

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

SC Court of Appeals

Edward W. Miller, Circuit Court Judge

CASE NO: 2009-CP-07-05410

THE CALLAWASSIE ISLAND MEMBERS CLUB, INC..... Respondent,

vs.

ARTHUR APPELEGATE.....Appellant.

INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF THE ISSUE ON APPEAL

Did the trial court properly transfer a breach of contract action to the non-jury trial roster after determining the subject documents were unambiguous and therefore no triable issues of fact existed, and where opposition to the motion to transfer was premised solely upon issues of law?

## STATEMENT OF THE CASE

This is a breach of contract action commenced on behalf of Respondent, The Callawassie Island Members, Club, Inc. ("CIMC"), seeking recovery of approximately six years of unpaid dues, fees, and assessments owed to it by the Appellant, Arthur Applegate, in connection with the five memberships he holds in CIMC. (Summons and Complaint). The Complaint initially requested the matter be heard nonjury. (Summons and Complaint). However, Applegate requested a jury trial and asserted counterclaims against CIMC in his Answer, alleging a breach of fiduciary duty, negligent misrepresentation, and seeking an accounting. (Applegate Answer). Applegate also asserted third party claims against individual directors, which were dismissed. A jury trial was originally scheduled for May 13, 2013. Applegate dismissed his counterclaims on May 9, 2013, leaving only CIMC's original breach of contract claims. (Stipulation of Dismissal of Counterclaims). There no longer existing any triable issue of fact, CIMC moved to transfer the matter to the nonjury roster. (Motion to Transfer). The Honorable Edward W. Miller, presiding judge, agreed, and filed a Form 4 Order on May 15, 2013, transferring the matter to the Honorable Marvin H. Dukes III, Beaufort County Master in Equity and Special Circuit Court Judge. (Form 4 Order). Upon receipt of the Form 4 Order, Applegate filed a motion to alter or amend. (Applegate Motion to Alter or

doing, explained that no issue of fact existed to be considered by a jury. (Order Denying Motion to Alter or Amend). Applegate then filed a Notice of Intent to Appeal. (Notice of Intent to Appeal).

### FACTS

Callawassie Island is a private, members-only island, located between Beaufort and Hilton Head Island in Beaufort County. Its members enjoy many amenities on the island, including tennis and golf facilities, as well as a clubhouse and dining facilities. These amenities are owned, managed, and maintained by The Callawassie Island Members Club, Inc., a 501(c)(7) mutual benefit nonprofit corporation registered with the State of South Carolina.

In order to associate a membership with every parcel of property on Callawassie Island, the Callawassie Island Property Owners Association ("CIPOA"), through a vote of its membership, amended its Declaration (covenants), to require each parcel purchased after December 1, 2001, to be also accompanied by a purchase of a membership in CIMC:

Section 2. Callawassie Island Members Club Membership. Every Person or entity who purchases property on Callawassie Island after December 1, 2001 shall thereupon be required to purchase an Equity Membership ("Membership") in the Callawassie Island Members Club, Inc. ("Club") and remain an Equity Member in good standing in such Club for each property purchased or transferred after the approval date of this amendment for so long as such person or entity owns the subject property.  
(CIPOA Declaration).

Within the same section, the Declaration states, "Each owner, by acceptance of a deed or other conveyance pursuant to purchase of a Lot or Dwelling after the approval date of this amendment consents and agrees to the obligations of an Equity Member of

the Club.” (CIPOA Declaration). The Declaration is filed with the Beaufort County Register of Deeds at Book 1505 and Page 850.

In 2003, The Callawassie Island Company, L.P.<sup>1</sup> (“CIC”), the developer and previous owner of the club’s assets, conducted an auction of real estate it owned on Callawassie Island. The auction was independent of CIMC, and CIMC neither controlled, funded, nor operated the auction, and was otherwise unrelated to the auction proceedings. (CIMC deposition, p. 99, l. 1-22). Applegate, a real estate investor and developer from Charleston, with over 25 years in the real estate business, purchased eight Callawassie lots at the auction. (Applegate Deposition, p. 8, l. 10-24, p. 9, l. 6-20, p. 20, l. 15-20). The sales contract executed for each parcel Applegate purchased states:

43. PURCHASER’S ACKNOWLEDGMENT: Purchaser acknowledges that Purchaser has received a copy of the Covenants...It is expressly understood and agreed by the Purchaser that the Property shall be conveyed subject to the recorded Plat and all easements as shown thereon and subject to the general easements, equitable restrictions, limitations on use and affirmative obligations to pay charges and the covenants and restrictions relating to Callawassie Island, all as specified in the Covenants, as amended from time to time, a copy of which has been provided to Purchaser simultaneously with the execution of this Agreement, the receipt of which is hereby acknowledged [Applegate’s initials are entered here]. Seller urges Purchaser to read said Covenants...

44. CALLAWASSIE ISLAND MEMBERS CLUB: Purchaser acknowledges that the Callawassie Island Members Club (“the Club”) on Callawassie Island is a private, equity club pursuant to the Callawassie Island Club Plan (“the Club Plan”). As a condition to Purchaser’s purchase of the Property, Purchaser is required (a) to purchase a golf Equity Membership in the Club for a Membership Contribution Fee of \$45,000.00, which Membership Contribution Fee is included in the Purchase Price, and (b) to

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<sup>1</sup> The Callawassie Island Company, L.P. and The Callawassie Island Members Club, Inc., are unrelated entities.

remain an Equity Member in good standing in the Club for so long as Purchaser owns the Property.  
(Sales Contracts).

The CIMC governing documents (in addition to the CIPOA covenants, to which Applegate is also bound) include the CIMC Plan for Offering of Membership, Club Bylaws, and General Club Rules, and all amendments to each. All contain similar provisions requiring a member to remain in good standing until the associated real property is sold and the membership is reissued.

In particular, Article X of the CIMC Bylaws of June 29, 2001 (effective at the time Applegate purchased property and obtained memberships), requires the CIMC Board of Directors to "adopt, and administer as appropriate, a Plan of Membership for the Club," which is to include "membership transfer provisions" and "dues fees, charges and assessment rules and procedures." (CIMC Bylaws). Article XI of the Bylaws authorizes CIMC to pursue legal action against its members for unpaid dues, fees, charges, or assessments. (CIMC Bylaws). This provision is repeated in Section 5.5 of the Plan for Offering of Membership. (Plan for Offering of Membership).

The Plan for Offering of Membership contains the following representations (all caps and bold print are included in original):

**1.7 CAREFULLY REVIEW ALL DOCUMENTS**

This plan is a summary of the membership opportunities offered by the Club and is qualified by the definitive information set forth in the attached exhibits. Every person who desires to purchase a membership in the Club should carefully read the Plan and all of the attached documents and should consider seeking professional advice to evaluate these documents.

**1.8 RELY ONLY ON INFORMATION IN THIS MEMBERSHIP PLAN**

No person has been authorized to give any information or make any representation not contained in the Plan and, if given or made, such information or representation must not be relied upon as having been authorized by the Club.

**1.9 MEMBERSHIPS OFFERED ONLY FOR RECREATIONAL PURPOSES**

MEMBERSHIPS ARE BEING OFFERED EXCLUSIVELY FOR THE PURPOSE OF PERMITTING PERSONS ACQUIRING MEMBERSHIPS TO OBTAIN RECREATIONAL USE OF THE CLUB FACILITIES. MEMBERSHIPS SHOULD NOT BE VIEWED OR ACQUIRED AS AN INVESTMENT AND NO PERSON PURCHASING A CLUB MEMBERSHIP SHOULD EXPECT TO DERIVE ANY ECONOMIC PROFITS FROM MEMBERSHIP IN THE CLUB. NO FEDERAL OR STATE AUTHORITY HAS PASSED UPON OR ENDORSED THE MERITS OF THIS MEMBERSHIP PLAN.

(Plan for Offering of Membership).

The Plan further provides, in pertinent part:

**2.2.4 PURCHASERS OF A RESIDENTIAL UNIT OR LOT IN CALLAWASSIE<sup>2</sup>**

Every person or entity which purchases or takes legal title to a Lot or Dwelling on Callawassie Island shall be required to purchase an Equity Membership in the Club and remain an Equity Member in good standing for so long as such person or entity owns a Lot or Dwelling on Callawassie Island.

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**2.4.9 PAYMENT OF DUES BY RESIGNED EQUITY MEMBERS**

An equity member who is on the waiting list to sell their Club membership will be obligated to continue to pay all Charges to the Club until his or her equity membership is reissued by the Club...A resigned member will be entitled to use the Club Facilities so long as the resigned member is obligated and continues to pay all Charges on the resigned membership.

\*\*\*

**3.4 MEMBERS' RIGHTS TO USE THE CLUB FACILITIES GOVERNED ONLY BY THE PLAN**

If approved for membership in the Club, the candidate agrees to be bound by the terms and conditions of the Plan and irrevocably agrees to fully substitute the membership privileges acquired pursuant to the Plan for any present or prior rights in or to use the Club Facilities. All new members and their spouses will be required to sign an acknowledgement that they have been provided a copy of, read and agree to abide by the Club's By-Laws, the Plan and the General Club Rules.

(Plan for Offering of Membership).

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<sup>2</sup> This provision is found in "Attachment B 6/21/01" to the Plan, and is identified as a "Conditional Addendum to Membership Plan." In accordance with Attachment B, Paragraph 2.2.4 became effective in December 2001 upon the enactment of a similar provision within the CIPOA covenants.

The CIMC General Club Rules, adopted by the Board of Directors on August 8, 2001, also addresses a member's ongoing obligation to pay dues, fees, assessments, and other charges until the membership is reissued:

**14.2.1** Any member may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for Offering of Club Memberships. Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums).

\*\*\*

**14.2.3** Notwithstanding any termination or suspension of membership, the member shall remain liable for any unpaid club account or membership dues, fees, charges, and assessments, and such member shall not be entitled to a refund of any part thereof paid by a member to the Club.  
(CIMC General Club Rules)

Regardless of other amendments to the governing documents during Applegate's time of membership in CIMC, they have consistently maintained the requirement that a member is obligated to pay dues, fees, assessments, and other charges to the Club until the member's property is sold and that membership is reissued.

Although Applegate originally purchased 8 lots on Callawassie Island and obtained 8 memberships to CIMC, Applegate continues to own only four lots on Callawassie, holding five memberships to CIMC.

As part of the purchase agreement between CIC and Applegate, the first two years' dues to CIMC were paid by CIC. However, after CIC's obligation to pay dues ended, Applegate failed to make any payments to CIMC for the subject memberships. CIMC then commenced this action, seeking recovery of the fees it is owed. (Summons and Complaint).

## STANDARD OF REVIEW

Whether a party is entitled to a jury trial is a question of law. Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). An appellate court may decide questions of law with no particular deference to the trial court. Verenes at 15, 690 S.E.2d at 773.

## ARGUMENT

The trial court properly found that the unambiguous documents at issue in this matter do not present a question of fact for a jury to consider, and properly transferred the matter to the master in equity for a bench trial.

**I. The Court correctly determined that an action at law presenting no triable issue of fact must be tried by the court.**

Generally, whether a right to a jury trial exists is determined by the nature of the action, either in law or in equity. Verenes at 16, 690 S.E.2d at 773. Only actions at law may be heard by a jury. Id. The Appellant erroneously contends that an action at law is automatically subject to a trial by jury. The South Carolina Rules of Civil Procedure, by their plain language, demonstrate that an action at law may only be tried by a jury when a triable issue of fact exists.

Rule 38(b), SCRPC, states, “any party may demand a trial by jury of **any issue triable of right by a jury...**” (Emphasis added). Therefore, even though the Rule also states that the right to a jury trial “shall be preserved to the parties inviolate,” such a right **only** extends to those matters which are subject to a jury determination. This recognition is buttressed by Rule 39, SCRPC: “The trial of all issues so demanded shall be by jury, unless... (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.” Rule 39 further provides:

“issues of law and issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court or may be referred to a master as provided in Rule 53....” Therefore, the trial court, upon determining no triable issue of fact existed, was within its authority to transfer the instant action to the master.

This matter involves contract interpretation. “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language.” McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (quoting Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). A contract must be read as a whole document so that ambiguity is not created by a single sentence or clause. Id. Importantly, whether the contract is ambiguous is a question of law for the court. Id. An unambiguous contract may not be varied or contradicted by evidence drawn from sources other than the contract itself. Walters v. Summey Building Systems, Inc., 311 S.C. 507, 509, 429 S.E.2d 854, 856 (Ct. App. 1993).

Accordingly, in a contract dispute, if the contract is determined to be unambiguous, there is no triable issue of fact for a jury. Correspondingly, the court itself is required to interpret the contract and apply the plain and ordinary meaning of its terms. Even though the matter may arise out of a contractual dispute, and is therefore an action at law, a jury trial is not appropriate when the contract is unambiguous.

In addition to the clear and consistent requirement that a member pay dues, fees, and other charges until the membership is reissued, it is equally important to note that the governing documents fail to relieve a member who is suspended, terminated, or expelled from that ongoing liability. After giving due consideration to the plain meaning

of the relevant provisions, the trial court correctly determined that no triable issue of fact exists.

Despite Applegate's contention that numerous issues of fact remain, the purported issues he raises within his brief are questions of law. First, Applegate raises the interpretation and applicability of certain statutes within the South Carolina Nonprofit Corporations Act as grounds for a jury trial. However, statutory interpretation is a matter of law for the court. Centex Intern., Inc. v. S.C. Dept. of Revenue, -- S.C. --, 750 S.E.2d 65, 69 (2013). The second issue he asserts in support of a question of fact are what he deems "clear provisions" within the documents that relieve him of ongoing obligations to CIMC. As previously established, unambiguous language is to be interpreted by the court. Therefore, Applegate's reliance upon clear language in the documents subjects the documents to a court's interpretation. In short, despite representations to the contrary, Applegate offered no triable issues of fact to the trial court, and has presented none in the instant appeal.

Finally, Applegate is incorrect in his contention that the trial court went beyond the scope of the motion and ruled on issues not before it. By the plain language of its motion to transfer, CIMC cited the unambiguous nature of the governing documents, offering specific provisions within the documents as support. (Motion to Transfer). The trial court was presented with those issues, and therefore the court was correct in ruling upon them. Moreover, whether an ambiguity exists in the subject documents is a threshold matter that had to be addressed prior to trial. Until the appealed-from Order was filed, the court had never before ruled whether an ambiguity existed in the subject documents, and if an ambiguity existed, what it was. (Prior Orders of Judge Mullen and

Judge Kinard). Accordingly, not only was it a requirement that the court address that specific issue, the court did not contradict any prior ruling in the case when it found the documents to be unambiguous.

**II. Applegate's purported lack of notice regarding the motion to transfer this matter to the nonjury roster is not properly before this Court.**

Applegate argues that he was not afforded proper notice of the motion to transfer this matter to the nonjury roster. However, this objection was raised for the first time on appeal. Therefore, because it was neither raised to nor ruled upon by the trial court, it is not preserved for appellate review. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

Moreover, given the fact that the trial court could not proceed without first deciding the motion to transfer, and in light of Applegate's dismissal of his counterclaims only days before the trial was scheduled to commence, it was proper for the court to make such a determination in an abbreviated time period. Although CIMC concedes the circumstances in the instant matter are unusual, its only options were to seek a transfer to the nonjury roster or proceed with a jury trial that presented no questions of fact. Accordingly, the motion to transfer was appropriate.

**III. Prior rulings denying summary judgment are irrelevant to the trial court's determination that no triable issues of fact exist.**

Applegate argues that the trial court ruling was improper because it contradicted prior orders denying CIMC's motion for summary judgment. This contention is misplaced.

Ignoring the plain fact that a motion for summary judgment is different than a motion to transfer, an order denying summary judgment does not establish the law of a case, and summary judgment may be raised again by subsequent motion. Ballenger v. Bowman, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). Therefore, a trial court is not bound by a prior order denying summary judgment.

Moreover, the prior orders do not address the issue presented to Judge Miller. Although trial courts previously denied motions for summary judgment, those orders do not find that the subject documents contain an ambiguity. (Orders of Judge Mullen and Judge Kinard). In fact, one order is silent as to the issue (Order of Judge Kinard) and the other specifically refuses to find an ambiguity. (Order of Judge Mullen). Consequently, even assuming the court here is bound by prior rulings, nothing in the prior rulings precluded the trial court from determining the documents are unambiguous.

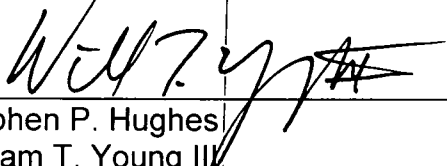
Interestingly, Applegate contends that the transfer of the matter to nonjury “effectively grants summary judgment.” This appears to be a concession that, upon a proper review and determination by the trial court, CIMC will prevail. If so, this concession only underscores the unambiguous nature of the documents. However, irrespective of his intent, Applegate can present his legal defenses, and the master may make his own determination regarding the governing documents.

#### CONCLUSION

For the reasons discussed herein, the trial court’s order was appropriate and its decision should be affirmed.

Respectfully submitted,

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December 18, 2013

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

CASE NO: 2009-CP-07-05410

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THE CALLAWASSIE ISLAND MEMBERS CLUB, INC..... Respondent,  
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RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE  
RECORD ON APPEAL

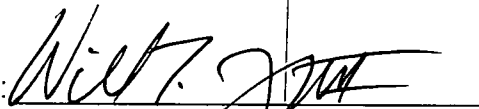
The Respondent, The Callawassie Island Members Club, Inc. (CIMC), designates the following matter to be included in the Record on Appeal:

- a. Summons and Complaint
- b. Answer to Complaint
- c. Stipulation of dismissal of Applegate's counterclaims
- d. CIMC Motion to transfer to nonjury
- e. Form 4 Order transferring matter to nonjury
- f. Applegate motion to alter or amend
- g. Order denying Applegate motion to alter or amend
- h. Notice of Intent to Appeal
- i. Callawassie Island Property Owners Association Declaration of December 1, 2001
- j. Deposition of Harman Switzer, as 30(b)(6) designee of CIMC, p. 99, l. 1-22
- k. Deposition of Arthur Applegate, p. 8, l. 10-24; p. 9, l. 6-20; p. 20, l. 15-20
- l. Sales contracts between Applegate and Callawassie Island Company

- m. CIMC Plan for Offering of Membership
- n. CIMC Bylaws
- o. CIMC General Club Rules
- p. Order of the Honorable Carmen T. Mullen denying summary judgment
- q. Form 4 Order of the Honorable J. Ernest Kinard, Jr. denying summary judgment

I certify that this designation contains no matter which is irrelevant to this appeal.

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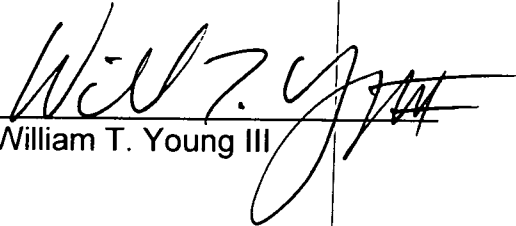
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CERTIFICATE OF SERVICE

I certify that I served the Initial Brief of Respondent and the Respondent's Designation of Matter to be Included in the Record on Appeal upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on 18<sup>th</sup> day of December, 2013.

By:   
William T. Young III