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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

CASE NUMBER 2009-CP-26-3596

Ronald Jarmuth, Appellant,

v.

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

APPELLANT'S MOTION FOR AN EXCEPTION TO
SCRAP RULE 208(b)(5)
PERMITTING LONGER APPELLANT BRIEF

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

Henrietta U. Golding
2411 Oak Street; Suite 206
Myrtle Beach, SC 29577-3164
843-444-1107
Attorney for Respondents

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SC Court of Appeals

1. Appellant hereby moves for an order of this Court granting an exception to SCRAP Rule 208(b)(5) to allow Appellant a 100 page Brief length instead of the 50 page limit imposed by the rule.

2. Authority. The Court has inherent authority to grant exceptions to those rules where the rules are not further limited by statutory restrictions, such as jurisdiction. This is exemplified by a specific reference in the Practice Guide of the U.S. 3rd Circuit Court of Appeals which specifically provides for the granting of exceptions to the length limitations on briefs when requested by motion.

The rule limits the length of principal briefs to 50 pages.

3. Two cases being appealed. The case on appeal is actually two cases tried simultaneously by Order of Court with a common Plaintiff (the Appellant) and one common Defendant (The International Club HOA) among three Defendants (K.A. Diehl and Rosemary Toth being Defendants in only one of the two cases). While there are some common issues of law and fact there are also issues unique to each case. The origins of the cases are even different, one beginning in the Court of Common Pleas (2009-CP-26-3596) and the other beginning in the Magistrate Court (as 2010-CV-26-1072943) and later transferred ¹ by request of Defendants / Respondents (new case number 20099-CP-26-11320) to the Court of Common Pleas and later “Consolidated” ² by request of the Respondent / Defendants “to be tried at the same time and in the same proceeding”. The final order of September 10, 2012 under appeal bears the captions of both cases.

¹ November 30, 2010.

² September 16, 2011 Exhibit A.

4. Length and Complexity of Final Order Under Appeal/

a. The September 10, 2012 Final Order under appeal (Exhibit B) is itself almost the length permitted for briefs (48 pages). Almost every sentence contains controlling issues of fact or of law properly subject to appeal.

b. The final Order admits to issuing decisions on thirty (30 separately numbered findings of fact, all of which are germane, controlling, and properly subject to appeal. The final Order likewise admits to issuing decisions on twenty eight (28) separately numbered Conclusions of Law. In point of fact the Final Order makes eighteen (18) additional separately lettered³ conclusions of law for a total of forty six (46) separate conclusions of law, each of which is germane, properly appealable, and which affects an important right of Appellant.

5. Large number of additional issues put before the Special Referee at Trial through argument and evidence and ignored in Final Order to which Appellant was entitled to a decision. The Complaints and case as tried demanded Declaratory Judgments as to the applicability of many provisions of the South Carolina Non-Profit Corporation Act, the statutes related to the indexing and recording of deeds, contract law, the common law as to equitable interests and horizontal privity, and interpretations of the Defendant HOA's Bylaws. The omission of a decision on these issues is properly appealable and affects Appellants' property rights. Per the SC Declaratory Judgment Act, SC 15-53 et seq, the absence of an "affirmative or negative" declaration leaves Appellant without a final order on those matters. SC

³ Conclusion of Law #6 has a conclusion in it's general body and lists three additional categories as "a" through "c". Likewise Conclusion #7 has two in addition to it's general conclusions; #12 has four, #14 has seven, and #19 has two.

15-53-20. Appellant has a right to decisions on issues set before the trial court – SC 15-53-30. These issues are in fact controlling issues of law ignored by the trial court which thus makes them properly appealable in their own right. The trial transcript perpetuates that the declaratory issues were argued at trial- but ignored in the final order. Appellants rights to such determinations are broad (SC 15-53-130) and the trial court’s failure to act on each statute, bylaw, or matter of common law is properly separately reviewable.

6. Numerous Serious Procedural Errors related to trial and formulation of Final Order properly before this Court.

These issues obviously are in addition to the errors of fact and law in the Final Order to which Appellant objects. They were perpetuated in two documents of record: Appellant’s August 28, 2012 letter to the Special Referee (as trial judge) (Exhibit C) stating certain objections and demanding redress – which was docketed in the record of this case – and Appellant’s September 19, 2012 Motion to Amend and for other Relief (Exhibit D, less supporting exhibits).

a. The letter perpetuates objections to the draft final order relating to reliance on evidence, law, and arguments never raised at trial and not even in the case record (nor provided Appellant in discovery) and decisions on issues (as findings of fact and conclusions of law) never even argued at trial.

b. The Motion perpetuates blatant violations of Appellant’s constitutional rights to due process and violations by the Special Referee of specific prohibitions on judicial conduct creating the appearance of judicial misconduct AND violating explicit procedural rights found in the civil rules and rules of judicial

behavior. The Motion at Exhibit D lists nineteen (19) separate and appealable procedural errors properly before the Appellate Court. These include the Special Referee's insistence on cutting the trial short (to three days) so that he could attend to personal business after agreeing to at least a five day trial, in violation of the Order of Reference, the denial of Plaintiff's Right to Close, allowing the testimony of Defense rebuttal witnesses on matters not yet argued at trial, allowing the admission of defense evidence identified less than two days before trial and given to Appellant / Plaintiff in the court room as the trial began; and the Special Referee conducting an independent investigation which identified and relied on documents not before the court either as trial exhibits or even as exhibits to interlocutory motions. The issues include that the final order actually lied ⁴ about what specific documents actually said. The trial transcript relates that Appellant as Plaintiff stated his intention to bring on one of the Defendants (Rosemary Toth) as his final witness at the close of the case but was denied the opportunity to do so by the Special Referee solely because it would interfere with the Special Referee's private business.⁵

7. Actual Number of Issues Separately Argued at Trial and Affected by Final Order is much greater. This is perpetuated by Appellant's Rule 16 Statement filed and docketed on May 17, 2012 (Exhibit E).

a. The Statement identifies at issue "Federal, State, and County Law".

There were actually forty one of these (41) presented as separate exhibits at trial

⁴ The Appellate Court is reminded that every word of the final order is the creation of Defense Counsel, who authored every word of the final order.

⁵ Which is what the Special Referee actually said as reflected in the transcript.

thus perpetuating that they were before the court.

b. **Covenant Amendments.** There were several ranging from election of officers through restrictions on use which relate to this case as they bear on Respondent's assertion that Appellant violated provisions which were "waived" by amendment.

c. **What South Carolina non-profit corporation is "The Association"** named in and with rights and obligations under the Covenants. The Respondent / Defendant corporation is NOT named in the Covenants but rather a different South Carolina non-profit Corporation is named ⁶ (as admitted by the Special Referee on page 12 of the final order).

d. **Right of the Defendant to forcibly collect assessments for another non-profit not named in the covenants with no vertical or horizontal relationship to the community.**

e. **Whether the Dedication of certain roads to the County before the covenants were written and the acceptance of the dedication by County Council without reservation extinguished any claim that the roads are subject to community covenants.**

⁶ "The Murrells Inlet Golf Plantation Association, Inc" is named as "The Association" in the covenants. Respondent argued that Amendment #1 changed the association but if that argument is followed, then "The Association" is "The International Club Association, Inc" which is another legitimate South Carolina non-profit corporation. The Respondent never even argued that the Covenants give The International Club Homeowners Association, Inc (the Defendant) any rights under the Covenants. The final order determined as a Finding of Fact that the ICA is "The Association" but then Defense Counsel wrote her client further findings and conclusions in the Final Order which are impossible given her client's absence from the Covenants. This matter alone is sufficient to overturn the entire final order.

f. Five issues relating to the Architectural Review Board which include whether an ARB chartered by the Homeowners Association Board as a committee whose members are appointed by the Board is a committee of the HOA subject to its Bylaws and the requirements of the South Carolina Non-Profit Corporation Act.

g. The action of the HOA relating to denial of architectural modifications requested by Appellant, implicating issues of what constitutes selective and capricious enforcement, and the effect of the 3rd Restatement of Servitudes as juxtaposed to the 3rd Restatement of Contracts.

h. Factual and Legal issues surrounding refusal to permit a swing set when a swing set had been allowed for an identical house in the counterpart location on the lot. This also addresses whether an HOA can impose restrictions on use not found in the covenants on issues addressed by the covenants, and the application of the rule that ambiguity should be resolved in favor of the free use of property (the Special Referee ruled in the reverse).

i. Whether the word “waived” in an Amendment to the Covenants relating to restrictions on use equated to “deleted”.

j. Ownership of and towing from private parking lots near the Amenity Center (Defendant Rosemary Toth had ordered “private parking” signs removed and had declared them the property of the nearby golf course and that these were for the use of a private golf school. These lots had been deeded to the Defendant which was ignored by Ms. Toth and was addressed by the Final Order as an “error in judgment” by Ms. Toth, said error corrected only after suit was filed. A Declaration had been sought on this to prevent a return to Ms. Toth’s prior opinion.

k. Whether homeowners could be forced to pay, through assessments, to maintain and irrigate private property, particularly that of the nearby private golf course. Homeowners have no right of use of the area they are paying to maintain. This also involve the question of riparian rights, since the Covenants granted the Murrells Inlet Golf Plantation Association, Inc riparian rights to the water in the ponds which was being used to water the golf course and Defendant private property.

l. The question of what areas are properly subject to the Covenants and part of the PUD, since the area where Appellant lives was deeded to a developer before the covenants were even written, let alone indexed and recorded, and since the grantee never affirmed in any way his post - sale acceptance of the covenants. At trial the issue of whether the seller is on actual notice of a grant deed when he delivers it or whether he can legally pretend he has no such notice until the deed is actually indexed and recorded at a later time. Another section of the PUD was involved as the Covenant's author's subjected that other area to the Covenants (by Amendment) more than four years after he sold that area.

m. Issues relating to the construction and use of the Amenity Center ranging from the use by the developer of HOA funds while the HOA was controlled by the Developer to build parking lots and other facilities whose funding was the obligation of the developer (a misappropriation or theft of funds) to whether the requirement to join and pay for the Amenity Center is a personal services contract which does not meet the requirements of the statute of frauds or a proper covenant touching and running with the land. It was noted at trial that the Amenity Center is

not available to all members of the Defendant HOA.

n. Golf Course Assessments. Whether a member of the board can create an enforceable contract modifying a provision in the covenants relating to severely reducing the amount of the golf course assessments without an amendment to the Covenants. The particular officer received a free golf course membership for his efforts which at trial was raised as criminal in nature. The developer, who employed the HOA officer (and appointed him, the developer refusing to hold elections for seven years) and who gave up nothing in the deal, receiving free golf course memberships and other valuable consideration IN THE WRITTEN CONTRACT in return for directing it's employee to make the contract. A related issue was whether the contract was enforceable as it had been breached by the Golf Course who never paid even the reduced assessments.⁷

o. The obligation of homeowners to maintain lawns between their property lines and the street curb – which is not land within an individual homeowner's lot and for which there is no obligation under the covenants for a homeowner to maintain. The Special Referee ignored this in his final order. The HOA issues "maintenance violation fines" if these areas are left unmaintained by homeowners.

p. Whether the actions of board members prior to September 2007 are ultra vires, since these boards were never elected in disregard of the law and bylaws and as the officers appointed by the builder were ineligible to hold office as a mater

⁷ The Special Referee made a finding that the Golf Course was never in arrears although at trial the Defendant HOA's Civil Complaint in the same courthouse alleging many years of non-payment of assessments was "of record" by verified complaint – which the Special Referee was asked, at trial, to take judicial notice of.

of law and bylaw. In addition, no contract of these boards was ever noted as approved in the minutes of the board, in violation of the South Carolina Non-Profit Corporation Act which holds that actions are legally ineffective until the affirmative vote of a proper board is noted in the minutes of the board. This issue was “ducked” by the Special Referee’s Final Order.

q. Does the Defendant actually have any legally effective bylaws since they were never adopted by the incorporator or by the membership nor are they indexed to the Defendant HOA by name. The purported bylaws are indexed to the Murrells Inlet Golf Plantation Association, although that non-profit corporation has adopted and indexed a very different set of bylaws.

r. Is the Defendant’s Cable TV Contract an obligation of homeowners as a proper covenant touching and running with the land or an improper personal services contract which violates the statute of frauds. A related issue was whether it is a contract binding the Defendant itself since the Defendant is not properly named in the cable contract by it’s legal name or by any recognized alias. The purported obligation supposedly required homeowners to pay for cable services offered by the HOA, but did not require the HOA to actually offer cable tv services. This was not a bulk billing arrangement as the cable tv company from which the services originated declared that homeowners are customers of the HOA, not of the cable company, and that the cable company sold cable service in bulk to the HOA, the HOA not the homeowners being an un-franchised reseller of cable service. Another issue is whether this was enforceable as only a fraction of homeowners all supposedly subject to the same covenants were required to buy the services from the

HOA.

s. Issue relating to computation and modification of obligations to pay capital contributions, to include the liability of Defendant KA Diehl to reimburse the HOA for missing capital contributions. The Chief Administrative Judge had issued an interlocutory order enforcing a subpoena which commanded the Developer to document how much was turned over to KA Diehl (the management company) in capital contributions. This was compared with accounting documents the Defendant provided in discovery. A comparison of the two for a common accounting period documented over sixteen thousand (\$ 16,000) dollars provided by the developer which had never been “booked” into the HOA accounts. The Special Referee ignored the document holding that because the current HOA president said no money was missing, with no explanation to contradict what the uncontroverted documents said, then no money was missing.

t. Use of money proceeds of the sale of certain rights of way to Central Electric by the HOA, this being that the HOA bought the property for one dollar (\$ 1.00) the land becoming HOA property, with no equitable interest by homeowners, and sold certain rights for almost eighty thousand dollars (\$ 80,000) and then distributed most of the money to homeowner in violation of the South Carolina Non-Profit Corporation Act which prohibits ANY distribution and which made Defendant Rosemary Toth personally responsible for the amount distributed since she admitted at trial that she made that decision. The final order held that this was a “return of over-assessments” even though the documents said it was proceeds from the sale and the statute prohibits any cash be given to any member except as

payment for goods or services rendered to the corporation.

u. **The Counter – Claim of the HOA.** This involved the question of how the HOA can counter claim to enforce covenants when it is not the named HOA, and how it can be entitled to legal fees to enforce this when the only money it spent was a deductible to defend itself from claims it is not the association named in the covenants and that it was in violation of the Non Profit Corporation Act, and to contest the request for Declaratory Judgment. The issues here include the extent to which a provision allowing collection of attorney fees to ENFORCE covenants can be extended to include money spent to defend against accusations the HOA itself violated the Covenants and the law.

v. **Declaratory Judgment on numerous Amendments to the Covenants.**

w. **Breach of Fiduciary Duty.**

x. **Defamation – a major issue perhaps rising to “First Impressions”** as to whether a contractor is entitled to the litigation defense privilege which arguably extends to his HOA employer, It also asked the question, ignored in the final order, as to whether the actions of board members telling persons not to associate with an individual is actionable and beyond “litigation privilege” and whether calling someone a “pedophile” in speech is covered by litigation privilege. This was ignored in the final order. It also asks whether a written publication by Defendants (all of them) accusing Appellant of being fired from a job with the FBI “for cause” which they made no attempt to verify and which was in fact untrue is actionable or covered by litigation privilege, as well as the related accusation that Appellant unsuccessfully sued his FBI co-workers for defamation in connection with their

revealing Appellant's misconduct (also false) is likewise actionable or protected by litigation privilege.⁸

y. **Committees.** The question of the independence of action of HOA committees without explicit authority from the Board, and the extent to which the contractor can exercise board punishment authority (including making findings and imposing fines without hearing) without this being in it's contract and with no authority in bylaws or covenants and in fact in conflict with bylaws.

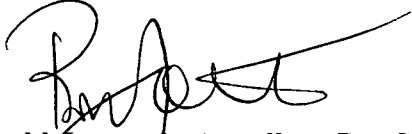
z. **Ownership of rebates and other money received by management company Defendant KA Diehl as a consequence of goods and services the management company obtained on behalf of the HOA.**

aa. **Whether a town house area is a multi-family area ineligible to use the Amenity Center per the Covenants or whether it is single family homes despite being designated as "multi-family" by the planning commission and building permits. The Special Referee ruled that the covenants could be ignored because The Glens did not have it's own swimming pool, ignoring that The Cambridge, a similar area, was banned from the Amenity Center and has no swimming pool of it's own.**

⁸ The Special Referee (ghost written words of Defense Counsel) wrote that the defendants were merely trying to give the homeowners the facts, but the defendants admitted they made no attempt to verify what they wrote before they wrote these lies.

8. Conclusion.

The interest of justice will be served by permitting Appellant a page limitation of 100 pages.

A handwritten signature in black ink, appearing to read 'Ronald Jarmuth', with a long horizontal flourish extending to the right.

**Ronald Jarmuth, Appellant Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
April 18, 2013**

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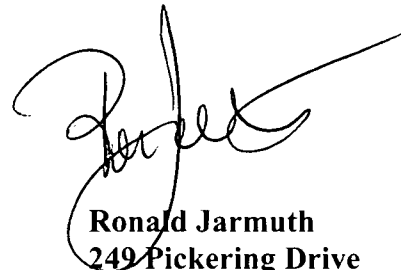
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SC Court of Appeals

PROOF OF SERVICE

I certify that on April 18, 2013 I served Appellant's Motion to Grant an Exception to the Page Limit on the Appellant Brief by depositing copies of same in the United States Mail, postage prepaid, addressed to Respondent's common counsel, Henrietta Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164

April 18, 2013



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