credibility was diminished because at the end she had contradicted herself.**
**(5) Plaintiff never accused the HOA of misappropriation; it was shown that credits should be present at least for telephone service and that Diehl is "responsible" to make up the deficit, however it occurred.**

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 Plaintiffs 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.

**Plaintiff Notes: (1) Golf Course Agreement / Cable contract / Waste Management contract were not known to homeowners and there was no clue in the BoD Minutes that these existed and were found only when Plaintiff discovered discrepancies in the budget and demanded to examine the files.**
**(2) Plaintiff at trial explicitly stated he did not seek to void the contracts. The issue was the enforceability by the IHOA against homeowners which left intact any obligation by the IHOA through it's contracts.**
**(3) At trial Freiboth admitted that the cable contract and waste management contract are selectively enforced as The Villas and The Cambridge are not subjected to these contracts. The Court never addressed this anomaly of selective enforcement and case law was**

**presented that covenants must be uniformly enforced.**

**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.***

**Plaintiff Note: (1) The above citations first appeared in Defendant's post-trial draft order and these assertions were not made at trial.**
**(2) Plaintiff made the uncontroverted assertion that Horry County has pre-empted towing on private property, HCC Code 12-5-123 which prohibits arbitrary towing and imposition of charges by private property owners. The Court's order is silent on this matter which bans the imposition of any charge. Further Freiboth at trial admitted that a homeowner as a member of the general public is not subject to the restrictions but when viewed as a homeowner a different standard is applied for the same conduct, a contradiction of rights which the court has not addressed.**

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.

**Plaintiff's Notes: (1) The Carter letter is dated April 16, 2009 and was not in Plaintiff's nor Defendants' evidence set. It was never used at trial which is probably why Defense Counsel never gave the date in her draft order. The actual letter, attached, states exactly OPPOSITE what Defense Counsel Golding wrote and there is thus a fraud upon the court. The actual text reads in part:**

> **"I have not reviewed the covenants and restrictions for your subdivision and express no opinion as to what rights, if any, the HOA may have in this regard. You would have to consult with a private attorney if you have any questions of that nature."**

**(2) Defense Counsel put another letter into evidence, Defense #61, from the Horry County Infrastructure and Regulation Division which makes a definite statement and which contradicts the Court's dependence on Carter's non-existent statement. #61 reads in part:**

> **"I am writing this letter to clarify some issues raised by residents ... many of the questions brought forth to you originated from differences of opinion between individual property owners and the Homeowners Association (HOA) ... Pickering Drive and International Club Blvd are both owned and maintained by the county. ... Taxes are not paid by the HOA for the land within these platted public rights of way."**

**Since the conclusion of the court is directly tied to correspondence from the County, the**

**Order is not supported by the evidence and the Order with respect to the roads should be Amended. Further, the Order was procured by fraud.**

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.**

**Plaintiff Notes: (1) Consistent use of word "delete" in Amendments not argued by Defense Counsel at trial. Not supported by the evidence. Amendment #1 paragraph 12 "waives" Developer's right under Covenant Section 7.37(c) to enter into and maintain golf course property which acts as a deletion AND has nothing to do with The Villas.**
**(2) There are two developers, R Scott Pyle of Plantation AD who authored Amendment #1 and DR Horton who authored all later Amendments.**
**(3) Paragraph 1 of Amendment 1 changed the PUD name which clearly is not a change directed only at The Villas thus the argument that everything in Amendment 1 pertains to The Villas is speculative. Paragraph 8, an addition relating to Reserve Funds, applied to single family units as well.**

**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.**

**Plaintiff's Notes: (1) The web list is not the "membership list" as defined in the statute.**
**(2) The statute does not require ownership of a computer and internet access as a precursor to obtaining the membership list.**
**(3) The statute does not require waiver of privacy rights as a precondition to obtaining the membership list.**
**(4) At trial it was not controverted that the web list is not prepared as required by 33-31-720 and does not consistently show the property address and never shows the number of votes an owner can cast thus the web list can never be the "voter list"**
**(5) 33-31-720 does not have a "good purpose" provision but states without qualification or limitation: "*(b) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting, beginning the day after notice is given of the meeting*" which is the statute Plaintiff put into evidence at trial #226 and to which he testified. The Order is silent about the statute at issue and Plaintiff is entitled to JAML on this matter as a matter of law.**
**(6) 33-31-1605 which relates to records of the corporation was NOT in evidence nor was it cited by Plaintiff. Subsection 1605 has the qualification but Section -720 is the one at issue.**

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

he 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's Notes: (1) Plaintiff relied on Section 4.10 of the Covenants which read in part "*all utility lines and facilities serving the Subdivision and located therein shall be located underground*" and section 7.23 which reads in part "*Exclusion of Above Ground Utilities. All electrical service, wires, pipes, lines, telephone, cable television (CATV) lines, security system lines and utility services of any type shall be placed in appropriate conduit***

***underground and no outside electrical lines shall be placed overhead."*** **which Plaintiff argued makes allowing above ground utilities an ultra – vires act. The applicability of Section 4.10 and Section 7.23, read to witness / Board Member Maureen Sullivan, was uncontroverted.**
**(2) Plaintiff never challenged granting an easement.**
**(3) Plaintiff cited Pre-emptive South Carolina Law, SC 33-31-1301, Prohibited Distributions, which bars ANY distribution: "*a corporation may not make any distributions.*" The $75 checks are distributions and Plaintiff is entitled to JAML on the issue. The exception of Section -1302 pertains to dissolution of a corporation or the "repurchase of memberships".**
**(4) The issue before the court is what the IHOA Board did with the money. Plaintiff cited and testified as to 33-31-813 "Liability for Unlawful Distributions" and Defense Counsel was silent and did not controvert that every Board Member including Defendant Toth was liable for the total sum distributed. The Court did not addressed how the prohibition on any distribution makes the $58,000 or so distribution legal and how the BoD is not subject to liability under 813. There is a clearly erroneous application of law and fact meriting new trial or Amendment.**

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 Note: Freiboth was unable to state how this is not a distribution. During Freiboth's testimony Plaintiff caught Defense Counsel signaling answers to Freiboth and brought this to the Court's attention – on the record.**

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.

**Plaintiff's Notes: Section 33-31-140(11 invoked by the Court defines "distribution" as ""Distribution" means the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers. The Court's conclusion of law is contrary to the very law cited by the Court!. Section 33-31-1401 (11)(b) states that "distribution" does not include "conferring benefits on its members in conformity with its purposes". An assertion that a transfer of income is a "benefit" and not a distribution under the law is a fraud and an error of law and fact not supported by evidence or law. To make such an argument Defense Counsel committed a fraud on the court. It is obvious that "benefit" is along the lines of services. Also – Defense Counsel did not argue "benefits" at trial; Freiboth testified that the Board decided to allow the homeowners to share in the income.**

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

**Plaintiff Note: Conclusion not supported by the evidence or the law.**

**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."

**Plaintiff's Note: Plaintiff's assertion applied to EVERY committee. The minutes of Board Meetings in evidence is that no committee has a single Board Member as a committee member – uncontroverted. Freiboth testified that board members attend committee meetings as "observers". The Court was asked to make a declaratory judgment on the matter and failed to do so as to the numerous committees other than the ARB.**

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..."

**Plaintiff's Note: (1) The statute recognizes only two sets of documents relating to non-profit corporations those being (a) Articles of Incorporation, which was in evidence as Pl #552 (March 1, 2001) and which had none of the optional text; and (b) Bylaws. It does not recognize "covenants" as having any legal bearing on a corporation. SC 33-31-140 (2) defines "Articles as "Articles of incorporation" or "articles" include amended and restated articles of incorporation and articles of merger." The Articles of Incorporation do not authorize anything outside the default provisions of law.**

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.

**Plaintiff's Notes: (1) Neither Section 7.2 of the Covenants which creates the ARB nor Section 7.3 (Objectives) provide the ARB the power to impose any fines or to enforce the covenants. Section 8.3, Enforcement limits the enforcement power to "*The Developer, the Association, and any Owner*". Plaintiff argued this, uncontroverted, at trial, invoking Section 13.3 of the Bylaws (Procedures) which apply to The Association. The Court has made the same conclusion that the ARB's power is merely "review and approve applications". This is inconsistent with enforcing a fine supposedly imposed by the ARB which is NOT part of the HOA but payable through a claim asserted by the HOA on behalf of the ARB which is not a component of the HOA. The HOA has no equitable or legal claim to demand money to satisfy something "owed" to somebody else (the ARB). Either the ARB is a committee subject to Bylaws 13.3 or the HOA has no standing to enforce an ARB fine and the Court has made an error of law in ordering Plaintiff to satisfy a "fine" not imposed by the HOA which is prohibited from imposing a fine or restricting rights until the Board, of it's own volition and without the application of a supposed violator, holds a hearing on the record – which it did not and which Plaintiff demanded in three letters of record in this case. Freiboth was required to read the first line of the first document which read "Appeal".**
**(2) As stated, the ARB is not created by the HOA's articles of incorporation or by it's bylaws thus it is not a "separate board established by the Defendant HOA's governing documents". This is an error of fact and of law requiring Amendment of the Order.**

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.

**Plaintiff's Notes: It is in the record of proceedings: That Section 3 e (v) of the Bylaws provides that committee reports shall be made at the annual meetings. The minutes of each annual meeting, which are in evidence, relates the "reports" of each of these "no-committees" and they are the only committees making reports. Likewise the minutes of each board of directors meeting, for which scores are in evidence, relate "reports" of these same numerous "non-committees". In addition, there is nothing to preclude the Board from creating a committee called the ARB and since the ARB gives it's reports just like all these other "non-committees" and obtains it's financial support from the HOA in the same manner, it is more likely than not, which is the standard, that the ARB has become a committee of the HOA and is thus subject to procedural requirements of Section 13.3 (hearings without need of appeal). This was also uncontroverted at trial. Order is unsupported by the proceedings.**

**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.*

**Plaintiff's Notes: (1) The covenants for Arcadian Shores and for the IHOA both provide for the creation of rules and regulations. However, the Court stated that rules and regulations can not impose or extend any restriction not explicitly already in the covenants – that such an extension requires an amendment of the covenants. Thus the rule making provisions in covenants were held irrelevant. Swing Sets are NOT RESTRICTED or even mentioned in any way in the Covenants. Any restriction by rule of any sort is an additional burden. Plaintiff read from the applicable portion and Defense Counsel did not controvert this. At trial Defense counsel did not assert the "rule making" argument. This came post-trial.**

**(2) The Court in Arcadian Shores wrote (this was read by Plaintiff into the record at trial): "<u>if the grantor had wanted to restrict mobile homes, he could have done so." *Id.* at 5, 498 S.E.2d at 86"</u> [Swing Sets existed in 1999 ipso facto the failure to restrict their use means they are allowed under the covenants and any restriction is an additional burden requiring amendment of the covenants – and not reachable through a rule]**

**"We concur ...that any "regulation" mentioning "motor homes (RV's), campers, or travel trailers" necessarily constitutes a change to the original 1965 restrictions and that such a change would require a document signed and acknowledged by the majority of lot owners." [Any change mentioning swing sets is a change to the 1999 restrictions and requires amendment]**

**"... 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. " [The attempt to restrict swing sets by imposing an "aesthetic standard" is a subterfuge and an illegal extension of the restrictions in the covenants]**

**And as to the irregular enforcement, Plaintiff put into the record numerous photos of fences and swing sets in every conceivable location and called the testimony of Pete Pizzi as to the side yard location of his daughter's swing set (which location was neither in the "rules" nor the covenants.) The Court held:**

**"<u>However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts.</u>"**

**"<u>Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures.</u>" Upheld that the Association thus waived its right to review / approve.**

**At trial Plaintiff put into the record 17 swing sets listed in the Response to Interrogatories Pl 604 Pl 605 which included that of Pizzi's daughter.**
**(3) The standard is "more likely than not" and Plaintiff met that standard in showing that no swing set restrictions exist and that fence and swing set controls are inconsistently applied. He also met his burden of "more likely than not" in proving that his edgers are "not a wall" but landscaping edging despite how it may have been intended. Facts on the ground and not speculative intentions are the only things a court is supposed to consider.**

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 thereunder."

**Plaintiff's Notes: (1) Per Arcadian Shores, the only use restrictions are the ones explicitly stated in the covenants, and Arcadian Shores had the same authority as the IHOA to make rules. The part of Arcadian which is germane is "motor homes" because an attempt was made to enlarge or restrict which was not, but could have been, in explicit use restrictions in the covenants. Any argument to the contrary is an error of law. Plaintiff is entitled to JAML on these issues.**

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

**Plaintiff's Notes: This is not the language of the Supreme Court in Arcadian. The court**

**excluded guidelines in their entirety from a controlling role: "We concur ...that any "regulation" mentioning "motor homes (RV's), campers, or travel trailers" necessarily constitutes a change to the original 1965 restrictions ... 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 In adopting the language of Defense Counsel the Court has made a clearly erroneous error of law.**

**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.

**Plaintiff's note: Did not make this argument at trial. The argument was directed strictly at (1) waiver of the covenant provisions and (2) county ownership of roads.**

I find that the Plaintiffs claims regarding the **ARB Guidelines are without merit**.

**Plaintiff's note: The challenge was to enlarging restrictions through "guidelines". The defendants testified through Freiboth that the "guidelines" are "general guides", and can't even be precisely relied on, and can be interpretatively enforced which is contrary, as a matter of law, to the Supreme Court's decision in Arcadian. The Order is clearly erroneous as a matter of law.**

**12. The ARB's denials of Plaintiffs 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 Assn, 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).**

**Plaintiff's note: None of this was raised at trial and there was no dependency on any of these cases. Plaintiff was denied due process opportunity to rebut or bring opposing evidence.**

a. The ARB has the authority to regulate improvements within the Community.

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....

**Plaintiff's Note: Per Arcadian, the ARB may not deny a fence which is not a patio privacy fence if there are fences in the sought location. The Arcadian decision stated:**

> **""Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures. Upheld that the Association thus waived its right to review / approve."**

**At trial Plaintiff showed the Court and filed pictures of fences for at least two houses running all the way around houses: left side to rear and up the right side and connecting to the house siding: 1112 Worcester Court and 276 Pickering Drive. A house on Pickering drive was shown to run a fence parallel to the street all the way to the left property line with no patio behind it or near it. Another one at 184 Seville went along the street front from the front house edge and back to the rear property line: more visible than Plaintiff's plan. All told it is more likely than not that fences are permitted which are more than patio privacy fences – the applicable standard. In addition, since Plaintiff's patio is at the rear of the house, the side fence IS a "Privacy Patio Fence" for at least two thirds it's length. The Order is clearly erroneous as to facts and to the law per Arcadian.**

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.

**Plaintiff's Note: At his deposition Pyle was unable to say for what purpose he "waived" use restrictions. Pyle SIGNED the covenant and amendment despite what he testified to which lends doubt to his credibility. He testified as follows:**

> **Q. What do you mean when you use the word waived?**
> **A. Waive, to not apply in this situation. How about that, yeah, to not apply in this situation? ...**
> **A. But again, you're asking me about a document that I did not sign, that I was a part of in conversation.**
> **Q. Fine. I'm glad you clarified that.**
> **Q. Did you have a hand in drafting up amendments two or three to the covenants?**
> **A. Our attorneys would draft documents. Sometimes I was involved, and sometimes I was not.**

**Despite several minutes of questioning Pyle (who signed the Covenants and Amendment #1) never identified "this situation".**

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's note: King testified he had not even read the covenants or the amendment at issue and had no particular knowledge of the facts. He testified that his "expertise" consists only in doing the work. King was unable to explain why a "waiver for the Villas" would be needed when he admitted that other provisions already in the Covenants, which he had not bothered to read, already exempted builders – including the Villas builder, from any use restriction. He also admitted that "waive" is functionally the same as "delete" and that he was unable to find any actual text in Amendment #1, which was handed to him, tying the waivers to The Villas. He admitted that the existing general language in the original Covenants exempting all builders from use restrictions is similar to what he has used, and which did not need later amending. This constitutes "ambiguity" and the cases Plaintiff cited all agree that ambiguities are resolved in favor of the "free use of property". Those case citations were not controverted at trial and have been ignored by the Court in it's final order.**
**Cases cited at trial but ignored by Defense Counsel's draft order: "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). Cited in 4575 - Santoro v. Schulthess, SCCA # 4575 Filed July 1, 2009 "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. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980): The applicable "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 "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).**
**The use of the phrase "waive" creates an ambiguity, particularly since the waivers are in a document with sections of general application (reserve fund and name change) to the entire development. It is more likely than not that sufficient ambiguity exists to require resolving the ambiguity in favor of the free use of property as the appellate courts require – especially given Pyle's confusion as to the circumstances.**

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.

**Plaintiff's Note: The Order admits that there are several fences which are not privacy fences. That they were erected while the developer controlled the ARB does not change the fact that the same covenants and same ARB were in place. The court decisions have never "aged" variations but see them as a whole and the IHOA president admitted to the variations, which the Court now chooses to ignore. The Order as to fences is not supported by facts and law. Also, Plaintiff showed pictures of many "non-privacy fences" and about a dozen where it was ambiguous whether they were "privacy" fences since they were adjacent to the road or the cul de sac.**

> "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's Note: Above citation not raised at trial. However, all of the fence "exceptions" are in plain view and were photographed from the roads.**

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.

**Plaintiff's Notes: (1) The order cites Freiboth as having admitted that there are non-privacy fences. Freiboth never testified that the developer had previously approved the fences. At trial Plaintiff read into the record IHOA answers to interrogatories which matched pictures of "non-privacy fences" to fences on the list approved by the post – developer HOA, so the "excuse" is a fiction contrary to the evidence.**
**(2) The age of the ARB is irrelevant.**
**(3) While Abel testified that Plaintiff had received approval for certain improvements her testimony never was that approvals were granted and the process acceded to (by Plaintiff) until the Swing Set denial. In point of fact whoever set out the sequence stated LIED and committed a fraud upon the court and thus the order is based on a falsehood and is contradicted by the evidence. All three of Plaintiff's applications are in evidence. THE FIRST was the swing set on July 21, 2009.**

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.

**Plaintiff Notes: (1) At trial Freiboth admitted that the Covenants do not contain the words "front yard fences" and when shown photos (in evidence) admitted that three houses have fences on the left, rear, and right of the houses and that another on Pickering Drive runs**

**from the front of the house approximately 40 feet to the left property line – none of them near any patio and none limited to the rear. Elsewhere in this Order copied from a post – trial brief not in evidence the Court excused this because prior ARB's allowed it.**
**(2) Swing sets: At trial Freiboth admitted that there is NO restriction on swing sets in the Covenants and that the ARB guidelines only say to secure them against high winds. The Court's conclusion is contrary to the facts through the evidence. "All ... are ... in the backyards" is contrary to the testimony of Pete Pizzi and photos and the admission of Freiboth that a swing set was allowed in the exact same side yard of the exact same house model – in the unit belonging to Sobczyk at 1212 Harrogate. The word "all" is in the Order. The statement of fact is fraudulent – because the Court heard Pizzi's testimony and saw two photos of same. The inclusion of this Defense Counsel written fraudulent conclusion is evidence of the appearance of bias by the Court. The side yard fact was repeated several times by Plaintiff in testimony and was NOT controverted by Defense Counsel. The "no side yard" "rule" is also fraudulent because Freiboth was shown the covenants and ARB rules and admittedly could not find such a "rule" or "restriction". As to the Human Affairs Commission, Toth signed a document stating that the "no side yard placement" was in the Covenants – which was a lie – and that no side yard placements are ever allowed – which is a lie when looking at the Harrogate photo. Notably – at trial Defense Counsel never made this argument and if they had the speaker would have been impeached by Plaintiff. The actual document was never addressed – except post trial by Defense Counsel which is outside the trial proceeding and not in the record of the trial.**

b. The ARB acted reasonably and in good faith in denying Plaintiffs 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 Note: (1) Defendant never argued this at trial – it is not in the record.**
**(2) The Sea Pines decision had a dependent phrase which this Order has omitted: "but bears a sufficient relation to the subdivision's general plan of development". Defense never plead nor argued that restrictions on side yard use is in the "general plan of development". To the contrary, documents are in evidence that the general plan had no such thought: (a) The covenants which speak only of observing side yard set backs; (b) the ARB guidelines which omit such a restriction when addressing swing sets; (c) the plans submitted to Horry County which address storage and utility buildings related to units and likewise only cite setbacks.**
**(3) "Arbitrary or capricious" is when the same exact thing is approved for one unit and denied for another. The Court's order ignored that Sea Pines also ruled that "In interpreting restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them." The Supreme Court interpreted Sea Pines in Cedar Cove Homeowners Association, Inc., v. Rudy DiPietro and Margaret L. DiPietro, 368 S.C. 254; 628 S.E.2d 284, cited by Plaintiff at trial, which stated, when Cedar Grove delayed suing for a year, that Sea Pines is inapplicable because, through the delay, *"We are then left with the provision that compliance with the restrictive covenants "shall be presumed... [if] no suit to enjoin construction is***

***commenced prior to substantial completion thereof. ... are entitled to the presumption of compliance"*** **and in THIS case Defendants waited a year before suing for compliance. Per Cedar Grove citing Sea Pines Plaintiff was in compliance because of the delay and the IHOA waived it's right to enforce any provision, if any, that existed. This explanation is unnecessary because Defendant's argument WAS NOT RAISED AT TRIAL.**

Plaintiffs 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 Plaintiffs applications were reasonable and not arbitrary or capricious.

**Plaintiff's Notes: (1) The "close to his property line" argument was never raised at trial or in any pleading. It is contrary to the evidence even of the "Patio Privacy Fences" because dozens of them are ON the rear property line and contrary to the law because there isn't a single document in evidence which has such a restriction. Such an argument is a fraud and justifies amendment or new trial. Since the assertion was added post – trial in the order it has the presumption of judicial bias.**
**(2) "Situated in the front yard" is a factual conclusion contrary to the evidence. The rear end of the fence is against the rear property line – per photos and survey plat in evidence. The front end of the fence begins approximately 40 feet rear ward from the front edge of Plaintiff's house. Defense Counsel apparently was so blatantly confident that she could write anything, true or not, that she didn't even try to write "some of it was in the front yard". And photos of three houses are in evidence of fences running from the Front edge of houses along the street to the left or right property lines. This was a fraudulent representation by Defense Counsel in her "draft order" which is not part of the record of the trial and it's adoption by the court give the appearance of bias by the Court since the Court saw the photos and plats at trial.**

c. The deferral of Plaintiffs 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.

Plaintiffs 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 Plaintiffs 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.

**Plaintiff's Notes: (1) Plaintiff argued at trial that Diehl not Roche was the source of the financial information – obvious because Toth wasn't on the IHOA board in 2012. The Court's finding of fact supports Plaintiff's allegation and the Order should be amended to grant the invasion of privacy allegation. At trial Defendants never argued that Plaintiff did not have an expectation of privacy in his account balances.**
**(2) The Order as written by Defense Counsel fraudulently mis – states Plaintiff's at trial basis for the cause of actions: (a) Plaintiff read into evidence (the document itself was in evidence) from the ARB application that the ARB's stated procedures excluded "deferral". Also read into evidence was the Bylaws 13.3 Procedures which state that no fine may be imposed nor right interfered with until the IHOA Board holds a hearing it must schedule whether or not an appeal is filed.**
**(3) Defense Counsel's text in the Order's statement that the "ARB Body ... determines the fines and their assessment" is a fraud by Defense Counsel. Sections 7,2 and 7.3 of the Covenants are in evidence and Freiboth was unable to find one word in the Covenants (Objectives and Prior Review) that had the word "enforce" or "fine" in it. The Covenants exclusively gives that authority to the IHOA Board and the IHOA Bylaws, 13.3, in evidence says they can't impose fines prior to the IHOA Board hearing. Section V b of the ARB Guidelines, in evidence, explicitly has the IHOA Board in control of the fines. If the ARB is "independent" than the Board can not "waive" ARB fines. At trial no explanation was given as to where the "fine" money goes – since the evidence is that checks are written to the IHOA and the ledgers, in evidence, is that the money goes in the IHOA accounts, not an ARB account.**
**(4) "ARB ... determines fines ... and their assessment". The evidence is that the ARB has never met to and never made a decision on imposing a fine. Contrary to the evidence.**
**(a) The violation letter Pl # 627 was "for" the IHOA, not the ARB. It did not cite the ARB Guidelines but instead the Procedures (Section 13) of the IHOA's bylaws and said the IHOA Board was the one to impose fines. (b) The October 14, 2010 Diehl letter "for the IHOA Board" cited the dispute route was with the IHOA Board, stated that the ARB merely makes the approval / disapproval decisions, and stated that the IHOA Board is the fining authority. At trial this was not controverted and no evidence or testimony disputed this.**
**(5) Per the SC Non-Profit Corporation Act, Roche had a clear conflict of interest and was not allowed to vote or even participate. The Court has admitted that no proper quorum was present. How it got to this is a mystery because there was no testimony or evidence cited at trial about how many ARB members were present or about quorum issues. There also is no evidence or testimony that the two other ARB members voted as Roche voted. "All ambiguities should be resolved in favor of the free use of property" and it is just as possible that there was a tie vote without Roche. For a court order to say that the explicit provisions of the Non-Profit Corporation act regarding conflicts of interest should be**

**violated to allow the violator to vote so that there would be a quorum where he could illegally vote is a travesty of justice, clearly contrary to the law, and merits a new trial or at least amendment of the order. The Order as crafted by Defense Counsel depends on things not in evidence and not in the record of the proceedings, and the Court's adoption of this presents the appearance of bias sufficient to merit a new trial. If also could be interpreted that the Court ignored the record and relied entirely on fraudulent material from the Defendant – meriting a new trial.**

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.

**Plaintiff's Notes: (1) The omission of a controlling dependent phrase in a controlling rule is a fraud when the Court depends on it. The rule of "notice" has such a clause: "13.3.1.3 ...m ay result in the imposition of sanctions after notice and hearing." The imposition of sanctions requires both "notice and hearing" NOT JUST NOTICE. The entire section was read into evidence by Plaintiff at trial. Freiboth was led through this word by word and agreed that no fine could be imposed until after notice and hearing. The judicial officer was observed to be taking notes at the time and listening closely to this. (2) The imposition of a fine and sanction by the IHOA is not mandatory. "May" in this context is that the IHOA "may" proceed to provide the mandatory hearing required by the aforesaid "notice and hearing". This is a technical point but it IS the one raised at trial and technical points are the ones the Court is supposed to depend on in contract matters. (3) Plaintiff had Freiboth read the hearing section which says that no sanction is effective until after a hearing recorded in the minutes of the board is held. The text in evidence and testimony reads:**

***"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."***

**At trial Freiboth was asked why the procedure was not followed and Freiboth testified that if Plaintiff had written to the Board asking for an appeal, they would have followed the procedure. He never alleged that there was a "may" in the rules. This material cited in the Order is outside the proceedings and CONTRARY TO THE EVIDENCE: At trial Freiboth was forced to read from Plaintiff's October 11, 2010 Pl # 633 whose FIRST**

**SENTENCE / Title included the phrase *"Appeal" of October 8, 2010 Disapproval of Fence / Approval of Flower Bed in "County Easement"*. At first Freiboth testified under oath that the IHOA Board expected Plaintiff to "appeal" but that Plaintiff did not. In impeachment, which destroys Freiboth's credibility, Freiboth admitted that Plaintiff used the word "Appeal" but said that the IHOA Board deliberately ignored the appeal because in paragraph #4 of the letter Plaintiff stated he was "disputing the necessity of an Appeal" with the words before it saying this was stated to avoid "waiver and estoppel" if it went to trial.**
**The direct and unambiguous testimony of Freiboth before he was presented with the letter was that if Plaintiff had presented a letter titled "appeal" the IUHOA would have been required to hold such an appeal per Section 13.3 of the Bylaws. The "may" is contrary to the evidence and testimony and merits Amendment to conform to the law and the facts.**

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 Plaintiffs continuing refusal to remove the brick foundation and place sod in that area.

**Plaintiff's Notes: (1) Section 7.2 is in evidence and was read at trial as well. There is not a single word in the section about "enforcement".**
**(2) Section 8.1 Enforcement of the covenants exclusively grant the IHOA the authority to impose fines and is silent about the ARB or any committee:**

> **Section 8.1. Enforcement. The Developer, the Association, and any Owner shall have the right to enforce ... 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 .... 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... "**

**Any assertion that the Covenants gives the ARB the right to impose any sanction or penalty is contrary to the evidence and merits Amendment. The assertion that this is to be found in Section 7.2 is a fraud written by Defense Counsel and the omission of Section 8.1, which is controlling, creates the impression of bias by the Court because this is supposedly the conclusions of fact and of law by the Court, not by Defense Counsel. At trial there was no testimony or evidence that the ARB had any sanctioning authority under the covenants. This is a post – trial creation, outside the record, meriting a new trial.**

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

**Plaintiff's Note: Not supported by the evidence or testimony.**

**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 arc "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**.

**Plaintiff's Note: (1) The "doesn't have amenities of their own" argument was NOT raised at trial and is not in the record of proceedings. It is an inadmissible post-trial statement first appearing in Defense Counsel's draft order which is not of record and to which Plaintiff has a constitutional due process right to rebut, which entitles Plaintiff to new trial.**
**(2) Paying assessments and using the facilities does not alter the covenants and is irrelevant.**
**(3) Section 6.5 is "Rate of Assessments". Any ambiguity as to the multi-family units and the Amenity Center was resolved by Amendment #4, December 28, 2004, in evidence as Pl#561 which explicitly modified the covenants and all prior amendments as follows and which excludes all multi-family areas from the Amenity Center.:**

> PROVISIONS IN THE DECLARATION
> 1. It is hereby agreed that the aforesaid **Declaration, including all previous amendments thereto, shah be and the same is hereby ratified, confirmed and adopted in ail respects and all particulars as to each and every provision thereof except as to those provisions expressly amended as set forth herein and shall be, and hereby are, binding upon all present and future Owners ...**
> **3. Pursuant to Section 6.5 of the Declaration, the rate of Assessments for the Units in the Multi-Family Parcel shall not include the cost for maintenance, upkeep and repair of certain recreational amenities located on Common Areas within the International Club Subdivision and *the Owners of Units within the Multi-Family Parcel shall not have the right to use said recreational amenities*.**

**Amendment #5 June 20, 208 Pl#563 in evidence said exactly the same thing with an unconditional prohibition of multi-family areas without any reference to whether or not they have separate amenities. This IS OF RECORD AT TRIAL.**

**AMENDMENTS**

**2. Pursuant to Section 6.5 of the Declaration, the rate of Assessments for the Units in the Multi-Family Parcel shall not include the cost for maintenance, upkeep and repair of recreational amenities located on Common Areas within the International Club Subdivision and *the Owners of Units within the Multi-Family Parcel shall not have the right to use said recreational amenities.***

**The Order is contrary to the evidence of record and must be amended. The inclusion of material not in the proceedings merits a new trial because of the appearance of bias.**

**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 Multifamily 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, Plaintiffs argument regarding the separation of capital contributions is without merit.

**Plaintiff's Note: (1) Plaintiff's argument is that Capital Contributions are properly dedicated / segregated to Capital Expenses of the HOA. Section 6.3 of the Covenants, in evidence, limits the purpose of such collections to "*the cost of any construction, reconstruction, repair or replacement of an improvement within the Common Area, and/or the Recreational Amenities including fixtures and personal property related thereto*".**
**(2) Plaintiff testified at trial that since this restriction is in the covenants using the money in violation of same is "ultra-vires" and beyond the authority of the IHOA Board. At trial Plaintiff's uncontroverted testimony was that the developer controlled board had used this money in part to pay for the Amenity Center which was a 100% developer financial obligation – including paving the Amenity Center original parking lot.**
**(3) Plaintiff introduced ledgers from DR Horton and for the same time period from the IHOA's Ledgers which showed that Horton had paid thousands of dollars in capital contributions to the IHOA and that the IHOA ledgers "booked" thousands of dollars less than Horton's books stated were paid. The Horton ledgers were produced subject to subpoena enforced by Order of Hon. Chief Judge Steven John almost three years after the subpoenas were served. At trial Plaintiff testified that it was more likely than not that the Horton money was paid and it was uncontroverted that the Horton amounts were paid. At trial it was uncontroverted that the HOA Ledgers produced by Order of Hon Judge Steven John were also correct. It was uncontroverted that the process was that the money was received by defendant KA Diehl which then solely and exclusively "booked" deposits. Plaintiff alleged that since the money was paid for the IHOA to Diehl but never booked, that Diehl is liable for the disappearance of the money. KA Diehl was present at trial through counsel and made to attempt to explain the discrepancy and made no allegation that the missing money was not the responsibility of Diehl to make up.**

**The portion of the Order relating to Capital Contributions is contrary to the evidence and failed to address the issue of Diehl's liability for the missing money. Amendment or a new trial is appropriate. Since the testimony of Jarmuth and introduction of associated ledgers took much of an hour, that this is missing from the order as written by Defense Counsel, gives the appearance of judicial bias and merits a new trial.**

b. <u>Equitable Ownership of Capital Contributions.</u>

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.

**Plaintiff Note. Plaintiff never made this allegation in the Complaint or at trial. This is a "bogus" issue. It is a mystery where it came from. In discovery there was a question about equitable ownership of the Amenity Center which never got as far as trial. The order must be amended because the issue was not before the court.**

c. <u>Developer's and Defendant HOA's Use of Capital Contributions to construct</u>

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**.

**Plaintiff's Notes: (1) Plaintiff did not argue this at trial and it is a mystery why the Court would be making findings of fact and conclusions of law on an which is outside the proceedings, merely because Defense Counsel snuck it into the draft order.**
**(2) That the Court blindly adopted it is evidence that the Court did not grant a fair trial because the Order thus did not depend on the evidence and testimony.**
**(3) The Court has argued this entire matter for the defendant: "if .. then". As a matter of law the Order is procedurally in error because it was not properly before the court and as the Court stated, "no evidence was presented" because NO ARGUMENT WAS MADE. An amendment is merited.**

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.

**Plaintiff's Notes: (1) Plaintiff argued that the amendment which imposed the burden of paying this on the homeowners, at first and at resale, instead of the builder, once at original sale, was contrary to the covenants and illegal per the Non-Profit Corporation Act and per case law. The author of the text deliberately changed the entire context substituting a**

**straw man not argued for one which was not controverted by the defense counsel.**
**(2) As a matter of law, it was settled and ordered in The Villas v IHOA, a separate case in this Court filed a week before Plaintiff's, that the accounts must be segregated. Plaintiff read into the record the case caption and read into the record selections from the final order.**
**(3) The issue as was argued at trial also includes the inequity imposed since the text now requires that**

> *The Association shall also collect a Capital Contribution equal to two (2) month's assessments for each such Unit from each new Owner of a Unit upon the transfer of such Unit either from the Developer or from another Owner.* **March 29 2004 Amendment 3 also December 28, 2004 Amendment 4.**

**The Non Profit Corporation Act provides that a change in the method of computing assessments must be put to the owners for amendment, which was not done. Plaintiff also argued at trial and cited cases that this is inequitable because a "unit" will unevenly contribute, since a unit sold many times will generate many times the assessment and one that is not resold does not pay the same. Also the amount of the payment for the same event will vary because it is tied to the unknown future current rate of regular assessments, so a unit sold one year will pay less than the same kind of unit sold a later year.**

**This was uncontroverted. Defense Counsel substituted a different issue never argued which is more favorable to it. As the Court adopted this and made findings of facts and law, a new trial is merited because no order was entered on the true issue and the issue it entered an order on is not supported by the trial proceedings.**

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 Plaintiffs claims without

**Plaintiff's Note: (1) This is Defense Counsel's fraudulent representation in it's entirety of what Plaintiff argued and of the trial proceedings. In debate this is called a "straw man" – when you can't win the issue you substitute an alternative that you can win and argue it. This is clearly one obvious reason why Plaintiff advised the court, in a letter filed August 21, 2012 with the clerk of court – which made it "of record" – that the draft order from defense counsel on which the court blindly relied was bogus from front to back, and that the court should obtain the transcript and rely on it and the sets of evidence so as to have an undistorted record of the actual testimony, argument and evidence.**
**(2) Plaintiff submitted evidence that the capital contributions ("CC") WERE properly PAID by Horton – and not one word was said about "collection".**

(3) Plaintiff never said a single word not made any allegation about the use of the capital contributions. Plaintiff did collect evidence he had received from discovery that Horton used HOA money to build the Amenity Center – actual HOA checks which Horton's appointed board wrote for expenses which, per the Developer's Agreement, was the Developer not the HOA obligation. But this was not mentioned at trial, because the Court cut Plaintiff off at noon on Friday, leaving him two and one half days instead of five, and did not permit Plaintiff to argue this area,
(4) Plaintiff never plead nor argued that capital contributions were useless. Rather, he cited to the covenants and argued that they were to be used for "capital" expenses, not ordinary ones, and thus should be segregated so as to permit auditing of their proper use. But this was argued relating to the validity of a change in the covenants which shifted the assessment from the developer at original sale to the purchaser at original sale and at each resale.
(5) Use for front entrance: This is 100 percent the opposite of what Plaintiff argued. Plaintiff cited to the covenants which said that assessments could only be used for the common area which the covenants defined as within Exhibit A and B of the plat referred to in the original covenants, which excludes the "front entrance". Plaintiff also argued that prior to mid 2010 Horton owned the front entrance, which thus was neither in the PUD, subject to the covenants, not a common area, and not HOA property.
(6) Plaintiff argued that the front entrance at the time of the lawsuit in 2009 should not have been maintained by the HOA for the reasons in "(5) above which have nothing to do with which HOA account the money comes from.
(7) Plaintiff never argued that "capital contributions are useless". Plaintiff cited the elements which are in the reserve study as areas typical of capital expenditures. Defense Counsel represents KA Diehl as well as the HOA and Defense Counsel, speaking jointly for Diehl, which witness Becky Abel argued has training, expertise, and years of experience, which means that the only a defense counsel with fraudulent intent would have advised the court that capital fund can be used for ordinary expenses (i.e., capital is to purchase "hard" items with a life expectancy of several years, specifically those items the IRS permits having a depreciation schedule for. Neither side said a single word about the intended or actual use of capital contributions.
(8) Re "collected by D.R. Horton ... not deposited into the Defendant HOA's account" The court's conclusion as to "not deposited" is contrary to the evidence. At Plaintiff's #704 was a spread sheet which was derived from Defendant's evidence, their "Bates" numbers 4480 to 4489, Pl # 703. Also in evidence and a source of the spreadsheet was Horton's accounting of capital contributions, Pl # 701. Defense Counsel did not submit or refer to any exhibits – not even Plaintiff's. The only thing defense offered on the matter was that Golding asked her witness, Diehl Employee Abel, did Diehl steal the money, which Abel said no. This, of course, is not evidence and Abel was not positioned to know anything about this anyway – and Plaintiff objects to the Court's apparent consideration of Abel's worse than hearsay / speculation as being the weight of evidence. Weight of evidence because Plaintiff was uncontroverted in going through the numbers to show that for sixteen months, beginning January 1, 2005 – NOT 2004, an error of fact by the Court (actually, Defense counsel who wrote the Court's order) Diehl "booked" $ 16,063 less than Horton's attorney, per order of Hon. Chief Judge Steven John, provided evidence of giving Diehl. Plaintiff did not argue that no collections were deposited, but that it is more likely than not

**that a lot of the money never made it into the books AND that Diehl was "responsible" for the missing money, however it came not to have made it into the HOA books.**
**(9) The order as written for the Court is fraudulent. It has premises and statements (or overlooking) of the evidence, and the conclusions written by Defense Counsel are worse than not supported by the evidence, they are CONTRARY to the evidence and supportive of the appearance of bias or fraud by the author (Defense Counsel) meriting new trial.**

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.

**Plaintiff's note: (1) Defense counsel never argued any of the above. Defense counsel was mute while and after Plaintiff presented his argument. Defense counsel did not present any evidence. Defense witness "King" was not asked about this and at cross examination admitted he had not even read the amendments or the original covenant and had no actual knowledge of the circumstances (or content) of Amendment #3.**
**(2) Amendment #3 was in evidence as Pl# 559 3/20/2004. Plaintiff's witnesses Pete Pizzi,**

**Mike Butryn, and Louis Astorino testified that they owned property at that time and had never been told of the intent to "make" amendment #3 and that the first they learned of it was in 2009 – from Plaintiff, who testified that he found it by doing a search in the Recorder of Deeds and that Plaintiff provided the HOA a copy of Amendments #2 through #5, none of which the HOA BoD were aware of prior to that. Thus the evidence is that element #4 of the Court's citation was not satisfied thus the Court's line of reasoning is contrary to the evidence.**
**(3) Plaintiff argued that the capital contribution is in fact an assessment, because per the covenants all collections are either annual or special assessments, and SC 33-31-1021 Amendments Changing Assessment specifically requires, as a matter of law, the approval of the substance of Amendment #4 by 75 percent of the homeowners – and no vote was taken. Further, Plaintiff noted that the Covenants state that any amendment which impairs the use and enjoyment of property requires an amendment by the homeowners and case law relating to voting rights and installation of satellite dishes categorizes any enlarged procedure or added charges as an impairment. At trial Plaintiff made the uncontroverted assertion that federal law prohibits the imposition of collections at a sale of a house of money which goes to any third party, and that federal lending authorities if aware of this are not allowed to provide mortgages to sales with such a burden.**

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).**

**Plaintiff's note: The above was never argued by Defense counsel at trial. Defense counsel was mute about the whole area. Queens Grant was never cited by Defense Counsel in this area of the case. Horton's ownership interest was never at issue.**

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.

**Plaintiff's Note: The original text, in evidence and read into the record by Plaintiff from the witness stand, had the phrase "by the developer" and amendment #3 substituted "from each new owner of a unit upon the transfer of such unit either from the Developer or from another owner". The original covenants had the text "at the closing of the initial sale". Plaintiff testified – and it was uncontroverted – that this meant that some "units" over their life contributed different amounts depending on how often the "units" were resold, and that since the payment is tied to the current assessment rate, the "1/6" would be a different sum depending on the year of sale or resale. The referenced text of the Order has the Court advocating for the Defendant and introducing new arguments on the Defendant's behalf never made at trial which arguments are outright misrepresentations and, when ascribed to Defendants – frauds and mis-representation of the evidence.**

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's Note: (1) It is not in the chain of title of existing homes whose titles would refer only to the original covenants and amendment #1.**
**(2) Section 8.5 Amendment contains the following text relating to an amendment affecting assessments: *"such amendment shall be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby;"***
**(3) The Court cited to element #3 of Queens Harbor; the order writes: "*3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants*; The amendment procedure in the covenants, pert of the record of this case, includes the requirement that "*Any amendment made pursuant to this Section 8.5(a) shall be certified by Developer as having been duly approved by Developer and by such Owners* ".**
**AMENDMENT #3 DOES NOT CONTAIN THE REQUIRED CERTIFICATION AND IS THUS INVALID AS A MATTER OF FACT AND OF LAW and the Court's conclusion is contrary to the evidence and the law – as a minimum, amendment of the order is required.**

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.

**Plaintiff's Note: (1) Once again a bogus argument by Defense Counsel. Plaintiff NEVER argued that "enforcement" was valid or invalid.**

**(2) The issue before the court, for a declaratory judgment, was is the amendment itself valid for failure to follow the procedures stated in the covenants for amendment and for violating the requirements of SC 33-31-1021. The Court has never ruled on the issue of the enforceability of the amendment !!! Having skipped an issue before the Court, amendment of the order is mandated. Having included and ruled on a matter not before the court, amendment deleting that conclusion is mandated.**

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.

**Plaintiff's Note: The arguments against Amendment #3 are the same as against #4. Defense Counsel misrepresented the effect of the amendment. Paragraph #4 of the amendment says that the multi-family owners are subject to the same capital contribution requirements as single family owners, "as amended" with all the notice and failure to follow procedure infirmities as Amendment #3. So the representation of the arguments and evidence are contrary to the record and the conclusion unsupported by the evidence.**

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

**Plaintiff's note: The trial proceedings never mentioned the "Developer Agreement" in the context of or in any way connected to Amendment #3. The Developer Agreement itself, while in evidence, was not before the court to make any declaration about it nor was there any declaration requested about it's connection to the covenants in an way. Any recitation of this matter in the final order arises outside the proceedings and the record and mandates deletion of this area. The Court was never asked to make any conclusions or findings as to this area.**

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.**

**Plaintiff's Note: Plaintiff's draft order and "brief" does not contain that request. The record of the proceedings does not reflect this being before the court at all.**

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."**

**Plaintiff's Note: (1) This line of argument was never made by Defense counsel at trial. When Plaintiff's witness Mike Butryn and later Pete Pizzi testified about the IHOA spending 80 percent (or so) of it's grounds maintenance budget on private property – mostly the golf course – Defense Counsel was mute. No contrary argument or evidence was presented. The Court is not allowed to find and state, post – trial, arguments on behalf of the Defendant. Doing so casts the impression of bias and this merits a new trial.**
**(2) The question before the Court was could the HOA involuntarily require homeowners, on the basis of the covenants, to pay assessments to maintain land which was not HOA property, not declared to be common area, not subject to the covenants, outside the development. No one questioned the HOA spending OTHER money from some other source – but the only HOA source of money is assessments through the covenants. What was uncontroverted at trial is that the Covenant for the Maintenance Assessment give**

**authority to the HOA to assess ONLY to maintain or construct HOA owned common property. The only semblance to an answer IN THE RECORD was Freiboth's assertion that sloppy looking private property hurt property values and he and other witnesses asserted that the covenants requiring good property maintenance do not apply to the golf course where 80 percent of the HOA grounds maintenance budget went. The "Final Order" itself says that the golf course is not subject to the covenant's land appearance requirements – thus the Order contradicts itself and mandates amendment to conform to the evidence and to be internally consistent.**

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.

**Plaintiff's Note: The question before the Court was what limits does the requirement to seek Horry County approval of PUDs have on a developer's expansion of a PUD beyond the boundaries of the approved PUD without county approval, and does a county approval of a PUD requiring the entire storm water retention pond system in the PUD to be maintained by the same HOA require the properties in the PUD to all at least contribute to the HOA's maintenance of that pond system. At trial the Plats submitted to the Planning Commission by the developer with the conditions of approval were in evidence as well as the Horry County development management ordinance. It was undisputed that the developer wrote covenants bringing in one area, The Meadows, beyond what the commission approved and failed to state in the covenants that the Enclaves and Meadows were subject to the covenants. It was not controverted at trial that "the community" is defined by the Planning Commission documents. The Court overlooked that the last revision to the Planning Commission's approval, the Plat titled "International Club PUD" in evidence, excluded Pebble Creek where Plaintiff lives from the PUD.**
**The Court's Order never answered these declaratory judgment questions but came up with a factual conclusion without declaring what the controlling law is – and thus the Order requires amendment to explain the impact of the Planning Commission approvals and Horry County Ordinances on the matter.**

**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.

**Plaintiff's Notes: (1) Plaintiff did not challenge the Highway 17 Covenant per se – the text of the Order does not reflect the proceedings. The above text is alien to the actual proceedings – it could have, but was not, argued at trial.**
**(2) The questions before the court are: (a) Is it a proper covenant touching and running with the land to obligate a land owner to pay money to perform a service far from his land – or is this a personal services contract not running with the land. The Court never answered this question. (b) Did Plantation AD have horizontal privity with the Highway 17 property, which those covenants actually relate to, when they were signed? The uncontroverted evidence supported by deeds and plats was NO – Plantation AD did not own any land even touching the Highway 17 property, and had no property interest in it. Further, uncontroverted testimony was offered that for several years the PUD did not even have access to the Highway 17 connector road so it had no benefit.**
**(3) The deposition testimony of Defendant Toth (who is also a Highway 17 officer) which the Court agreed would be as if offered at trial was that the County does the landscaping, drainage, signage, in fact everything. She admitted that the County OWNS that road, and that most of the Highway 17 money goes to pay the management company. At trial Plaintiff argued "changed circumstances" as a ground to eliminate any PUD obligation to pay for that purpose, if such obligation exists. The Court's "order" ignores that issue and it was required to rule on everything put before it for Declaratory Judgment.**

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.

**Plaintiff's Note: Plaintiff put into evidence that when the Highway 17 covenant was signed the IHOA did not exist (for several years) and did not own any property, and that the Highway 17 covenants exempts property owned by a HOA thus defendant does not own property subject to the Highway 17 covenant. It was also uncontroverted that no officer of the HOA ever agreed to this "collect for someone else" requirement and has not signed any related contract. It was uncontroverted that the Highway 17 covenant is not indexed to the PUD property. The Court never explained the basis in contract, land, or case law which permits a corporation (Highway 17) to subject another corporation to obligations it did not agree to. The record of the proceedings relates that Defendant did not make this argument but instead was mute. The Court's adoption of this argument is not from the evidence or testimony of the trial and must be vacated.**

**19. The Plaintiffs 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.

**Plaintiff's Notes: (1) This "argument" was never made by the Defendant at trial. Defense Counsel sat mute through the presentation, offered no exhibits, and did not challenge any testimony. That the Court included new argument on behalf of the Defendant stuck in the draft order by Defense Counsel not made at trial is (a) outside the proceedings (b) the clear impression of bias meriting a new trial.**
**(2) Plaintiff's words were that the two page letter when sent to her clients was privileged. Plaintiff asserted that this privilege did not apply to the recirculation of material by DEFENDANT KA Diehl, which is not an employee of the IHOA Defendant. KA Diehl itself never asserted any privilege and a privilege, if not asserted, is "waived". The Court has asserted the waive-able privilege on behalf of the OTHER Defendant KA Diehl which has the effect of causing doubt as to the public's perception of judicial integrity, whether there is any or not. The impression that this may be present is sufficient to merit a new trial. Plaintiff never testified that the letter was not defamatory – only that he would not challenge it's privilege when limited to between the attorney and client. There was no argument made that homeowners were "the clients" or that Diehl was "a client". In point of fact until several months later, Diehl was NOT McNair's client.**
**(3) The Court has observed that in addition to the letter there was a separate "list of cases"**

**and some reported decisions. There is no record of any discussion of the "reported decisions" in the proceedings – because Plaintiff stayed away from them. At her deposition KA Diehl employee Julie Case admitted that she was entirely responsible for assembling the defamatory package and for arranging to mail it to over 500 people and to email it to several hundred more. PLAINTIFF'S ACTUAL TESTIMONY was that it was the text of the "list of cases" – written by an unknown author – that was defamatory AND the unrefuted testimony of witness Lou Astorino that Defendant's officer William Fletcher had said to Astorino that Plaintiff was a "child molester" which is Defamatory Per Se. This testimony went unchallenged.**

**(4) At trial Plaintiff testified from the "list of cases" and in comparing them to the actual cases with actual extracts in evidence argued that the text of the "list" was not an extract of the cases but was separately authored (i.e., not by the court or a party to the original cases), and that it contained blatant lies about the cases and about Plaintiff. At trial plaintiff read from the text of the "list" and then from the actual case documents showing the lies. Plaintiff questioned several witnesses who testified that the lies distributed by DIEHL were what gave them a defamatory impression about Plaintiff. At trial Plaintiff presented many emails from homeowners which had unfavorable comments which – it was uncontroverted – came from the list. At trial Defense Witness Sullivan testified that the homeowners did not know anything about Plaintiff prior to "the list". The Court's order is silent about the actual evidence. Defense Counsel's allegation in her draft order that Plaintiff did not contend that any of the material was defamatory is FRAUDULENT, and is a ground under the rules for a new trial, especially when the fraudulent description of the proceedings is in the Court's order.**

**(5) The Court never made a finding of fact nor conclusion of law whether co-defendant KA Diehl committed an actionable defamation of Plaintiff. This merits opening the proceedings because Defense Counsel ignored the allegations against Diehl, did not controvert Diehl's culpability, and was silent about any Diehl defense.**

a. The Defense of Absolute Privilege Bars Plaintiffs 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.

**Plaintiff's Note: (1) The above argument was never made by anyone at trial. As meritorious as it might be, it is a waive-able argument of privilege and is waived unless made AT TRIAL – which it was not.**
**(2) Defendant KA Diehl was not a party to the lawsuit and had no reasonable expectation they would be sued when Diehl put together the package, apparently authored the list, and published it to Plaintiff's neighbors. The testimony of Board member Sullivan, supported by a letter from Case, was that there was no direct communication between the attorney and Diehl. The contracts of Diehl, in evidence, had no element that Diehl was responsible to do anything relating to the Defendants other than manage the property – they had no contractual role in litigation. Diehl did not assert the privilege and the Court Order does not explain how the privilege would extend to Diehl. As a matter of law and relying on the fact in evidence, Plaintiff is entitled to a JAML against Diehl on defamation.**

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).

**Plaintiff's note: (1) This argument was not made by Defense Counsel at trial. The Court is not permitted to give Defense Counsel a post – trial opportunity to assert new arguments, now matter how potentially applicable, outside the proceedings and not subject to rebuttal.**
**(2) Diehl is not an "employee" of the IHOA so the above is inapplicable.**

The Defendant HOA notified its members regarding Plaintiffs 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 Plaintiffs litigation.

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

**Plaintiff's Notes: (1) The first page of the defamatory package was a letter signed by Diehl employee Beckie Abel on Diehl letterhead color stationery. Diehl had none of the "duties" mentioned above by the Court. The package is in evidence. The Beckie Abel lists only the McNair letter as coming from the attorney. It separately lists "the list" without any authorship identified or claimed. Defense Counsel never claimed the "list" was authored by the attorney or privileged and that is the law of the case.**

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:

**Plaintiff's Notes: (1) Plaintiff never complained of "intentional infliction of emotional distress" or argued this at court. When a court adopts a straw man argument not in the record and uses it in an order to justify the order that creates the impression of bias or worse and merits a new trial. This issue came up in a hearing before Hon. Judge Hyman where Plaintiff corrected Defense Counsel who was making that bogus argument at the time and Golding admitted at the hearing that there was no such claim in the case. The court now mysteriously resurrects this bogeyman McNair claim for improper purpose.**
**(2) Likewise, there is no claim related to defamation that "provide him information" is related to the count of defamation. Plaintiff never sought damages from Toth or any defendant for failing to provide information. Statutory immunity under the Act only from exposure to damages – not from being ordered to obey the law as to releasing information.**
**(3) The assertion that Plaintiff implicated Toth in his Frivolous Proceedings claim is an invention of Defense Counsel. Plaintiff always asserted the "frivolous counter claim" was an IHOA tort. In a hearing April 16 the Court ruled as Plaintiff requested (a) that Plaintiff's Frivolous Proceeding claim would not be dismissed because sufficient facts were stated; (b) that as Plaintiff argued at the time, the "Wall" Defense Counter – Claim was on behalf of the IHOA not on behalf of Toth (and thus that under no circumstances was she entitled to attorney fees or damages.**
**(3) The order as crafted by Defense Counsel is contradicted in that Plaintiff's "Frivolous" proceedings claim was filed on March 20, 2012 in the "11320" case, not the "3596" case. The only defendant in the 11320 case is the IHOA, thus the assertion that the frivolous proceeding claim was aimed at Toth is sheer invention. This is a significant mis-statement of the case leading to a finding of fact and conclusion of law which is impossible to be supported by the evidence and the record. That the Order contains this (and other) significant errors of fact indicates that leads to the impression, true or not, that the Court completely disregarded the pleadings, evidence and testimony which merits a new trial.**

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's Note: (1) The Order as written by Defense Counsel once again has made a finding of fact that is contrary to the evidence. The Court's order does NOT say that despite the evidence, or that the evidence was insufficient, but that "no evidence was presented". Once again the finding is not just unsupported by the evidence, it is contrary to the evidence, a fraudulent conclusion by Defense Counsel. Plaintiff provided evidence that Toth joined in the order to distribute $ 75 of Central Electric money to each homeowner. Plaintiff cited the South Carolina Non-Profit Corporation Act which says that any distribution, except at dissolution, is illegal. Plaintiff cited the Act which says that a director who does not oppose such a distribution is personally liable to the distribution, and that the immunity is explicitly lacking, per the law, in this instance. Plaintiff also read from the Covenants which requires all easements for utilities to be underground, which makes granting an above ground easement an act prohibited by the Covenants and thus "ultra – vires"; the immunity only running for "intra – vires" acts.**
**(2) The Court was asked to hold Toth personally liable only for one other tort – defamation. For every other cause of action, and there was approximately 700 exhibits (not "no evidence", the relief was remedial – to obey and comply with either the Covenants or The Act. There is no immunity from being required to obey the law and the board's source of authority, the covenants. "Acted improperly" includes acted in defiance of the law or covenants, thus the conclusion of fact ignores hundreds of items of evidence made part of the case at trial and such a gross error is grounds for a new trial.**

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.

**Plaintiff's note: The minutes of every meeting of the board of directors is in evidence. The uncontroverted testimony of Butryn and Pizzi at trial, and of Toth at her deposition, is that she approved various contracts. Toth, Freiboth and Sullivan never disputed that almost every board decision, including landscaping and management contracts, prior to Freiboth's election was made without a vote on the record at a meeting of the board (or outside per the alternative procedure stated in The Act). Butryn and Pizzi's testimony was that Toth personally approved these contracts. Her name is on the management contract. No contracting action except the Central Electric contract is "in the minutes" so the evidence is that none of these contracts "were authorized by the Board" as required by The Act. So the conclusion of fact is contrary to the evidence, and thus follow – on conclusions of law are likewise unsupported. These blatant mis-representations by Defense Counsel of the record also create the impression of judicial incompetence or bias and merit a new trial. Toth was present at trial and Defense did not call her to controvert the accusations relating to her by the other witnesses, thus they are admitted as "more likely than not".**

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 Assn, 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.*

**Plaintiff's note. Once again the Order added, post trial, an argument never raised by the Defense at trial. Defense counsel never argued "business judgment" or "intra-vires" and never cited to "Dockside" at trial. These new arguments inserted, post trial, on behalf of the Defendant into the draft order creates a presumptive indication of bias or procedural error violating constitutional rights (to confront the contention) and merits a new trial.**

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, Plaintiffs 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 v rich the public 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 Plaintiffs personality, publication of private affairs or intrusion into private activities. Therefore, his invasion of privacy claim is without merit.

**Plaintiff's notes: (1) Defense counsel never argued the first paragraph above. Defense counsel was mute during and after Plaintiff's testimony and presentation of evidence. Once again the Court has added, post-trial arguments on behalf of Defendant which are not part of the record.**
**(2) The "invasion of privacy" allegation was made against the IHOA and DIEHL in connection with the disclosure, to the ARB, of Plaintiff's putative alleged outstanding HOA account balance. The Court has held in this order that the ARB is not part of the HOA but a separate entity and Plaintiff argued that if this is the Court's line of reasoning, that Plaintiff had a reasonable expectation of privacy as to his financial account. The testimony of Diehl employee Beckie Abel at trial was that Diehl gave the ARB that information. Separately in the Order the Court has made the conflicting allegation that ARB member Roche (Toth's husband) gave the ARB this information – and Plaintiff explained that Toth was not a member in 2012 and could not have, and was not alleged to have, given the ARB Plaintiff's financial information. At trial the invasion of privacy allegation was carefully segregated from the defamation information and the Order's depiction of the arguments at trial is a fraudulent insertion by Defense Counsel and gives the impression either that the Court ignored the record, is incompetent, or concluded in spite of the evidence – any of which merits a new trial whether any of these are true or not.**
**(3) Once again the Order has created and put into the Defense "mouth" arguments never raised by defense counsel at trial which was mute on the proceeding through the trial. This creates the impression of bias and certainly depends on material which could have been argued but which was not argued at trial. As a matter of constitutional due process the Court is required to restrict itself to the record of trial proceedings..**

**22. Plaintiffs 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 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). In fact, Plaintiffs witness Ms. Pizzi testified that the

litigation in which Plaintiff was involved could be googled.

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. Plaintiffs claim is without merit.

**Plaintiff's notes: (1) That the Court adopted Defense Counsel's assertion post trial in a "draft order" which is not part of the record of the proceedings, not available to Plaintiff to enter objections, nor to contest, indicates that it is more likely than not that the Court did not read the Complaint – because plaintiff did not have an allegation of "emotional distress". The Court's order ignores the evidence and testimony of witnesses relating to the grounds which WERE asserted by Plaintiff: (a) that HOA board appointee Fletcher called Plaintiff a child molester – uncontroverted testimony by Louis Astorino, which is defamatory per se; (b) that Diehl wrote into it's "list of cases" document that Plaintiff was fired from the FBI for cause, which is defamatory per se and a lie – Plaintiff presented his personnel record as evidence; (c) that Plaintiff sued the deputy attorney general of Pennsylvania in a separate law suit, which is a lie, as proved by the docket of a case where said attorney was an "interested party" at her request so as to obtain the evidence and transcript to convict a Pennsylvania state police sergeant to admitted destroying evidence against Jim Frinzi; (d) that Plaintiff accused fellow FBI workers of defamation, where the actual pleadings are that Frinzi was never an employee of any government; (e) that Plaintiff sued "doctor Brian Krolczyk" for no good reason whereas the record of the West Virginia Board of Examiners of Psychologists, in evidence, was that he practiced psychology without a license nor required training and Krolczyk perjured himself at trial by claiming to be licensed falsely representing his training and competency; (f) that Diehl and the HOA claimed Plaintiff was not represented by counsel in any of these case whereas the actual records included representation by a Pennsylvania state prosecutor and by the deputy US Attorney in separate matters (the allegation was that a jury had found against Plaintiff but the uncontroverted record before the court was that the case never went to the jury and was dismissed for procedural reasons), and by attorney Ern Reynolds in many others; (f) that Plaintiff was unsuccessful in every case whereas Plaintiff had secured access to sought records under federal FOIA and had won a judgment in a represented jury trial in federal court.**

**(2) Since the ORDER's finding relative to Defamation was based on claims not actually lodged and the order was silent about the Fletcher and Diehl defamations (child molester / fired for cause from FBI job) as well as the emails presented at court proving actual damage to reputation, this creates the impression of bias by the Court meriting a new trial.**

**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's notes: (1) The Order ignored that every allegation made by Plaintiff was supported by evidence of record – this was not just "testimony". The testimony got the evidence into the record.**
**(2) Defendant Diehl's contracts are in evidence and they have a clause prohibiting IHOA board members who have not agreed to the limitation from competing with Diehl and requires the IHOA not to consider such former board members in competition against Diehl. This alone defeats the Court's contention that "nothing in the evidence". Once again the order as written by Defense Counsel fraudulently misrepresents the record of proceedings and creates the impression of bias meriting new trial.**
**(3) Plaintiff cited to a federal criminal case involving a Walmart employee which depended on a federal fraud law and the federal court, upheld on appeal, depicted the arrangement between Diehl and contractors as criminal.**
**(4) Plaintiff presented evidence that Diehl required potential contractors to join the Community Management Institute (CAI) as a condition of being considered for contracts, and that this made Diehl eligible for "kickbacks" from CAI based on recruiting new members. Beckie Abel testified that CAI is entirely focused on management companies and offers no benefit to a contractor for HOA work. Plaintiff related this to extortion under the law and as a prohibited practice in the law the court cited above. Plaintiff also cited the Diehl contracts as admitting that it retained credit card or manufacturer rebates / refunds related to purchases for the IHOA – and Beckie Abel, the Diehl employee, did not controvert this when confronted with it. Plaintiff's assertions from the witness stand that these funds are the property "of the master" was not controverted and is in fact reflected in IRS regulations which require such refunds to be a reduction in the book value of purchases in making business deductions.**
**(5) The "checks and balances" contention was not an accusation against Diehl but was an explanation of how the disappearance of funds might have occurred un-noticed. Plaintiff alleged that the IHOA had no checks and balances – but this was not a "count" in any**

**complaint against either defendant so the Court's order reflects confusion by the Court and disregard of the record. In a separate letter filed with the Court on or about August 20, 2012, which is in the docket of the case, Plaintiff suggested to the Court that it order the transcript because indications were that the Court was perhaps overwhelmed by the breadth of the case and that Defense counsel was giving the Court "off the record" arguments and false descriptions of the proceedings and evidence.**

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, Plaintiffs request was for a membership list containing homeowners emails, phone numbers and delinquency status. K.A. Diehl's representative, Beckie Abel, testified that Plaintiffs **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.

**Plaintiff's notes: Beckie Abel admitted that Diehl / the IHOA disregarded three requests and testified that she didn't give what she considered "entitled" information. She also was required to explain how the statute's requirement for number of votes a homeowner is entitled to cast is not the same as "delinquency status" and could not explain why communicating with homeowners about an HOA board election is not a "good reason". The Complaint also perpetuated that the HOA released the list of owners to homeowners to use to sell merchandise to other homeowners which was not controverted in Defense answer or testimony so the record was not that Diehl / HOA insisted on "good purpose" but were trying to control the flow of contrary information to protect their jobs. At trail Beckie Abel admitted that the list they have on their website has "homeowners emails, phone numbers" and addresses so Plaintiff was asking for the "official" list of information Diehl and the HOA was already not holding "private". The Order as crafted by Defense Counsel ignored the admissions of the defendant in impeachment and the conclusions of fact and law are not supported by the evidence. Once again there is the impression of a selective choice of evidence and disregard of actual testimony creating the presumption of judicial bias meriting new trial.**

**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.

**Plaintiff's notes: (1) The Court has agreed that Freiboth testified at trial that the $5,000, actually $ 2,500 in 2009 to defend against the 2009 complaint where there was no counter-claim by Defendants to enforce any covenant provision. It was admitted that the money was NOT paid to enforce the Declaration. This was more than uncontroverted – it was the admission of the president of the IHOA. The Defendants were defending against what was largely a request for Declaratory Judgment as to the Non-Profit Corporation Act and the Covenants. Freiboth also testified that the other $2,500 was paid in November, 2010 to defend against the allegations that the HOA improperly denied a fence. Freiboth admitted that after the $ 5,000 the IHOA did not spend a cent to advocate it's causes or defenses.**
**(2) Freiboth admitted that in both the 3596 and 11320 cases, as they were when the $ 2,500 was paid (in each) there would have been no change to Plaintiff's property if the IHOA prevailed and that Plaintiff had not violated (at that time) any provision of the covenants thus applying the Court's own logic none of that money was spend "to enforce the Declaration" and thus the Court's findings of fact and conclusions of law are contrary to the evidence and law.**
**(3) When the 11320 case was filed the Defendant's $ 2,500 was filed ONLY to ask the magistrate court – where it originated – to dismiss that case as it was then captioned. It was not spent to "enforce" anything or even to prosecute the case.**
**(4) In the case in magistrate court (11320) there was no counter – complaint. Defense counsel alleged that Plaintiff's claim exceeded the magistrate's subject matter jurisdiction. Neither party asked for a transfer to the Court of Common Pleas. The magistrate did so on his own. The record is that immediately thereafter, in the docket of the 11320 case, Plaintiff filed a "precipe" on December 14, 2012 alerting the court that this was procedurally defective.. The document was titled "Plaintiff's Precipe of Objections to Order Transferring" and began with the phrase**

> **"Plaintiff, Ronald Jarmuth, pro se, perpetuates his objections to certain content in the order of the Magistrate Court entered November 30, 2010, transferring this case to this Court."**

**In Frierson v In-Town Suites, No. 2007-UP-549 Filed December 14, 2007 the Court of Appeals observed that the power to transfer a case to Circuit Court when the statutory limit is exceeded occurs only when there is a counter – claim whose amount, when added to the claim, exceeds the statutory limit. There was no counter – claim here so the limited authority of the magistrate court to transfer the 11320 case was not applicable. The appellate court wrote:**

> **"The jurisdiction of the magistrates' court is statutorily limited by South Carolina Code section22-3-10 (2007). Although we note there are limited circumstances where the legislature has allowed magistrates to transfer a case to the circuit court, such as when a counterclaim is filed pursuant to South Carolina Code section 22-3-30 (2007), we believe the legislature intentionally limited the scope of a magistrate's power to transfer cases to the circuit court. In addition to Rainey, we find the statutory guidelines that**

> **govern magistrates' court support this view by not expressly authorizing magistrates to transfer any type of case to the circuit court."**

**This conclusion of law was repeated by the Court of Appeals in the controlling case of Mosseri, Mosseri, Castro v Austin's at the Beach, Inc. and Paris, Inc., Opinion No. 4215 Filed March 12, 2007 which was an appeal from Horry County (this court) with further explanation. The Court wrote that**

> **"In cases that do not fall under Section 22-3-10 (12) of the South Carolina Code [w]hen a counterclaim is filed which if successful would exceed the civil jurisdictional amount as provided in Section 22"**

**The case must be dismissed if the case does not involve the ownership of land, in which case the case still will not be transferred but will be retained in the Magistrate Court. Circuit Court can not obtain subject matter jurisdiction by the consent of the parties; it is statutory. The 11320 case involved "the wall" aka "fence" and as a matter of law required dismissal per the insistence of Defendant. Although the magistrate court transferred without authority, this did not result in this Court having subject matter jurisdiction over the "fence / wall" issue which was part of that case, which should have been dismissed. In the least, the $ 2,500 the HOA spent to obtain dismissal can not survive the transfer because this Court has not authority to award attorneys fees for a case it dose not have jurisdiction over, assuming that the covenants provided that authority (for attorney fees defending, not prosecuting, a case).**

**[text of order continues]**

> **"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.

**Plaintiff's note. (1) This was not argued by Defendant in the trial nor in any brief pre-trial. (2) This supports Plaintiff's contention that the $ 5,000 is not recoverable because it was not spend "to enforce the covenants".**
**(3) The next section of the order depends on satisfying the "gatekeeper" provisions in the case law above. These gatekeeper provisions, as a clear issue of fact, were not satisfied.**

> "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.

**Plaintiff's Notes: (1) The above was not argued by Defense Counsel at court and has been raised by the Court on behalf of the defendant. More exactly, the Court allowed Defense**

**Counsel to argue it's case after the trial closed and the above text reflects the "off the record" document handed to the Judicial Officer by Defense Counsel on or about August 20th, 2012.**
**(2) The next part of the Order is legally irrelevant since the money was not allowable by the covenants to Defense Counsel in seeking dismissal of one case and in not advocating the covenants in the other.**

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.

**Plaintiff's notes: (1) The Court has previously held in this Order that the ARB is not an extension of the IHOA but a legally separate entity. In the above paragraph the Court identifies the "fines" as being "ARB fines" not HOA fines. This distinction was clearly made to evade the fact that the HOA is not entitled to fines because it did not comply with Section 13.3 or it's asserted bylaws which requires that the HOA may not impose a fine nor suspend rights until after it holds a hearing, whether or not the violator requests it, on the minutes of the Board of Directors of the HOA.**
**(3) The ARB is not a party to this lawsuit. There is no authority in law for the HOA to sue on behalf of another non-party (the ARB) to collect a debt not owed to the party (the IHOA). If the ARB desired to collect it's alleged fine it must have, but did not, petition to join the suit as a party. Having not done so, the ARB fine is not properly before this court.**
**(4) This Order requires that fines allegedly due this separate ARB entity be paid to the IHOA to whom it has never been alleged it is owed.**
**(5) The Order is contrary to the facts and the law in this case. The Order's paragraph immediately above is so self-contradictory it implies utter confusion by the judicial officer and is itself grounds for a new trial. The lack of subject matter jurisdiction or a debt owed the IHOA itself is grounds to amend the Order.**

**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 Plaintiffs 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: September 10, 2012

**Planning & Zoning Department**

1301 2nd Ave. Ste. 1D-09
Conway, SC 29526

**Phone:** 843-915-5340
843-205-5340

**Fax:** 843-915-6340

www.horrycounty.org

April 16, 2009

The International Club HOA
Rosemary Toth - President
c/o K.A.Diehl
11740 Highway 17 By-Pass South
Murrells Inlet, SC 29576

Re: On Street Parking

Dear Ms. Toth:

As a general rule, the county does not prohibit on street parking in subdivisions. In other words, there are no laws against it. However, covenants and restrictions are a different matter altogether. They are in essence private contractual agreements. While the county does not enforce covenants and restrictions, it does not interfere with a HOA's ability to enforce them on county maintained roads.

The information I am providing is general in nature. I have not reviewed the covenants and restrictions for your subdivision and express no opinion as to what rights, if any, the HOA may have in this regard. You would have to consult with a private attorney if you have any questions of that nature.

Sincerely,

Janet L. Carter

Janet L. Carter
Planning Director/I&R Counsel

**ENGINEERING DEPARTMENT INFRASTRUCTURE & REGULATION DIVISION**

4401 Privetts Road
Conway, South Carolina 29526

Horry County
Committed to Excellence

Post Office Box 1236
Conway, SC 29528-1236

Phone: (843) 915-5160
Fax: (843) 365-2170

Defendants' Exhibit 61

August 24, 2009

Mr. Michael Butryn
1008 Ennis Drive
Murrells Inlet, SC 29576

Re: The Links @ International Club – Phase 1 Plat

Dear Mr. Butryn:

As per our phone conversation last week, I am writing this letter to clarify some issues raised by residents within Phase 1 of The Links. As you had explained to me, many of the questions brought forth to you originated from differences of opinion between individual property owners and their Homeowners' Association (HOA) with regard to maintenance responsibilities and ownership of particular easements, rights-of-way and common areas as shown on the plat for your subdivision. For reference, I have attached a copy of the recorded plat for Phase 1 of The Links and a copy of a sheet from the plat for International Club Boulevard and Pickering Drive.

Pickering Drive and International Club Blvd are both owned and maintained by the county. The right-of-way for each of these roadways is 66 feet in width. Since the asphalt surface for these roadways is approximately 24 feet wide, the county rights-of-way actually extend about 20 feet beyond the back of the curb on each side of these roadways. The grass and landscaped areas alongside these roadways and within the county rights-of-way are maintained by the International Club HOA. Taxes are not paid by the HOA for the land within these platted public rights-of-way.

The International Club HOA owns (and is responsible for paying taxes on) the parcel at the southwest corner of Pickering Drive and International Club Boulevard. This parcel is shown on the attached plat as a 6,534 square foot "common area". The HOA is responsible for maintenance for this parcel; this is indicated as item number 14 under the "notes" section of the attached plat for The Links.

A 15 foot irrigation easement is shown on the plat for The Links. This easement is adjacent to and outside of the county rights-of-way on Pickering Drive and International Club Boulevard, but it is within the rear property boundaries of lots 94 through 98 and lot 1. I was not able to research the restrictive covenants (for The Links or for International Club) for specific references to this irrigation easement, but it appears that the easement was included to allow for sprinkler/irrigation systems to facilitate HOA maintenance of the landscaped areas along International Club Boulevard and Pickering Drive.

If you have any further questions, please do not hesitate to contact me at the phone number shown above.

Sincerely,
HORRY COUNTY

Andrew J. Markunas, P.E.
Deputy County Engineer

Attachments (2)
cc: File

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE MAGISTRATE COURT |
| COUNTY OF HORRY | ) | CASE NO. 2010-CV-26-1072943 |
| RONALD JARMUTH<br>Plaintiff, | ) | |
| vs. | ) | ANSWER |
| THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.<br>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.

**EXHIBIT C**

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
Fax: (843) 443-4137
Email: hgolding@mcnair.net
*Attorney for the Defendant*

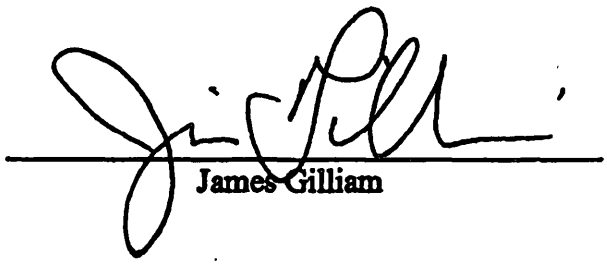
Myrtle Beach, South Carolina
November 17, 2010

**CERTIFICATE OF SERVICE**

I, James Gilliam, an employee of McNair Law Firm, P.A., certify the foregoing document was served via United States Mail, postage prepaid, and/or by Electronic Mail, to the Counsel of Record, and/or Pro Se Parties, on this the 17th day of November, 2010, as follows:

Addressee(s):

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576



James Gilliam

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|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE MAGISTRATE COURT |
| COUNTY OF HORRY | ) | CASE NO.: 2010-CV261072943 |
| Ronald Jarmuth, | ) | |
| Plaintiff, | ) | |
| vs. | ) | **MOTION TO DISMISS COMPLAINT** |
| The International Club Homeowners Association, Inc., | ) | |
| Defendant. | ) | |

The Defendant hereby moves to dismiss the Complaint in its entirety in accordance with the South Carolina Rules of Civil Procedure, Rule 12(b)(8), in that there is currently pending a civil action brought by the Plaintiff against the Defendant in a South Carolina State Court being Civil Action No.: 2009-CP-26-3596 pending in the Court of Common Pleas for the County of Horry, State of South Carolina. The claims asserted by Plaintiff in this action are the same claims he asserts in the civil action currently pending in the Court of Common Pleas for the County of Horry, State of South Carolina.

As an additional ground, the Plaintiff is seeking relief not within the jurisdiction of the Magistrate Court and therefore the Complaint should be dismissed.

**Respectfully submitted:**

**November 9, 2010**
**Myrtle Beach, South Carolina**

**McNair Law Firm, P.A.**

Henrietta U. Golding, S.C. Bar #2173
McNair Law Firm, PA
2411 N. Oak Street, Suite 206
Myrtle Beach, SC 29577
Ph: (843) 444-1107
Fax: (843) 443-9137
Email: hgolding@mcnair.net



**EXHIBIT D**

2011-11-30 Transfer Order

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | ) | IN THE MAGISTRATE COURT<br>FIFTEENTH JUDICIAL CIRCUIT<br>CASE NO.: 2010-CV261072943 |
| Ronald Jarmuth,<br><br>Plaintiff,<br><br>vs.<br><br>The International Club Homeowners Association, Inc.<br><br>Defendant. | ) | ORDER TRANSFERRING CASE TO CIRCUIT COURT |

Plaintiff filed this action in Magistrate Court asserting four claims against the Defendant. The Plaintiff's claims are premised upon the legality of the Defendant Association to contract for such things as cable television and garbage collection, as well as to assess the Plaintiff as a homeowner in the International Club community. The Plaintiff seeks to recover monies he and his predecessor in title paid to the Defendant, as well as injunctive relief seeking to bar the Defendant from future assessments and fines.

The Defendant filed a Motion to Dismiss, as well as an Answer. One basis of the Motion to Dismiss is that there is an action pending in the South Carolina Court of Common Pleas, Civil Action No.: 2009-CP-26-3596 in which the Plaintiff and the Defendant are parties and the Plaintiff asserts claims in this action that are the same claims in the Civil Action pending in the Court of Common Pleas for Horry County. Additionally, the Defendant contends that this Court does not have jurisdiction for the Plaintiff seeks injunctive relief and his claim is in excess of $7,5000.00.

Based upon the arguments made before Court and the pleadings in this action, I find that the above entitled action must be transferred to the Court of Common Pleas in that the Magistrate



EXHIBIT E

Court does not have jurisdiction. Further, before any Court can determine if the Plaintiff is entitled to the relief he is seeking, Plaintiff's claim in the Civil Action No.: 2009-CP-26-3596 must be decided. Therefore,

IT IS ORDERED, ADJUGED AND DECREED that the above entitled action is hereby transferred to the Court of Common Pleas for Horry County.

IT IS SO ORDERED.

Magistrate Court Judge

Dated: 11/30/10

Conway, South Carolina

2009-CP-26-3596

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
ronaldjarmuth@hotmail.com
August 21, 2012

FILED
HORRY COUNTY
2012 AUG 22 PM 1:50
MELANIE HUGGINS-WARD
CLERK OF COURT

Honorable Ralph P. Stroman
c/o Horry County Master-in-Equity's Office 1301 Second Avenue
Conway, SC 29526

Re: *Ronald Jarmuth v. The International Club HOA* Civil Action No. 2009-CP-26-3596; and *Ronald Jarmuth v. The International Club HOA* Civil Action No.: 2010-CP-26-11320

Dear Judge Stroman:

Today I am in receipt of a copy of the Defendants' material which was submitted, as was mine (yesterday) in deference to your order from the bench on August 10, 2012 to submit a "Brief and Proposed Order". I observe that the Defendants' material lacks a Brief. This egregious non-complying omission I respectfully suggest should rule out consideration of what the Defendants did finally offer the Court in written form.

I am not arguing the contents of anything stated what in the Defendants filed as their final submission. It is my understanding that the opportunity to present evidence, cite to cases and law, and to argue a case opens and closes with the trial. There is clearly no opportunity post trial to contest any new matter raised post trial, and I am carefully not doing so.

That being said, it appears to me from reading the Defendants' material and considering mine that there are two entirely different visions of what was before the court at the trial – even as to what issues were or were not argued.

In anticipation of this I insisted (and provided the text) that the Consent Order of Reference explicitly provide that the IHOA Defendant (or more exactly, their insurance company) pay all the costs of the court reporter.

It is my suggestion that the Court utilize this opportunity to order the Transcript of the Trial from the Court Reporter at the (by consent) expense of the Defendant to resolve the question of exactly what was testified to, what issues were argued, what was included in the arguments, what cases and law were cited at trial, and what evidence was submitted either before or during the trial.

EXHIBIT F

**I simply do not recognize from being present at the trial much of what is in the Defendant's proposed Order, but at this point I believe it is for the Court and not me to make this determination.**

**Yours truly,**

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

**cc: Defendants through counsel Henrietta Golding**
**hgolding@mcnair.net**

| | | |
|---|---|---|
| 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 | ) | consolidated with |
| Plaintiff | ) | Civil Action No. 2010-CP-26-11320 |
| | ) | |
| vs. | ) | PLAINTIFF'S POST-TRIAL BRIEF |
| | ) | SUPPORTING |
| The International Club | ) | PLAINTIFF'S CONSOLIDATED |
| Homeowners Association, Inc., | ) | POST-TRIAL MOTION |
| et al | ) | RULE 50, RULE 52, RULE 59, RULE 60 |
| Defendants | ) | |
| | ) | |

**BRIEF SUPPORTING PLAINTIFF'S POST-TRIAL MOTION FOR RELIEF**

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1. A Memorandum summarizing Plaintiff's September 19, 2012 post-trial motion is attached and incorporated by reference, said motion seeking and stating the grounds for relief from the Special Referee's September 10, 2012 order.

APPLICABLE THRESHOLD OF PROOF

2. The applicable standard and threshold of proof which Plaintiff has to meet is very low:

a. That it is more likely than not that the facts are favorable to Plaintiff.

b. That if ambiguity exists it must be resolved in favor of the Plaintiff, in favor of the free use of property, and likewise against a developer or Declarant'.

> "[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. -- Hardy e at v Aiken et al, S

> "rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Citing 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).

> "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.

c. 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. "Every essential element must be expressed in the writing for the contract to meet the Statute of Frauds" Cash v. Maddox, 265 S.C. 480, 484, 220 S.E.2d 121, 122 (1975)) ; (3) acceptance of terms; (4) consideration ["In order that there may be consideration, there must be mutual concessions." Maynard v. Durham & S. Ry., 365 U.S. 160, 163 (1961)].

d. Where the terms of a covenant or a contract are contradicted by the language of a statute, even where the contract is freely entered, the contract is void: Statute of Frauds in the Conflict of Laws / Basic Rule of Validation: " validating or invalidating LAW is always given preference by the courts over the intent of the parties stated in a written document." – Restatement Second Conflict of Laws.

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## DECLARATORY JUDGEMENT

### Covenants and Conduct Pre-empted by Statute
### Declaratory Judgment Demanded in Complaint

3. The Covenants do not apply to Pebble Creek because they were not effective as a matter of law unless filed and indexed prior to the sale of Pebble Creek by Plantation AD and because Plantation AD had no equitable interest in Pebble Creek when Plantation signed and filed the Covenants.

a. Law.

SC 30-07-010 Recording Essential to Validity Pl #209
All deeds of conveyance of lands, ... or charging or encumbering it,
... all contracts for the purchase and sale of real property, ...
... generally all instruments in writing conveying an interest in real estate required by law to be recorded ... are valid so as to affect the rights of subsequent creditors ... or purchasers for valuable consideration without

notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court ...

30-7-20 .Manner and form of recordation of contract affecting... real property. The recordation of any contract in the nature of a subordination, waiver or extension of any lien on real property, ... shall be upon the record of the recorded mortgage or other written instrument ... giving the names of the parties thereto and the date and the book and page where such instrument is recorded. Pl #262

30-9-10 Indexes to records of registry. To the records of the registry, reference shall be had by means of two indexes, both containing the year of registry, names of parties, record and page, the alphabetical arrangement of one being according to the names of the parties who executed the writings and of the other according to the names of the parties to whom they were executed.

30-9-30. Filing of written instruments concerning real or personal property; false or fraudulent documents.
(A) ... each clerk of court ... in this State shall keep a record, in the office in which he files all conveyances, mortgages, judgments, liens, contracts, and papers relating to real and personal property required by statute to be kept by him, by entering in the record the names of the grantor and grantee, ... or other parties to the written instruments, date of filing, and nature of the instrument immediately upon its lodgment for record. The filing is notice to all persons, sufficient to put them upon inquiry of the purport of the filed instrument and the property affected by the instrument. ...

30-9-40 Requirement and effect of indexing of instruments filed for recording.
The register of deeds or clerk of court ... shall immediately upon the filing for record of any deed, mortgage, or other written instrument ... enter it upon the proper indexes in his office, which constitute an integral, necessary, and inseparable part of the recordation of the deed, mortgage, or other written instrument for any and all purposes whatsoever, ...
The entries in the indexes required to be made are notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage, or other written instrument so filed for record, but the recordation of a deed, mortgage, or other written instrument is not notice as to the purport and effect of the deed, mortgage, or other written instrument unless the filing of the instrument for record is entered as required in the indexes.

The Restatement Third of Servitudes states that when a covenant is imposed it most be in writing and final form and to be enforceable proven that the document presented was

the document agreed to at sale. The Covenants fail at this point.

b. Facts.

(1) Plantation AD LLC sold Pebble Creek, where Plaintiff's house is situated, to Sunbelt Associations on January 29, 1999 Pl #543. The deed was notarized ("Probate") that same day and payment was rendered that day. On that day there were no covenants or other restrictions of record filed in the office of the Clerk of Court for Horry County applicable to Pebble Creek – nor to the larger area of the Murrells Inlet Golf Plantation ("MIGP") from which Pebble Creek was carved. There is no evidence or testimony that Plantation AD had created any draft covenants for MIGP. While the deed to Pebble Creek states that Pebble Creek "is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation", there were no such covenants or restrictions at the time. The sentence in the deed goes on to say "which are recorded in Deed Book _____ at Page _____" but these blanks, which must be complete as a matter of law (if such covenants, were they to exist, are to apply per the Statute of Frauds) are blank – because on January 29, 1999 there were no such covenants or restrictions.

(2) On February 8, 1999, ten days after Pebble Creek had been sold, R. Scott Pyle filed a set of Covenants for MIGP with the Recorder of Deeds at Deed Book 2117 Page 1353. They were never indexed to Pebble Creek, which on February 8, 1999 was no longer part of Plantation AD's Murrells Inlet Golf Plantation.

(3) Sunbelt, the owner of Pebble Creek as of January 29, 1999, never took any act to ratify the Plantation AD covenants and never filed or indexed Plantation's covenants to Pebble Creek.

(4) As is discussed in the next section, at the time of filing the Covenants themselves never subjected any land to it's terms.

(5) The "Declaration" of the Covenants explicitly states that the area which could be subjected to the Covenants (Pl #547) did not immediately subject any land in MIGP to the covenants but that individual areas of MIGP "may, in Developer's <u>sole discretion</u>, ... <u>by subsequent amendment</u> hereto, <u>may</u> be <u>subjected to this Declaration</u>". This is the view adopted by Defense Counsel and the Special Referee when the Court found that The Enclaves and The Fairways, which are part of "Exhibit B" are not subject to the Covenants and are not required to participate in the HOA. This interpretation is

consistent with what Plantation and it's successor DR Horton did when, by Amendment #4 on December 29, 2004 (Pl #561), Horton attempted to subject The Villas (which were sold by Plantation AD May 9, 2000 to International Villas LLC) to the covenants. On May 9, 2000, through Amendment #1 to the Covenants, Plantation attempted to subject Pebble Creek to the Covenants FOR THE FIRST TIME – even though Plantation had no equitable or horizontal privity in Pebble Creek for over a year. The language of Amendment #1 is

> "The property set forth and described in Exhibit A, which is attached hereto, and incorporated herein by reference, is hereby subjected to the Declaration."

There was no exhibit attached to Amendment #1 [1] which means that Amendment #1 does not satisfy the Statute of Frauds as to specificity. Exhibit A to the covenants includes Pebble Creek, the vacant multi-family area now known as "Ballycastle", the Golf Clubhouse tract, and the Golf Course itself.

(6) Neither of the parties disputes that through Amendment #1 Plantation AD renamed the PUD "International Club" but nothing previously filed and indexed to "MIGP" was re-indexed to "International Club". The covenants were never indexed to Pebble Creek.

(7) On April 29, 2003 Plantation AD sold most of it's remaining land in MIGP / International Club to DR Horton and on that day filed Amendment #2 to the Covenants (Pl #555). On page 2 of the Amendment Plantation AD explicitly with-held from Horton as successor developer the right to subject two area of Exhibit B (to original Covenants, Plat Book 160 Page 79 Pl #454) to the covenants, these being The Enclaves and The Fairways, which are on Exhibit B to the original covenants. This supports the argument that additional amendment specifically subjecting an area to the covenants is required and that the filing of the covenants was "informational".

(8) On March 29, 2004 (Pl #559) Horton, using the same language as Plantation AD had used in Amendment #1, subjected all of the areas described in Exhibit A and Exhibit B of the Covenants which was not in Pebble Creek and which is not The Enclaves

or The Fairways to the Covenants. This includes all of the multi-family areas built by Horton and all of the single family homes built by Horton. If these were included with the initial covenants then later inclusion by amendment would not have been necessary.

(9) At trial Peter Pizzi and Michael Butryn testified that they purchased their homes in Pebble Creek, just like Plaintiff's vertical predecessor Cheryl Essex, prior to Amendment #1 [2] which attempted to subject Pebble Creek to the Covenants. At trial William Freiboth, current IHOA president, admitted that no effective attempt was made until 2004 to subject The Villas to The Covenants - four years after The Villas had been sold by Plantation AD . This could not subject The Villas to the Covenants.

(10) Sunbelt was not made a "Designated Builder" by Plantation AD in any amendment to the covenants nor in the Deed. If the Covenants applied to Pebble Creek than Sunbelt would not have been allowed to build a single home or do any landscaping without an ARB approval. Sunbelt never applied for any ARB approval – ever. A year after the sale when Plantation AD filed Amendment #1 it designated International Club Villas LLC as a designated builder. Every builder in the PUD – except Sunbelt / Pebble Creek -- was identified through an Amendment to the Covenants as a "Designated Builder".

c. Discussion.

(1) Since The Covenants were filed and indexed on February 8, 1999, ten days after Pebble Creek was sold to Sunbelt, as a matter of law the covenants, if they arguable subjected anyone to the covenants at that time, were ineffective against purchasers prior to that date -- Pebble Creek -- and through Sunbelt Associates to it's successors, including Plaintiff.

(2) The deed to Pebble Creek did not satisfy statutory requirements as to specificity such as to legally invoke any covenants of record.

(3) The subsequent name change of the PUD without re-indexing the covenants to International Club is a legal impediment to enforcing it against property owners in

---

[1] Amendment #1 is in Deed Book 2258 Pages 1453-1454. The next page, Deed Book 2258 Page 1455, is the first page of the deed from Plantation AD LLC to International Club Villas LLC which means that no separate Exhibit was filed with Amendment #1.
[2] September 27, 2001 Sunbelt to Cheryl Tucker Essex, the lot which is now owned by Plaintiff.

International Club.

(4) The ambiguity in Amendment #1 by the Declarant forgetting to include an Exhibit A must be resolved in favor of the free use of property. There is no clear citation in Amendment #1 as to whether a separate Exhibit or Exhibit A of the original Covenants was intended. IN EVERY INSTANCE in subsequent amendments where additional land was subjected to the covenants, an Exhibit A was attached to the amendment itself.

(5) The requirement for proper indexing and filing before covenants are effective was stated in Thomas v. Thomas, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985) (citing Bradley v. Guess, 165 S.C. 161, 163 S.E.2d 466 (1932)) –

(6) The Restatement Third of Servitudes imposes a requirement beyond having horizontal privity when Covenants are declared and that is the issue of Notice.

(7) In Arcadian Shores Homeowners v Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007 the Court held that "(1) the 1985 Regulations were not valid because they were not properly signed, acknowledged, or indexed;",

d. Declaratory Judgment which should be rendered.

(1) Pebble Creek is not subject to the Covenants filed by Plantation AD as to Murrells Inlet Golf Plantation on February 8, 1999.

(2) The Villas is likewise not subject to those Covenants.

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4. The Covenants do not apply to Pebble Creek because the Declarant did not have any horizontal privity or equity in Pebble Creek at the time he actually attempted to subject Pebble Creek (and The Villas Condominiums) to the Covenants.

a. Case Law. All cited at trial. Perpetuated in Plaintiff's Brief filed August 12, 2012.

> "South Carolina courts have freely drawn upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants" – Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997)
>
> There must be privity of estate between the parties to the covenant. Raintree Corp. v. Rowe, 38 N.C. App. 664, 669, 248 S.E. 2d 904, 907-08 (1978). "We adhere to the rule that a party seeking to enforce a covenant as one running with the land at law must show the presence of both horizontal and vertical privity.

The loss of Plantation's equitable interest and horizontal privity occurred "when there was an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997).

In Player v. Chandler, 299 S.C. at 105, 382 S.E.2d at 894, the South Carolina Supreme Court asserted: that in interpreting the sale the terms are limited to what is written on the deed itself. The court wrote that the terms do not include any "secret purpose or intention on the part of one of the parties, stored away in his mind ... ". Cited in Clardy and Clardy v Bodolosky and United Land-Magnolia, LLC, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) which was an appeal from Horry County.

Additional supporting cases where it was held that privity in property is required so as to subject property to initial burdens through covenants or to impose additional burdens through covenant amendment:

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

Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

Hardy v. Aiken 631 SE 2d 539, 369 SC 160 - SC: Supreme Court, 2006

Arcadian Shores Homeowners v Cromer, 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007

Dryden v. Calk, 771 F. Supp. 181 (S.D. Tex. 1991).

Frey v. De Cordova Ben Estate Owners' Ass'n., 632 S.W.2d 877, 880 (Tex.App.– Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ;

Holleman v. Mission Trace Homeowners' Ass'n., 556 S.W.2d 632, 635 (Tex.Civ.App.–San Antonio 1977,

The Restatement Third of Servitudes requires that the Declarant have horizontal privity at the moment of the Declaration.

On Page 942 of Black's Law Dictionary, First Edition, privity is defined Pl# 89 as being an equitable interest in property simultaneous to the exercise of some property right in that same property. There must be a "mutual interest in the same property" for two parties to be bound by a property related agreement. For Covenants to be effective and binding the grantor and grantee must have a simultaneous interest in the property when a Covenant is declared.

b. Facts.

(1) Plantation AD sold Pebble Creek to Sunbelt Associates (Pl# 545) (January 29, 1999) ten days before the Covenants (# 547) were filed on February 8, 1999. Because of the language of the covenants, which stated that subjecting any property to the covenants would require an amendment, the filing of the covenants did not actually subject any individual lot to the provisions of the covenants.

(2) Plantation AD attempted to subject Pebble Creek to those covenants through Amendment #1 on May 10, 2000 (Pl #551) but this was more than a year after Plantation had lost any privity / equity in Pebble Creek.

(3) Plantation AD sold the property which is now The Villas condominiums to The International Club Villas LLC on or about May 10, 2000.

(4) DR Horton, the successor to Plantation AD, attempted to subject The Villas to the covenants through Amendment #4 (# 561) on December 28, 2004. This was more than four years after Plantation AD had sold it and thus Horton had horizontal privity such as to be able to subject The Villas to the covenants in 2004.

(5) The "International Club PUD Master Land Use Plan filed by the Developer (Pl #461) with and approved by the Horry County Planning Commission June 19, 2003 omits the Pebble Creek area from the PUD indicating that the Developer recognized that the PUD no longer included Pebble Creek. This was the first PUD land use plan filed with the County after Pebble Creek had been sold.

c. Declaration that should be made.

(1) Because of a lack of privity at the time the covenants were stated and because of a lapse of over a year from the time the Declarant ceased to have an equitable interest in Pebble Creek, Pebble Creek is not subject to the covenants.

(2) For the same reasons, the lapse between ownership and declaration in this instance being over four years, The Villas is not subject to the covenants.

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5. SECTION 33-31-205 Requirement for Initial Board of Directors and Successors to be Elected, not appointed.

a. Statute:

SECTION 33-31-205. Organization of corporation.

(a) After incorporation: (2) if initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at a call of a majority of the incorporators:
(i) to elect directors and complete the organization of the corporation; or
(ii) to elect a board of directors who shall complete the organization of the corporation.

b. Facts.

(1) March 1, 2001 - the IHOA was incorporated. Pl # 552 HOA Articles of Incorporation with the Secretary of State.

(2) The Articles of Incorporation for the IHOA states that it was incorporated per SC 33-31-202 of the South Carolina Non-Profit Corporation Act which made it subject to that Act. Paragraph 1 of the document.

(3) IHOA's Legal Name as filed with the Secretary of State is exactly as follows, "International Club Home Owners Association"; nether "LLC" or "Inc" are not part of it's legal name but the Secretary of States lists that "Inc" is the IHOA's "associated type".

(4) The Defendant IHOA is a "mutual benefit corporation"; paragraph 3 of the incorporating document.

(5) The Defendant IHOA has members; paragraph 4 of the document.

(6) Paragraph 8 of the Articles did not state any of the options provided for (SC 33-31-202) for governance of the IHOA. The Declarant wrote as the corporation's purpose that it is a "Homeowners Association" which has no special meaning under South Carolina law, since the South Carolina legislature declined to enact a Homeowners Act.

(7) SC Code 27-31 et seq, the Horizontal Property Act, does not apply to the IHOA since per SC 27-31-30 the incorporating documents must so state and must also plead the particulars enumerated by SC Section 27-31-100 – and Section 27-31 is not refereed to at all in the Covenants nor in the incorporating documents. The dependency of the Special Referee on Section 27-31 et seq (and by Defendants' Counsel) is legally erroneous.

(8) The HOA has not filed any document that it is doing business as any alias.

(9) Options which were <u>not</u> selected when incorporating the IHOA. These were required to be stated in the document filed with the Secretary of State, not in any covenant:

SC 33-31-202 (c) The articles of incorporation may set forth:
(1) the purpose for which the corporation is organized which may be, either

alone or in combination with other purposes, the transaction of any lawful activity;
(2) the names, addresses, and zip codes of the individuals who are to serve as the initial directors;
(3) provisions not inconsistent with law regarding:
(i) managing and regulating the affairs of the corporation;
(ii) defining, limiting, and regulating the powers of the corporation, its board of directors, and members, or any class of members; and
(iii) the characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members;
(4) any provision that under this chapter is required or permitted to be set forth in the bylaws.

(10) The sole Declarant for the Association was "Ken Grover; paragraph 9 of the Articles. Ken Grover was not the Declarant of the Covenants which contain what is purported to be the Bylaws of the Defendant Association. The Declarant of the Covenznts was Plantation AD.

(11) The Articles did not name any initial directors.

c. APPROPRIATE DECLARATORY JUDGMENT:

(1) HOA operations are strictly governed by the South Carolina Non-Profit Corporation Act and all default provisions are applicable since no optional variation was stated in the Articles of Incorporation. Conflicting provisions of the Covenants or Bylaws are void.

(2) The HOA lacks legal capacity to enter into any contract under anything but it's exact legal name.

(3) Per SC 33-31-205 all the initial directors must be elected at the time and in the manner specified by law and the organization of the corporation must be completed at that time, not seven years later.

(4) Since no director was elected until September, 2007, all acts of the prior directors, who were appointed by the Developer, are void and of no effect.

SECTION 33-31-205. Organization of corporation.
(a) After incorporation: (2) if initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting ... (i) to elect directors and complete the organization of the corporation;

(5) Because "organization of the corporation" includes adoption of bylaws, any Bylaws adopted prior to incorporation by someone who was neither the incorporator nor

an initial director are null and void.

SECTION 33-31-304. Ultra vires. (c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by derivatively.

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6. SECTION 33-31-206 HOA Bylaws are void.

a. Applicable statute Plaintiff's # 548,

SECTION 33-31-206. Bylaws.
(a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

b. Facts.

(1) Bylaws Invalid. Every act of R. Scott Pyle in regard to the covenants was in his capacity as President of Plantation AD ("PAD") which corporation was the owner of the Murrells Inlet Golf Plantation (PUD). PAD and not Pyle is the Declarant of the Covenants and of Amendment #1. Ken Grover, in his individual capacity, was the incorporator of the International Club Homeowners Association Inc. Per SC 33-31-120 no corporation has the legal capacity to incorporate a non-profit corporation in South Carolina and the Articles of Incorporation can only be signed by an officer of the non-profit (if it already has officers) or by an individual acting as incorporator. Per that statute, if someone asserts a capacity other than an individual incorporator, that capacity must be stated. Ken Grover never stated any such capacity other than as individual incorporator. Per SC 33-31-140 (23)(a) the PAD is ineligible to be a member of a non-profit corporation because it is not a "person", and likewise the Golf Course is not eligible to be a member and neither is entitled, as a matter of law, despite the covenants or bylaws,

to vote [3] or hold office in the HOA directly or through a representative. The statutes state that rights under the bylaws to appoint a director do not give the holder of those rights membership or vote in the non-profit corporation. Through at least September, 2007 the developer and the golf course were both voting, exclusively holding office, and through their appointees exercising powers of board members in defiance of the pre-emptive provisions of law.

(2) No board of directors, neither the initial illegal board nor a subsequent one, has adopted the Bylaws under which the HOA operates.

(3) The incorporator of the IHOA, Ken Grover, did not adopt the Bylaws of the IHOA. R. Scott Pyle, in his capacity as President of PAD, which has no legal connection to the IHOA, filed the putative IHOA Bylaws. In deposition and trial testimony both R Scott Pyle and the IHOA's expert witness, King, testified they had not read the bylaws or the covenants.

c. Declaratory Judgment mandated by law:

That the Bylaws set out in Exhibit C of the Covenants are not legally effective bylaws of the defendant IHOA.

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7. HOA Bylaws can only be adopted using Statutory Amendment Procedures/

a. 33-31-206 applies to the initial meeting and the decisions of the board at that initial meeting. Only the initial board may simply adopt bylaws.

b. If bylaws are not adopted at the initial meeting, they must be chosen by the members using the procedures specified for Amendment. The implication is that with initial Bylaws, members can choose to not join if they do not like the bylaws. Where there are existing members and no bylaws, the membership must agree on what will govern them as members.

c. Declaratory Judgment: Since there are no legally effective bylaws, the

[3] Property owners of units subject to the covenants are entitled to vote on amendments to the covenants – including corporations owning units. Such corporate property owners are not eligible to be members of a non-profit corporation, to vote in it's affairs, or through an employee who himself is not eligible to be a member, to control the operations of a non-profit corporation.

membership must adopt bylaws using the provisions of the South Carolina non-profit corporation act which apply to amendment of Bylaws.

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8. SC 33-31-206(b) Bylaws of a Non-Profit Corporation Are Strictly Limited to the Regulation of the Operation of the Corporation and may not constitute Covenants Restricting the Free Use of Property.

a. Law.

SC 33-31-206(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

b. Facts.

(1) The Bylaws of the Defendant IHOA contains provisions purporting to control the use of property which the non-profit corporation does not own and to impose obligations towards the IHOA by any person found on non-HOA property within the PUD. It also purports to grant the IHOA rights to control the behavior of anyone on non-HOA property, whether a member of the HOA or not.

(2) The statute limits bylaws to procedural provisions relating to the "affairs of the corporation", and does not grant a non-profit corporation quasi-governmental authority to regulate the private affairs or conduct of citizens under the mantle of the Bylaws or authority derived from the Bylaws. Non-members not standing on IHOA property are beyond the reach of a non-profit corporation. When non-members are on IHOA property, the rights of the IHOA towards such persons are limited to those of an ordinary property owner.

d. Declaration Requested:

That any provision of the IHOA Bylaws or IHOA rules which relates beyond the explicit affairs of the HOA and beyond conduct on IHOA property are ultra-vires and void.

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9. SC 33-31-206(b) Only Bylaws and not Property Covenants may control the operation of a South Carolina Non-Profit Corporation and only Bylaws adopted in the manner specified by statute are valid..

a. Law.

(1) SECTION 33-31-206. Bylaws.

(a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

SC 33-31-206 provides that only the Bylaws properly adopted shall govern the operation of a South Carolina non-profit corporation; that they must be consistent with the law, and that their provisions are limited to the governance of the association. The HOA Bylaws in use were neither adopted by the incorporator of the HOA nor by any board.

(2) The HOA's covenants were not adopted according to any provision of the statute relating to bylaws. Covenants are explicitly contractual agreements between contracting parties stating what their limiting obligations (what they may not do) on their own property and rights they hold as to what they can elect (optionally) to do on someone else's property.

(3) No individual has ownership rights in a non-profit corporation and such non-profits can not issue stock. Only people can be members or officers of a non-profit corporation.

(4) Acts of the HOA undertaken under the purported authority of Bylaws which have not been legally adopted are ultra-vires as a matter of law:

SECTION 33-31-304. Ultra vires.
(c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by derivatively.

b. Facts.

(1) The HOA Bylaws were not legally adopted but instead were stated by R Scott Pyle who had no authority under the statute to enact bylaws for the HOA

(2) The Covenants purport to decide who can be a member of the IHOA, how voting shall occur, and attempt to control the operation of the non-profit corporation. The covenants state that the Golf Course has 50 votes but as a matter of law a for-profit corporation can not be a member of a non-profit corporation and unless the Articles provide otherwise, may not vote in the operation. The articles of incorporation do not grant the Golf Course this right.

(3) The IHOA has no vertical privity to anyone who ever had horizontal or equitable privity in the property of any homeowner. The IHOA has not been declared a successor Developer and thus can not have "vertical privity developer rights".

(4) The Covenants purport to being able to require the IHOA to establish certain committees, For example, to establish an Architectural Review Board and to expend money for it's operation. A covenants is a contract for land and can not do this.

c. Appropriate Declaratory Judgment:

(1) That any provision of the Covenants which relates to the operation of the HOA non-profit corporation is ultra-vires and pre-empted by law. -- Statute of Frauds in the Conflict of Laws; Basic Rule of Validation

> A validating or invalidating LAW is always given preference by the courts over the intent of the parties stated in a written document.

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10. SC Code SECTION 33-31-401 Only Contracts and Acts of the Defendant HOA in it's legal name are intra-vires and enforceable.

a. Law.

> SECTION 33-31-401. Corporate name.
> (b) a corporate name must be distinguishable upon the records of the Secretary of State from the name of any other corporation, or partnership [doing] business in South Carolina
> (c) A corporation may use a name that is not distinguishable .. if: (1) the other corporation consents to the use in writing

b. Facts.

(1) Through 2010, all Defendant's Official Acts were in the Name of the International Club Property Owners Association, Inc.

(a) The "International Club Property Owners Association" is a non existent corporation and not a legal alias for the IHOA..

(b) As recently as May 5 2010 (Pl # 370) a year after this lawsuit was filed, the Defendant HOA was titling the minutes of the meetings of it's Board of Directors as "Board of Directors Meeting Minutes" of the "International Club Property Owners Association, Inc".

(2) Through the end of 2008, the Defendant IHOA was requiring homeowners to pay assessments to (and was cashing checks made out to) the "International Club Property Owners Association" (ICPA).

(3) There is no such entity registered with the South Carolina Secretary of State and no "doing business as" document related to the ICPA filed with the Horry County Clerk of Court or with the South Carolina Secretary of State. The cable contract also included the fraudulent statement that the International Club Master HOA was the "sole owner" of the premises to be provided cable television service.

(4) Cable Contract In name of the "International Club Master HOA" – a non-existent entity.

The IHOA purports to be bound by contracts signed in the name of or on behalf of or by persons with an official capacity stated as relating to "The International Club Master HOA (Owner)" (ICMHOA) – October 20, 2003 cable contract (Pl #302) between ICMHOA and Horry Telephone Cooperative (HTC) signed by Doug Brown in the capacity as the ICMHOA "President" of the ICMHOA and as owner of the property to be provided cable service. Neither the IHOA nor the ICMHOA nor Doug Brown ever owned a residential unit in the PUD. Use of the name ICMHOA to bind the IHOA violates the statute of frauds.

(5) General Lack of Approval by Board of Directors of Contracting Authority until 2011.

There is no notation in the minutes of any meeting of the Board of Directors of the ICPOA or the IHOA (title of minutes) authorizing anyone to enter into any particular

contract until late in 2011. No document exists binding the IHOA or it's members to the Waste Management or Cable TV contracts; i.e., neither the IHOA nor the homeowners nor any legally designated representatives of same ever entered into either of those contracts. Prior to the September 2007 IHOA Board election, there were no legally seated IHOA Board members and as such no such IHOA Board member acted "intra-vires" when signing any contract for the IHOA. Any such contract was "ultra-vires".

(6) IHOA has no rights or obligation under the original or amended covenants. The name of the HOA specified as having rights through the Covenants (Plaintiff's #547) is the "Murrells Inlet Golf Plantation Association, Inc" (MIGPA) and this is the corporation to which homeowners owe, to the extent permitted by law and to the extent that the covenants are binding after considering horizontal and equitable privity at the time of declaration that said covenants are binding on property. MIGPA exists (Articles of Incorporation with South Carolina Secretary of State, Pl# 568) and claims to be the HOA with rights and obligations under the covenants. MIGPA has not attempted to collect assessments until this litigation is settled. It has not maintained common property in the PUD because it does not own any. The Special Referee found that Amendment #1 to the Covenants changed the controlling HOA to the "International Club, Inc" (page 12 of the Order).

(7) An argument can and has been made by the Defendants that Amendment #1 (Pl #551) to the Covenants designated a different non-profit corporation Arguendo that this is valid, the successor corporation is the "International Club Association, Inc" (ICA). ICA exists (Articles of Incorporation with South Carolina Secretary of State, Pl #570) and, prior to merger into MIGPA (Articles of Merger filed with South Carolina Secretary of State, Pl# 571), claimed to be the HOA with rights and obligations under the covenants, thus those claims were inherited by MIGPA. ICA merged into MIGPA on April 4, 2011 making MIGPA "The HOA" under the covenants either through merger or because it held such capacity all along. Plaintiff so testified at trial. An analysis of name changes showing that it was impossible to transpose "Murrells Inlet Golf Plantation Association" into "International Club Home Owners Association" was introduced and addressed at trial (Pl# 567). It was shown that using the logic advocated by Defendants the ICA became the HOA under the covenants.

(8) At trial it was demonstrated (Pl# 567) that it is impossible for the IHOA to be the HOA with rights and obligations under the Covenants. There was no attempt at trial to refute this and to show legal capacity for the IHOA under any theory relating to the Covenants. In the final order a new theory was injected for the first time - that being that because the IHOA maintained property the IHOA owned, somehow that altered the Covenants and created a contract between homeowners and the IHOA. This argument violates the Statute of Frauds. The logic of name transformation was not challenged by Defense Counsel.

(9) On Page 12 of the final order – which reflects the position adopted by it's author, defense counsel, the Court made the following finding of fact upon which all of it's follow-on conclusions of law must reconcile themselves to (and they do not, thus the factual basis for all conclusions of law in favor of the IHOA are in error):

> "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". " (underlining added)

(10) This finding of fact relates to what changes the Special Referee concluded Amendment #1 (Pl #551) enacted. To reiterate, ambiguity must be resolved against the Declarant, in favor of the Plaintiff, and in favor of the free use of property. A strict construction standard, the Statute of Frauds and the "more likely than not" standard applies to the interpretation of contracts and findings of facts in this case and everything points to the fact that the Defendant IHOA has no authority under the covenants..

(11) On Page 11 of the Final Order the Special Referee made a conclusion which is contradicted by his finding of fact IF "present name" means the IHOA -- since no name transposition theory [4] / formula applying Amendment #1 can possibly support changing the name from "Murrells Inlet Golf Plantation Association" to International Club

Homeowners Association, Inc". Defense Counsel wrote without explanation, and the Special Referee adopted the following language on Page 11 of the Order, not supported by any facts or law:

> "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." [5]

(12) ICA was merged into MIGPA on March 7, 2010, by filing the appropriate documents with the South Carolina Secretary of State (Pl #571) and filing a copy with the Horry County Recorder of Deeds. This placed the world on notice of the succession of rights from ICA to MIGPA.

c. Declaratory Judgment:

(1) That no act or contract entered into in a name other than the IHOA can legally bind the IHOA nor derivatively bind members of the IHOA.

(2) Act or contract entered into without authority perpetuated in the minutes of the Board are ultra vires – see next section.

(3) That The Murrells Inlet Golf Plantation as successor to the International Club Association Inc is the HOA named in the Covenants as amended and is the only HOA with rights and obligations under the Amended Covenants and to whom homeowners subject to the Covenants owe obligations.

11. Invalidity of Acts of Board of Directors taken Without a Vote of the Board recorded in the Minutes of the Board.

a. Law and Bylaws.

SECTION 33-31-821. Action without meeting.
(a) Unless the articles or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes filed with the corporate records reflecting the action taken.

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[4] Amendment #1 says that wherever the phrase "Murrells Inlet Golf Plantation" is found in the covenants, it shall be replaced by "International Club". Starting with the name "Murrells Inlet Golf Plantation Association, Inc" and applying this formula leads to "International Club Association, Inc" (ICA). There is no way the phrase "Homeowners" can get inserted using the authority of Amendment #1.

[5] The Special Referee did not clarify whether this meant ICA or IHOA.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.
(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

SECTION 33-31-824. Quorum and voting.
(a) Except as otherwise provided in this chapter, the articles, or bylaws, a quorum of a board of directors consists of a majority of the directors in office immediately before a meeting begins. In no event may the articles or bylaws authorize a quorum of fewer than the greater of one-third of the number of directors in office or two directors.
(b) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board unless this chapter, the articles, or bylaws require the vote of a greater number of directors.

33-31-1601(a) Permanent Records
(a) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors as authorized by Section 33-31-825(d).

Bylaws Article 4 BOARD OF DIRECTORS
Section 10. Quorum. A majority of the number of directors shall constitute a quorum for the transaction of business. Every act or decision done or made by a majority of the directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Board.

Section 11. Powers.
(1) To suspend the voting rights and right to use of the Common Areas, Recreational Amenities and other facilities by a member during any period in which such member shall be in default in the payment of any Assessment levied by the Association. Such rights may also be suspended after notice and hearing, for a period not to exceed sixty (60) days for infraction of published rules and regulations;

Section 13. Rule Making
13.2 Authority and Enforcement.
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
13.3.2 Within two (2) months of such demand, ... written notice of a hearing to be held by the Board in executive session.

> 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.

> SCREvid Rule 803 Hearsay Exception
> (10) Absence of Public Record or Entry. [It is sufficient to submit] testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry

It is clear from the statutes and the bylaws that "no act or decision" of the HOA is legally effective unless and until there is a record in the minutes of the board of directors that a majority of the members of the board voted in favor of the contract or disbursement. It is also clear that no board member has authority to bind the HOA or disburse HOA money without approval by the board as a whole, at a meeting, with a quorum, perpetuated in the minutes of the board.

Under the HOA Bylaws only the Board has authority to impose any restriction, suspension, fine or any action at all for non-payment of assessments or violation of covenants or "published rules and regulations".

b. Facts.

(1) Through November, 2011, with the exception of November 2005 for 2006, [6] there is no record in the minutes of the meetings of the Defendant HOA Board of Directors for the approval of a single contract: including but not limited to the KA Diehl management contract, the golf course agreement, the cable contract, the garbage contract, nor the grounds maintenance contract. Thus through November 2011 almost all HOA disbursements were not approved as required by statute and the purported Bylaws.

(2) Prior to September, 2007 there is no record of a vote by the Board to select a replacement director to fill the term of a director who has resigned. In point of fact there is no record that any of these early directors, none of whom were elected by the membership, ever resigned and Plaintiff testified that none of them were homeowners and thus none of

[6] The 2006 Diehl, Landscape, Pool Mazintenance, and Janitorial contracts for 2006 were approved November 14, 2005.

them were members of the IHOA – and thus ineligible to hold office. Replacements just "popped up". After September 2007, replacements for resigned directors is evidenced by vote of the remaining board on the minutes.

(3) From at least as far back as November, 2004, as evidenced by the Board Minutes, there have been committees appointed by and reporting to the Board at quarterly Board Meetings. The Transition Committee, which came into being in 2006, had a charter from the Developer, DR Horton, and not from the Board. It's members were appointed by Horton. Through at least November, 2011, no member of ANY committee was appointed by Act of the Board as reflected in a vote perpetuated in the minutes.

(4) The first version of the Architectural Review Board (ARB) Guidelines was adopted January 18, 2005 by act of the Board perpetuated in the minutes. They were NOT enacted by independent action of the ARB. There is no record that any ARB actually existed in 2005. The June, 2005 amendment of the ARB Guidelines was made without Board approval (not in the minutes). Per the November 2005 Board minutes, the ARB requested for permission to propose ARB guideline changes which were approved in November, 2005 by the Board. Per the Board minutes, the January 2007 amendment of the ARB Guidelines was made without approval of the Board on the minutes. According to the March 11, 2008 Board minutes, Defendant / (then) Board President Rosemary Toth personally ran the ARB and unilaterally, without approval by the Board, announced changes to the ARB Guidelines she had made (effective April 2008). The April, 2008 ARB Guidelines, unilaterally adopted by Rosemary Toth, was the Guidelines used by the ARB when Plaintiff submitted his "Swing set" Application on July 21, 2009 and likewise was the authority used when the ARB, led by Rosemary Toth, used them as authority to deny Plaintiff's "Swing set" application (denial dated August 5, 2009 but postmarked August 19, 2009). The May 5, 2012 Board minutes noted that Defendant Rosemary Toth had appointed (on her own) new ARB members, There is no record in Board minutes of even mentioning the July 2010 ARB Guideline changes unilaterally made by Rosemary Toth for the ARB. The July 2010 ARB Guidelines, not approved by the Board, are the ones used to refuse to approve Plaintiff's landscaping, and fence. The November, 2011 Version / Revision of the ARB Guidelines was not approved by the Board or even mentioned in the minutes. It was the version in effect when Plaintiff's Palm Bed extension was requested

February 27, 2012 and rejected March 16, 2012.

(5) There is no allegation that Plaintiff has ever been in default on assessments. It was admitted at trial by Board President William Freiboth that the HOA Board never held a hearing relating to any alleged violation of Rules or Covenants by Plaintiff. The refusal to act on Plaintiff's application to extend a palm bed because of an alleged violation of a rule has exceeded the 60 day limit stated in Bylaws Article 4 Section 11 (1). Every sanction, including the counter-claim to collect fines, was taken without the hearing mandated by the Bylaws.

(c) Discussion.

(1) Most Actions of Board taken Outside of Board Meetings without vote of the Board and not reflected in minutes.

An action which is not reflected in the minutes of a board meeting is an "Action Without Meeting. SC 33-31-821 (Action without meeting) makes it clear that no such action is effective until "when the last director signs ... written consents .. included in the minutes filed with the corporate records reflecting the action taken."

(2) An action taken at a board meeting requires a notation in the minutes describing the action and the vote. SC 33-31-824 (Quorum and voting) states that an "act of the board" requires "the affirmative vote of a majority of directors present" as perpetuated by the minutes.

(3) Article 4 Section 10 of the HOA's putative Bylaws requires that "Every act or decision done or made" requires "a quorum for the transaction of business" and the affirmative vote of "a majority of the number of directors present at a duly held meeting at which a quorum is present".

(4) The absence of a record in the minutes of proper board approval for an action is evidence that the act was taken without approval and is ultra-vires.[7] SC Code 33-31-1601(a) (Permanent Records) requires that the "permanent records" of a non-profit corporation "shall" include in the minutes "a record of all actions taken" "by the members or directors" and <u>as well as all actions taken by committees</u> ... (and) directors" when authority to individually act is somehow bestowed by the Articles of Incorporation or Bylaws – and no such authority exists and the minutes do not reflect any official individual

act of a director.

(5) Per the Statute of Frauds (lack of capacity) and the Basic Rule of Validation (failure to comply with pre-emptive mandate of law) any contract or act of the board which violates a procedural mandate of the statutes or the bylaws is ultra-vires and void.

(6) Counter-Claim Procedurally Invalid – SC Statute & IHOA Bylaws.

The IHOA has not exhausted the administrative remedies it's own purported Bylaws require prior to imposing any sanction, restriction of rights, or fine upon Plaintiff.

(a) ARB Fines.

(i) If the ARB is a creature of the IHOA, it has no authority to independently impose any fine, restriction or sanction. No fine, restriction, or other sanction by the Counter-Plaintiff IHOA upon Plaintiff actually exists such as to be an enforceable obligation until a hearing has been held.

(ii) If the ARB is not a creature of the IHOA, then any alleged sanction, fine, or other demand by the ARB is not within the personal jurisdiction of this Court because the ARB is not a party in this action.

(iii) On May 16, 2012, before the Hon. Judge Steven John, the Court declined to grant Plaintiff an amendment to his Complaint which sought to join the ARB as a separate party defendant (which would have positioned the ARB so that it could have asserted a counter-claim).

(iv) The ARB does not and never did own property and has no vertical privity to enforce any rights or obligations owed to someone who at some time had horizontal and equitable privity in Plaintiff's property. The matter of the effect of such privity or lack thereof was amply argued at trial and no such privity was claimed for the ARB or the IHOA by Defense Counsel at trial – or even in the final order. IF the ARB is a creature of the IHOA, per the Bylaws, only the Board may impose sanctions – after hearing. IF the ARB is not then any claim by the ARB against Plaintiff must be ignored because the IHOA lacks the capacity to assert a claim against Plaintiff by or on behalf of a non-party.

(b) IHOA as originator of fines or suspension of rights.

(i) The IHOA's purported bylaws (Article 4 Section 13.3, Procedure) states that

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[7] Actually, the burden is on the IHOA to show that the approval of any action is to be found in the minutes.

> "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 procedure is (1) notice of and (2) actual conduct of a hearing. The procedure goes on to state that (Section 13.3.3)

> "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."

This section has three important procedural mandates which were ignored by the IHOA which invalidate the IHOA's counter – claim [8] against Plaintiff, Arguendo that it has standing to assert it:

(1) No claim is "mature" until notice and hearing have occurred, which they did not as proved by the absence of same in the minutes of the board, all of which are in evidence;

(2) notice of this shall be posted in the minutes – and no notice is found in the minutes;

(3) the results and sanctions flowing from the meeting must be posted in the minutes and there is an absence of same in the minutes (SCRevid).

Any counter-claim which the Defendant IHOA may advance in this matter can only flow from such a hearing perpetuated in the minutes. Further, per SC Law, every official act of the IHOA must be recorded in the minutes showing that the matter came up at a meeting of the board, that there was a quorum, the action proposed, and the approving vote. The record and action of the board requirement is present in both the Bylaws and the Law.

(d) Declaratory Judgment and Findings of Fact and Conclusions of Law.

(1) No Act of the HOA, including contracts and disbursements, fines, suspension of rights of homeowners, appointments to committees, are enforceable and all such acts are ultra-vires.

(2) The counter – claim of the IHOA against Plaintiff is unenforceable either

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[8] The entire counter-claim is based on the assertion that the IHOA has a valid claim against Plaintiff which matured through the procedures of the Bylaws and Covenants and which relate to an alleged violation of rules relating to landscaping changes. This includes both

because (a) it is a not a cause of action of the Defendant but is a claim of the ARB, over which the Court has no personal jurisdiction, or (b) because the cause of action does not satisfy the procedural requirements of the SC Non-Profit Corporation Act and / or the Bylaws the IHOA claims to operate under.

(3) No acts of the Developer either directly or through his non-elected appointees to the board are enforceable, even if the "record and vote" requirements of Board Meetings was met, when the board's membership consisted of appointees of the Developer because these board members were not members of the IHOA, were ineligible to hold office and were not duly elected. The Court affirms that only persons can be members of a non-profit corporation, only members can vote or hold office in a non-profit corporation, only owners of property in the PUD can be members of the IHOA, and that no board member prior to September, 2007 individually owned property in the PUD nor was any such person elected by the members or as a successor, elected by the board.

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12. The Covenant's Requirement to Join and remain a member of the HOA is Contrary to Law.

a. Law.

SECTION 33-31-601. Admission.
(b) <u>No person may be admitted as a member without his consent.</u>

SECTION 33-31-620. Resignation.
(a) A member may resign at any time.

SECTION 33-31-612. Member's liability to third parties.
A member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation.

b. Discussion.

(1) Rule of Validation.

(a) There is no alternative stautory authority under which a requirement in a covenant to join a non-profit corporation incorporated under Code 33-31-et seq can be found. The statute advanced by Defense Counsel and adopted by the Special Referee is inapplicable by it's very language because the statute states an intent to limit itself to

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the alleged fine and the cost of suing to cause the violation to cease and desist.

condominiums: The Horizontal Property Act (Sec 27-31-30) states that the owners must explicitly state in writing their intent to submit the property to the Act citing the statute with the specific information enumerated in Sec 27-31-100. Sec 27-31-40 states that the Act applies to Apartment buildings. Sec 27-31-90 has the additional attribute of stock ownership in the enterprise; and under the non-profit corporation act, under which the particular IHOA was incorporated, there is no ownership rights in the corporation and no stock. Particularly fatal is the election of the IHOA to incorporate under Sec 33-31 et seq, not 27-31 et seq (for which it is ineligible anyway). In Defense Counsel's proposed Order, adopted by the Special Referee, the following Section is cited as the authority to compel membership (on Page 19 of the Order):

> SECTION 27-31-190. Expenses shall be shared.
> The co-owners of the apartments are bound to contribute pro rata in the percentages computed according to Section 27-31-60 toward the expenses of administration and of maintenance and repair of the general common elements and, in the proper case, of the limited common elements of the property and toward any other expense lawfully agreed upon.

The Special Referee / Defense Counsel mis-applied this inapplicable statute and took the statute out of context. They quoted the last sentence of the statute

> 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.

(b) The contractual requirement in the Covenants requiring every homeowner in the area described by the PUD to join a South Carolina non-profit corporation violates the applicable statute and there is no alternative "saving" statute. Further, the notes of (printed) Page 4246 of the SC House (of Representatives) Journal, Tuesday, April 12, 1994 states a specific intent that under no circumstances may inhabitants of South Carolina be required to join a non-profit corporation, that such membership is and always will be voluntary and temporary.[9] The House of Representatives also wrote that it is it's specific

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[9] For comparison, the Bylaws of the South Carolina Administrative and Regulatory Law Association:
Procedures for Becoming a Member. Persons wishing to become members shall submit a membership application and a check for dues. The Board of Directors shall review each application and direct the Treasurer to accept or reject the application. (33-31-601)
Resignation of a Member. A member may resign at any time. Failure to pay annual dues

intent that inhabitants not be forced to join a non-profit corporation just because they live someplace – which is the major criteria for membership in the PUD's HOA under the covenants and under the IHOA's Bylaws. The House wrote relating to 33-31-601, Admission:

> "Subdivision (b) prevents corporations from admitting people as members unless they consent to becoming members. Consent may be express or implied. For example, consent may be implied by acceptance of membership benefits knowing that the benefits are only offered to members.
>
> Corporations sometimes name people as members without knowing or having the ability to identify individual members. For example, a corporation's bylaws may provide that "all poor people within one mile of city hall are members entitled to vote for directors." ... As a result of section 6.01, the above bylaw provision simply authorizes poor people in the area to become members. Before they became members they would have to apply for or consent to joining by attending a meeting, voting or otherwise evidencing consent. Until they had manifested this consent they would not be "members" as that term is defined in section 1.40(21)

(c) The Covenant and Bylaws make membership permanent and proide no mechanism to resign. This is specifically invalidated by SC Code 33-31-620(a) and there is no "saving" statute under the Rule of Validation. Just as with the statute that individual can not be compelled to join without their consent, as a matter of law they can resign at any time, being responsible only for those personal charges they incurred while a member. As will be discussed below, they can not be held liable after resigning for the expenses or debts of the non-profit corporation, only the additonal costs the non-profit corporation incurred because of the individual acts of a person while a voluntary member. The House of Representatives intent on the matter was stated in the Printed Page 4251-4252 1994 Tuesday, April 12, 1994 SC House Journal:

> Section 6.20(a) sets forth the basic right of a member to resign from a nonprofit corporation at any time. A nonprofit organization cannot force a person to belong to it. ... Under section 6.20(b) a person may be liable for obligations incurred or commitments made prior to the resignation.

(d) Argument that Use of Amenity Center and Ongoing Assumption by HOA of maintenance responsibilities for Common Area created a contract.

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by October 1 is deemed a resignation of membership for the year of unpaid dues. A member may be reinstated commensurate with nonprorated payment of the annual dues as

This argument is contrary to the Statute of Frauds. The putative contract is indefinite, certainly beyond one year; there is no voluntary exchange of consideration; there are no specifics as to what services are to be rendered and at what price; and importantly, as to the maintenance of cmmon property and the Amenity Center, all that can be said is that the IHOA maintained property it owned. No contract was created. This argument was advanced in the Special Referee's Final Order as follows (Page 7):

> "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 "

No evidence was submitted at trial to support this and Plaintiff contested this. The testimony of Defense Witness Maureen Sullivan was that she recalled a single instance prior to the lawsuit in 2009 where Plaintiff brought several foster children to the pool. Her recollection was that Plaintiff attended several socials at the Amenity Center prior to 2009 to which non-homeowners were admitted as well. As to the depositions, the complete testimony adduced from William Freiboth was that the depositions were taken at the Amenity Center upon his invitation and for the convenience of the witnesses, who are all homeowners in the PUD. This did not create a contract which satisfiees the Statute of Frauds.

(2) Conflict of Laws.

Where the terms of a covenant or a contract are contradicted by the language of a statute, even where the contract is freely entered, the contract is void. As is stated in the Restatement of Contracts, Conflict of Laws / Basic Rule of Validation, a "validating or invalidating law is always given preference by the courts over the intent of the parties stated in a written document." – Restatement Second Conflict of Laws.

c. Declaratory Judgment.

(1) No one can be forced to join a non-profit corporation incorporated under the South Carolina Non-Profit Corporation Act.

(2) Anyone who voluntarily joins such a corporation may resign at any time.

(3) A person who voluntarily joins such a corporation is liable only for the

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set in Section 2.03 hereof. (33-31-620)

incremental expenses incurred by the corporation in rendering goods or services to said person at his request prior to his resignation.

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13. A Member Who Resigns Can not be required to make payments to satisfy debts or contractual obligations of the Non-Profit HOA.

a. Law.

SECTION 33-31-612. Member's liability to third parties.
A member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation.

b. Discussion.

(1) Contracts incurred by the corporation fall within the definition of "acts, debts, liabilities or obligations of the corporation." Per the Statute of Frauds a non-profit corporation is without capacity to bind a member for goods or services ordered by a non-profit corporation, whether or not the intent is to resell same to members.

(2) The cable tv contract is between the Horry Telephone Cooperative (HTC) and the IHOA.

(a) At trial Denise Ambuhl, an officer of HTC, testified that the homeowners are not parties to the cable contract and that it is a bulk contract allowing the IHOA to resell cable tv services. Denise Ambuhl confirmed that the February 27, 2009 letter from HTC's President / CEO / CFO M. O'Neal Miller stating that no homeowner is a customer of HTC is correct and that the IHOA is billed for the number of households the IHOA reports are being served, which means that if a member resigns and / or refuses service, the IHOA is not liable for services which are then disconnected (by HTC).

(b) Participation in the HTC / IHOA cable tv contract is also not required from all home owners in the HOA. Those homeowners who live in The Villas (condos) and The Cambridge condos are not required by the IHOA to pay – thus it can not be asserted that the covenants require all homeowners to obtain these services.

d. Cable tv service is ambiguously mentioned in the covenants as a service that the IHOA is permitted to offer and there is nothing that says that the HOA must provide it or that homeowners must subscribe to it. An assertion that cable tv participation is mandated is negated as "<u>selective enforcement</u>" and is a "<u>waiver</u> of the right to demand compliance"

but in reality it is not a proper covenant obligation running with land but a personal service which does not survive sale from one owner to another (Plaintiff is not the original homeowner) and, lacking any terms or even a description in the covenants of the services, term, or price, as the covenants in reality is a contract the cable tv provision fails the Statute of Frauds. The Golf Course, presumably subject to the covenants, is also not required by the IHOA to obtain it's cable tv service through the IHOA.[10] The contract was not approved by the board in the minutes. This contract is strictly between the IHOA and HTC (or more accurately the International Club MASTER Home Owners Association Inc) and does not generate expenses to the IHOA for home owners who resign – if the contract bound home owners in the first place.

(c) The HTC / IHOA Cable Contract is illegal and pre-empted in South Carolina. It is an act in restraint of trade per SC 39-3-10 Pl # 263, Agreements affecting Competition.

> SC 39-3-10. Arrangements, contracts, agreements, trusts and combinations adversely affecting competition or price declared against public policy. All arrangements, contracts, agreements, trusts or combinations ... (b) between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the ... consumer of any such product or article and (c) between two or more persons as individuals, firms, corporations, syndicates or associations that may lessen or affect in any manner the full and free competition in any ... prices in any branch of trade, business or commerce are declared to be against public policy, unlawful and void.

At trial Plaintiff testified that Time Warner refused to provide cable service to Pebble Creek because the existence of the IHOA / HTC contract prevented Time Warner from ever achieving a profitable critical mass of customers. Plaintiff also entered into evidence a Dish TV Advertisement which offered alternate TV Programming for $ 19.95 per month, Pl# 81, far less than the IHOA charges for cable tv. Plaintiff cited these South Carolina statutes and the Special Referee was silent on the matter in his order. The violation of Section 39-3-10 brings with it an explicit civil cause of action under which Plaintiff can recover charges:

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[10] If cable tv is not a personal service but a core function then the golf course should be paying for 50 "service units" since it is to pay, per the covenants, 50 times what a homeowner pays in his assessments. Cable tv service is not billed separate from the genral assessments. The golf course does not pay anything at all to the IHOA.

**SECTION 39-3-30. Injured person may recover damages.**
**Any person who may be injured or damaged by any such arrangement, contract, agreement, trust or combination described in Section 39-3-10 may sue for and recover, in any court of competent jurisdiction in this State, from any person operating such trust or combination, the full consideration or sum paid by him for any goods, wares, merchandise or articles the sale of which is controlled by such combination or trust.**

**(3) Horry County bills homeowners in the unincorporated areas of the county for use of the county's waste management facilities, one of which is a fraction of a mile from Pebble Creek where Plaintiff lives. Payment for this county provided service is mandatory and it provides for homeowners to dispose of everything that Waste Management Services collects and many items the garbage collection does not collect. The use of a private collection service is discretionary, and it comes down to the garbage service hauling a homeowner's garbage to the same ultimate county disposal facility that is the destination of garbage taken by a homeowner to the local collection point.**

**The waste collection contract suffers from the same "waiver" and "covenant vs personal service contract" problems as cable tv. The Villas, The Golf Course, and The Cambridge homeowners do not participate in the Waste Management contract. In addition, as was discussed in the Motion for New Trial (etc), what Defense Counsel and the Special Referee referred to as the Waste Management Contract is a fraudulent document when represented as such, because it provides for three garbage cans to be collected in a Myrtle Beach private office (not even in Murrells Inlet) – and was not approved in the minutes. This contract also does not incur costs to the IHOA for homeowners who resign the IHOA.**

**(4) The contract with the management company, KA Diehl, as exemplified by the 2010 (Pl #383) contract between the IHOA and KA Diehl (the last one defendant provided Plaintiff despite the continuing requirement of discovery) does not reflect incremental costs to the IHOA for services provided to individual homeowners but rather is a fixed rate contract.[11] The resignation of a homeowner does not leave the IHOA with incremental costs attributable to a specific homeowner – assuming that a homeowner is responsible for this debt of the IHOA.**

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[11] **It does not have a rate based on number of households – no "front door" charge.**

(5) The contract for maintenance of the Amenity Center is not a general expense [12] and is merely an expense for maintenance of the IHOA property and is not scaled to usage. The Horizontal Property Act ties an apartment owner's obligation to expenses for common property but the Non Profit Corporation Act does not. The contract for grounds maintenance of the common areas is likewise not scaled to homeowner membership and is fixed thus it is not legally a debt of a departing homeowner. Further, per the unchallenged testimony of Pete Pizzi and Mike Butryn, [13] the vast bulk of this money is spent voluntarily by the HOA to maintain non-IHOA property – property of the golf course and of the county and is thus not even an actionable obligation of the IHOA and thus not a debt of departing homeowners.

(6) At most these contracts can be compared to the contract between a gasoline station and a soda supplier for a vending machine. The local owner has his own deal with the vendor and although gas station customers may benefit from the presence of the soda machine there is no obligation between a customer and the gas station in case the machine operates at a loss – or to buy sodas at all.

(7) Case law summary: Under Section 33-31-612 of the South Carolina Nonprofit Corporation Act, a member of a nonprofit corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation. However, in South Carolina, a court may permit a creditor of the HOA to pierce the corporate veil and impose the liabilities of the nonprofit corporation on the members if (1) the dominant members have failed to treat the entity as a truly separate "legal person" and (2) it would be unjust or fundamentally unfair to protect the dominant members from the plaintiff. In all other cases individual members have no liability.

c. Declaratory Judgment.

(1) Homeowners who resign from an IHOA incorporated under the South Carolina Non-Profit Corporation Act have no liability for continuing general obligations of the IHOA. Plaintiff has no continuing obligation to the IHOA.

(2) Homeowners who resign from an IHOA are not bound by any contract

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[12] It is not charged to homeowners in the condominium areas.

[13] This was substantiated by Pl# 330, The June 25, 2008 study commissioned by the Board analyzing what the IHOA's Grounds Maintenance Budget was being spent on.

entered into by the IHOA to which the homeowner did not individually agree OR whose terms do not completely satisfy the Statute of Frauds. Plaintiff has no obligation under any contract the IHOA entered into.

(3) No homeowner contracted for cable or waste management services in a manner which satisfies the Statute of Frauds. The IHOA / HTC contract is not a contract between the homeowners and HTC. The Covenant is not a legally sufficient contract between Plaintiff and the IHOA on specific cable services, specific costs, specific conditions, or for a specific term. No homeowner individually signed the covenant for it to constitute a legally sufficient contract for services when the covenants were filed. Any services provided Plaintiff by the Defendants was not requested but was supplied whether Plaintiff desired it or not. He was never asked. Plaintiff has no obligation to accept or pay for cable or waste management services under the Defendant's theory that the Covenants created a contract between the IHOA and Plaintiff for the delivery of said services – at Defendant's discretion, because the covenant did not even mandate the delivery of such services.

(4) Funds collected in the past from Plaintiff for goods or services he did not specifically request must be returned to Plaintiff by Defendants.

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14. The Waiver of Restrictions in Amendment #1 to the Covenants applied to everyone in the PUD.

a. Law.

(1) Ambiguity must be resolved in favor of the free use of property and against the Declarant. See supra Section 2 for applicable standard of proof.

(2) A "Waiver" equates to deletion of a restriction.

On Page 1231 of Black's Legal Dictionary, 1st Edition, the legal meaning of the phrase "Waiver" is stated as follows (Pl #97 and 98) --

> "WAIVE, v. To abandon or throw away; as when a thief, in his flight, throws aside the stolen goods, in order to facilitate his escape, *he is technically said to waive them.*
> In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong. A person is said *to* waive a benefit when lie renounces or disclaims it,

and lie is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet"

(3) Case law is that an ambiguous restriction is no restriction at all:

"rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Citing 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

"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).

"[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. – Hardy e at v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006 .

(4) Provisions of Original Covenant (Pl # 547).

"Section 2.2 Plan of Development of Additional Property. ... Developer reserves the right to plan, design, develop, construct, maintain and manage ... any unsold Unit as Developer deems necessary or convenient for its purposes, ... including without limitation the right to change the number, shape, size and density of the unsold Units, ... "

Article VII, Use Restrictions; Section 7.2, Prior Review of all Plans. Last paragraph:

"Section 7.2 of this Declaration shall not apply to the Developer or to any Designated Builder "

(5) Declaration of "Designated Builders" through Covenant Amendments.

EVERY builder in the PUD was identified as a "Designated Builder" or as the "Developer". [14]

Amendment #5 Pl #563 Para 7 named Kinsale a Designated Builder – for Ballycastle.

Amendment #1 Pl #551 Para 7 named The Villas developer a designated builder.

Amendment #2 Pl #555 Page 2, named Horton as the developer..

Amendment #3 Pl #559 Pages 2 and 3, paragraph 5 named Sunbelt as a designated builder.

(6) Language of Amendment #1, May 9, 2000, Pl #551.

"WHEREAS the Declarant desires to amend the Declaration in certain particulars; and
WHEREAS the Declarant desires to add additional Property owned by it to the Declaration."
NOW THEREFORE the Declarant hereby amends the Declaration as follows: ... [15]
2. The Property set forth and described in Exhibit A, [16] ... is hereby subjected to the Declaration ... [The] ("Multifamily Parcel") is being conveyed by the Declarant to International Club Villas .... The Declarant hereby grants to International Club Villas, LLC, all of its rights contained in the Declaration to develop the Multifamily Parcel ..."
3. There is no "Common Area" ....
4. Section 3.7 of the Declaration is hereby deleted in its entirety. There shall be no restrictions on property management firms utilized to operate any Multifamily Association created on the Multifamily Parcel. [17]
5. 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 ... [18]

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[14] Except for Sunbelt, the developer of Pebble Creek. See discussion supra.
[15] #1 is the name change of the PUD to "International Club".
[16] There was no Exhibit A to Amendment #1 filed with the Recorder of Deeds. The "Multi-family Parcel" of Exhibit A to Covenants is the area now called "Ballycastle" which was not the area sold by Planatation AD to International Club Villas LLC. On May 20, 2000 Plantation AD sold "The Villas" land to International Club Villas LLC by deed. The Villas land is at Exhibit B to the original Covenants, not Exhibit A to the Covenants. Plat Book 160 Page 79 Pl # 454.
[17] There are two multi-family parcels in Exhibit A to the Covenants: Ballycastle and The Glens. The paragraph is ambiguous. Taken to mean applicable to Exhibit A to the Covenants, this has nothing to do with The Villas.
[18] See footnote above. This restriction is being enforced against The Cambridge which is in Exhibit B to the original covenants and is not The Villas..

**6. The Multifamily Association(s) ... will ... collect and pay Master Association assessments...** [19]
**7. The Declarant hereby designates International Club Villas, LLC, as a Designated Builder ...**[20]
**...**
**9. The Declarant hereby <u>waives all easement rights</u> reserved in Article IV, Sections 4.10 [easement for utilities], Section 4.11 [easements for walks and trails]**[21]**, Section 4.12 [enter onto any unit]**[22]**, Section 4.16 [environmental easement]** [23] **and Section 4.17 [wells & effluent]** [24] **of the Declaration.**[25]
**...**
**11. The Declarant hereby waives the Architectural Controls set forth in the two numbered Sections 7.2 in Article VII and of Section 7.4, Section 7.25 and Section 7.31 of the Declaration.** [26]
**12. The Developer hereby waives its rights to enter into and for maintain the <u>Golf Course Easement Area</u> as set forth in Article VII, Section 7.37 (c) of the Declaration.**

**b. Facts.**

**(1) When the Declarant referred to The Villas, as in paragraph 2 of Amendment #1, the language says so ("The <u>Declarant hereby grants</u> to International Club Villas, LLC,").**

**(2) By the language of the original covenants, Section 2.2, plan of development, and the last paragraph of Section 7.2, no restriction applied to the Developer or a Designated Builder. There was no need to "waive" any restriction for The Villas since it was now a designated builder.**

**(3) At the time of Amendment #1, The Villas area was not subject to the**

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**[19] The Villas was not subjected to the Covenants until Amendment #4, December 28, 2004. The Cambridge association follows this provision.**
**[20] This designation meant that The Villas was not subject to any current or future restriction and no waiver was required. This only benefit of this designation is to free a builder from the use restrictions.**
**[21] This easement applied to the golf course, the wetlands, the area along side undedicated roads as well as the mutli-familiy areas.**
**[22] This easement was a right to enter ANY unit to check for covenant violations.**
**[23] Allows enforcement of environmental law on common areas and single family homes, as well as multi-family.**
**[24] Applies to entire subdivision. Gives HOA riparian rights to surface water and right to use it to irrigate.**
**[25] Waived easement at Section 4.10 Covenants applied to single family lots: 5' on the front and side boundaries and 10' on the rear, as well as to multli-family areas.**

Covenants and was not putatively so subjected until Amendment #4 in December, 2004.

(4) Amendment #1 says it has many purposes: change of PUD name, annexation of additional property; identification of designated builders, AND amendment of covenants.

(5) There are two other multi-family areas in the PUD which are in Exhibit A to the Covenants: Ballycastle and The Glens, and three other such area elsewhere in Exhibit B which is where The Villas is in the Covenants: Cambridge, The Enclave, The Fairways. Amendment #1 is silent about them. Homeowners in The Glens and The Cambridge have been required to conform to the Restrictions on Use. The Ballycastle has never been built upon and remains vacant.

(6) The Horry County Planning Commission approved plans for the PUD as of May 14, 1999 (the last approval prior to the sale of The Villas by Plantation AD, Pl #451) has no ponds in the area designated for (what became) The Villas thus there would be no need to "waive" riparian rights in The Villas multi-family area. The Plat filed with the Planning Commission for the International Club Golf Course, which shows The Villas area as Parcel C, Plat Book 181 Page 89, January 2, 2002 (Pl #460) likewise does not show any ponds in The Villas area.

(7) Section 4.12, waived, was the right to enter to check for covenant violations. The Villas was not subject at the time to the covenants and if it was so subjected in the future, it was exempt from provisions of the covenants because the builder was a "designated builder". Clearly these waived sections are superfluous to The Villas.

(8) Amendment #1 is clearly both confusing and ambiguous.

(9) The entire argument of the Defendants that "waiver" is limited to The Villas depends on Defense Counsel's argument that the ambiguity should be resolved in favor of restrictions on the use of property and in favor of the developer. This is absolutely contrary to case law and to the statutes requiring specifics in placing deed – like restrictions on property. As a matter of law the ambiguity must be resolved with the interpretation that the waivers are general.

(10) The waivers are each self-contained. Looking to each there is nothing to

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[26] 7.2 is the requirement to submit plans to the ARB; 7.4 is fence restrictions; 7.25 is parking; 7.31 Open outdoor storage.

hint that the waivers are anything less than general. The "wherefore" portion of the Amendment says nothing to hint that the Declarant desires to "free" any particular subset of owners from the restrictive covenants.

(11) The absence of reference to Sunbelt as a designated builder indicates that when Amendment #1 was filed, which is after Sunbelt had begun construction and sale of units, it was never intended that the covenants apply to Pebble Creek anyway. This is further buttressed when considering that the master use plan for International Club, on June 19, 2003 omitted Pebble Creek.

c. Declaration as to Effect of Waivers.

(1) The waivers and deletions of Amendment #1 to the Covenants are general in nature and were not limited to The Villas multi-family area. Each such waiver must be read with the alternative meaning "deleted".

(2) No remedial cause of action is available for violation of any provision of the covenants marked in Amendment #1 as "waived" or "deleted".

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15. Counter-claim of Defendant IHOA is void because it has not exhausted all it's administrative remedies and has not complied with it's own Bylaws.

a. Bylaws claimed by Defendants, Pl #548, February 8, 1999:

"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 ... for violations of the Declaration, By-Laws or any rules and regulations for the Association, unless and until the following procedure is followed:

13.3.1 Written demand to cease and desist

13.3.2 Within two (2) months of such demand, ... the Board may serve such Owner with written notice of a hearing to be held by the Board in executive session. ...

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."

b. Facts.

(1) Architectural Review Board – an entity of the Defendant IHOA.

On May 16, 2012, the Chief Administrative Judge held a hearing on Plaintiff's motion to amend his complaint, to add the "Architectural Review Board" (ARB) as an additional defendant based on the surprise assertion by the current (William Freiboth) and former HOA presidents (Defendant Rosemary Toth) at depositions that the ARB was not a committee of the Defendant HOA, was not subject to the governance of the Defendant HOA, and operated outside the Bylaws of the HOA. Based on the discussion of the parties or their attorneys at the hearing, the Court ruled from the bench that the ARB was in fact a committee of and controlled by the HOA, thus amendment was not required. Defense Counsel subsequently prepared a follow-on order which Plaintiff did not have an opportunity to comment on, and which omitted this bench decision.

(2) Despite having secured the consolidation of the 2009 and 2010 cases, the IHOA filed separate and identical counter-claims in both cases, which Plaintiff argues was meant strictly to increase the costs of litigation and which could serve no other purposes. Both counter-claims shared the following identical language regarding the role of the Architectural Review Board (ARB). These statements in the IHOA's answers bind the IHOA and state that the ARB is an integral creation of the IHOA, and not a separate entity as the William Freiboth stated at trial and in his deposition. First paragraph number is from the IHOA's "2010 Answer"; second from it's "2009" Answer.

> 29/57. The Architectural Review Board <u>for the Defendant HOA</u> holds the architectural review rights pursuant to the Governing Documents
> 30/58. The <u>Defendant HOA</u> enacted Architectural Guidelines in 2005 and has amended them from time to time.
> 33/61. The Defendant HOA, through <u>its</u> Architectural Review Board, sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines ...

(3) Contradictory Argument by Special Referee / Defense Counsel's in Final Order: The Special Referee's Order stated that the ARB is not a creation or entity of the IHOA, that the ARB not the HOA imposed a $ 100 a month fine, that the ARB as being separate from the IHOA is not subject to the Bylaws of the IHOA which Bylaws prohibit any fine or sanction until after a hearing per the provisions of Section 13.3 of the Bylaws. The Special Referee's Order made the following Conclusion of Law:

> The ARB is a <u>separate Board</u> ... <u>created by</u> Article VII <u>of the Declaration</u>.

> ... 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 ...

(4) Defense counsel misrepresented what the Covenants actually state and the Special Referee did not bother reading the Covenants so as to note the mis-representation. The Covenants actually state that an ARB is an optional creation of the IHOA Board:

> Article III Section 3.1 The Association. The Association shall be authorized but not required to ... (d) To set up and operate the Architectural Review Board ...

Section VII does not create an independent ARB but states it's procedures and specifically identifies the ARB as an entity / creator of the Association:

> Section 7.2. Prior Review of All Plans. ... 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

Clearly there was an error of controlling facts by the Special Referee. This is why the judicial canons prohibit entry of proposed findings of facts and conclusions of law without giving the opposing side an opportunity to be heard.

(5) At trial Plaintiff questioned IHOA President Freiboth and confronted Freiboth with Plaintiff's October 11, 2010 Letter to the HOA (Pl #633) "SUBJECT: Putative "Appeal" of October 8, 2010 Disapproval of Fence / Approval of Flower Bed in "County Easement" which at paragraph 3 stated:

> "I invoke what the HOA represents in it's putative Bylaws as Section 13.3, Procedures, which precludes the HOA from taking any further action until it meticulously completes each and every procedure stated therein."

The witness was also questioned regarding the IHOA's answering letter to Plaintiff dated October 21, 2010 Pl #634 which acknowledged receipt of the letter (it refused to refer to it as an appeal) it went on to ignore Plaintiff's demand for an appeal hearing when the IHOA stated "Unless you successfully appeal the ARB decision...". If one casually looks to the procedure of Section 13.3, the HOA is required to schedule the hearing on it's own and no

appeal is necessary. Freiboth was questioned relating Plaintiff's responding letter of October 23, 2010 Pl #635 which read

> "SUBJECT: Your Refusal to Follow Your Purported Rule 13.3 (your putative bylaws) which controls what action your HOA must take following an appeal from a putative ARB decision"
> 4. What must follow. ... b. The "Administrative Appeal" of your Section 13.3. ... your obligation is strictly to obey your own claimed procedure and to schedule a hearing which would require addressing issues ..."

The answer of Mr. Freiboth at trial to the question of why the IHOA Board did not schedule a hearing was first that he did not consider Plaintiff's "appeal" to be serious and upon challenge that such a determination was not in the procedures, Freiboth then claimed that the entire process was an ARB issue. He was unable to state what form an appeal of the ARB refusal of Plaintiff's fence request might be if it was not the hearing by the IHOA per Bylaws 13.3. In point of fact there is no alternative procedure so stated. It is a fact that on several occasions the IHOA Board has held appeals of ARB decisions so this is double-talk. The October 14, 2010 Board letter to Plaintiff was signed "For The Board of Directors" and not for the ARB. Again, the Covenants clearly setup the ARB as an optional creature of the HOA Board of Directors.

c. Declaratory Judgment.

(1) That the Architectural Review Board is a creation of and part of the Defendant IHOA.

(2) That the IHOA may not impose any fine or sanction or restriction of rights on a homeowner prior to holding a hearing which it must schedule in accordance with Section 13.3 of the Bylaws it touts as it's own.

(3) That the IHOA was on notice that it had not followed it's own procedures.

(4) That the IHOA attempted to impose fines and other sanctions in violation of it's own procedures and had not exhausted it's administrative remedies; and that it is prohibited by it's Bylaws from so acting.

(5) That the IHOA made a conscious decision not to hold such a hearing.

(6) That because of these findings Plaintiff is not liable for any fines or other sanctions in favor of the IHOA.

(7) That because of the obviousness of the facts and the HOA's procedures, and

because the IHOA was on notice of the procedural error, the HOA's conduct in filing a counter – claim is a frivolous proceeding subject to SC Code 15-36 and sanctions should be imposed in at least double the amount the IHOA was seeking from Plaintiff, plus all costs of depositions, transcripts and motions from the time the IHOA filed it's two counter – claims August 20, 2011

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16. Counter-claim of Defendant IHOA is void because the IHOA Does Not Have Capacity:

a. The Defendant IHOA is NOT the HOA under the Covenants.

(1) See prior argument. This is also the finding of the Special Referee in his Order, adopting the position of Defense Counsel. On page 12 of his order the Special Referee made a controlling finding of fact and conclusion of law which reads:

> "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"." "

(2) The implication of this is that the ARB was not legally constituted because the Covenants give only the HOA it designates the authority to create an ARB and for the Board of said HOA to appoint the members. Any action of a board appointed by Defendant IHOA is ultra-vires and of no consequence.

(3) Another implication is that since the Defendant IHOA is not the HOA under the covenants, it lacks standing to advance a cause of action for violation of the covenants.

b. The IHOA has no standing to assert a claim by an independent ARB..

(1) The Court held that the fines that the IHOA is seeking to collect – payable to the IHOA – are fines from the ARB as an entity independent from the IHOA. This artifice was invented by Defense Counsel to explain why Bylaws Section 13.3 was ignored but it also means that the IHOA has no standing to assert the claim of the "separate and independent ARB". In paragraph 24 of the Order, the Court wrote the following conclusion of law which identifies the fines as arising from non-party ARB but payable to

party IHOA:

> "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."

(2) The related finding of the Special Referee announced in his Order is:

> The ARB is a separate Board ... created by Article VII of the Declaration. ... 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 ...

(3) The Bylaws do not establish the ARB. The only mention of the ARB in the bylaws is that (Section 11.1.1 Restoration of destroyed condemned land) landscaping plans for a restored areas must be approved by the Developer, the Board, and the ARB; and per Bylaw Section 12.3.6 The HOA must pay the expenses of the Architectural Review Board.

c. Declaratory Judgment which follows this analysis.

In the alternative, The IHOA lacks standing to seek to enforce a fine by the ARB and to sue out the covenants because of any and all of the following:

(1) The IHOA has no standing under the Covenants as it is not the HOA.;

(2) The ARB had no authority to impose a fine since it was not constituted by the HOA designated by the Covenants as amended;

(3) The ARB is a separate entity from the Defendant IHOA and thus the IHOA has no standing to advocate a cause of action which belongs to the ARB.

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17. The Counter – Claim is Void because the restriction on fences and walls was "waived" or because of selective and capricious enforcement or because the Complaint never complained of a "brick wall" or a "brick foundation"..

a. See discussion supra.

b. The requirement of Covenant Section 7.2 to seek prior approval of the ARB was deleted in Amendment #1 of the Covenants. The provision regarding fences, Section 7.4 of the Covenants, was likewise deleted in Amendment #1 to the Covenants.

c. The IHOA selectively and capriciously denied Plaintiff permission to erect a

fence.

(1) Case Law.

... extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993).

In Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, refiled May 17, 2007 the Court found that the homeowners association waived it's control over fences and other issues. The Court noted that

"the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

(2) The Court was shown the following pictures to prove the "extensive omissions or variations and that was requested by Plaintiff had already been approved elsewhere in the PUD by the IHOA:

| EXHIBIT | Locations |
|---|---|
| Pl # 2 | 8 foot high plastic fence on Pickering Drive. |
| Pl # 3 | 8 foot high plastic fence on Pickering Drive. |
| Pl # 4 | 112 Worchester Court. Completely surrounds the sides and rear of the back yard and one side is against the street. |
| Pl # 5 | Right side of 120 Seville - GSWSA 8 foot high wood fence. |
| Pl # 6 | Same fence visible from GIA – fence is clearly a nuisance to Harrigan at 120 Seville Drive. |
| Pl # 8, # 9, # 10 | Fences adjoining street at 165, 170, and 174 Seville These stand astride the lot property line. |
| Pl # 12 | Similar fences at 184 Seville. |
| Pl # 13 | Similar fences at 164 Seville. The court is asked to note that these are neighbors or close to Defendant Toth. |
| Pl # 14 | Fence at 186 Seville viewed from GIS. Note fence is facing Dunham Court. |
| Pl # 15 | Fence at 166 Seville. |

(3) The actual complaint was that (paragraph 32 of the 2010 case counter – claim) "the Plaintiff constructed a brick wall on the property without obtaining the approval of the Defendant HOA or the Architectural Review Board." (same text in 2009 case counter – claim). And in paragraph 37 of the 2010 counter – claim :

"The Architectural Review Board also demanded that the brick wall be removed from the property ..."

And from paragraph 39 (of the 2010) "Although Plantiff's application for the fence and brick wall were denied ...

And from paragraph 40 (of the 2010) "The brick wall is a continuing violation of the covenants...:"

(4) It was never alleged by Defendants that Plaintiff actually erected a fence, which Plaintiff did not do (although an application to do so was submitted and illegally refused). The Complaint of Defendant is very specific and repeatedly claims with specificity that Plaintiff constructed a "brick wall".

(5) The Court was shown the Defendant IHOA's response to interrogatories which proved to the Court that fences and walls are commonly approved throughout the PUD: On March 18. 2011 Defendant responded to Interrogatories posed by Plaintiff (on February 16, 2011). Quoted below is Interrogatory #16 and Defendant's Answer: Pl# 604 / 605.

> 16. Identify by name, lot address and date any instance where a homeowner has been permitted to erect a fence situated between his lot and an adjacent lot.
> ANSWER: Listed below are the dates, names and addresses where fences have been permitted:
>
> 1. February 4, 2004 - Diskin - 505 Crawley Place
> 2. September 1, 2004 – Bernardo - 182 Pickering Drive
> 3. September 22, 2004 - Cipriani - 186 Seville Drive
> 4. September 28, 2004 - Tempelton - 826 Castlebridge Court
> 5. October 15, 2004 - Buller - 513 Dunham Court
> 6. February 2, 2005 - Lattig - 208 Whitchurch Street
> 7. March 8, 2005 - Small - 166 Seville
> 8. June 13, 2005 - Wronka - 170 Seville
> 9. August 5, 2005 - Anthony - 831 Castlebridge Court
> 10. August 16, 2005 - Bergman - 405 Moat Court
> 11. September 8, 2005 - Sweeney - 704 Hawick Street
> 12. January 17, 2006 - Sciarretta - 1020 Knightsbridge Court
> 13. March 3, 2006 - Dougherty - 280 Pickering Drive
> 14. March 6, 2006 - McCray - 805 Castlebridge Court
> 15. March 6, 2006 - Sconyers - 253 Whitchurch Street
> 16. March 13, 2006 - Hamden - 230 Pickering Court
> 17. May 3, 2006 - Walker - 849 Castlebridge
> 18. May 3, 2006- Zielenski - 1019 Knightsbridge Court
> 19. July 11, 2006 - Boudreau - 105 Keswick Court
> 20. October 13, 2006 - Russell - 139 Wicklow
> 21. October 13, 2007 - Weibel- 252 Marbella
> 22. April 9, 2007 - Proctor - 174 Seville –
> 23. June 27, 2007 - Pappas - 501 Turret Court

24. July 3, 2007 - Benjamin - 627 Locke Court Fences and Playsets
25. August 28, 2007 - Antioho - 1108 Preston Place
26. December 21, 2007 - Rearick - 1112 Worchester Court
27. January 18, 2008 - Crawford - 521 Tamarindo Court
28. September 22, 2010 - Kinsey - 236 Whitchurch

(6) Plaintiff introduced into evidence and showed the court photos of what Defendant was calling a "brick wall", Pl # 36, which showed that it was nothing more than a row of plant bed edgers which was what was requested in Plaintiff's ARB Application (Pl# 629) and which was approved by HOA (Pl# 631) as they approved the plant bed with brick edgers. Plaintiff also introduced and showed the Court other pictures of elsewhere on Plaintiff's lot where the HOA called the same bricks "landscape edging" and which the HOA had previously approved numerous times and which was also – as "landscape edging" in front of a member of the ARB's house (Pl # 21 – 26; #42), Color Enlargements of these photos were in Poster Board and were handed to the Special Referee to examine. Testimony was "torn" from Freiboth that what was "on the ground" could not possibly have anything to do with a fence or brick wall because of structural reasons. Plaintiff's witness Mike Butryn, who is a contractor, testified as such and that what is "on the ground" is not a fence or a wall.

(7) The Counter – Claim is very specific. It alleges a brick wall was built. It says this over and over. It does not allege landscaping edgers were laid. Such an assertion (that a brick wall was constructed) by Defendants and their counsel is a frivolous claim and should be sanctioned.

(8) There is also the defense for Plaintiff of "necessity". A member of the Defendant HOA' ARB, Jay Cartman, repeatedly drove stakes through Plaintiff's irrigation system along the property line of the "brick wall" – destroying Plaintiff's irrigation system. The Court was shown pictures of Cartman's "No Trespassing" signs – IN PLAINTIFF's YARD and pictures of Cartman trespassing to drive said stakes (caught with a hammer in hand) (Plaintiff # 620 – 625). This also included a picture of a hypodermic needle .left by Cartman on Plaintiff's side yard where his children play, for which several police investigations / reports were made (they took possession of the needles). The HOA refused to do anything about Cartman's "illegal" signs and stakes. The Horry Police recommended the wall as Cartman was considered "erratic and dangerous" since it was

perpetuated in police reports that Cartman was making threats and gesturing wildly and yelling at Plaintiff's wife when she landscaped on Plaintiff's property.

(9) In testimony at trial IHOA President William Freiboth persisted in calling what Plaintiff constructed a "brick wall". Plaintiff called it "landscape edgers". No one called what was on the ground as a "brick foundation". At the end of Plaintiff's presentation relating to the "fence" and "counter-claim" Defense Counsel never contested any of Plaintiff's assertions and never introduced no evidence. Defense counsel did not challenge Plaintiff's witness Mike Butryn, a contractor, when he asserted that what was on the ground was nothing more than landscape edgers and was useless in connection with a fence or wall.

(10) Defense Counsel, faced with the laughable contradiction between the complaint's assertion that Plaintiff had constructed a "brick wall" and the photos and testimony, after the trial was over created a new theory never presented at trial: that Plaintiff built a "brick foundation" – Special Referee's Order paragraphs 27 and 28. Per the photos and testimony (of Butryn), the brick edgers could not serve as a "foundation" for anything since there was no paver base and no stability to edgers merely pushed into the soil. In paragraph 25 the Special Referee ordered Plaintiff to remove the "brick foundation" which is impossible because it never existed.[27] Applying the applicable standard, it is more likely than not that Plaintiff had not constructed what Defendant's complaint alleged, a "brick wall" or the new theory introduced at trial, a "brick foundation".

d. Declaration Sought:

(1) That the denial of Plaintiff's application to install a fence was selective and capricious and that because of the wide variation in fences installed, in every conceivable location on lots, the IHOA had waived it's right to enforce this restriction.

(2) That any IHOA action based on the Covenant provision relating to fences is void because that provision was "waived.

(3) That the IHOA refusal to approve Plaintiff's fence and landscape edging was

[27] As a matter of discretion, Plaintiff removed the brick edgers but contends it was approved because the ARB approved the brick landscape edgers beginning at the curb and running inwards. Somehow when the edgers got 10 feet in they now were a brick

selective and capricious enforcement, and that the IHOA had approved the same brick edging only yards away on Plaintiff's property as "landscape edging". The refusal to approve what had been approved for use previously in the same area was selective and capricious.

(4) That no counter – claim was posed stating an issue with "landscape edging" or "brick foundation" but rather that Plaintiff had built a "brick wall" which is not supported by the evidence. The allegation that Plaintiff build a "brick foundation" is not supported by the evidence either.

(5) That for any and all of the aforesaid, no judgment can issue in favor of Defendant on it's counter – claim.

(6) That because it was clear that no "brick wall" was built, the counter – claim constitutes a frivolous proceeding under South Carolina Law, and Defendants shall be assessed a penalty double the cost of Plaintiff's depositions, transcripts, motions, and other court after the date of the filing by Defendant of it's counter-claim on August 26, 2011.

(7) That Plaintiff shall be permitted to erect a fence and adjacent paver edging as requested in his ARB Application dated September 30, 2010, Pl #629.

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18. Defendants Rosemary Toth and HOA through it's Officers Rosemary Toth, William Fletcher, and Jay Cartman Harassed and Stalked Plaintiff.

a. Law.

SECTION 16-3-1700. Offenses Against The Person, Harassment and Stalking. Definitions
(B) "Harassment in the second degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and ... would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the second degree may include, but is not limited to, verbal, written, or electronic contact that is initiated, maintained, or repeated.

(C) "Stalking" means a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear: ...
(2) assault upon the person or a member of his family;
(3) bodily injury to the person or a member of his family; ...

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foundation.

(6) damage to the property of the person or a member of his family.

SECTION 16-3-1750. Action seeking a restraining order against a person engaged in harassment or stalking; jurisdiction and venue; forms; enforceability.
(A) Pursuant to this article, the magistrates court has jurisdiction over an action seeking a restraining order against a person engaged in harassment in the first or second degree or stalking.

SECTION 16-3-1830. Availability of other civil and criminal remedies.
A proceeding commenced pursuant to this article is in addition to other civil and criminal remedies.

b. Facts.

(1) Trial testimony and evidence was offered that Jay Cartman, a member of the HOA's ARB and the next – door neighbor to Plaintiff, was part of a campaign by Defendant HOA and it's officers to discourage Plaintiff from exercising his constitutional rights of free speech with regard to the HOA but also to retaliate against Plaintiff and discourage him from continuing his civil suit against Defendants, which is Plaintiff's constitutional right.

(2) On October 12, 2010 Plaintiff filed a civil suit against the Defendant HOA in Horry County Magistrate Court, 2010CV261072943 whose allegations included

> 22. The actions of Defendant constitute harassment and tortuous interference with Plaintiff's lawful use of his property.
> 23. Wherefore Plaintiff asks for relief consisting of: ...
> b. for an Order barring Defendant from any future acts attempting to restrict Plaintiff's use of his property or requiring him to have any dealings at all with Defendant regarding any matter; ...

When transferred at Defendant's request to Circuit Court, this case became 2010-CP-26-11320 which has been consolidated into the 2009 case.

(3) Testimony was offered by Mike Butryn that Rosemary Toth personally instructed him to "fire" Pete Pizzi from his position on the Buildings and Grounds Committee because Pete Pizzi was seen entering Plaintiff's residence. This was admitted as being a policy chosen by the HOA, by Defense Witness / board member (at the time) Maureen Sullivan.

(4) Amendment #1 to the Civil Complaint in Civil Case 2009-CP-26-3596 included the following accusations against the HOA and Toth (Para 91)

because the IHOA was on notice of the procedural error, the HOA's conduct in filing a counter – claim is a frivolous proceeding subject to SC Code 15-36 and sanctions should be imposed in at least double the amount the IHOA was seeking from Plaintiff, plus all costs of depositions, transcripts and motions from the time the IHOA filed it's two counter – claims August 20, 2011

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16. Counter-claim of Defendant IHOA is void because the IHOA Does Not Have Capacity:

a. The Defendant IHOA is NOT the HOA under the Covenants.

(1) See prior argument. This is also the finding of the Special Referee in his Order, adopting the position of Defense Counsel. On page 12 of his order the Special Referee made a controlling finding of fact and conclusion of law which reads:

> "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"." "

(2) The implication of this is that the ARB was not legally constituted because the Covenants give only the HOA it designates the authority to create an ARB and for the Board of said HOA to appoint the members. Any action of a board appointed by Defendant IHOA is ultra-vires and of no consequence.

(3) Another implication is that since the Defendant IHOA is not the HOA under the covenants, it lacks standing to advance a cause of action for violation of the covenants.

b. The IHOA has no standing to assert a claim by an independent ARB..

(1) The Court held that the fines that the IHOA is seeking to collect – payable to the IHOA – are fines from the ARB as an entity independent from the IHOA. This artifice was invented by Defense Counsel to explain why Bylaws Section 13.3 was ignored but it also means that the IHOA has no standing to assert the claim of the "separate and independent ARB". In paragraph 24 of the Order, the Court wrote the following conclusion of law which identifies the fines as arising from non-party ARB but payable to

party IHOA:

> "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."

(2) The related finding of the Special Referee announced in his Order is:

> The ARB is a separate Board ... created by Article VII of the Declaration. ... 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 ...

(3) The Bylaws do not establish the ARB. The only mention of the ARB in the bylaws is that (Section 11.1.1 Restoration of destroyed condemned land) landscaping plans for a restored areas must be approved by the Developer, the Board, and the ARB; and per Bylaw Section 12.3.6 The HOA must pay the expenses of the Architectural Review Board.

c. Declaratory Judgment which follows this analysis.

In the alternative, The IHOA lacks standing to seek to enforce a fine by the ARB and to sue out the covenants because of any and all of the following:

(1) The IHOA has no standing under the Covenants as it is not the HOA.;

(2) The ARB had no authority to impose a fine since it was not constituted by the HOA designated by the Covenants as amended;

(3) The ARB is a separate entity from the Defendant IHOA and thus the IHOA has no standing to advocate a cause of action which belongs to the ARB.

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17. The Counter – Claim is Void because the restriction on fences and walls was "waived" or because of selective and capricious enforcement or because the Complaint never complained of a "brick wall" or a "brick foundation"..

a. See discussion supra.

b. The requirement of Covenant Section 7.2 to seek prior approval of the ARB was deleted in Amendment #1 of the Covenants. The provision regarding fences, Section 7.4 of the Covenants, was likewise deleted in Amendment #1 to the Covenants.

c. The IHOA selectively and capriciously denied Plaintiff permission to erect a

fence.

(1) Case Law.

... extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993).

In Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, refiled May 17, 2007 the Court found that the homeowners association waived it's control over fences and other issues. The Court noted that

"the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

(2) The Court was shown the following pictures to prove the "extensive omissions or variations and that was requested by Plaintiff had already been approved elsewhere in the PUD by the IHOA:

| EXHIBIT | Locations |
|---|---|
| Pl # 2 | 8 foot high plastic fence on Pickering Drive. |
| Pl # 3 | 8-foot high plastic fence on Pickering Drive. |
| Pl # 4 | 112 Worchester Court. Completely surrounds the sides and rear of the back yard and one side is against the street. |
| Pl # 5 | Right side of 120 Seville - GSWSA 8 foot high wood fence. |
| Pl # 6 | Same fence visible from GIA – fence is clearly a nuisance to Harrigan at 120 Seville Drive. |
| Pl # 8, # 9, # 10 | Fences adjoining street at 165, 170, and 174 Seville These stand astride the lot property line. |
| Pl # 12 | Similar fences at 184 Seville. |
| Pl # 13 | Similar fences at 164 Seville. The court is asked to note that these are neighbors or close to Defendant Toth. |
| Pl # 14 | Fence at 186 Seville viewed from GIS. Note fence is facing Dunham Court. |
| Pl # 15 | Fence at 166 Seville. |

(3) The actual complaint was that (paragraph 32 of the 2010 case counter – claim) "the Plaintiff constructed a brick wall on the property without obtaining the approval of the Defendant HOA or the Architectural Review Board." (same text in 2009 case counter – claim). And in paragraph 37 of the 2010 counter – claim :

"The Architectural Review Board also demanded that the brick wall be removed from the property ..."

And from paragraph 39 (of the 2010) "Although Plantiff's application for the fence and brick wall were denied ...

And from paragraph 40 (of the 2010) "The brick wall is a continuing violation of the covenants...:"

(4) It was never alleged by Defendants that Plaintiff actually erected a fence, which Plaintiff did not do (although an application to do so was submitted and illegally refused). The Complaint of Defendant is very specific and repeatedly claims with specificity that Plaintiff constructed a "brick wall".

(5) The Court was shown the Defendant IHOA's response to interrogatories which proved to the Court that fences and walls are commonly approved throughout the PUD: On March 18. 2011 Defendant responded to Interrogatories posed by Plaintiff (on February 16, 2011). Quoted below is Interrogatory #16 and Defendant's Answer: Pl# 604 / 605.

> 16. Identify by name, lot address and date any instance where a homeowner has been permitted to erect a fence situated between his lot and an adjacent lot.
> ANSWER: Listed below are the dates, names and addresses where fences have been permitted:
>
> 1. February 4, 2004 - Diskin - 505 Crawley Place
> 2. September 1, 2004 – Bernardo - 182 Pickering Drive
> 3. September 22, 2004 - Cipriani - 186 Seville Drive
> 4. September 28, 2004 - Tempelton - 826 Castlebridge Court
> 5. October 15, 2004 - Buller - 513 Dunham Court
> 6. February 2, 2005 - Lattig - 208 Whitchurch Street
> 7. March 8, 2005 - Small - 166 Seville
> 8. June 13, 2005 - Wronka - 170 Seville
> 9. August 5, 2005 - Anthony - 831 Castlebridge Court
> 10. August 16, 2005 - Bergman - 405 Moat Court
> 11. September 8, 2005 - Sweeney - 704 Hawick Street
> 12. January 17, 2006 - Sciarretta - 1020 Knightsbridge Court
> 13. March 3, 2006 - Dougherty - 280 Pickering Drive
> 14. March 6, 2006 - McCray - 805 Castlebridge Court
> 15. March 6, 2006 - Sconyers - 253 Whitchurch Street
> 16. March 13, 2006 - Hamden - 230 Pickering Court
> 17. May 3, 2006 - Walker - 849 Castlebridge
> 18. May 3, 2006- Zielenski - 1019 Knightsbridge Court
> 19. July 11, 2006 - Boudreau - 105 Keswick Court
> 20. October 13, 2006 - Russell - 139 Wicklow
> 21. October 13, 2007 - Weibel- 252 Marbella
> 22. April 9, 2007 - Proctor - 174 Seville –
> 23. June 27, 2007 - Pappas - 501 Turret Court

24. July 3, 2007 - Benjamin - 627 Locke Court Fences and Playsets
25. August 28, 2007 - Antioho - 1108 Preston Place
26. December 21, 2007 - Rearick - 1112 Worchester Court
27. January 18, 2008 - Crawford - 521 Tamarindo Court
28. September 22, 2010 - Kinsey - 236 Whitchurch

(6) Plaintiff introduced into evidence and showed the court photos of what Defendant was calling a "brick wall", Pl # 36, which showed that it was nothing more than a row of plant bed edgers which was what was requested in Plaintiff's ARB Application (Pl# 629) and which was approved by HOA (Pl# 631) as they approved the plant bed with brick edgers. Plaintiff also introduced and showed the Court other pictures of elsewhere on Plaintiff's lot where the HOA called the same bricks "landscape edging" and which the HOA had previously approved numerous times and which was also – as "landscape edging" in front of a member of the ARB's house (Pl # 21 – 26; #42), Color Enlargements of these photos were in Poster Board and were handed to the Special Referee to examine. Testimony was "torn" from Freiboth that what was "on the ground" could not possibly have anything to do with a fence or brick wall because of structural reasons. Plaintiff's witness Mike Butryn, who is a contractor, testified as such and that what is "on the ground" is not a fence or a wall.

(7) The Counter – Claim is very specific. It alleges a brick wall was built. It says this over and over. It does not allege landscaping edgers were laid. Such an assertion (that a brick wall was constructed) by Defendants and their counsel is a frivolous claim and should be sanctioned.

(8) There is also the defense for Plaintiff of "necessity". A member of the Defendant HOA' ARB, Jay Cartman, repeatedly drove stakes through Plaintiff's irrigation system along the property line of the "brick wall" – destroying Plaintiff's irrigation system. The Court was shown pictures of Cartman's "No Trespassing" signs – IN PLAINTIFF's YARD and pictures of Cartman trespassing to drive said stakes (caught with a hammer in hand) (Plaintiff # 620 – 625). This also included a picture of a hypodermic needle .left by Cartman on Plaintiff's side yard where his children play, for which several police investigations / reports were made (they took possession of the needles). The HOA refused to do anything about Cartman's "illegal" signs and stakes. The Horry Police recommended the wall as Cartman was considered "erratic and dangerous" since it was

perpetuated in police reports that Cartman was making threats and gesturing wildly and yelling at Plaintiff's wife when she landscaped on Plaintiff's property.

(9) In testimony at trial IHOA President William Freiboth persisted in calling what Plaintiff constructed a "brick wall". Plaintiff called it "landscape edgers". No one called what was on the ground as a "brick foundation". At the end of Plaintiff's presentation relating to the "fence" and "counter-claim" Defense Counsel never contested any of Plaintiff's assertions and never introduced no evidence. Defense counsel did not challenge Plaintiff's witness Mike Butryn, a contractor, when he asserted that what was on the ground was nothing more than landscape edgers and was useless in connection with a fence or wall.

(10) Defense Counsel, faced with the laughable contradiction between the complaint's assertion that Plaintiff had constructed a "brick wall" and the photos and testimony, after the trial was over created a new theory never presented at trial: that Plaintiff built a "brick foundation" – Special Referee's Order paragraphs 27 and 28. Per the photos and testimony (of Butryn), the brick edgers could not serve as a "foundation" for anything since there was no paver base and no stability to edgers merely pushed into the soil. In paragraph 25 the Special Referee ordered Plaintiff to remove the "brick foundation" which is impossible because it never existed.[27] Applying the applicable standard, it is more likely than not that Plaintiff had not constructed what Defendant's complaint alleged, a "brick wall" or the new theory introduced at trial, a "brick foundation".

d. Declaration Sought:

(1) That the denial of Plaintiff's application to install a fence was selective and capricious and that because of the wide variation in fences installed, in every conceivable location on lots, the IHOA had waived it's right to enforce this restriction.

(2) That any IHOA action based on the Covenant provision relating to fences is void because that provision was "waived.

(3) That the IHOA refusal to approve Plaintiff's fence and landscape edging was

[27] As a matter of discretion, Plaintiff removed the brick edgers but contends it was approved because the ARB approved the brick landscape edgers beginning at the curb and running inwards. Somehow when the edgers got 10 feet in they now were a brick

selective and capricious enforcement, and that the IHOA had approved the same brick edging only yards away on Plaintiff's property as "landscape edging". The refusal to approve what had been approved for use previously in the same area was selective and capricious.

(4) That no counter – claim was posed stating an issue with "landscape edging" or "brick foundation" but rather that Plaintiff had built a "brick wall" which is not supported by the evidence. The allegation that Plaintiff build a "brick foundation" is not supported by the evidence either.

(5) That for any and all of the aforesaid, no judgment can issue in favor of Defendant on it's counter – claim.

(6) That because it was clear that no "brick wall" was built, the counter – claim constitutes a frivolous proceeding under South Carolina Law, and Defendants shall be assessed a penalty double the cost of Plaintiff's depositions, transcripts, motions, and other court after the date of the filing by Defendant of it's counter-claim on August 26, 2011.

(7) That Plaintiff shall be permitted to erect a fence and adjacent paver edging as requested in his ARB Application dated September 30, 2010, Pl #629.

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18. Defendants Rosemary Toth and HOA through it's Officers Rosemary Toth, William Fletcher, and Jay Cartman Harassed and Stalked Plaintiff.

a. Law.

SECTION 16-3-1700. Offenses Against The Person, Harassment and Stalking. Definitions
(B) "Harassment in the second degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and ... would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the second degree may include, but is not limited to, verbal, written, or electronic contact that is initiated, maintained, or repeated.

(C) "Stalking" means a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear: ...
(2) assault upon the person or a member of his family;
(3) bodily injury to the person or a member of his family; ...

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foundation.

(6) damage to the property of the person or a member of his family.

SECTION 16-3-1750. Action seeking a restraining order against a person engaged in harassment or stalking; jurisdiction and venue; forms; enforceability.
(A) Pursuant to this article, the magistrates court has jurisdiction over an action seeking a restraining order against a person engaged in harassment in the first or second degree or stalking.

SECTION 16-3-1830. Availability of other civil and criminal remedies.
A proceeding commenced pursuant to this article is in addition to other civil and criminal remedies.

b. Facts.

(1) Trial testimony and evidence was offered that Jay Cartman, a member of the HOA's ARB and the next – door neighbor to Plaintiff, was part of a campaign by Defendant HOA and it's officers to discourage Plaintiff from exercising his constitutional rights of free speech with regard to the HOA but also to retaliate against Plaintiff and discourage him from continuing his civil suit against Defendants, which is Plaintiff's constitutional right.

(2) On October 12, 2010 Plaintiff filed a civil suit against the Defendant HOA in Horry County Magistrate Court, 2010CV261072943 whose allegations included

> 22. The actions of Defendant constitute harassment and tortuous interference with Plaintiff's lawful use of his property.
> 23. Wherefore Plaintiff asks for relief consisting of: ...
> b. for an Order barring Defendant from any future acts attempting to restrict Plaintiff's use of his property or requiring him to have any dealings at all with Defendant regarding any matter; ...

When transferred at Defendant's request to Circuit Court, this case became 2010-CP-26-11320 which has been consolidated into the 2009 case.

(3) Testimony was offered by Mike Butryn that Rosemary Toth personally instructed him to "fire" Pete Pizzi from his position on the Buildings and Grounds Committee because Pete Pizzi was seen entering Plaintiff's residence. This was admitted as being a policy chosen by the HOA, by Defense Witness / board member (at the time) Maureen Sullivan.

(4) Amendment #1 to the Civil Complaint in Civil Case 2009-CP-26-3596 included the following accusations against the HOA and Toth (Para 91)

"c. Intimidation / Harassment with the objectives of
(1) inflicting emotional distress; and
(2) intimidation to interfere with occupation, expression of political opinion, exercise of political rights and privileges;"

(5) None of the material which was mailed to homeowners and non-homeowners (such as renters) who happened to be on the HOA mailing list was known to the recipients and they had no reason to inquire into same. Because access to Westlaw and Lexis is by subscription, most of the information about Plaintiff published by Defendants was unavailable to the homeowners and renters. The multiple and indiscriminate publication constituted an "intrusion into the private life" of plaintiff and equates to harassment and stalking as a matter of law. Whether or not it constitutes defamation, the systematic and redundant publication by mail and email and posting on a web site of the false accusation -- that Plaintiff had been terminated for cause by the FBI and had falsely accused fellow FBI employees of defaming him (none of which was true) -- in the "List of Lawsuits" (which not just a list but included additional negative text) constitutes harassment in the second degree. As a matter of law, per SC 16-3-1830 a civil remedy is available to Plaintiff.

(5) The campaign against Plaintiff included Cartman actually damaging Plaintiff's property (Pl# 620, 621, 622, 623, 625 photos) and threatening emails (Pl# 518). Mention was made about Police Reports (introduced into evidence as Pl #530) and of an investigation by Horry County Police. Although Cartman was present in the courtroom during the trial he was never called by Defense Counsel to rebut this. At Pl #620 was a picture of a hypodermic needle left by Cartman on Plaintiff's yard (one of many) about which police reports were filed after they investigated and took possession; At Pl #621 was a photo of Cartman driving stakes through Plaintiff's irrigation system; at #622 Cartman carrying a saw to damage shrubbery; at # 622 Cartman's stakes through Plaintiff's sprinkler line. At #626 was Plaintiff's September 10, 2010 letter to the HOA complaining about the conduct of Cartman.

(6) Defamatory Speech by IHOA. Louis Astorino testified in his deposition May 25, 2012

Page 23 12 Q. Do you recall the name... Bill Fletcher?
14 A. Yes

18 Q. Is that the same Bill Fletcher who at times was on the HOA's architectural review board?
22 THE WITNESS: Yes.
24 Q. What did he tell you about me?
Page 24 1 THE WITNESS: That you're a pedophile.
Page 28 21 Q. Did a conversation you had with Bill Fletcher occur before or after this letter came out?
24 A. It was before.

(7) Louis Astorino in his deposition March 27, 2012:

Page 22 12 Q. What did any board member or committee 13 member of the HOA say to you regarding your socializing with me?
18 THE DEPONENT: They -- I was told, even before the meeting run, that I shouldn't speak to him because he was a pedophile.
21 BY MR. JARMUTH:
22 Q. Who said that?
21 BY MR. JARMUTH:
22 Q. Who said that?
23 A. My -- a neighbor across the street from me,
24 John and Bill Fletcher.
25 Q. Is that same Bill Fletcher a homeowner?
Page 23 5 BY MR. JARMUTH:
6 Q. Where does Bill Fletcher live?
7 A. On Pickering.
8 Q. Is Pickering in the HOA?
9 A. Yeah.

(8) Michael Butryn in his Deposition March 27, 2012:

5 Q. Can you describe anything anyone said to you regarding having a social relationship with me?
9 THE DEPONENT: Yes. Everyone thought that you were my best friend. They said to me that I should stay away from you.
...
25 As I said to them, that I do not
[Page 29 Line 1] socialize with you. No one felt that that was true.
4 Q. Around this time, what was Mike Templeton's capacity with the HOA?
6 A. I believe Mike was on the board. He was on the board of directors.
8 Q. What did Mike Templeton tell you regarding Pete Pizzi at that time?
10 A. About Pete, I received a phone call from him. ...
15 Mike had called me and said that he met with the board, and that him and Bill Jacques felt that Pete was undermining the board. And as a result, what I should do, because Pete -- I was chairman at the time, committee chairman of buildings and grounds -- Pete -- they said I should get rid of Pete, and I'm the one that should do it because Pete reported to me.
...

[Page 30 Line 25] THE DEPONENT: Okay. From my
Page 31 1 understanding in talking to Mike Templeton, he felt that Pete was undermining the board because the papers that he supposedly carried there, and the fact that they were having difficulties with you, and why would he go to your house.

(8) The testimony of Mike Buttryn and Louis Astorino were repeated at trial and no attempt was made to controvert these statements and no witness was offered to contradict these. Since Templeton and Fletcher were officers of the Defendant HOA, these were statements against interest and excited utterances. At trial no objection to the testimony of Butryn or Astorino were raised by Defense Counsel.

(9) The Statute does not require that the target of the conduct actually suffer emotional distress but that the target believe that it "would cause a reasonaable person ... to fear".[28] Plaintiff reported the threats to the Horry County Police which is evidence that it is more likely than not that Plaintiff had such a belief at the time.

(10) At trial threatening emails were introduced and read the like of which had not been circulated in the PUD community before or since and certainly not relating to Plaintiff. Pl # 531 perpetuated threatening emails that circulated after the IHOA Board began their campaign against Plaintiff. HOA Board Member Maureen Sullivan, who is a neighbor and friend of Aine Hukezalie, testified that neither knew Plaintiff prior to this sequence of events. Plaintiff testified that he has never had any direct dealings with Huckazalie:

From: Aine Hukezalie (ahukezalie@yahoo.com)
Sent: Sun 5/31/09 2:35 PM To: ICbuzz@yahoogroups.com
... why not go door to door and found out just how much stress and anguish he has caused a huge portion of our community. Life is way too short to have someone as negative, vindictive and combative as him. He has finally pushed me to the limit, and I certainly have enough going on without contending with him. I and 25 others are now going to take action against him in person, but come hell or high waters, I will not have a big bully do this to me and my son. How dare he...surely they have medication or clinics for people like him! How dare he cause such pain and stress to people he has not ever even met. Enough is enough!!!

c. Conclusions. The testimony and evidence demonstrated that there were therats against Plaintiff which Plaintiff took seriously, that persons with whom Plaintiff socialized were told (by the HOA Board) not to socialize with Plaintiff, and that the Board

[28] SC 16-3-1700 (C).

imposed sanctions against persons who disregarded the Board's "isolation" edict and the Board's intent was to harm Plaintiff. In addition, Plaintiff's property was actually damaged by an HOA ARB committee person, Jay Cartman which is within the "Stalking" statute, and additional intimidating and harassing conduct consistied of the hypodermic needles. Fletcher, and Cartman were present at trial and no attempt was made to contradict the assertion that this was part of the IHOA Board / Rosemary Toth intimidation campaign against Plaintiff.

d. Finding of the Court which should follow:

(1) That the defendants Rosemary Toth and the IHOA unlawfully stalked, harassed, and intimidated Plaintiff and interfered with Plaintiff's social relationships, all for the purpose of retaliating against Plaintiff for the exercise of his constitutional rights..

(2) That a sanction and damages in an amount the Court deems fit should be imposed, plus punitive damages as the court sees fit.

(3) That an injunction should issue enjoining the Defendants from further harassing or stalking or intimidating Plaintiff.

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19. Defendant IHOA, through it's Board Member William Fletcher, defamed Plaintiff,

a. Facts.

(1) Testimony was offered at trial by Louis Astorino that Mr. William Fletcher, an officer of the IHOA, called Plaintiff a "pedophile" and stated that for this reason Astorino should have nothing to do with Plaintiff. See excerpt from Deposition, above.

(2) This conduct is not protected by litigation privilege. The uncontroverted testimony was that the statement, which is defamatory per se, was made with no context at all to any litigation, that no attempt was made by Defendants to controvert the statement nor to prove it true, and that to the contrary, at trial Plaintiff testified that he is a licensed foster parent, which requires a background check where a pedophile history would be disqualifying. Such an accusation is defamatory per se because it can be expected to have a negative impact on social relationships and employment.

b. Decision by the Court.

(1) The Court should enter a finding that the Defendant IHOA, through it's

officer William Freiboth, defamed Plaintiff with a statement which would induce outrage in a listener and which is defamatory per se.

(2) The Court should impose a judgment of both direct and punitive damages as it sees fit.

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20. Co-Defendant K.A. Diehl Defamed Plaintiff /

a. Amendment #1 to Plaintiff's Complaint added K.A. Diehl as an additional defendant – paragraph 89. The Special Referee's Order completely ignored Diehl's culpability for defamation. The complaint went on to say that Julie Case and Beckie Abel are employees of Diehl acting within the scope of their employment. This was never denied by either in their deposition (Case) or trial (Abel) testimony.

b. The Amendment accused Diehl of (Para 91)

"a. Defamation;
b. Invasion of Privacy;
c. Intimidation / Harassment with the objectives of
(1) inflicting emotional distress; and
(2) intimidation to interfere with occupation, expression of political opinion, exercise of political rights and privileges;

c. In paragraph 19 of his Order the Defense Counsel wrote, and it was adopted by the Special Referee without consulting the transcript, that

> "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."

This is not what Plaintiff said. Plaintiff made the point at trial that anything that Golding wrote to her client is privileged – as long as it stays with her clients, the IHOA Board and Rosemary Toth. Plaintiff made the point that re-publication is not subject to the privilege. Plaintiff also stated he was not going to deal with the case summaries extracted verbatim from Westlaw or other such sources, but instead focused on the enclosure to the letter titled "List of Lawsuits Associated with Ron Jarmuth" Pl #515 republished beginning on May 27, 2009 – by Defendant KA Diehl. This document was an original composition and did not

quote court orders - or it contained partial quotes of same - mixed it with absolute lies of a defamatory nature. Plaintiff's witness Jane Pizzi testified that Diehl employee Julie Case testffied that Case admitted republishing the material, which Case admitted at her deposition. Case and Abel signed the transmission documents (Pl #526), 524 which they admitted doing. It was admitted that Diehl published this material on Diehl's web site (Pl #529. and that Abel authored a "Dear International Club Hmeowens" letter May 28, 2009 signing as an employee of KA Diehl. This material was submitted to the Court as Exhibit 4 to the Astorino Deposition of August 11, 2010 and by Order of the Chief Judge Steven John and by agreement of the Special Referee was accepted at trial as if stated during the trial. re-publication.

d. On Page 41 of the Order the Special Referee / Defense Counsel wrote that the defendants are protected by litigation privilege, and at trial Defense Counsel had her witness IHOA Board Member (at the time) Maureen Sullivan testify about the Board receiving the Golding letter. At Julie Case's deposition she did not claim litigation privilege and stated that the only reason she and Abel republished the material, within their scope of duties as Diehl employees, was because the IHOA Board told them to. No litigation privilege was claimed or agrued for them at trial. The same statements were elicited from Beckie Abel at trial. There was no reason for Diehl to anticpate being a party to this or any other case involving Plaintiff and there was no testimony or evidence to this effect – this being a necessary element of litigation privilege, thus this is not available for KA Diehl.

e. On Page 42 of the Order the Special Referee claimed that the letter to homeowners was privileged because ""Communications between officers and employees of a corporation are qualifiedly privileged" – But Julie Case and Beckie Abel are neither officers nor employees of the IHOA and Diehl has no special relationship with the homeowners. On Page 42 the Special Referee attempted to cloak the republication with privilege when he wrote that

> "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."

There was no testimony or evidence that any homeowner had any corresponding interest or

duty or was able to do anything with this information. It was pointed out at trial that Diehl sent the material to renters who had no litigable interest in the case. The mailing list included anyone who had signed up on the web site and had provided an email address, irrespective of ownership status (Pl 522 & 525) and Abel's testimony at trial..

f. At Exhibits 500 to 536 Plaintiff produced evidence that the material in the "List of Lawsuits" was false in many respects which were of a nature to cast a negative view of Plaintiff.

(1) In #10 the author of the List wrote with the putative authority of a non-existent findings in a court decision that Plaintiff

> "alleged defamation by some of his co-employees at the FBI. He also alleged that their defamations led to the termination of his employment with the FBI."

Butryn, Pete and Jane Pizzi, and Astorino testified that the langauge of this told them that (a) Jarmuth falsely accused FBI co-employees; (b) that Jarmuth was fired for cause from the FBI, and that this must have been a substantial wrong because it is difficult to terminate a career federal employee. Plaintiff's evidence at trial (Pl #511) was that during the time period in question Plaintiff received cash awards for and the highest possible performance rating, that Plaintiff was not terminated but instead continued to serve with various executive departments including Homeland Security, the FBI, and the Department of Defense, and that James Frinzi, the defendant (Pl #512) had never been a federal employee but in fact had been arrested by the Pennsylvania State Police on request of the FBI and that Frinzi had sent or had made defamatory letters and phone calls to Plaintiff's FBI supervisor in retaliation. Plaintiff also testified that he has been a licensed foster parent which means that none of the allegations made by Frinzi and contained in the enclosures mailed by Diehl could be true (background checks). A statement that someone had been terminated for cause by the FBI is defamatory per se and Abel and Case admitted that Diehl made this to 646 addresses per the count provided Plaintiff by the US Postal Service through FOIA and introduced at trial. This number is greater than the number of HOA households which is around 500. Diehl has no asserted nor actual litigation privilege for making this false and defamatory statement.

(2) In #2 on the list the author wrote that Plaintiff had sued "Dr Brian Krolczyk". Plaintiff produced the docket sheet for this case (Pl #507) which showed that

Krolczyk was not a "doctor" (but this was added by Golding for embellishment and credibility); that Jarmuth was not pro se; and that Krolczyk had been found guilty by the WV State Board of Examiners of Psychologists (Pl #507) of the illegal practice of psychology / impersonating a psychologist / perjury at trial / illegally using materials he was not licensed to use and that WV felt this was so important it was the only time in the history of West Virginia that this sort of matter had been published in the West Virginia (official) state register. Another document (Pl #506) was introduced that showed Krolczyk was placed in the "stop" database in case he tried to bill for mental health services in West Virginia. The testimony of Plaintiff's witnesses is that the false depiction of Krolczyk as a "Doctor" (hence licensed) gave the false impression which impugned Plaintiff's reputation as going around suing medical practitioners for no reason. In fact Krolczyk was caught offering perjured testimony with false credential in an unjustified expert witness capacity. The effect of this mis-representation by the author of the list is cumulative in harming Plaintiff.

(3) #3 on the list stated without citation that Plaintiff had sued "Tara Patterson, esquire" which Plaintiff's witness stated they recognized as meainng that Jarmuth had sued (another) attorney. This was another cumulative lie which the author of the list put out to harm Plaintiff's standing in the community. Plaintiff introduced the docket (#512) of the Frinzi case which showed that not only had Jarmuth not sued Patterson, that she was not a party in the case and Jarmuth's testimony was that she had petitioned to get the deposition testimony of Pennsylvania State Police Sergeant Andre Stevens released to her from seal (She was Assistant Pennsylvania State Attorney General) because he admitted destruction of evidence against James Frinzi and she intended to prosecute Stevens. This element that Frinzi had corrupted a Pennsylvania State Trooper was omitted by Golding who could have found it on the federal Pacer. The mis-characterization is a defamation by Diehl of Jarmuth.

(4) Relating to #4 "Jarmuth v Reno" for which no case description was given and #6 Jarmuth v Natalia McLemore, also with no case description, Plaintiff produced the FOIA List of Cases (Pl #500 & 505) to show that these were Federal FOIA requests which had not been initially honored; that one names the custodian of records in a FOIA suit, and that Jarmuth ultimately prevailed and obtained the sought records. The author implied by

omitting comment that these were also unmerited actions, to add another "notch" to maligning Plaintiff.

(5) #12 Jarmuth v Weiss. The author wrote that "Jury found against Jarmuth" when in fact it had never gone to the Jury and that this was the other half of "Weiss v Jarmuth and Fuller" where Jarmuth was represented by the Assistant US Attorney Genearl, resulting in a dismissal of Weiss' complaint, the firing of Weiss for cause – not a pro se action and with a positive set of facts. There was no accusation that Jarmuth was "violating various regulations...". The false representation that a jury had found against Jarmuth and that the case had been decided after trial is injurious to Plaintiff's reputation as Plaintiff's witness' testified they thought on first reading.

(6) 13. Jarmuth v Turetsky relating to a removal from state court. Plaintiff introduced the US Party Case index from Pacer as to Turetsky (Pl #510) and the federal Judgment on the Verdict against Turetsky (Pl #501) to show that Turetsky, not Jarmuth, had attempted removal from state to (Maryland) federal court and that was refused, that Jarmuth had filed an initial (not removed) case in USDC-DC, that Jarmuth was represented in Maryland and DC by Counsel, and that Jarmuth was awarded a judgment against Turetsky after a jury trial which withstood a Bankruptcy filing by Turetsky and an appeal. Defense Counsel Golding, if she acted in good will, would have seen the USDC-DC case as the central case and reported it, which detailed that Turetsky had forged a power of attorney and had stolen some funds from a stock broker account. A full listing would have shown a protective order barring Turetsky from stalking the federal judge.

g. The evidence was that Diehl had not asserted nor justified litigation privilege, that Diehl had republished material originally given the HOA Board and addressed to them, not to the homeowners, and that the material included false and defamatory statements that Plaintiff had been "terminated" for cause by the FBI for falsely accusing his co-workers of defamation. This is sufficient for a judgment in defamation against KA Diehl.

h. Finding which should follow by the Court.

(1) That any republications by KA Diehl are not protected by litigation privilege.

(2) That KA Diehl defamed Plaintiff by publishing, by US Postal Mail (646 pieces Pl #522) and email (354 reached out of 577 (Pl #525) attempted), material about

Plaintiff which is Defamatory Per Se.

(3) A judgment in an amount as determined by the Court should follow reflecting 1000 republications.

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21. The IHOA defamed Plaintiff by writing and emailing to homeowners and others the false statement that Plaintiff has been "terminated" for cause by the FBI and that Plaintiff has falsely accused FBI co-employees of defaming him.

a. The accusation by the IHOA was stated in the "List of Lawsuits" (Pl #515) that was authored by Defense Counsel Golding but was sent by Golding with the intent that it be seen only by her clients, the HOA Board per the very language of her cover letter (Pl #520). The statement [29] – under the purported authority of an attorney or a court decision – that Plaintiff had been "terminated" from a job with the federal government – the FBI – brings with it the implication that serious wrong must have been found because it is almost impossible, in the public view, to terminate a federal employee with tenure. Such an accusation made widely has a potentially serious negative impact on future employment opportunites for Plaintiff. In addition, the IHOA's republication contained the assertion that Plaintiff had falsely accused his FBI co-workers of defaming him, which brings with it a stigma which also could negaitively affect Plaintiff's future employment and social relationships. The testimony of Rosemary Toth and Julie Case in their depositions and Maureen Sullivan at trial was that neither the IHOA nor KA Diehl had done any fact checking. Such a false accusation is defamatory per se.

b. Per the testimony of HOA Board Member Maureen Sullivan the Board made the decision to redistribute / republish the material their attorney sent them. Per the testimony of Diehl employee Beckie Abel and Board member Sullivan, the board chose to use the mailing list / email list that the HOA uses to mail informational material to homeowners. This includes renters and other person who are not owners of record. No attempt was made to filter the mail list so as to mailed only to homeowners. Per the testimony of Beckie Abel, a KA Diehl employee, almost anyone can join the IHOA mail list and web site.

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[29] The inclusion of this false accusation in a document titled "List of Lawsuits..." made it

c. Per the South Carolina non-profit cororation act, no homeowenr was at risk in any way for a judgment which might be entered against the IHOA, since members of a non-profit corporation are not liable for the debts of the corporation. In the event that a judgment was entered against the IHOA, the IHOA's insurance covers such a judgment so that neither the IHOA nor the homeowners were at risk to any extent. There was no demand in the original complaint for any significant monetary damages about which the homeowners need concern themselves. The questions about cable tv service and other contracts could only have resulted in a downward charge or no charge at all, not an increase in charges that the homeowneres need worry about.

d. At the onset of the litigation the 2009 complaint can best be described as a demand for declaratory judgment and for the Court to determine whether acts of prior boards were void for a variety of reasons. The Court was asked to determine how the HOA must conduct business so as to be in compliance with the Non-Profit Corporation Act.

e. The final order authored by Defense Counsel and signed by the Special Referee stated the limits of the Litigation Privilege. On Page 42 of the Order the Special Referee wrote regarding communication between a party to litigation and persons who are NOT parties to the litigation::

> "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 flaws in applying this as the legal basis for finding that the communication between the IHOA and homeowners, renters, and persons who are neither renters nor homeowners, is that none of the persons to whom the IHOA sent the package had any duty or "corresponding interest" in the litigation. As a parenthetical note, Defense Counsel never raised this argument at trial and never cited to this case. The Special Referee was not permitted as a matter of judicial canon to add this as a basis of defense for Defendants after the trial was over. A judge is not permitted to conduct an independent investigation or advocate for a party. The canons require that before acting on proposed findings of facts

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appear that the accusation was a finding of fact by a court, which it was not.

and conclusions of law the judicial officer must give the other party a chance to respond.

f. The Special Referee adopted in his order a finding of fact which also ignores the defamatory additions to the "List of Lawsuits" which were separately authored from any court decision. On the same page of the Order the Special Referee wrote:

> "The Defendant HOA notified its members regarding Plaintiffs 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 Plaintiffs litigation.:

This finding ignored that the IHOA went beyond just recounting or citing cases, and went beyond distributing material written by a court. The "List of Lawsuits" lied about key elements in many of the lawsuits, but one need only look to the citation with the defamatory statement about termiantion of employment to find defamation per se beyond the litigation privilege.

g. The publication of what was purportedly decisions of courts – findings of fact and conclusions of law – is actually the domain of the "Fair Reporting Privilege". For the "Fair Report Privilege" to apply the publication must be made without editorial comment, embellisment, and must be absolutely trusthful. Anything less losses the privilege. Clearly the claim of Maureen Sullivan at trial that all they were doing was republishing court documents does not apply when one looks at the actual "List of Lawsuits" and it's editorial comments and inventions.

> In order for the fair report privilege to apply the report of a public proceeding must be a fair and accurate recount of the public proceeding. *Rosenberg v. Helsinki* 328 Md. 680664 (Md. 1992).
>
> The fair report is a conditional privilege that can be waived if not exercised "with good faith, without malice and absent any knowledge of falsity or desire to cause harm." Gilliland v. St. Joseph's at Providence Creek, C.A. No. 04C-09-042, 18 (DE 1/27/2006)(DE 2006)
>
> It applies equally to media and non-media parties. *Rosenberg* at 680.

h. The US Mail publication was to 627 homeowners, one at an international address, per the IHOA's document titled "#4458-4464 6-1-09 Mailhouse Invoice - Jarmuth Mailing" in discovery, which adds one to the 626 Count Plaintiff obtained from the US

Postal Service and provided at trial, Pl #522. The Email Publication was sent to 577 email addresses by Julie Case, per the IHOA's document titled "#4405-4430 5-28-09 Intl Club Email - Jarmuth litigation deta" (but reaching 354 "live" addresses) – Pl #521 at trial. The IHOA admitted 354 delivered email copies.

i. Decision by this Court.

(1) The Court should rule that the grant of litigation privilege to the IHOA for republishing to the public the fraudulent / false / editorial comments about Plaintiff's work experience with the FBI was not covered by Litigation or other privilege – that portion of the republication being the defamatory element.

(2) The Court should impose both a direct and punitive judgment against the Defendants for the false statement about Plaintiff's employment, which is defamatory per se and which implies direct damages. The Complaint asked for damages in the amount of $1000 per addressee which is not unusual. The Court is asked to use it's own discretion in determining damages.

(3) The Court is asked to impose a permanent injunction barring the IHOA from publishing any material about Plaintiff without his consent.

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22. KA Diehl invaded Plaintiff's Privacy by Providing Financial Information about Plaintiff's Account to ARB members.

a. Facts.

(1) K.A. Diehl has access to the details of Plaintiff's IHOA financial account and other documents relating to Plantiff by virtue of the records it keeps on behalf of the IHOA, as a contractor. No employee of KA Diehl is an employee of the IHOA.

(2) Plaintiff has refused to sign or agree to any statement of privacy rights or agreement regarding use of private information, either with the IHOA or with KA Diehl.

(3) At trial both William Freiboth, IHOA President, and Beckie Abel, KA Diehl employee, testified that the Architectural Review Board (ARB) is not part of the IHOA but is a completely separate, stand-alone entity. Whether or not the ARB is an entity of the IHOA is irrelevant to invasion of privacy because the scope of duties of the ARB does not require access to Plaintiff's IHOA financial information or to any material in the custody of KA Diehl regarding Plaintiff.

(4) The supposed task of the ARB is to look to the Covenants, the ARB Guidelines, Horry County zoning regulations, and the contents of a homeowner application to modify his property and, using these sources, to decide whether or not a propsed change should be allowed. At Pl #646 is the "Modification Request Application" document that the November 2011 ARB Guidelines prescribes for use. This is the complete set of information which the ARB supposedly is to base it's decision on. The document asks for the location of the house, the house plat or sketch of the lot, plans or pictures of the project, and other information at the owner's discretion to describe the project. The document states that "if enough information is not included in this application ... it may be returned to me for more information". This states that additional information, if required, must be requested from the homeowner, not KA Diehl.

(5) The area for the entry of ARB action provides four alternatives: "Approved" "Disapproved" "Conditional Approval" "Withdrawn" (by owner). The form provides a place for the ARB members who made the decision to date and sign their names. This form was never provided Plaintiff in discovery by the IHOA or KA Diehl.

(6) At Pl #644 was the March 16, 2012 "non-decision" by the ARB. Like the documents related to the Swing Set and Fence, the leterhead was the "International Club HOA, Inc". All were signed by a K.A. Diehl employee (this one by Vanessa Fattoross) as "Managing Agent for International Club HOA, Inc". Over her signature she wrote "For The Architectural Review Board" with whom Diehl and Fattoross had no legal connection, except through the IHOA if the ARB is a creature of the IHOA. The letter stated:

> "The ARB has deferred consideration until your present ARB violation is remedied by removing the brick work along the property line and restoring the sod. *Your HOA account also needs to be brought current. As of today your account balance is $1,735.00.*"

At trial Beckie Abel admitted that the ARB got the information relating to Plaintiff's account from KA Diehl. There is no other way for the ARB to have received this information and it is more likely than not that Diehl provided ARB members information relating to Plaintiff's "HOA Account" – which includes assessments..

(6) The procedures stated in the ARB Guidelines have no provision for consideration of prior ARB applications or violations nor considerations about Plaintiff's finalcial account. As has been pointed out earlier, the IHOA per it's Procedures Section

13.3 can not suspend any rights or take any action against a member unless the IHOA Board has held a hearing, which it did not. Using an ARB application to sidestep this requirement so as to collect some alleged IHOA account is not an option available to the IHOA. Per William Freiboth, the ARB does not act for the IHOA. The Articles of Incorporation do not provide that any committee of the IHOA has any delegated or inherent power, nor do the IHOA's Bylaws. The Covenants Section 7.3 Objectives of ARB Page 17 Plaintiff # 547 do not include collecting account deficiencies of the IHOA. No such objective or procedure is included in the IHOA Bylaws either. No where in the ARB Guidelines is there a mention of status of other projects or status of an IHOA account.

(7) The information which the ARB legitimately would use in making a decision are Covenants, current ARB Guidelines, and the Homeowner Application.

(8) ARB members, ARB applicants, and IHOA homeowners are not given a statement of privacy rights and (except for optionally joining the Diehl website) are not asked to sign or given an opportunity to "opt out". Plaintiff has repeatedly informed the IHOA in writing that he refuses to agree to any privacy waiver of the IHOA, this being in conjunction with the IHOA's statements that he is excluded from email communication by the IHOA unless and until he signs such a waiver.

(9) The ARB at the time included certain homeowners who by words had stated that they were hostile to Plaintiff and whom Plaintiff would never have consented to allow access to his IHOA information at all.

(10) Plaintiff had a reasonable expectation of privacy that his financial information with the IHOA, in the possession of KA Diehl, would remain private and would not be disclosed to the ARB.

(11) No explanation has been given by Diehl or IHOA representatives at trial as to why the information was provided. There is no record in discovery of a request from the ARB for information about the status of Plaintiff's accounts or prior ARB applications. No ARB member would know if a prior disagreement about an ARB application had been resolved between the IHOA Board and Plaintiff because hearings on such matters, per Bylaws Section 13.3, are in "executive session". It is more likely than not that Diehl's intent in passing this material to the ARB (which was irrelevant to the decision on hand) was to harm Plaintiff. Diehl was a co-defendant in this litigation at the time.

(12). It is more likely than not that co-defendant KA Diehl violated Plaintiff's Privacy relating to his financial information and that Diehl did so intentionally.

b. The Court Should Enter Findings and Conclusion that –

(1) Plaintiff had a reasonable expectation that the ARB would not be provided his financial information.

(2) KA Diehl violated Plaintiff's reasonable expectation of privacy.

(3) KA Diehl did so intentionally.

(4) The Court should enter an award of punitive damages against KA Diehl in an amount of the Court's discretion.

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23. The IHOA unlawfully and in bad faith refused to approve Plaintiff's Swing Set Application.

The refusal violated the implied covenant of good faith and fair dealing; it was selective and capricious enforcement; it enforced non-existent restrictions; it was a "family status civil rights violation; another homeowner was approved for a larger swing set in the identical lot location adjacent to the same model home.

The assertion that no application to the ARB need be made because Covenant Section 7.2 was waived has been addressed already, as has the contention that the IHOA lacks authority as does it's ARB (not the HOA in the Covenants).

a. Case Law (recited at trial).

ARCADIAN SHORES HOMEOWNERS v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007:

> "... 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."
>
> "if the grantor had wanted to restrict mobile homes, he could have done so."
>
> "However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts."
>
> "Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."
>
> "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). Cited in 4575 - Santoro v. Schulthess, SCCA # 4575 Filed July 1, 2009

"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. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980):

b. Restrictions of Record.

(1) Covenants. There are no restrictions on Plzy Sets. The following are applicable to structures in general.

Section 7.1. Conformity and Approval of Structures. No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping or other improvement shall be placed or altered on any Unit except in accordance with the provisions of this Declaration.

Section 7.10. Use and Height Restrictions. Except in Multi-Family Areas no structure shall be erected, placed or permitted to remain on any Unit in excess of three (3) stories in height, and in no instance shall any residence exceed thirty-five (35') feet in height above existing grade. For purposes of this section, the first parking level or deck underneath a building built at or above grade shall not be considered a story.

Section 7.11. Setbacks and Building Lines. No Unit or structure of any kind .... shall be erected on any Unit nearer than the building setback lines established by the Murrells Inlet Golf Plantation Planned Unit Development approved by Horry County which is incorporated herein by reference.

(2) Setback Lines approved by Planning Commission:

From the Planning Commission Approval of the Murrells Inlet Golf Plantation PUD:

For Single Family Homes –
Front Setback 15 feet
Rear Setback 10 feet
Side Setback 5 feet
Corner Lot Side 10 feet
Maximum Height 50 feet

Single Family Home Accessory Structures
Minimum Separation 6 feet behind principal structure
Side Yard 10 feet
Corner Lot Side 15 feet

**Rear Yard 15 feet**
**Maximum Height 15 feet**

**Plaintiff's proposed playset (application at Pl# 601 conforms to the setback and height restrictoins.**

**(3) ARB Guidelines. ARB Guidelines DO address swing sets. Since the subject was specifically addressed, these are the exclusive and complete restrictions and no others are implied or enforceable. See case law:**

> **"L. Recreational Equipment. ... 2. Swing Sets must be approved by the ARB and if approved must be securely anchored per hurricane specifications".**

**c. The denial was bogus and was not based upon covenants or rules.**

**(1) The IHOA denied Plaintiff's application to place a swing set on the right side of his house, which is the only area that it could safely be placed, by letter dated August 5, 2009 "NOTICE OF DISAPPROVED REQUEST" signed by "Julie Case, Assistant Manager; KA Diehl & Associates, Inc; Managing Agent for International Club HOA, Inc " It read:**

> **"The installation of a swing set on the side of a home which is visible to the street and infringes on other homeowner's enjoyment of their property is prohibited."**
> **"This application must be denied based on the location of the swingset."**

**(2) There is no restriction in the covenants or ARB rules restricting a swing set to the rear of a house and prohibiting it from a side yard if the set backs are honored. There is nothing in the letter or the evidence or testimony at trial showing how the swingset "infringes on other homeowenr's enjoyment of their property" and how this is a criteria in the rules or convenants – which it is not (and it would be a very subjective one).**

**(3) There is likewise no requirement that a swing set not be visible from the street.**

**(4) In his deposition and at trial Pete Pizzi testified that his daughter owns an identical model house and that the IHOA had approved a similar, but larger, swing set on the corresponding right side of his daughter's house. This was never controverted. The same testimony was offered in a deposition of Pete Pizzi and was likewise not controverted.**

**(5) At trial Plaintiff offered photos of the house where the identical proposal had**

been approved: The house is at 1212 Harrogate Court and belongs to Robert & Carolyn Sobczyk.[30] At Pl #611 is the color picture of the front of the Harrogate house showing that one can see the swing set (at the right of the house) from on the pavement. At Pl #612 is a color picture of the side yard showing the much larger swingset in the exact corresponding location that Plaintiff propsoed to place Plaintiff's Swingset.

(6) The language of the denial is telling: "infringes on other homeowner's enjoyment of their property". The record of the case and the testimony of Plaintiff at trial was that Cartman, an ARB member, stated that the ARB would never approve a swingset on the side of Plaintiff's house near Cartman's house because Cartman "hates kids" and considers them "too noisy". Cartman was in the courtroom and was never called to deny making this statement and the IHOA never denied that the statement was made. A denial of the swingset on the basis that it would be used by children is also a Human Rights Violation – act of a corporation depending on family status – and is against public policy.

d. The denial was Selective and Capricious. At trial Plaintiff introduced Defendant's March 17, 2011 responses to an interrogatory (Pl #604):

> 15. Identify the owners by name and address of any lot which now has, or ever has had, children's playground equipment on said lot.
>
> ANSWER: Listed below are the names and addresses where swings / play sets have been permitted:
>
> 1. Fleishman, 408 Adare Court
> 2. Bailey, 512 Turret Court
> 3. Bernstein - 245 Pickering Drive
> 4. Parr - 239 Pickering Drive
> 5. Llewellyn - 229 Pickering Drive
> 6. Vargo - 100 Pickering Drive
> 7. Vietri - 600 Bristol Place
> 8. Jordan - 873 Castlebridge Court
> 9. Anderson - 116 Keswick Court
> 10. Boudreau - 105 Keswick Court
> 11. Knaffle -101 Keswick Court
> 12. Sobczyk - 1212 Harrogate Court
> 13. Mahnke - 216 Whitchurch Street
> 14. Magnetico - 267 Whitchurch Street
> 15. O'Harra - 223 Whitchurch Street
> 16. Mitchell - 400 Kinsale Court
> 17. Mullins - 314 Conchal Court

[30] The daughter and son-in-law of Mr. Pizzi.

At trial Plaintiff testified that the Parr swingset (#4 in the interrogatory answer) was across the street from Plaintiff and plainly visible from Plaintiff's doorstep with no obscuring vegetation at all. The entire Parr playset was thus plainly visible from Pickering Drive, the main road through Pebble Creek.

e. Findings of Fact and Conclusions of Law sought:

(1) The refusal by the IHOA to allow Plaintiff to erect a swingset as he requested was not based upon any explicit or enforceable covenant provision or published rule of the IHOA.

(2) It was more likely than not that the refusal was based on the discriminatory beliefs of Jay Cartman a member of the IHOA's ARB. There is no location restriction on the placement of swing sets. The decision was based on hostility to family status (presence of children).

(3) The refusal was selective and capricious and was made in bad faith and was a violation of the implied covenant of good faith and fair dealing.

(4) Through the approval of a similar (or larger) swing set in a correspondeing location at 1212 Harrogate Court, the IHOA waived it's right to assert location as a reason for it's denial.

(5) Plaintiff has a right to and is granted permission to erect a swing set as requested in his ARB Application dated July 21, 2009 (Pl #601).

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24. Defendant Rosemary Toth made an illegal distribution of IHOA Funds and As a Matter of Law Must Return $ 50,250.00 she chose to distribute to homeowenrs.

a. ByLaws

1. CONDEMNATION

11.1 Whenever all or any part of the Common Areas or Recreational Amenities of the Subdivision shall be taken by condemnation or eminent domain, or is <u>conveyed in lieu thereof by the Board</u> ... then the award or the <u>proceeds collected</u> for such taking or sale in lieu thereof shall be <u>payable to the Association</u> and shall be disbursed or held as follows:

11.1.1 If the taking or sale in lieu thereof involves a portion of the Common Areas on which <u>improvements have been constructed</u>, then, ... the Association shall <u>restore or replace such improvements</u> ... If such improvements are not to be repaired or restored, the award or proceeds shall

be retained by and for the benefit of the Association.
11.1.2 If the taking or sale in lieu thereof does not involve any improvements to the Common Areas, or if there are funds remaining after any such restoration or replacement of such improvements is completed, then the award, proceeds or net funds shall be retained by and for the benefit of the Association

There is no provision for a distribution of any part of the proceeds to members.

1. INTRODUCTION
(f) There shall be no dividends or profits paid to any members nor shall any part of the income of the Association be distributed to its Board of Directors or officers. In the event there are any excess receipts over disbursements, such excess shall be applied against future expenses, etc..

Excess revenues are not to be rebated to homeowners as refund of excess assessments BUT said excess receipts must be retained in the treasury for future expenses.

b. Statute.

SC 33-31-140. Definitions.
(11) "Distribution" means the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers. The term does not include:
(a) the payment of compensation in a reasonable amount to its members, directors, or officers for services rendered;
(b) conferring benefits on its members in conformity with its purposes; or
(c) repayment of debt obligations in the normal and ordinary course of conducting activities.

The testimony of Maureen Sullivan at trial and Rosemary Toth at her deposition was that the IHOA had excess income and the homeowners had been assessed more than was needed for the year, so they elected to distribute it to the members.

SC 33-31-1301. Prohibited distributions.
Except as authorized by Section 33-31-1302, a corporation may not make any distributions.

"SC33-31-1302. Authorized distributions.
(a) A mutual benefit corporation may purchase its memberships ...
(b) Corporations may make distributions upon dissolution ...
(c) The board of directors may base a determination that a distribution is not prohibited under subsection (a)" [relating to purchase of memberships. No applicable].

SC 33-31-833. Liability for unlawful distributions.

> (a) Unless a director complies with the applicable standards for conduct described in Section 33-31-830, a director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.

As a matter of law, no distribution could be made without violating this chapter.

c. Facts.

(1) On April 19, 2010 the IHOA called a Special Meeting of the Members per the Board Minutes of the event (Pl # 369). At a cost of $ 3,000 for the meeting. The meeting was chaired by Defendant Rosemary Toth. Per paragraph V of the minutes the purpose was to tell the members that the Board had unilaterally, without a vote, decided to sell Central Electric an easement in the front entrance which involved the destruction of landscaping and the restoration of the landscaping. Paragraph IV 1 stated that Central Electric would provide the materials and labor to restore the area at no cost to the IHOA. Subparagraph 2 stated that the IHOA was receiving additional "compensation" in the amount of $ 80,000.00. $3,000 of this would go to repaying the expense of the Special Meeting. Beneath that was the following text:

> "Breakdown of the remaining funds $ 80,000.00.
> $50,000.00 funds to be distributed to 670 homeowners at the rate of $ 75.00 per unit owner".

This computes out as $75.00 times 670 equals $ 50,250.00. Section X was the "Motion to Grant the Easement". The section stated that William Freiboth, board member, made a motion to grant the easement and that the "vote" of the board was that it "passed unanimously with a roll call" of the board. The minutes was signed by Defendant Rosemary Toth, Board President, as Board "President".

(2) The April 6, 2010 letter to the homeowners from the IHOA Board signed by Defendant Rosemary Toth stated that "this is not a voting meeting of the membership" but that this was a Special Meeting of the Board of Directors. At the Special Meeting Rosemary Toth refused the request of members for a vote by the members on the decision.

(3) Subsequently, as was confirmed by Mr. Freiboth at trial, the checks were issued to the homeowners from the proceeds of the Central Electric sale of the easement.

(4) This is a distribution as defined by the South Carolina Non-Profit Corporation Act. This distribution also violated the Bylaws of the IHOA.

(5) Per the statute, Rosemary Toth is individually liable for the full $50,250 distributed to the 670 homeowners.

d. Special Referee's / Defense Counsel's Explanation.

(1) On page 8 of the Order they wrote:

> 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.

The Finding of fact that the IHOA received consideration from Central Electric for the granting of an easement and destruction of landscaping is correct. So is the finding of fact that the IHOA distributed $75.00 to each member. So is the finding that the "HOA shared the proceeds" – that the money that went to the members was directly descended from the Central Electric money. The Special Referee made an incorrect Conclusion of Law that this could be distributed under any circumstance (save dissolution of the corporation or repurchase of non-existent memberships).

(2) On Page 27 the Special Referee made additional findings related to this distribution. The court related what William Freiboth testified to at trial relating to this:

> "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. "

This was clearly a reference to one exception of the statute: SC 33-31-140.

> "Definitions. (11) Distribution ... does nor include (b) conferring benefits on its members in conformity with its purposes".

(3) This is still a violation of the IHOA's Bylaws and there is no "purpose" within the Articles of Incororation which can be cited AND a benefit is never a cash distribution but goods or services within the purposes of the Corporation – for example mats to lie on at the swimming pool. The provisions of SC 33-31-1301. Prohibited distributions make a cash distribution illegal because it is not one of the exceptions stated in SC 33-31-1302. The statute would otherwise be meaningless because any money in the "till" of a non-profit corporation could be considered "excess assessments" through this bogus theory that repayment of cash on hand is a "benefit".

e. Findings of Fact and Conclusions of Law which should follow:

(1) The distribution of $ 50,250 to homeowners was an illegal distribution.

(2) Rosemary Toth, as President of the IHOA at the time, voted for this illegal distribution.

(3) Rosemary Toth is personally liable as a matter of law for the full amount.

(4) Rosemary Toth shall repay the $ 50,000 to the IHOA from her personal funds. She may not be indemnified by the IHOA's insurance company for an illegal act which was ultra-vires.

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25. Horry County owns the Roads in Pebble Creek.

a. Newly Disovered Evidence. On November 14, 2012 the Horry County Council, at a public meeting of the board, at Plaintiff's request discussed the question of why taxes are not levied on the roads in Pebble Creek and elsewhere in the International Club PUD. The County Council recognized that on October 15, 2002, by Resolution R 155-02, the County had accepted the dedication of the roads in Pebble Creek to Horry County. The discussion on the record was that in all circumstances other than outright ownership the County collects taxes on roads per the requirements of state law. The County Council directed Assistant County Administrator Steven S Gosnell, who is also the County Engineer and Director of the Infrastructure & Regulatory Division, to confirm the ownership of these roads by the County. This request by Plaintiff to the County Counsel was in response to the dependence by the Special Referee to a letter from Janet Carter [31] which was misquoted by the Special Referee as saying that the position of the County was that it held only an easement on the roads.

b. On page 25 of the Special Referee's Order Defense Counsel Golding wrote the following which the Special Referee adopted – and which refers to a document never in evidence:

> "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

[31] County Attorney.

covenants."

(1) No such letter was in the IHOA's Rule 16 list of Exhibits presented to the Court at the beginning of trial (or earlier) and no such exhibit was in either Party's Exhibit Books.

(2) The name "Carter" does not appear in the Transcript nor does the phrase "April 16). Clearly the assertion that the letter of Janet Carter was introduced is a fraudulent one.

(3) Such a letter exists and it is from Janet L. Carter as Planning Director / I&R Counsel and was written on April 16, 2009 to Rosemary Toth as President of the IHOA. The letter is not on Plaintiff's Rule 16 list of exhibits and was not in Plaintiff's exhibit books at trial nor introduced by Plaintiff. The letter is NOT in Defense Counsel's last Rule 16 list of Exhibits dated August 8, 2012 handed to Plaintiff in the courtroom as the trial began. Clearly Defense Counsel inserted this into the draft order as evidence she wished she had introduced. However, at the conclusion of Plaintiff's presentation about the roads Defense did not challenge anything stated or introduced by Plaintiff nor did it introduce evidence of it's own. Janet Carter was not listed as a witness and did not testify. A finding of fact which explicitly depends on a document not introduced in evidence, or which could not have been introduced because it was available and not so listed for trial, is a finding of fact which is not supported by the evidence. As impeachment, Plaintiff quotes the following very important text which Defense Counsel omitted:

> "I have not reviewed the covenants and restrictions for your subdivision and express no opinion as to what rights, if any, the HOA may have in this regard.

In addition, Janet Carter's letter said nothing about "permits" [32]. There are three fraudulent fabrications of evidence by Defense Counsel here: (1) that the letter was introduced or reference was made to Janet Carter at all at trial; (2) that she said the PUD covenants specifically are enforceable, and (3) the reference to permits.

c. Controlling evidence omitted by the Special Referee. In evidence and discussed at trial was the August 24, 2009 letter from Andrew J Markunas, Deputy County

[32] There is nothing in Janet Carter's letter that even hints at the following statement by Defense Counsel adopted by the Special Referee: "the County does its best not to issue permits that would be in conflict with covenants."

Engineer for Horry County, to Mike Butryn, Pl # 61 – introduced at trial and authenticated by Butryn. The letter included the following text of the second paragraph:

> "Pickering Drive and International Club Drive are both owned and maintained by the county. ... The Internatonal Club HOA owns (and is responsible for paying taxes on) the parcel at the southwest corner of Pickering Drive and International Club Boulevard. The parcel is shown on the attached lat as a 6,534 square foot "common area"."

Mr. Butryn testified that he collected this information as part of his official duties as Chairman of the Buildings and Grounds Committee and provided this information to Rosemary Toth in her capacity as IHOA President. The context was that the IHOA was spending most of it's grounds maintenance budget maintaining land it did not own. Defense Counsel received this letter in discovery in 2009. The correspondence in evidence supports a conclusion of law that the County owns Pebble Creek roads – not the IHOA!

d. Ownership and Covenant History of Pebble Creek. There were no covenants of record when through a Plat submitted to and recorded by the Horry County Planning Commission, Dedication was agreed upon. At the time of actual dedication [33] the roads in Pebble Creek belonged to Sunbelt Developers – not DR Horton. Dr Horton had an inherited dominant easement of use over the Pebble Creek roads for access to Horton's property but Horton could not convey an easment of use over roads he did not own to anyone except a purchaser of a Horton house, which includes the county years later in 2006. [34] Dedication and transfer of ownership of the road had already occurred in 2002:

(1) On January 15, 1997 the Horry County Planning Commission approved the submission of the Murrells Inlet Golf Plantation, LLC (MIGP) to develop the "Murrells Inlet Golf Plantation" Pl # 450.. The documents explicitly stated that the roads shall be <u>dedicated</u> to Horry County. On the approval dated <u>February 4, 1997</u> which is in the files of the Planning Commission the document stated that there would be "<u>easements</u>" – but that these applied to "<u>Utilities</u>". Roads were considered separate from easements under the section which followed titled "ROW Maintenance".

(2) In February 1997 there were NO COVENANTS applicable to any land in the PUD (MIGP) and no easements other than the ones mentioned in the MIGP Plat..

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[33] October 15, 2002, R155-02, Pl# 413.

(3) On December 5, 1997 MIGP sold the property to Plantation AD. There were still no covenants.

(4) On January 29, 1999 Plantation sold the portion of the Murrells Inlet Golf Plantation property called "Pebble Creek" where Plaintiff lives to Sunbelt – Pl #545. There were no covenants of record with the Horry County Recorder of Deeds. The deed referred to Plat Book 160 Page 79 Pl #454 which is the same plat which was later refereed to in the Covenants. Parcel 1 in the Plat is what Plantation AD conveyed to Sunbelt. The Plat did not depict or set out any roads or easements within Parcel 1 – Pebble Creek. Paragraph 2 of Exhibit A of the Deed (the description of what is conveyed) gave SUNBELT, not Plantation AD, "a non-exclusive easement of ingress and egress" over roads in the remainder of MIGP and over any road ultimately built connecting MIGP with Tournament Drive. The Deed also gave SUNBELT, not Plantation AD, an easement to run utilities under roads in the remainder of MIGP. In paragraph 3 Plantation AD reserved to itself a 20 foot wide golf cart easement to be used to cross what is now Pickering Drive. That same paragraph reserved for Plantation AD "a non-exclusive easement of ingress and egress" over what is now Pickering Drive so that the remaining property in MIGP could get to McDowell Shortcut Road and would not be "landlocked".

(5) Since the only interest Plantation AD retained in Pebble Creek was a "non-exclusive" easement of use and Plantation AD had no equitable interest in Pickering Drive, which did not exist and was part of the total parcel conveyed (without reservation), the only thing that Plantation AD or it's successors could convey relative to Pebble Creek Roads was Plantation's own non-exclusive easement – but only to it's vertical successors in the remaining property of MIGP. It could not grant an easement to others who were not successor owners of Plantation's property – such as the public at large.

(6) On February 8, 1999 Plantation recorded covenants Pl # 547. As a matter of law (horizontal equity / privity) these could apply only to property Plantation owned when recorded – which does not include Pebble Creek. The Covenants were a unilateral document not signed by or otherwise subscribed to by Sunbelt and did not constitute a modification of the earlier deed. The Covenants could not create easements which did not

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[34] The February 22, 2006 dedication R018-06 Pl# 405 was for a section of Pickering Drive outside of Pebble Creek in front of the Amenity Center.

exist in the earlier deeds. The Covenants could not return to Plantation AD that any part of Parcel – 1 (Pebble Creek) which ultimately became Pickering Drive (and other streets in Pebble Creek).

(7) On October 15, 2002 (Pl # 413) Sunbelt (not Plantation LLV) and County Council through Resolution R155-02 documented the county's acceptance of the dedication without any conditions of Pickering Drive and other major roads in Pebble Creek. There wasn't a single word in any of the documents stating that the transfer was subject to any restrictions. The document begins: "Whereas the Developers of Pebble Creek" which was Sunbelt, not Plantation AD or it's successor Horton. It goes on to say "request the roads and drainage be dedicated to Horry County". It then says that Sunbelt has provided Horry County with "fully executed dedication documents". It says that "it is the intent of Horry County Council to accept the roads and drainage at Pebble Creek into the County System." It does not say that the intent is to accept an "easement" but the roads themselves. And it does not say that there is any reservation of rights by Sunbelt. It is noted that a dedication of the roads to Horry County does not diminish the easement of Plantation for interior landlocked property to exit over the roads, because this right became enlarged, not diminished with public ownership and Plantation's right was "non-exclusive". Horry County then resolved to accept the dedication into the County System. IF the covenants applied, Plantation AD would have had to sign off on the dedication because, among other things, the Covenants forbid the dedication of any roads subject to the Covenants to the public (Pl # 547, Covenants,

> Section 8.7. No Dedication of Streets or Common Areas, Etc.
> Each of the streets in the Subdivision now or hereafter designated on any plat is a private street, ... and neither the Developer's recording or any such plat nor any other act of the Developer with respect to the Property is, or is intended to be, or shall be construed, as a dedication to the public of any of said streets, ....

(8) On April 29, 2003 Pl # 556 Plantation LLC sold the remainder of the PUD to Horton. Page 2 of the Deed conveyed, in addition to the remaining land in MIGP, "*an easement and right of way for ingress and egress for vehicular and pedestrian traffic*" over all the property described in Plat Book 160 Page 79, which is the same non-exclusive easement that Plantation had granted to Sunbelt over the land that Plantation now sold to Horton

and which also is the same non-exclusive easement that Plantation retained for itself when it sold Pebble Creek to Sunbelt. Prior to April 29, 2003 there had been no dedication of any roads in the remainder of MIGP to Horry County but there had been a second dedication by Sunbelt to Horry County (January 21, 2003 R008-03 Pl #401) of additional roads Sunbelt had constructed in Pebble Creek after the initial dedication previously. The deed to Horton thus conveyed the roads in the remainder of MIGP subject to the non-exclusive easement previously conveyed to Sunbelt for Pebble Creek. The deed also reserved a non-exclusive easement of ingress and egress for what is now called The Fairways, The Enclave, The Grand Vistas, and the property now comprising the front entrance of the community from Tournament Drive.

(9) On May 18, 2004 Pl # 408 Sunbelt, not Horton or Plantation LLC, and County Council through R73-04, completed the dedication of the remaining roads in Pebble Creek to the county without reservation. Again, if there were covenants affecting these roads, Horton as the successor to Plantation LLC would have had to sign off on it because the dedication is not permitted under the covenants Plantation declared.

(10) The Special Referee and Defense Council point to the dedication from Horton to Horry County which occurred on February 21, 2006, Resolution R18-06 (Pl #405). The Special Referee refers to the title "Dedication of the Roads and Drainage at International Club Drive and Pickering Drive into the County Road System". The Special Referee clearly depended on the text suggested by Defense Counsel and never bothered to read the exhibit because on Page 2 of the Exhibit is a map of what was dedicated and it includes that limited portion of Pickering Drive outside of Pebble Creek which is in the Plantation (now Horton) area of MIGP and that limited portion of International Club Drive which goes from in front of The Villas condominiums north to the intersection of Pickering Drive in the MIGP area owned by Horton. The dedication omits that portion of International Drive south of The Villas ("the Front Entrance") and that portion of Pickering Drive which goes past The Glens condominium and up to and through The Enclaves / Fairways area. On February 21, 2006 Horton was not the owner of the underlying property for Pickering Drive in Pebble Creek. If that area of Pickering Drive in Pebble Creek was subject to easements, Sunbelt the Pebble Creek Developer was the owner who would have to grant it, and Horton was NOT the property owner and could not

convey an easement to Horry County in Pebble Creek.

(11) Horry County has been maintaining the sewers under Pickering Drive and cleaning the roads. After a storm September 22, 2011 Horry County sent a crew to unclog a storm sewer on Pebble Creek which was caused by a blockage at a retention pond (downstream) owned by the Golf Course. Horry County also sent a street sweeping machine to clean the dirt that had washed onto the roads Pl #18, 20, 29, 30 – photos). It is my belief that when there is an easement the owner ("Servient") of the property, not the beneficiary who uses the easement ("Dominant") is responsible to maintain the easement area and to bear the cost of maintaining the easement area. Horry County bore the entire cost of cleaning the sewer and the road.

(12) The Special Referee's Order. On page 23 of the Order the Special Referee wrote:

> 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.

Plat Book 181 Page 89 was filed on June 19, 2003, approximately two years after Sunbelt bought Pebble Creek. This Plat is titled "Plat of ... International Club Golf Course". It was submitted by the owner of the Golf Course, International Club LLC, which is neither Sunbelt, Plantation AD, nor DR Horton. The references to International Club BOULEVARD are informational – the land was never owned by the entity that filed the Plat [35] and International Club LLC had not delegated authority over the roads. The plat strictly and exclusively concerned Golf Course Parcel Tracts 1 through 6 and the statement in the notes that "Parcels are subject to all rights or restrictions of record" does not apply to any streets but to the Golf Course parcels. Any finding of fact or conclusion of law based on this Plat is erroneous and not supported by the evidentiary record.

(13) The Special Referee cited case law which was not offered at trial by Defense Counsel but which supports Plaintiff's position on this matter:

> "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).

[35] The Golf Course.

Thus the case law on which the Special Referee depended recognizes that a Dediction can be a transfer of title, not just a right of use. The facts support these Dedications as a transfer of title and not an easement. On Page 25 the Special Referee found and cited an additional case which favors Plaintiff's interpretation:

> "The party dedicating land.. .may impose certain restrictions or reservations." 77 Am. Jur. Proof of Facts 3d 1.

This must be read in conjunction with the next citation which the Special Referee cited:

> "In order to create conditions or reservations, appropriate and specific language must be used." 77 Am. Jur. Proof of Facts 3d 1

The dedication documents contained NO language stating any conditions or reservations.

e. Law.

(1) Horry County Ordinance 18 / 4 / 2-1 requires the dedication of roads in subdivisions to either the county, the state, or to an HOA which will maintain same. No HOA in the International Club has ever owned any roads in the PUD and no roads in the PUD have ever been "dedicated" to any such HOA.

(2) SC Code 12-37-220 has no provision to exempt the roads owned by a Homeowner Association from taxation, and if it did, no HOA owns the roads anyway. Pickering Drive in Pebble Creek either is owned by the County (thus not taxed) or is owned by Sunbelt and must be taxed. There is no TNS assigned to Pickering Drive and according to County Council this is because Horry County owns the roads.

f. Findings of Fact and Conclusions of Law sought:

(1) The roads in Pebble Creek are owned by Horry County.

(2) The roads in Pebble Creek are not subject to any covenants of record.

(3) DR Horton never had an ownership interest in the roads in Pebble Creek such as to entitle Horton to convey an easement to the public for use of those roads; the easement held by Horton was a non-exclusive easement for the use of the Pebble Creek roads by purchasers of property in MIGP from Horton.

26. KA Diehl is responsible for Capital Contributions Which Developer DR Horton told the Court was paid to KA Diehl for the IHOA and which KA Diehl is unable to account for.

a. On April 18, 2012 DR Horton provided financial information first subpoenaed from Horton in 2009, Pl #701 which related to Capital Contributions given KA Diehl in trust for the IHOA On June 1, 2012 the IHOA provided financial data likewise requested in discovery in 2009, relating to capital contributions "booked" into the IHOA accounts, Pl #703. Extensive testimony was offered about this at trial by Plaintiff and no effort was made to controvert this, to offer alternative explanations or other evidence. The only contrary testimony on the matter was a statement at trial by William Freiboth (Transcript Page 913 through Pg 914 Line 18) that it was his personal belief "no" that KA Diehl did not take the missing money.

> 18 Q: Have you looked into that issue?
> 19 A: Yes, I have.
> 20 Q: And tell us about your conclusions as to the monies collected from D.R. Horton from 2004 to 2007.
> 23 A: The monies collected from D.R. Horton, the <u>report that D.R. Horton</u> gave us indicating what they thought they had collected, it does match what - - the <u>report that we get from our management company</u> about what we had reported, about what we have on-hand, what we had collected.
> 4 Q: Did you find any evidence of any kind that K.A. Diehl took a hundred and sixteen thousand dollars [36] of these capital contributions?
> 7 A: No.

b. The "report that D.R. Horton gave us" is Pl# 701. The "report that we get from our management company" is Pl# 703. The comparison of the two was Plaintiff's spreadsheet Pl# 704. There was no other evidence before the Court. The evidence from Horton provided over affidavit by Order of the Court and Defendant's own records as compared with Plaintiff's spreadsheet shows a $116,000 discrepancy. Mr. Freiboth never actually addressed Plaintiff's calculations – he ignored the actual evidence. His statement that "it does match" is contrary to the evidence. The allegation was not that KA Diehl "took" the money. The allegation is that it went missing on Diehl's watch and that it doesn't matter what happened, KA Diehl as a fiduciary is responsible to replace the

[36] The allegation was that $16,063.00 is unaccounted for, not $116,000. Freiboth clearly had not looked into this or he would immediately have picked up this discrepancy.

missing money. Freiboth's unsupported statement that KA Diehl properly accounted for all money is neither evidence nor based on any investigation that Freiboth cared to explain. At Pl #704 a spreadsheet was prepared and offered into evidence which summarized the data contained in the Horton and the Diehl / IHOA financial documents relating to capital contributions.

c. The limited financial ledgers provided by Horton concerned capital contributions passed to Diehl for the period January 7, 2004 through April 30, 2006. The IHOA / Diehl data covered the period January 13, 2005 through December 22, 2005 and from January 3, 2006 through April 30, 2006. The only audit available was for the common period which meant removing Horton data through (and prior to) January 12, 2005 which left a remaining common period January 13, 2005 through April 30, 2006. Plaintiff believes that financial discrepancies are large in other financial periods but due to Horton's destruction of records this can not be proved.

d. The data shows that during the common period Horton gave KA Diehl, in trust for the IHOA, $ 46,834.00 to be applied to the Capital Contributions account. Pl #704. The KA Diehl data shows that KA Diehl "booked" $ 30,771.00 during that same period. This leaves an unaccounted discrepancy of $16,063.00.

e, The issue was addressed by the Special Referee in the order beginning at page 49 in a section marked "*23. The Defendant K.A. Diehl Properly Performed its Duties as the Community's Manager.*" The order stated that

> "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 . . . ." "

The <u>Order was then silent on the matter of the Horton ledgers</u> which showed a deficiency in the IHOA / Diehl Accounts. THE SPECIAL REFEREE MADE NO FINDING OF FACT OR CONCLUSION OF LAW REGARDING THE MISSING MONEY. The evidence was sufficient to meet a higher standard than "more likely than not". The Order is strangely about conclusions – there simply is no way to spin Freiboth's simplistic opinion into something with more weight than sworn ledgers.

f. As a matter of constitutional right and law, the Court had an obligation to rule on the matter presented to it and the evidence. The section postured with text

addressing everything but the central issue in hand – missing money on "Diehl's Watch". The evidence is that Defendant Diehl, as fiduicary for the IHOA, is liable and responsible to replace money missing under it's care. Earlier, after Plaintiff made his presentation on the matter, Defense Counsel had been silent. No opposing witness (other than Freiboth's opinion nothing was wrong) or evidence was offered. It is more likely than not that the money was misappropriated. The Court need find nothing more than that the money was entrusted to Diehl and that it is missing from the accounts. Horton's records were produced subject to an Order of this Court and under affidavit of authenticity. Defense Counsel was present when the hearing on the Motion to Compel was heard and reheard (reconsideration). Defense Counsel promptly received a copy of the Horton documents and had ample time to come up with an explanation. The Court is asked to note that common defense counsel represents Diehl who is a co-defendant. Under common law a fiduciary is responsible to make up an unexplained shortage in the accounts of a client.

e. Findings of Fact and Conclusions of Law.

(1) DR Horton provided KA Diehl, as fiduciary for the IHOA, $46,834.00 to be applied to the Capital Contributions Account of the IHOA during the period January 13, 2005 through April 30, 2006.

(2) KA Diehl as community manager for the IHOA, was a fiduciary for the HOA.

(3) KA Diehl can account for only $ 30, 771.00 during that same period of time.

(4) There is a deficiency in the IHOA Capital Contributions Account of $16,063.00 for that period of time.

(5) As fiduciary for the IHOA, KA Diehl is responsible to make up the shortage in that account.

(6) Defendant KA Diehl is ordered to pay the sum of $16,063.00 to the IHOA for use in the IHOA's Capital Contributions Account.

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27. Pebble Creek Homeowners have no obligation to the Highway 17 Connector Association to be members of that Association or to pay Assessments to it.

a. The principles of horizontal privity and equitable interest in the formation of covenants discussed supra apply here, as well as the prohibition on involuntary

membership in a non-profit corporation.

(1) On Page 942 of Black's Law Dictionary, First Edition, privity is defined Pl# 89 as being an equitable interest in property simultaneous to the exercise of some property right in that same property. There must be a "mutual interest in the same property" for two parties to be bound by a property related agreement.

| | | Action or Restraint | |
|---|---|---|---|
| | | Do Something | Refrain from Doing Something |
| Where the Action or Restraint Takes Pl | On One's Own Land or in Relation to One's Own Land | A promise to do something on one's own land: Typically a covenant or equitable servitude: e.g., (i) A promises to maintain a drainage ditch on A's land to keep water from draining onto B's land, or (ii) A, living in a private subdivision, promises to make monthly homeowners' association payments | A promise to refrain from doing something on one's own land Typically a negative easement (some states limit the types) or restrictive covenant (real covenant or equitable servitude): e.g., A promises not to build anything on A's lot that would block the view to the lake for B, who owns an adjacent parcel. |
| | On Another's Land | A right to do something on another's land: Typically an easement: e.g., A grants to B (who lives across the street from A) the right to cross A's ocean front property to get to the beach. | *An obligation to refrain from doing something on another's Land: [no easement or covenant running with the land; this is just the owner's right to exclude]* |
| | | | |

Legal Provisions of a Proper Covenant as to Obligations and Restrictions

(2) The Highway 17 Covenants impose an obligation for Pebble Creek homeowners to do something – pay money – on Horry County property, the International Club Drive, which was dedicated to Horry County on June 5, 2001 R076-01 Pl# 409. An argument that Horry County only got an easement over Tournament Drive, as the road is now called, makes no difference to the issue of proper covenants vs personal service contracts. Parenthetically, Horry County has repaved the road, torn out all landscaping, rearranged the road, and put new landscaping and traffic control signs in. On another's property the only legitimate obligation that a covenant can impose is an obligation NOT to do something. An obligation to DO something on another's property or for another's property is a personal services contract. The Highway 17 Covenant fails as a contract because it was not signed by anyone with a capacity to permanently bind owners in Pebble Creek, it does not state that it "is a contract for services", and does not state with absolute certainty all the essential terms of the agreement – it lacks exactly how much someone has to pay. This last flaw causes the Highway 17 covenant to fail the statute of frauds. The obligation does not survive a change in ownership, thus any obligation that Plantation AD

may have committed to did not transfer to Sunbelt and Pebble Creek. The Highway 17 Covenants were not covenants of record as to the MIGP tract when Sunbelt bought Pebble Creek. They were covenants of record only for the Tournament Drive tract itself.

(3) At no time prior to the sale of Pebble Creek to Sunbelt did a property owner of what became Pebble Creek have an ownership interest either in the land that became Tournament Drive aka Highway 17 Connector, nor in the land immediately adjacent. No property owner in Pebble Creek signed the Highway 17 Connector Covenants such as to bind vertical successors. The Highway 17 Connector Covenants do not impose a restriction as to what a property owner in Pebble Creek can not do on his Pebble Creek property nor an obligation to do anything on that same Pebble Creek Property. There was no exchange of consideration by any owner of property in Pebble Creek. The Highway 17 Connector covenants do not grant Pebble Creek property owners any rights as to the Highway 17 Connector property, not even a right of ingress or egress, and such a right was never connected with deeds descending from any deed to the Pebble Creek property. The issue is a supposed covenant obligation of Pebble Creek homeowners to pay a sum of money to a non-profit to use to maintain[37] a non-contiguous, distant property which Highway 17 does not even own – which is owned by and maintained by Horry County.

b. The Special Referee wrote on page 44 of his order that

> 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.

No evidence was presented that showed that any veritcal predecessor / owner of Pebble Creek property was ever a "developer of property between Highway 707 and Bypass 17" during the relevant period.

c. The payment of money for goods or services used off-property is a "Personal Services Contract" which is not enforceable as a covenant and which expires, if it exists at all, at the transfer of property of any signatory to the property for which the personal services contract is related to. The Highway 17 covenant does not satisfy the Statute of Frauds as a contract because it lacks such important details as to what exact services will be performed, what the exact financial obligations of the contracting parties are, and

[37] This is legally no different than homeowner lawn maintenance contracts.

suffers from the additional issue that the purpose is moot since Horry County has the obligatoin which it frequently performs of landscaping, maintaining the road it owns, and maintaining the adjacent berms. In point of fact Horry County totally destroyed all landscaping in 2011 when it reconfigured and repaved Tournament Drive.

d. The Special Referee also determined that the IHOA or HOA for the PUD is contractually bound by the Highway 17 Covenants even though it has not entered into a contract of it's own and no act of the board of directors of the IHOA has ratified or "signed up" to this obligation as an official act of the IHOA. The IHOA could not be so bound because the Covenant came into existence prior to the incorporation of the IHOA and no third parties, under any circumstances, can bind a non-profit corporation which does not exist to acts it does not agree to. The Special Referee wrote:

> "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.

e. Case Law.

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

Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

Hardy v. Aiken 631 SE 2d 539, 369 SC 160 - SC: Supreme Court, 2006

ARCADIAN SHORES HOMEOWNERS v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007 –

Clear Lake City Water Authority

Dryden v. Calk, 771 F. Supp. 181 (S.D. Tex. 1991).

Frey v. De Cordova Ben Estate Owners' Ass'n., 632 S.W.2d 877, 880 (Tex.App.—Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ;

Holleman v. Mission Trace Homeowners' Ass'n., 556 S.W.2d 632, 635 (Tex.Civ.App.—San Antonio 1977,

f.. Facts.

(1) On December 29, 1998 a group of developers recorded a document titled the

"Declaration of Special Covenants for the Highway 17 Connector Road Maintenance District Association Inc. Pl # 547. Deed Book 2105 at 607. There is no such thing, in South Carolina or Horry County, as a "Road Maintenance District". There are special purpose districts which have been created by ordinance of Horry County for special purposes, for example, the Murrells Inlet Fire Department, whose source of revenue is a portion of taxes collected by the county assessor, as part of property taxes, from residents in that district. There are similar special purpose districts in Myrtle Beach, similarly created by ordinance whose revenues are taxes.

(2) The Covenant on it's page 3, Deed Book 2105 page 609 Pl #541 says that

> "an owner shall mean and refer to the record owner (including the Declarant) as shown by the real estate records ... situated within the "Property".

The Highway 17 Covenant on it's page 4, Deed Book 2105 page 610, says that "Property" shall mean and refer to all the Property which is subject to this Declaration. It says that the Plantation Tract is at Exhibit F. The actual property subject to the Covenants, called "The Connector" is where the PUD homeowners have a putative duty to do something, is described on Book 2105 page 608 page 2 as stated at Exhibit C to that document.

(3) On Page 7 Article 5 Section 1 of the Highway 17 covenants it is asserted that non-owners of The Connector property have an obligation to pay for the purposes described in Section 2. The purposes are stated in Section 2, Page 8, Book Page 614, that being "the improvement, maintenance, enhancement, enlargement, and operation of ... the Connector." The Connector Property, Exhibit C, Deed Book page 651, page 45 of the Covenant, excludes the actual road from the property, but it includes the rest of the right of way for what is now known at some of Tournament Drive.

(4) On June 5, 2001 the entire Connector, including roadway and shoulders, was conveyed to Horry County and accepted by Horry County Council Resolution R076-01, Pl # 409. As such the entire area which to be benefited by the Covenants do not belong to any of the original parties to the Covenants. The dedication was made without any reference to the Highway 17 Covenants and thus they are not preserved.

(5) The Tournament Drive Dedication documents describes the dedication as being Tournament Boulevard, and the owners of The Connector as being "Kaminski, owner and developer of Prince Creek", ETS, and Bill Hatoway. Plantation AD is not

listed as an owner. All owners have to be listed on dedication documents to assure that everyone with an interest in the property has surrendered it to the County.

(6) Exhibit F is the property belonging to Plantation AD which is related to the Highway 17Covenants and it is described as the "Murrells Inlet Golf Plantation" property. This property is not contiguous with The Connector and shares no common point. It is separated from The Connector by the southern end of Tournament Drive which was not and is not a part of the PUD. There is no horizontal privity between the Plantation property and the Connector. The southern end of International Club Drive is on Plat Book 160 at 79, Pl #454, which plat also describes 9.79 acres which is Cypress Keyes. Cypress Keys is not contiguous with the Murrells Inlet Golf Plantation. Cypress Keyes is contiguous with The Connector. The owner of the Plantation property did not have horizontal privity to The Connector – he never owned any of the Highway 17 property no did he own adjacent property. The owners in the PUD do not have vertical privity to an original owner with horizontal privity to The Connector.

(7) The IHOA can not be bound by the Highway17 Covenants because it's property is not subject to those Covenants. On page 11 of the Highway 17 Covenants, Deed Book 2105 page 617, it exempts from any obligation under the Highway 17 Covenants Section 11 (c) any property owned by a non-profit organization – which includes the HOA. Thus the HOA being exempt has no vertical or horizontal privity with Highway 17 through property it owns and thus has no obligations under the Highway 17 Covenants.

g. Findings of Fact and Conclusions of Law.

The following relief is, however requested:

(1) No horizontal privity or common equitable interest in land existed when the Highway 17 Covenants were filed such as to obligate any owner of Pebble Creek property at the time to be subjected to the Highway 17 Covenants as covenants. To the extent that the Highway 17 document bound Plantation AD, who owned what became Pebble Creek, and obligation was a personal services contract and was extinguished when Plantation AD sold Pebble Creek to Sunbelt.

(2) No HOA for the International Club PUD is subject to the Highway 17 Covenants because any property such an HOA owns is exempt from the terms of that covenant.

(3) Homeowners in Pebble Creek in particular and in the International Club in general have no obligation to make any payments to the Highway 17 Association through their HOA.

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28. The Obligation to Join the Amenity Center is a Personal Services Contract and not a proper Covenant touching and running with the Land.

a. The Order. On Page 18 of the Special Referee's Order the Special Referee addressed this issue in a section titled "5. Plaintiff is Obligated to Pay Assessments Relating to the Amenity Center." In the order the Special Referee's analysis is as follows:

> 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).

This was not Plaintiff's argument. It is a strawman created by Defense Counsel to avoid confronting the issue posed by Plaintiff: that a requirement to utilize services is not a proper covenant "touching and running with the land" even if the obligation is written into a covenant – that it is actually a Personal Services Contract subject to the limitations of the Statute of Frauds. The Obligation which the Restatement refers to is the obligation for the maintenance of common property. This, however, is subject to pre-emptive law: The South Carolina Non-Profit Corporation Act.

The Special Referee next relied on a statute which applies to apartment and condominiums as discussed supra:

> "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.")"

This statute is inapplicable. The IHOA was organized under SC 33-31 et seq. The Special Referee finally found 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.

At trial it was pointed out that only some homeowners are required to pay

assessments for and join the Amenity Center. This is not a general obligation. The Covenants do not even require the IHOA to actually have an Amenity Center. It is in the covenants that, if the HOA chooses to build one, some but not all homeowners are required to join under unspecified conditions of use and to pay an unspecified amount for it's use. This is a personal services contract whose terms – ambiguity – violate the Statute of Frauds.

All homeowners pay general assessments which are computed, accounted for, and sometimes billed separately. The Special Referee completely ignored the actual argument posed at trial: That the obligation to join and pay separate assesments for the Amenity Center is not a proper covenant touching and running with the land.

b. The Requirement to Join the Amenity Center is a Personal Services Contract. This argument and all citations to cases was made by Plaintiff at trial and was ignored by the Special Referee in his Order.

(1) There is no case law to support the notion that homeowners can be forced to join amenity centers in their developments but there is case law to the contrary, albeit not in South Carolina where this has never been challenged before. South Carolina has adopted the doctrine that where a case presents a "novel" situation, South Carolina trial courts should look to the decisions of appellate courts in other states for guidance.

(2) South Carolina courts have freely drawn upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997) MidSouth Golf v. Fairfield Harbourside Condominium Assn., 187 N.C. App 22, 31, 652 S.E.2d 378, 384 (2007),

(3) In MidSouth, the declaration of restrictive covenants provided that the homeowners be assessed a license fee for maintenance of recreational amenities owned by the Declarant, regardless of whether or not they used the amenities. MidSouth, 33,. The homeowners had no equitable rights in the amenities. *Id.* at 35.

(4) The court in MidSouth relied heavily upon the precedent set by the court in Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978) and in MidSouth voided the homeowner obligation, finding in MidSouth that it did not run with the land.

(5) In Raintree, a developer created a covenant requiring all lot owners to be

members of a country club and pay dues. The court found that the covenant did not run with the land and voided that aspect of the covenants.

"This covenant creates an affirmative duty, a charge or obligation to pay money, i.e., country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The [lot owners] are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land. Nesbit v. Nesbit, 1 N.C. 490,495, 1 Cam. & Nor. 318, Cam. & Nor. 318 (1801) Courts have generally held that covenants to pay money do not touch and concern the land. Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (N.Y. 1938)). . . We find that the performance by the defendants of this covenant is not connected with the use of their land and does not touch or concern their land to a substantial degree. [Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978).

(6) In MidSouth the Court concluded that "the recreational amenities are not appurtenant to [the land] and therefore the covenant to pay amenity fees does not touch and concern [the land]." MidSouth at 36, 652 S.E.2d at 388.

(7) This should be the law of the case for both the Amenity Center and Highway 17 dues.

c. At trial Plaintiff informed the Court about the amounts due Plaintiff on acccount of being required to pay additional dues for the Amenity Center. Plaintiff computed this for trial (Pl # 382) for the period 2007 through 2012, ignoring the prior sums. Through August of 2012, from January of 2007, the amounts are computed as follows:

| Year | Total Assessment Per Month | Amenity Center Per Month | Amenity Center Per Year |
|---|---|---|---|
| 2007 | $70 | $18 | $216 |
| 2008 | $70 | $18 | $216 |
| 2009 | $88 | $18 | $216 |
| 2010 | $88 | $18 | $216 |
| 2011 | $88 | $18 | $216 |
| 2012 | $91 | $18 | $144 |
| | | | $1,224 |

The Amenity Center assessments are taken from IHOA documents:
2007 From the November 2006 Year End document, $ 18 per month for 2007.. Pl # 317.
2008 From the December 2, 2007 IHOA letter, no change in assessments for 2008. Pl # 342.
2009 There was no change in the amount for the amenity center.
2010 From the November 6, 2009 Budget Pl # 364 and the November 20, 2009 Newsletter, Pl # 366.

**2011 From the November 16, 2010 Budget Letter, Pl # 387 the amenity center charge is unchanged, although overall assessments rose.**
**2012 From the October 28, 2011 Budget for 2012, Pl # 388, overall assessments rise but the amenity center charge remains at $ 18.00.**

**c. Findings of Fact and Conclusions of Law. The Court is asked to find as follows:**

**(1) The obligation of some homeowners to join and pay additional assessments for the support and use of the Amenity Center is a personal services contract even though it is stated in the Covenants. As a personal services contract it did not survive the sale of units from the developer to any homeowener.**

**(2) As a personal services contract, the obligatino does not satisfy the Statute of Frauds.**

**(3) Plaintiff has been involuntarily assessed for the Ameinity Center since his purchase of his home in 2006. He is on record as objecting to the requirement to pay this additional charge as an assessment or otherwise.**

**(4) Plaintiff is entitled to the return of the sums he has been forced to pay for the Amenity Center.**

**(5) The measure of damages through the end of 2012 is $ 1,224.00 and judgment is entered against the Defendant IHOA in fovor of Plaintiff in that amount.**

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**29. The HOA Illegally Failed to Give Plaintiff the Voter List.**

**a. Law**

**SC 33-31-720. Members' list for voting.**

**(a) After fixing a record date for a notice of a meeting, a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting and shall list the members by classification of membership, if any. The list must show the address and number of votes each member is entitled to vote at the meeting. The corporation shall prepare on a current basis through the time of the membership meeting a list of members, if any, who are entitled to vote at the meeting but not entitled to notice of the meeting. This list must be prepared on the same basis and be part of the list of members.**

**(b) The list of members must be available for inspection by any member for**

the purpose of communication with other members concerning the meeting, beginning the day after notice is given of the meeting for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a reasonable place identified in the meeting notice in the city where the meeting will be held. A member, a member's agent, or member's attorney is entitled on written demand to inspect and, subject to the limitations of Sections 33-31-1602(c) and 33-31-1605, to copy the list, at a reasonable time and at the member's expense, during the period it is available for inspection.

(c) The corporation shall make the list of members available at the meeting, and any member, a member's agent, or member's attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a member, a member's agent, or member's attorney to inspect the list of members before or at the meeting, or copy the list as permitted by subsection (b), the court of common pleas of the county where a corporation's principal office in this State or, if none in this State, its registered office, is located, on application of the member, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete and may order the corporation to pay the member's costs, including reasonable counsel fees, incurred to obtain the order.

(e) Unless a written demand to inspect and copy a membership list has been made under subsection (b) before the membership meeting and a corporation improperly refuses to comply with the demand, refusal or failure to comply with this section does not affect the validity of action taken at the meeting.

(f) The articles or bylaws of a religious corporation may limit or abolish the rights of a member under this section.

(g) A member may inspect and copy the membership list only if
(i) his demand is made in good faith and for a proper purpose;
(ii) he describes with reasonable particularity his purpose; and
(iii) the list is directly connected with his purpose.

SC 33-31-1602 (c) Good Faith Request for Records
(c) A member may inspect and copy the records identified in subsection (b) 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.

(d) This section does not affect:

(1) the right of a member to inspect records under Section 33-31-720 or, if the member is in litigation with the corporation, to the same extent as any other litigant; or

(2) the power of a court, independently of this chapter, to compel the production of corporate records for examination.

SC SECTION 33-31-1605. Limitations on use of membership list.

Without consent of the board, a membership list or any part of a membership list may not be obtained or used by a person for any purpose unrelated to a member's interest as a member. Without limiting the generality of the foregoing, without the consent of the board a membership list or any part of the list may not be:

(1) used to solicit money or property unless the money or property will be used solely to solicit the votes of the members in an election to be held by the corporation;
(2) used for any commercial purpose; or
(3) sold to or purchased by any person.

b. Bylaws of IHOA. There are no Bylaws regarding inspection or copying of records. There is no statute or case law which makes HOA member names, addresses, phone numbers, and email addresses and number of votes they may cast "privileged". The HOA publishes the above (less number of votes) to anyone who bothers to sign up on the KA Diehl web site – but there is no consistency between this and the "official" list and the web list is incomplete and includes many individuals who are not eligible to vote (such as renters or family members).

c. Interpretation of SC Statutes by South Carolina Attorney General.

On December 21, 2011, only three weeks before the case was originally scheduled to go to trial January 17, 2012, the South Carolina Attorney General responded to a request from SC State Senator Tom Davis to provide an Attorney General's opinion relating to whether there was any statutory impediment or condition diminishing an absolute right of a homeowner to obtain the Members List For Voting per SC 33-31-720. The focus of this is whether an HOA could use an "interprative spin" using the authority of 33-31-1602 (c) *Good Faith Request for Records* to refuse to provide the "Members List". The answer was provided over the signature of Harrison D. Brant, Assistant Attorney General, and it was "no" – because subsection (d)(1) of Section 1602 makes Section 1602 inapplicable to

requests posed under Section 720. Further, the burden under Section 1605 is on the HOA and the homeowner making a request under 720 has no burden of proof to show that he does not intend to use it to solicit money; for any commercial purpose; or to sell it to another person.

d. Facts.

(1) On July 24, 2008 Plaintiff requested the Members List for Voting Pl # 333. In standalone paragraph 4, the request said:

> The list is requested for the purpose of communicating with members eligible to vote, and to verify the validity of votes cast at the general meeting.

The language of SC 33-31-720(b) is "for the purpose of communication with other members concerning the meeting" so the stated purpose is taken word for word from the statute. The letter requested the names and addresses of the persons entitled to vote, plus the phone numbers and email addresses of same – for persons entitled to notice. While the phone numbers and email addresses are not subject to Section 720 they are subject to Section 1602 and the purpose, being as a matter of law (Section 720) a good faith reason, Plaintiff was entitled to have the additional information as well. The request went on to request, as to homeowners not entitled to notice, just the statutory list of those voters which per Section 720 is the names and addresses and numbers of votes they can cast. The letter was sent to Defendant Rosemary Toth in her capacity as HOA President. The HOA / Rosemary Toth ignored the request and instead sent a dump of the name / address list from the HOA web site which reflected what homeowners or non-homeowners chose to post, which is not an official document of the IHOA. Plaintiff's letter states that this request was

> "In conjunction with the forthcoming General Meeting of Members which will address the election of Directors

Section 720(e) implies that the failure to provide the Members List invalidate the action taken at the 2008 Annual Meeting and invalidate the election of any director at the 2008 election, and by "inheritance", the legitimacy of any director appointed to replace a director elected in 2008 who resigned. In 2008 two directors were elected. No Member List was provided to Plaintiff in 2008.

(2) There is no limitation on how often the Member List may be requested. It is in fact a "living document". On April 28, 2009 Plaintiff again requested the Members List

for Voting Pl #358. The letter was titled "Request for Copy of HOA Voter List" and was sent to the IHOA through it's registered agent, Defendant KA Diehl. The letter stated that "*The purpose of this request is to communicate with fellow homeowners*" the purpose stated in the statute. The HOA ignored this request entirely.

(3) On September 3, 2009 as the Annual Meeting where Directors would be elected drew closer, Plaintiff stated a "Request for Copy of HOA Voter List" Pl #361. This was sent to the IHOA c/o it's registered agent, Defendant KA Diehl. Paragraph 4 of the letter stated *"The purpose of this request is to communicate with fellow homeowners."*

(4) The list of members, including email addresses, has been provided to and used by homeowners to sell merchandise (e.g., straw baskets, garage sales, insurance, arts and crafts). This is a particular purpose explicitly forbidden by Statute, but has not been an impediment when the list is used by "friends" of the Board.

e. Trial Testimony.

(1) Defense Witness Abel admitted receiving the requests for the Voting List and that Defendants never provided it – nor any answer. On Page 1008 of the Transcript she was questioned about this by Defense Counsel:

> 13 Q: And what is the date of Mr. Jarmuth's letter?
> 14 A: April 28th, 2009.
> 15 Q: And is this letter requesting a voter list with emails, telephone numbers and addresses?
> 17 A: Yes.
> ...
> 23 Q: And what response, and that's the next letter in Exhibit 53, what response was made and the date and who made that response?
> Page 1009
> 1 A: This came from McNair Law Firm, and it was April the 28th, 2009, and the response was – I think basically what I said, they could – we could give him the homeowners list, but no further information.

But Defendants KA Diehl and the IHOA never gave Plaintiff the "homeowner list" which is not the same anyway as the "list of voters". They gave Plaintiff – NOTHING. Abel's testimony continued on Page 1009:

> Q: To your knowledge, have you attempted to provide or K.A. Diehl attempted to provide Mr. Jarmuth all the information he's requested that is permissible to provide a homeowner?
> 14 A: Yes.

In cross examination, it was clarified that no response was made to the latter two requests

and that the response to the first request was not the Member List as described in the law. On Page 1005 of the transcript Ms. Abel testified that she gave Plaintiff, in response to Plaintiff's 2008 request, a telephone listing.

> 20 Q: Could I please see it? Could you please read the title of the attachment?
> 22 A: "Print owner telephone directory."

The statute states that the list shall include the number of votes a member is entitled to cast. On transcript page 1007 lines 1 through 4 Plaintiff walked Abel through Bylaws Section 13.1's provision of denying a member a vote for non-payment of assessments, thus the number of votes such a person could cast would be zero ("0") which is not in a phone list. On Line 18 of Page 1009 Abel testified that no member has a right to see the voter list so as to prevent a person from voting whose voting privileges had been suspended. On page 1010 Abel testified that she knew access to the list is mandated under the law:

> Q: Are you familiar with the South Carolina Non-profit Corporation Act?
> 15 A: Yes.
> 16 Q: Doesn't that act have a provision that says that any member of the non-profit corporation at the time of voting has a right to see the list of voters then or even previously before that to verify the voting status of any particular member of the Association?
> 22 A: It may say that and I think it does say that.

Abel next admitted in testimony (Page 1012-1013) that not only was the first list a telephone list, but that the IHOA and Diehl intentionally declined to provide the much changed list in 2009 and later:

> 17 Q: Is it your statement, your testimony, if I get it in one year, I can't have it in a subsequent year?
> 20 A: Just the voter list you can have.
> 21 Q: I seem to hear you saying that because I got something in 2008, you wouldn't give it to me in 2009.
> 24 A: No, that's not what I said. We gave you – the list you asked for in 2008 was a telephone directory. In 2009, you require a voter list which included mailing addresses, telephone numbers, and also arrears status.

On Pages 1013 through 1015 Abel stated that the number of votes to be cast was one so it was implied – but then admitted that the Golf Course was not in the telephone list and that it was casting somewhere between 50 and a number she did not know of votes which made the telephone list clearly not a voter list since it was missing up to fifty votes. Page 1015:

> 8 Q: How many votes was the golf course being allowed to vote during the period between 2003 and the present, —

11 A: Well, it depends on —
12 Q: — a year?
13 A: It depends on what year.
14 Q: Pick a year.
15 A: I really can't -- couldn't tell you.

And on Page 1018

Q: Isn't it a fact the response to my letter of April 28th, 2009, instead of provide me at least something, which the things you feel I was entitled to, you, in fact, provided me nothing?
14 A: We followed the, the opinion of the Association's attorney.
16 Q: Is that yes or no, that you provided me nothing?
17 A: It's yes, we provided you nothing.

(2) Abel testified that when Plaintiff asked for the members' list the request was not stated exactly as it read in the Statute and that this justified KA Diehl, who also is the registered agent for the IHOA, and the IHOA to give Plaintiff nothing. Upon questioning she admitted that names and addresses and number of eligible votes are not privileged – never citing where this notion of privilege came from.

(3) The phrase "Privacy Act" being applicable to homeowner associations was stated at trial by Board President William Freiboth, board member Maureen Sullivan, and by Diehl employee Abel.

f. Special Referee's Consideration of the Matter.

(1) On page 8 of the Order the Special Referee wrote:

"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."

No evidence or testimony was offered that the website list is equivalent to the "official" list. It does not contain the number of votes an individual is entitled to cast; it does not distinguish those entitled to notice from those not; it contains many individuals who are not members. Plaintiff's uncontroverted testimony is that the list has many errors. The statute does not make enrollment in a website and waiver of privacy rights a condition for access to the list. Further the assertion by the Special Referee that Plaintiff hides his email address is blatantly idiotic on it's face and contradicted by the evidence of numerous emails

back and forth between the IHOA, KA Diehl, and Plaintiff. Making an email address available to the IHOA for private communication with the Plaintiff is unrelated to a refusal to have one's email and other information posted on a quasi-public web site where it could be used for improper purpose. There is NO evidence that Plaintiff ever received the membership list from anyone and in fact the testimony was that the HOA refused to give it to anyone. No witness stated a date, let alone a time and method of transmission, that Plaintiff received a copy of the member list. In addition, the statute does not abolish a right to get the list, the most current list, which changes all the time, directly from the association.

(2) On page 24 of the Order the Special Referee directly addressed the requests with findings of fact which infer that it is almost certain that he never bothered to read the evidence or exhibits or look to notes because his findings are completely at odds with the facts. This is what happens when a judicial officer disregards the Canon against blindly adopting a party's proposed findings of facts and conclusions of law without giving the other side an opportunity to be heard:

> "Immediately after Plaintiff commenced this lawsuit, he emailed a demand for a membership list containing members' email addresses, telephone numbers and delinquency status. "

This ignored the July 24, 2008 request sent a full year before litigation began; the ignoring of same being a major incentive for the lawsuit. The second request was sent over two weeks after litigation began. The Statute explicitly states that litigation does not negate a member's rights to the voter list. The Special Referee's Order continued:

> *"In response, Defendant HOA's attorney sent a letter denying his request."*

implying the letter was sent to Plaintiff. The Special Referee did not cite a date of this letter and no such letter was entered into evidence by the Plaintiff nor by the Defendant. Abel's testimony was that Defense Counsel Golding, who wrote the Special Referee's Order and forgot that she wrote to Diehl and not to Plaintiff, sent the letter related to the 2008 request – TO DIEHL. As far as the Court is concerned, Golding's letter does not exist because it is not in evidence – yet the Court depended on this as a "finding of fact".
The Special Referee went on to discuss compliance with Section 33-31-1602 but the Special Referee was clearly not familiar with and made an error of law because sub-section (d)(1) makes Section 1602 inapplicable to requests for the Voter List under Section 720. Defense

Counsel and the Special Referee also depended on the 1976 version of the statute [38] which is not the current version. The Special Referee / Defense Counsel went on to write:

> 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.

The Statute explicitly states that the pendency of a lawsuit does not diminish a member's rights under the statute. Further, the Special Referee misquoted the request which actually read:

> The list is requested for the purpose of communicating with members eligible to vote, and to verify the validity of votes cast at the general meeting

Per the statute, no further clarification is required and the IHOA had only one legal response: provide the list – which they failed to do. It is more likely than not, the legal standard, that the Defendants simply believed they were above the law and the true reason was that they feared that the list would be use to organize an opposition to their re-election, which is not a legitimate reason to hide the list. The Special Referee closed discussion of this subject by writing:

> 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.

This conclusion is not supported by "evidence". The absence of the Golf Course from the "Telephone List" disqualifies that as the Voter List. Abel testified that the web site only has a "telephone list". Access to the "website" does not equate to access to the legal "member list of voters".

g. Findings of Fact and Conclusions of Law.

(1) Plaintiff made three legally sufficient requests for the Members List for Voting.

(2) Defendants KA Diehl and the IHOA had a statutory duty to comply.

(3) In response to Plaintiff's first request Defendants KA Diehl and the HOA provided something which does not satisfy the law – a partial telephone list – and

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[38] The order reads "*See S.C.* Code Ann. Section 33-31-1602 (1976)." The current version begins "ARTICLE 1. GENERAL PROVISIONS SECTION 33-31-101. Short title. *This chapter may be cited as the South Carolina Nonprofit Corporation Act of 1994*." Defense Counsel needs to buy a current version of the statute.

Defendant provided nothing in response to the later two requests.

(4) As a matter of law, the meetings which followed these requests for the Lists of Voters may be declared invalid. As a consequence, the HOA elections and decisions made at the September 2008 and September 2009 Annual Meetings of Members is null and void.

(5) There is no privilege inherent in the names, addresses, phone numbers, and email addresses provided to the IHOA by it's members and the phone numbers and email addresses must be provided unless a particular member has made a request that these not be published.

(6) In accordance with SC 33-31-720(d) the Plaintiff is entitled to recover from Defendants IHOA and Diehl, jointly and individually, the entire cost of this litigation and it is so ordered.

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30. The Golf Course Assessments Must Be In Accord with the Covenants.

The Board of Directors unilaterally modified the Rate of Assessment for the Golf Course disregarding the provisions of the Covenants. This was an ultra-vires act. None the less, the Golf Course has not even paid the substantially reduced rate and is deeply indebted to the Association. This has damaged the homeowners: liquidated direct damages easily caluculable. As a result homeowers have thus illegallly been overcharged to make up the golf course deficieincy.

a. Rate of Golf Course Assessment Established by Covenant.

> Covenants Section 6.5. Rate of Assessment.
> Both annual and special Assessments must be fixed at a uniform rate for all Units (whether improved or unimproved) ... multi-family Unit owners will not be required to pay any portion of any special assessment levied by the Association relating to the costs of construction repairs or maintenance of such recreational amenities.
>
> Also, 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 ... provided further the owner of the golf course shall not be required to pay a one time capital contribution.

The rate of assessment of the Golf Course is not set by rule of the association or by the

Bylaws of the Association but rather is a contractual obligation of the Golf Course established by the Covenants and which affects every homeowner. Given that the HOA has a cost-based budget, the rate of assessment of any individual unit is the budget amount divided by the number of units. If the golf course does not pay what is mandated by the covenants, the burden unlawfully falls on homeowners to pay the deficiency, in effect subsidizing the golf course operation. The assessments are no longer "uniform" per unit as the covenants require. Since assessments are involuntary, a failure of the golf course to pay what it owes under the covenants results in an involuntary gift by homeonwers to the golf course.

b. Covenant provision for amendment of Section 6.5. Since the rate of assessments is set by covenant, a change to the rate of assessments can only be achieved by an amendment of the covenants. The covenants are clear that only an amendment to the covenants can alter any provision of the covenants and the following provision exclusively applies:

> Section 8.5(b) Amendments by Association. Amendments to this Declaration, other than those authorized by Section 8.5(a) [39] above, shall be proposed and adopted in the following manner:
>
> (1) Notice of the subject matter of the proposed amendment shall be included in the notice of the meeting of the Association at which such proposed amendment is to be considered and shall be delivered to each member of the Association.
>
> (2) At such meeting, a resolution adopting a proposed amendment may be proposed by either the Board of Directors or by members of the Association. Such amendment must be approved by Owners holding at least three-quarters (3/4) of the total votes in the Association *other than the Developer;*
> ...
>
> (3) The agreement of the required percentage of the Owners ... to any amendment of this Declaration shall be evidenced by their [40] execution of such amendment, or, in the alternative, the sworn statement of the President of the Association attached to or incorporated in the amendment executed by the Association attached to or incorporated in the amendment executed by

[39] Section 8.5 (a) provides for Amendment of Covenants by Developer. The alteration of the rate of assessment for the golf course was a contract supposedly entered into by the IHOA Board of Directors, not by the Developer.

[40] Three quarters of the homeowners must individually sign the Amendment.

> the Association, which sworn statement shall state unequivocally that the agreement of the required parties was lawfully obtained. Any such amendment of this Declaration shall become effective only when recorded or at such later date as may be specified in the amendment itself.

Thus to alter the provision of the Covenant specifying the rate of assessment of the golf course there must be (1) Notice of a meeting for the purpose of amending the golf course obligation; (2) a resolution adopting the amendment; (3) approval by three-quarters of the voting strength excluding the developer; and (4) execution and recording of evidence of all this happening. The requirement for the golf course to pay at the "50" unit level remains in force and can not be altered until this is all satisfied.

Evidence was presented at trial that NONE of the above occurred.

c. Bylaws provision relating to alteration of rate of assessment of dues. Since the assessments are effectively the dues of the IHOA, the bylaws provision must also be satisfied. The Bylaws of the IHOA #548 are silent as to assessments, dues, or even the term "Golf Course".. The South Carolina Non-Profit Corporation Act applies as to dues (or any subject where the Articles of Incorporation or Bylaws are silent, or when the statute pre-empts anything the Bylaws might say.

The Bylaws do address Amendments:

> Per Section 9(c), "In order for such amendment or amendments to become effective, the same must be approved by Owners holding at least a majority of the total votes in the Association ..."

d. Statutory Provision Regarding Alteration of Dues.

> SC Code 33-31-1021. Amendment of the bylaws by directors and members. (Pl #242) (d) Unless otherwise provided in the articles, an amendment to the bylaws which relates solely to the dues required for membership and which establishes or changes an amount for, or method of computation of, dues, must be approved by the members.
>
> SC Code 33-31-1003. Amendment of articles by directors and members. (Pl # 241)
> (a) If the corporation has members entitled to vote on the amendment ... an amendment to a corporation's articles to be adopted must be approved: (2) ... by the members by two-thirds of the votes cast or a majority of the voting power, whichever is less

The alteration of the golf course's obligation to the HOA was never addressed at a meeting of members and was never put to a vote of the members.

e. Facts. At trial substantial time and evidence was presented that the

President of the HOA, Doug Brown, an employee of D R Horton, which director was never elected by the members, without even an approving resolution of the Board as perpetuated in the minutes, entered into a contract benefiting the Golf Course, DR Horton, and Doug Brown himself at the cost to the HOA and membership. Evidence was presented at trial that it was a conflict of interest. Transcript Pp 257 - 273 Testimony of Plaintiff:.

> Page 272
> 3 Doug Brown got a, got a free golf course membership as a consequence of him agreeing to that agreement. Horton got tens of thousands of dollars of free golf course memberships. The golf course got a reduction of assessments valued at hundreds of thousands of dollars, and the – and in exchange, the IHOA got a piece of property which its declarations to Horry County said it was worth five thousand dollars,

DR Horton got free or reduced price golf memberships and free or reduced price use of golf course facilities to sell homes; Doug Brown personally got a free golf course membership. The Golf Course got the HOA to irrigate golf course property at the HOA's expense and received hundreds of thousands of dollars in reduced assessments. At the time the un-controverted evidence from the HOA's own ledgers produced in discovery was that the Golf Course owed thousands of dollars in assessments. To upset this arrangement all that need be proved is to show that the alteration was ultra-vires. To prove direct and liquidated damages, all that need be shown is how much the golf course paid and how much it should have paid, either per the covenants or per the illegal arrangement.

(1) Golf Course Agreement. On November 3, 2003 Pl# 558 Doug Brown, President of the Developer appointed HOA Board of Directors, entered into an unrecorded agreement with the Golf Course which directly contradicts the mandates of the Covenants in that it changed the rate of assessments charged to a particular PUD property owner – the Golf Course. That modification was unilaterally made by Doug Brown, the Horton employee who Horton unilaterally and illegally positioned as HOA president. There is no record that the agreement was approved by the Board. As addressed at trial, the minutes of meetings of the Board of Directors state that the Board wanted a very different resolution of the golf course' very substantial debt through non-payment of assessments.

(2) In 2012 the IHOA sued the golf course in this same courthouse for non-payment of years of assessments. The actual complaint was put into evidence as Pl #396, 2012-CP-26-1740 Complaint <u>IHOA v Golf Course.</u> The benefits to the Golf Course and

the loss to homeowners was put into evidence as the benefit to the Golf Course is at Pl #389 [2012-07 Revised Computation of Golf Course Debt to HOA], #390 [2004 HOA General Ledger – Golf Course]; #391 [2005 HOA General Ledger – Golf Course]; #392 [2009 HOA General Ledger – Golf Course]; #393 [2010 HOA General Ledger – Golf Course]; #394 [2011 HOA General Ledger – Golf Course]; # 705 [2006 HOA General Ledger – Golf Course]; 706 [2007 HOA General Ledger – Golf Course];, and 707 [2008 HOA General Ledger – Golf Course];.Board Minutes September 10, 2002 Pl # 300; Board Minutes September 3, 2003 Pl # 3011; and Board Minutes November 20, 2003 Pl # 303.

(3) The November 3, 2003 "Golf Course Agreement" Pl #357 in the form of a contract between the IHOA and the Golf Course, (which was not authorized by the board or reflected either in the minutes of the Board nor was it recorded with the Recorder of Deeds) forgave all golf course debt and established an alternative and rate of assessment that was not uniform or fixed. For 2004 it reduced the covenant mandated rate from 50 equivalent units to 20. For each year beginning in 2005 the unit rate was to increase by 3 units until by 2014 it would increase by 4 units and be back at the 50 unit rate. This alteration to the rate of assessments is ultra-vires and is not in accord with the covenants and was not reached in a manner allowed by the covenants. This is sufficient to disallow the golf course agreement.

(4) The Golf Course never paid at the new rate. For the benefit of the Court a spreadsheet was prepared (Pl # 389, which showed how much the Golf Course paid every year and how much it should have paid either using the Covenants mandate of 50 or per the void reduced assessment rate contract = as of July 19, 2012. It is now half a year later and the Golf Course is in further arrears as to it's indebtedness under the Covenants.

(5) The Golf Course Contract has a provision that if the Golf Course fails to honor the new assessment schedule, the arrearage is not forgiven and the reduced assessment schedule is revoked. The November 20, 2003 Contract Pl # 558 has a default provision on page 2 Paragraph 2 which reads:

> 2. Future Assessments. Upon the completion by the Golf Course of all the covenants, conditions and promises contained in this Agreement for which Golf Course is responsible, DRH shall cause an amendment to the CCR's to be properly executed and recorded reflecting the above listed schedule of assessments by the Golf Course.

"All ... conditions and promises" includes paying the new schedule, which the Golf Course

has never done. Further, this acknowledges that all parties were aware that the assessment schedule can only be altered by amendment of the Covenants. It also contemplates that such amendment would occur in 2014 when the schedule ends and the Golf Course rate returns to 50 units. Such an amendment could not be made because no amendment of the covenants by the Developer could be made after the schedule ends December 31, 2014.

> Section 8.5. Amendment. (a) Amendments by Developer. For a period of fifteen (15) years from the date of recording of this Declaration, Developer may amend this Declaration

The Covenants were recorded February 8, 1999 and fifteen years expires on February 8, 2014. In addition the Developer lost his right to alter the Covenants as a matter of common law when he no longer had an equitable interest in units in the PUD which was expected to occur and which did occur in 2008. None of the subscribing parties had a realistic expectation that Horton would be able to amend the Covenants in 2014.

f. Computation of Arrearage. The following data was presented to the court together with the underlying ledgers and minutes from which the data was taken. No objection was raised to the admissibility or accuracy of the information.

(1) Computation of Golf Course Arrearage Per Ultra-Vires Contract:

## PAYMENT SCHEDULE PER 2004 CONTRACT

| Year | Golf Course Assessable Units | Assessment for PAEC Homeowners | Actually Paid Per Year | Payable Per Year at Rediced Assm'ts | Loss to HOA Under Contract | Golf Paid Per Contract Unit |
|---|---|---|---|---|---|---|
| Thru 2003 | 50 | $35 | $0 | - | $116,000 | $0 |
| 2004 | 20 | $45 | $8,400 | $10,800 | $2,400 | $35 |
| 2005 | 23 | $65 | $9,660 | $17,940 | $8,280 | $35 |
| 2006 | 26 | $70 | $10,920 | $21,840 | $10,920 | $35 |
| 2007 | 29 | $70 | $18,878 | $24,360 | $5,482 | $54 |
| 2008 | 32 | $70 | $13,872 | $26,880 | $13,008 | $36 |
| 2009 | 35 | $75 | $15,133 | $31,500 | $16,367 | $36 |
| 2010 | 38 | $88 | $2,597 | $40,128 | $37,531 | $6 |
| 2011 | 41 | $88 | $0 | $43,296 | $43,296 | $0 |
| 2012 | 44 | $91 | $0 | $48,048 | $48,048 | $0 |
| 2013 | 47 | | | | | |
| 2014 | 50 | | | | | |
| Cumulative Assessment Loss to HOA | | | | | $301,332 | |

Note: 2003 Deficit from Board of Directors Minutes

*Note: $ 35 from 11/03/2003 Agreement admitting $1,750 debt per mo on 50 units*

*Note: 2006 through 2008 Actual Full Assessment was $ 70*

*Note: 2009 Actual Full Assessment was $75*

Note: 2010 & 2011 Actual Full Assessment is $ 88 per month

Note: 2012 Actual Full Assessment is $ 91 per month

*Note: Actual Amounts from General Ledger, Budget Statements, or HOA Golf Course Suit*

*Note: In 2003 the golf course owed $3250 per month* . Per BoD Minutes

Note 2009 Audit fraudulently claimed $75 X 35 per month actually paid.

**If the Golf Course had paid at the agreed contract rate the total of "Payable Per Year at Reduced Assessment would be $ 264,792 from 2004 through 2012.**

**The arrearage if the ultra-vires contract was valid is $301,332 as of July 19, 2012.**

(2) Computation of Golf Course Arrearage Per Covenants:

Golf Course Debt Per Covenants

| Year | Golf Course Assessable Units | Monthly Assessment Paid By PAEC Homeowners | Golf Course Actually Paid | Payable Per Year at Covenant Rate: 50 Units | Assessment Loss to HOA | Simple non-compounded Interest at 18% |
|---|---|---|---|---|---|---|
| | | | | | | |
| 2002 | 50 | $35 | $6,500 | $21,000 | | |
| 2003 | 50 | $35 | $0 | $21,000 | $58,000 | $83,520 |
| 2004 | 50 | $45 | $8,400 | $27,000 | $18,600 | $23,436 |
| 2005 | 50 | $65 | $9,660 | $39,000 | $29,340 | $31,687 |
| 2006 | 50 | $70 | $16,296 | $42,000 | $25,704 | $23,134 |
| 2007 | 50 | $70 | $18,876 | $42,000 | $23,124 | $16,649 |
| 2008 | 50 | $70 | $13,872 | $42,000 | $28,128 | $15,189 |
| 2009 | 50 | $75 | $15,133 | $45,000 | $29,867 | $10,752 |
| 2010 | 50 | $88 | $2,597 | $52,800 | $50,203 | $9,037 |
| 2011 | 50 | $88 | $0 | $52,800 | $52,800 | - |
| 2012 | 50 | $91 | $0 | $54,600 | $54,600 | |
| Cumulative Assessment Loss to HOA | | | | | $370,366 | $213,404 |
| | | | | | | $583,770 |

*Note: Per Nov 3, 2003 document Golf Course owed $ 51,000 thru Aug 31 plus $ 7000 thru Dec 31 = $ 58,000 thru end of 2003*
*Note: 2008 GL is $ 10,404 thru Sep 30; Multiply by 4/3 = $ 13,872*
*Note: 2009 GL is $ 13,872 thru Nov 30; Multiply by 12/11 = $ 15,133*
*Note: 2010 amount is from the HOA v Golf Course Complaint*

If the Golf Course paid at the Covenant Rate, it would have paid $307,200 from 2004 through 2012 (total of column "Payable Per Year at 50 Units"). The payments under the reduced contract rate for the same period would have been $ 264,792. The difference is $ 42,408. The Court is asked to remember this number for comparison with benefits promised under the contract below..

The arrearage under the Covenants as of July 19, 2012 is $370,366. Since the covenants provides for an 18 percent annual rate of interest, this has been computed on a non-compounded basis. A judgment should reflect the interest allowable.

g. Testimony about the Arrearage. Page 402 Line 6:

I've mentioned already. That number is the number of shortfall of a hundred and eighty-three thousand dollars if the golf course had lived up to that agreement. So in no year has the golf course lived up to that agreement, if The Court even finds that the agreement was valid. So in any case if it finds it valid or not. So if that agreement was valid, with the interest, there's a shortfall of a hundred and eighty-five thousand dollars. Now, if the agreement was not valid, the second page of my worksheet shows that, in fact, the loss to the HOA is five hundred and eighty-three thousand,seven

hundred and seventy dollars.

On page 916 William Freiboth under direct questioning from Defense Counsel controverted the ledgers the HOA had provided to Plaintiff by testifying as follows – without pointing to a single document or quoting a single number:

> 10 Q: Now, have you reviewed the accounting records of the Homeowners Association to determine if the golf course has paid all the assessments due to the Homeowners Association?
> 14 A: Under the golf course agreement, yes.
> 15 Q: And has the homeowner, excuse me, has the golf course paid all the assessments that are due to the Association?
> 18 A: Yes.
> 19 Q: There was reference to a lawsuit that was brought for collection of assessments. Has that lawsuit been resolved with the golf course?
> 22 A: Yes.
> 23 Q: And that was just recently, within the last week?
> 24 A: Yes.

On Cross Examination Mr. Freiboth testified in part (page 933):

> 18 Q: Now, is it the Association's business to do what you said to help Horton sell houses?
> 20 A: It's – I'm going to answer that and then I'm going to explain. No, it's, it's not the Association's business to sell houses.
> ... Page 934
> 7 Q: Is it true or false the memberships, D.R. Horton got seventy-five reduced price golf course memberships, at least a substantially reduced price at seven hundred dollars each?
> 11 A: I believe so, and I'm not sure what the history was there, but yes.
> 13 Q: In addition to being president of the HOA, who did Doug Brown work for at the time?
> 15 A: Oh, he worked for D.R. Horton.
> 16 Q: Do you see any conflict of interest there?
> 17 A: I don't see any in what he did, but there's a theoretical one.

h. What the Special Referee said about this in the Order of Defense Counsel which he adopted without checking the facts in the Exhibits:

(1) From Page 5:

> 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.

DR Horton's participation represented a conflict of interest for Doug Brown, Horton's employee and Horton's appointee as unelected HOA President. Per documents recorded with the Horry County Recorder of Deeds, the parking lot acreage was worth $ 5,000. Per the Covenants, the HOA owned the riparian rights to the ponds and the main beneficiary of the pumping at HOA expense has been golf course property (non-greens). Extensive testimony and evidence was offered by Pete Pizzi and Mike Butryn. It was not controverted.

(2) From Page 5.

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.

The transcript does not reflect any testimony with the phrase "5.42 acres" in any context. The phrase "around 2 acres" is likewise not in the transcript. It is "telling" that the Order does not cite a witness as having said it or a document that brought this to the court's attention. Clearly if this is a finding of fact any conclusion of law is not supported by the facts because this "fact" was not stated in the trial. The "throw in" of the 5.42 acres was never stated by any Defense Witness as connected in any way to the Golf Course contract – or in any context at all. Defense Counsel fraudulently wrote this "after the fact" and in a manner to deceive and the Special Referee, since he didn't even check the dates of the deeds, fell for it. This statement is contrary to the evidence.

It was not until June 18, 2009, six years after the Golf Course transaction, that Horton deeded the "front entrance" to the HOA: Deed Book 3406 at 1694 – International Club Drive Pl # 564. The front entrance was a major element of the trial since from 2003 through 2009, it was owned by Horton, outside the PUD and not subject to the covenants, not HOA common property, yet maintained by the HOA at HOA expense under the HOA Grounds Maintenance Contract and irrigated by the HOA with Golf Course water at HOA expense. The "front entrance" also has a sign which featured Horton and other developer property which is NOT part of the PUD and does not pay dues to the HOA – yet the HOA paid the electric cost (and still does) to illuminate this sign. There is no contractual obligation for these non-HOA communities to appear on this front entrance sign along

Tournament Drive, illuminated at HOA expense. Thus this statement upon which the Special Referee depends is a lie. It was written by Defense Counsel Henrietta Golding. It is an ethics violation.

(3) From Pages 15 - 18. Quoting only those sections which relate how the contract was entered into and the Golf Course's Putative Compliance with it's Obligation. The Special Referee failed to cite any actual evidence and the only evidence introduced at trial in this matter is that evidence submitted by Plaintiff. Defense Counsel displayed a GIS Aerial view of the area as it is today, but that only showed the relative locations of the different parcels. Nothing from the Plat Book was introduced into evidence by Defense Counsel on this matter.

> 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.

The Special Referee totally ignored the general ledgers of the Defendant IHOA which proved it is more likely than not that the Golf Course IS NOT current in the payment of it's assessments. At trial, the testimony of William Freiboth was that the IHOA sued the Golf Course – in this court – for being in arrears. The actual complaint was introduced as evidence (see exhibit numbers below table earlier in this section). These were never controverted.

At trial Plaintiff introduced and testified as to Covenant Section 4.17. Under that section, and the interpretation was not disputed,

> Section 4.17 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, ... (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...

The HOA did not need to negotiate for the right to use the ponds and to install pumping stations. It already had that right and the golf course was stealing water from the ponds that the HOA owned by this Covenant. That water which the golf course uses to irrigate it's greens could easily have offset much lesser water used to irrigate HOA owned commons. The Special Referee ignored this thought which Plaintiff testified about. Chris Sullivan also testified that he was unaware of Grand Strand Water and Sewage Authority's program to provide free "treated waste water" to irrigate large areas and which the HOA was eligible for.

The Special Referee alleged that this was a valid "business judgment" call. Such an argument was not made at trial. The Business Judgment argument was made for certain acts of the board since 2007 but none for boards prior to that and can not be raised post-trial. Further, the very citation and argument of the Special Referee is defeated by the requirement that any act must be "intra-vires" and because the rate of assessments is set by the covenants, it can not be upset by an ordinary board action:

> 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 Assn v. Deyton, 291 S.C. 214,* 217, 352 S.E.2d 714, 716 (Ct. App. 1987).

The phrase "business judgment" was never spoken by anyone at trial. This argument was not specifically made by the IHOA at trial (although it was hinted at). No citation to "Dockside" was recorded in the minutes. Clearly this was a "I wish I had said it" after-thought by Defense Counsel and again, the Special Referee made a conclusion of law based on an argument of law never advanced at trial – which makes the entire decision suspect and has ethical implications.

The minutes of the board entered into evidence at trial confirm that R. Doug Brown

acted without the authority of the board to enter into this agreement and it was a corrupt act made in bad faith which benefited himself financially and his employer financially in a very large measure – the details of which are of record at trial.

The Special Referee found that the transaction was fair and thus not voidable, but ignored the full financial implications which were set before him.

(1) Under the contract the HOA paid for golf course water. It did not get that water free. The Golf Course received even more water from the ponds than the HOA used and paid nothing for it. The transaction failed to even attempt to compute this offset. This is not an offset to the loss of assessments.

(2) The fair market value of the parking lot, per the deed / sale documents filed with the Recorder of Deeds, was $ 5,000, and this is what the parties to the deed signed off on Page 3 by Affidavit in this August 4, 2004 Parking Lot Deed Pl #560, Deed Book 2771 Page 1482.

(3) From the spreadsheets above the loss to the HOA from giving the Golf Course a reduced assessment would be $ 42,408. To this must be added the arrears which the golf course had through 2003: $ 116,000 from the Board of Directors minutes. For the transaction to be "fair" to the IHOA the value must have been worth in the neighborhood of $ 158,408. Neither Defense Counsel at trial nor the Special Referee in his order made any effort to explain how $ 5,000 in benefits plus allowing the HOA to irrigate golf course "non-greens" property equated to $ 158,408. The finding of the Special Referee is not supported by the evidence. In addition, to change the assessments required an amendment to the Covenants and the golf contract was thus ultra-vires, even if it had been "fair".

g. Findings of Fact and Conclusions of Law:

(1) A change to the rate of assessments for the Golf Course requires an amendment to the Covenants. No such amendment was even attempted. An attempt to alter the amount the Golf Course pays in assessments through a contract is an ultra-vires act and unenforceable, even if fair, and thus the Golf Course Contract is void.

(2) The Golf Course never paid as required under the contract. Per the terms of the contract itself, the Golf Course contract is thus void. There are thus two reasons that the Golf Course Contract is void: the Golf Course did not honor it's obligation, and because the contract was ultra-vires. The unpaid assessment arrears of the Golf Course is

thus calculated per the terms of the Covenant.

(3) The obligation of the Golf Course to pay assessments is and always has been the rate and terms stated in the Covenants.

(4) The amount of unpaid arrearage of the Golf Course on it's assessments through July 19, 2012 is $ 370,366.

January 22, 2013
Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355

| | | |
|---|---|---|
| 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 | ) | MEMORANDUM TO |
| | ) | PLAINTIFF'S RULE 12(b)(1) / |
| vs. | ) | RULE 60(b)(4) MOTION TO |
| | ) | DISMISS COUNTER CLAIM FOR |
| The International Club | ) | LACK OF SUBJECT MATTER |
| Homeowners Association, Inc., | ) | JURISDICTION |
| Et Al | ) | |
| | ) | |
| Defendants | ) | |
| | ) | |
| | ) | |

## MEMORANDUM THAT CERTAIN CONCLUSIONS OF LAW ARE VOID BECAUSE THEY DO NOT RESOLVE A SPECIFIC CLAIM

### Rule 12(h)(3) Preservation of Defense

*"If a court is shown at any time that it lacks subject matter jurisdiction over an element of an order the Court SHALL vacate that aspect of the Order."*

1. This memorandum preserves and supplements oral argument made at hearing on this matter to provide for the possibility the Court chooses to consider certain conclusions of law in the final order in chambers prior to making a determination.

2. It is well settled that a conclusion of law is void because it lacks subject matter jurisdiction when the conclusion of law does not resolve or relate back to a sufficiently plead claim.

3. The September 10, 2012 Final Order contains twenty five (25) conclusions of law which either are completely unrelated to any claim or are so tangentially related to a claim that the conclusion resolves a question not posed in a claim or does not resolve the issue posed in the

tangentially related claim.

4. Conclusions of law not listed in this Memo, which Memo reflects Exhibit 1d (pages 6 and 7 of the Exhibit Book) are not challenged on the basis of no relation to a specific claim (but some not enumerated here are challenged on other grounds, such as pre-emption by law or unsatisfied pre-litigation contract provisions.

5. All the Claims are listed at Exhibit 1 E, Exhibit Book pages 8 to 10. The full text of the claims in the Complaints are at Exhibits 2 through 8.

Conclusions of Law Challenged on this Basis:

The letter "C" followed by a number refers to a numbered conclusion of law within the final order dated September 10, 2012 Exhibit 2 Book pages 11 to 58.

C1 See note to Exhibit 1d, Book page 7. C1 states that the IHOA's 2001 Articles of Incorporation give it the authority to exercise power in the development.

The only tangentially related claim is 15(f) Book page 184, in the 2010 Complaint which asks which of several HOA is the legal party to the Covenants, the one defined as "The Association" in the 1999 Covenants. This is a legal question as to the construction and interpretation of a contract and is resolved within the pages of the Covenants, not by what conduct or practices occurred years later.

The Final Order Conclusion 1 at Exhibit Book Page 20 says that "The Association" legally a party to the 1999 Covenants is the "International Club Association, Inc." which answers Claim 15(f). That is the only conclusion which relates back to the question in the claim.

The Order goes on to say that because the IHOA has assumed the rights of THE ASSOCIATION, it can continue to do so. That issue was not raised in a claim.

C2 The related issue raised by Claim 15h was because of SC 33-31-206 are the February 8, 1999 Bylaws void because they were not adopted by the IHOA Board which first met

September 10, 2002 and never adopted any Bylaws. This is a pre-empting statute.

The Conclusion of Law was not are these the HOA's Bylaws but rather are they legally effective?

C3 Claim 5a was whether the May 6, 2003 tripartite contract between Sunbelt, Horton, and Plantation AD (the covenant declarant) voided the Covenants because that agreement explicitly stated that all prior covenants are void. The claim noted that the only covenant at the time was the 1999 Covenant. The word "Meadows" was never mentioned. The phrase "Golf Course" was mentioned only in connection with an unpaid assessment balance the Golf Course owed.

The claim did not ask or plead whether any of these subdivisions are subject to the covenants irrespective of the May 6, 2003 agreement. The issues of Privity, the contents of the deeds, and recording the deeds were never raised and there is no subject matter jurisdiction over the question of was Pebble Creek validly subjected to the Covenants in 1999. The claim focuses on May 6, 2003. Likewise the Golf Course in 1999 and The Meadows in 2003 are not part of a related claim.

C4 Claim 5m asked whether the November 3, 2003 Golf Course Contract was legally approved because, per SC 33-31-83(e) the contract is valid only if approved by a majority of directors with no conflict of interest and all directors had a conflict of interest. The Claim never questioned the golf course assessment account.

The Conclusion of law ignored the claim actually posed and answered a question never asked, thus without subject matter jurisdiction. The unasked question it answered is the status of the golf course account which was $214,000 in arrears plus $300,000 interest owed on arrears as explained at trial – but not in any claim.

In March 2012 the IHOA sued the Golf Course for assessments owed. On September 10, 2012 that suit was still pending in this Court.

The Golf Course was NOT a party to this lawsuit – further reason for no subject matter

jurisdiction.

C5 Conclusion that dual assessment rates are legal. No claim.

Claim 5s was whether the $35 user charge for the Amenity Center permitted under the Covenants. Insufficiently related.

Claim 5v was whether townhouses may use the Amenity Center which was answered with a separate conclusion of law and is insufficiently related to the dual assessment conclusion.

C6a Conclusion that Cable TV and Garbage Contracts are not personal service contracts but are proper covenants because they somehow improve the value of property. This issue was pre-empted by SC 27-1-701 effective February 1, 2012 in which the General Assembly found that as a matter of public policy these are not proper covenants.

Nearest Claim - 5m (2) which asserted that these contracts are void because the HOA board never approved these contracts. Claim 5m (4) asserted that the cable contract is void because the HOA is operating an unlicensed / unfranchised cable tv system.

C7 Conclusion that HOA can regulate parking on the public streets.

Nearest Claim – 5f HOA is mowing private property and public road shoulders.

C9 Sale of Easement in 2010 to Central Electric. Never raised in 2010 Complaint. Includes all conclusions of law related to IHOA President Toth's liability.

C10 Conclusion of Law that Committees do not require an HOA Board Member because committees do not make decisions.

There is no corresponding claim. In a defense at trial I argued that ARB decisions are void because SC 33-31-825 requires board members on all committees. This is a defense and does not convey subject matter jurisdiction.

C12 Conclusion relating to Swing Set. There was no claim asserted relating to the swing set. The issue was raised at trial to show bad faith by the Board.

C14c Conclusion about use of Capital Contributions by Horton to build Amenity Center. No related claim. Claim 5h that Pebble Creek homeowners have an equitable interest in the Amenity Center because of promises made to them by Sunbelt Homes is unrelated. Commingling mentioned at trial, not in a claim.

C14d Conclusion that the reserves for the Amenity Center account and general accounts can be co-mingled. No related claim. Mentioned at trial relating to Claim 5h, equitable interest in Amenity Center.

C14e Conclusion that capital contributions collected for reserves may be used for maintenance, not just for replacement. No related claim.

C15 Conclusion that per the 2004 3rd Amendment to the Covenants the developer of Pebble Creek, Sunbelt, could pay a capital contribution directly to DR Horton instead of to the HOA for the construction of an Amenity Center owned by DR Horton. Insufficiently related claim 5h Book page 60 that Sunbelt turned over to Horton money collected from 1999 to 2004 to build Pebble Creek its own Amenity Center. No decision on the claim actually plead.

C17 Conclusion that Fairways and Enclaves subdivisions not subject to the Covenants. Those subdivisions were never mentioned in any claim.

C18(1) Conclusion that the Highway 17 Maintenance Non-Profit Association covenants are valid. Highway 17 never mentioned in any claim, "Highway 17" not a party to the case.

C18(2) Conclusion that the HOA must collect Highway 17 Association assessments from homeowners. No related claim and Highway 17 not a party.

C23 Conclusion that there was no mishandling of funds or other misconduct by the management company, KA Diehl. No related claim and Diehl a co-defendant only as to defamation claim. At trial to show HOA Board neglect of duty an accounting of capital contributions was presented which showed that KA Diehl's ledger for that account did not reflect payments made by Horton.

**Submitted for the Court.**

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**For April 27, 2016**

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