THE STATE OF SOUTH CAROLINA
In the Supreme Court



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

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

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Ronald Jarmuth .....Petitioner

v.

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

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# REPLY TO PETITION FOR A WRIT OF CERTIORARI

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## ARGUMENT

1. **The case below is no more than complete judicial disregard (below) of the law and the facts.**

**In its simplest form, the case is before the Supreme Court because in every step of the judicial process below the Courts have ignored the undisputed law and facts within the Plaintiff's pleadings and have blindly assumed that the pleadings of the opposing counsel were accurate as to law and facts even when they were absurd.**

**If this sounds unbelievable, one merely needs to look at the case at its simplest:**

a. **There is no contract or law which permits a defendant in a civil case to recover it's attorney costs to defend the civil case.**

**The trial court awarded costs to defend the case and to defend a separate South Carolina Human Affairs Commission (SCHAC) discrimination investigation against the homeowner association (HOA).**

**The defendant said it wanted its costs to defend the case and to defend a South Carolina Human Affairs Commission INVESTIGATION into an allegation that the defendant homeowner association had committed family status discrimination.**

**The SCHAC costs were admitted by the HOA as having nothing to do with the civil case at bar.**

**The HOA never plead any authority to recover its SCHAC related costs.**

**The HOA plead as authority the HOA bylaws which permit it to recover costs to enjoin a covenant usage violation but it spent the money years**

before any covenant usage violation was alleged to have occurred. The first check was in 2009. The second check was in 2010. The alleged violation was in 2011.

We are here as a result of the court's mishandling of Plaintiff's motion to vacate (Rule 60(b)) filed because the court had no authority to grant such relief. The motion judge's order denying relief didn't even bother to state where he found the authority for the award. He simply entered a Form 4 Order saying the allegation that the court lacked the authority was "denied". It is absurd to argue that the motion judge or the appellate panel misunderstood this most basic part of the law. It is clear that the motion judge knew that the award of defense costs was unconstitutional and an embarrassment. Nothing he could write could get around this so he didn't bother to write an explanation. The appellate panel likewise saw the judicial embarrassment. When you look at the panel's order it too is a cover up for judicial disregard at the trial court level or trial court blatant bias evidenced by total disregard for the law.

b. The panel relied on a legally non-existent second order to affirm the illegal award of attorney costs.

There were two orders following the motion hearing:

(1) An April 27, 2016 Form 4 Order App. pp. 229-230 which stated no findings of fact nor conclusions of law, saying simply "denied". This was appealed on May 17, 2016, within the 30 day period. This is the order on appeal.

(2) A June 6, 2016 "long order" App. pp. 231-240 which was entered by the motion judge after he became aware that the matter was on appeal [1] and when it became obvious that the award of attorney fees was so outside the

1 On April 27, 2016 the Chief Administrative Judge of the judicial district entered a

law. This was almost two months after the hearing and almost a month after the case was on appeal. As a matter of sound discretion Plaintiff Jarmuth amended his Notice of Appeal to add the second, "long" order so that he could assert that the "long" order is void.

The panel ignored the legal question as to which order controlled.

Faced with a Form 4 Order with no findings of fact nor conclusions of law the panel would have had to conduct a de novo review and go on the record that the award of attorney fees has no factual or legal basis, that in fact this was a miscarriage of justice. This would have been an admission that the trial court special referee and a circuit court judge had chosen to save a law firm from embarrassment by finding for a pro se on review. The hearing judge and the panel chose to favor a law firm over justice.

It is settled law that an order entered well after a case is on appeal is void. A lower court can not modify the order on appeal. It can make no new findings or conclusions.

To avoid having to admit the errors below the panel looked to the second "long" order and stated without analysis or reference to the facts or the law that they could find no errors in that order. Except that there legally is no such order to affirm. It is a waste of time to argue that the panel's reasons to affirm that second order are erroneous (although Jarmuth briefed this in detail) because there is no such second order. Clearly the members of the panel didn't want to sign a document which stated that the HOA was entitled to attorney fees to defend a civil case and to defend something which wasn't even in the case. Instead they affirmed

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Form 4 Order alerting all judges in the trial court that the court had lost jurisdiction because the case was on appeal.

by "boiler plate" about "procedure" instead of relating to the law and the facts in this case.

c. Wrong "Court" for SCHAC related costs.

Only the SCHAC itself has authority to award costs following an actual administrative law hearing before the commission. That authority does not extend to legal costs related to an investigation without a hearing. The commission, and only the commission as a matter of black letter law may, but is not required to, award costs related to a HEARING to a prevailing party. There never was a hearing before the commission and the HOA never applied to the Commission for costs. SC Code 31-21-130(M).

The judiciary is charged with knowing the law. The solemn oath requires members of the judiciary to admit if a judgment is in legal error. The solemn oath of attorneys prohibits them from asking the court to take action which is contrary to law. The HOA's counsel never argued that the award of SCHAC related costs was an "extension" of established law or practice and never provided a rationale for such an extension. They simply demanded it from a too willing judiciary which was only too willing to ignore the law and gave it to them.

d. No enforceable contract for HOA to collect covenant violation "fines".

The trial court awarded the HOA "fines" for an alleged covenant usage violation. The trial court concluded it had the authority to do so because the HOA's bylaws have a provision which allows the HOA Board to impose fines for covenant violations. The provision does not provide for automatic action and states no specific fines. It is procedural. That provision is not in the covenants running

with the land; it is simply in the bylaws of a voluntary non-profit corporation incorporated under the South Carolina Non-Profit Corporation Act. A non-profit corporation's bylaws apply only to (a) the non-profit corporation and its officers; and (b) members.

This Supreme Court has recently held in Callawassie v Dennis, Opinion #27835, August 29, 2018, that per the act "A member may resign at any time." S.C. Code Ann. § 33-31-620(a) (2006). The dispute in Callawassie turned on what the member's obligations to buy services are after such resignation and did not dispute the right to resign without any further obligations.

Two legal questions were before the Courts in this case at all levels. The Courts ignored both those questions.

The first question is whether the alleged contract provision (Bylaws Section 13.3) provided contract authority to impose a fine and to litigate it thereafter.

The second question is whether the bylaws even applied to Jarmuth.

(1) The bylaws do not apply to Jarmuth (Question #2). There is no enforceable contract about fines. Jarmuth had resigned. In the civil case Jarmuth asserted that his 2009 civil complaint (and the merged 2010 Magistrate Complaint where this was explicitly plead) had put the HOA on written notice of his choice to resign. The HOA never disputed this.

(2) The HOA has no contract authority to impose fines on any homeowner. (Question #1).

On the face of the HOA's bylaws it states it is the Bylaws of the Murrells Inlet Golf Plantation Association (MIGPA), Inc.. The defendant is the

**International Club Homeowners Association, Inc. (HOA) . MIGPA exists and files taxes. This is not even close. While there was a finding of fact that the declarant had changed the name of "The Association" as mentioned in the covenant to "The International Club Association"(ICA), this still is not the defendant. The ICA also legally exists – and is not the HOA. The South Carolina legislature recently enacted "The South Carolina Home Owner Association Act" which codified the mandate that Bylaws must be recorded with the Register of Deeds to be enforceable, and they are enforceable only by the entity named in the recorded document. The MIGPA Bylaws are not enforceable by the HOA. They need to record their own bylaws.**

**Without looking to the substance of the bylaws asserted by the HOA and relied upon by the trial / hearing court and the panel, it is clear that their is no contract binding on Jarmuth. This Court in Callawassie affirmed this because Jarmuth resigned two years prior to any alleged covenant violation. Additionally, even before such resignation the MIGPA Bylaws did not create any mutual rights and obligations between Jarmuth and the HOA.**

**e. Bylaws Contract does not give HOA any enforceable right to demand "fines" through the Court.**

**The HOA demanded "fines" for allegedly violating a usage provision of the covenants. It cited Section 13.3 of the bylaws as the civil contract it was relying on. Enforcement provisions of contracts start with a big "IF" and are followed by a "THEN". The HOA stated the "then" without bothering to even state or argue the applicable "IF".**

**The substance of Section 13.3 has not been disputed. The trial court / hearing court / and panel assumed that the contract reads something like**

*If you violate the covenants a fine of such and such automatically applies and if you don't pay it the HOA can sue you to collect it.*

**The actual contract provision is very different.**

**The actual and undisputed IF is**

**IF the Board of Directors at a hearing on the record to which the home owner is invited finds that a violation has occurred AND IF the Board chooses to impose a reasonable fine AND IF the HOA next sends a demand letter on the record following the hearing AND IF that letter is ignored THEN the HOA can sue for the fine.**

**The actual IF has nothing to do with a violation. It is all about the HOA Board meeting on the record. If the HOA Board at a meeting to which the homeowner is invited determines a violation and imposes a fine which is ignored, the board action on the record is what creates the right to litigate.**

**It is undisputed that no such board meeting ever took place and that the HOA board never, on the record, even found a violation nor imposed a fine.**

**The HOA counter – claim plead only a violation, not a board hearing or board determination. The record of the board meetings for that year are determinative that no such hearing ever took place. This argument and evidence was, of course, before the hearing judge and the panel and was conveniently (for the HOA) ignored.**

**It is rudimentary law that one can not be subject to a penalty without an adjudication. In technical terms, Jarmuth presented this as a pre-litigation requirement, much as a requirement for mediation, or arbitration, or notice and opportunity to cure. Section 13.3 of the Bylaws, "Procedure" is clear.**

> **[T]he court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent.**

**Buchanan v. S.C. Prop. & Cas. Ins. Guaranty Assoc., Op. No. 27840, App. Case**

**No 2016-002156, at p. 6 (S.C. Sup. Ct. filed Sept. 5, 2018) (internal quotations and citations omitted).**

**The inconvenient truth is that the Special Referee didn't bother to read the HOA counter-claim or look at the evidence. He left it all locked up in the records section of the courthouse. A pro se had no place in his courtroom. So he blindly gave the HOA attorney everything she asked for – over forty pages word for word without changing even a comma, including at least twenty five (25) conclusions of law for which there was no corresponding claim.**

**2. <u>Post-trial Proceedings were all about why the law should be ignored</u>.**

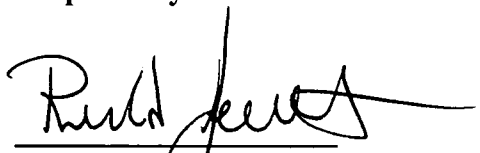
**It is obvious that the determination of the special referee, the hearing judge, and the panel had nothing to do with the facts and the law. It is obvious that the judicial system became trapped in an embarrassing situation where a Special Referee blindly and erroneously assumed that defense counsel would not misrepresent the facts and the law in a proposed final order which the Special Referee did not bother to read before signing. The proceedings that followed clearly focused on covering up that embarrassment rather than fixing the mistake.**

**Justice has nothing to do with finding a rationale to reach a predetermined conclusion. True Justice is all about achieving a "just result".**

## CONCLUSION

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

**Respectfully submitted**



**October 8, 2018**

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## PROOF OF SERVICE

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**I certify that on October 8, 2018 I Served Appellant's Reply to his Petition to the Supreme Court for Writ of Certiorari to the Court of Appeals on Respondents through Respondent's common counsel, Henrietta Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164 by mailing it to same by first class mail, postage pre-paid.**

**October 8, 2018**

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