THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2014-001524

The Callawassie Island
Members Club, Inc.,

Respondent,

v.

Ronnie D. Dennis and
Jeanette Dennis

Appellant.

REVISED INTIAL BRIEF OF APPELLANT

November 5, 2014

Brian D. McDaniel
Law Office of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
(843) 379-5117
Attorney for Appellants

Appellate Case No.: 2014-001524

Other Counsel of Record:

Minor, Haight & Arundell, P.C.
Ehrick K. Haight, Jr., Esquire
P.O. Drawer 6067
Hilton Head Island, SC 29938
Attorney for the Plaintiff / Respondent

Howell, Gibson & Hughes, P.A.
Stephen P. Hughes, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Plaintiff/ Respondent

Howell, Gibson & Hughes, P.A.
William T. Young, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Plaintiff/ Respondent

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and upon which the Plaintiff was never allowed to cross-exam the Plaintiff.

STATEMENT OF THE CASE

This appeal arises from a civil action filed by the Callawassie Island Members Club, Inc. in Beaufort County Common pleas in which the Respondent/Plaintiff alleged breach of contract against the Appellants/Defendants. The claims arise from what the Respondent claims is a memberships owned by the Appellants in the Respondent Club, for which the Respondent (Club) is seeking monetary relief for unpaid dues, fees, assessments, and other charge accrued, plus interest and the costs of the action. The Appellants have asserted, among other things, that the Respondent's action against them is in violation of state law, is sought in violation of the controlling governing documents and contractual representations made to them, and that any damages claim should be offset by the amount of equity they have in their membership purchase and by the damages they have incurred in not being allowed to swap memberships with another member.

The Plaintiff in this action filed a motion for Summary Judgment which was heard before Judge Carmen T. Mullen (Hearing Judge) on November 8, 2013. The Hearing Judge granted the motion and awarded damages of $51,131.76 for approximately three years worth of dues, fees and attorneys' fees. The Hearing Judge issued her order on January 15, 2014 and the Defendants timely filed and served a Motion to Reconsider. (Mot. To Alter or Amend dated January 24, 2014). A hearing on the Motion to Reconsider was heard May 27, 2014 and the court issued an Amended Order Granting Callawassie Island Members Club,

Inc.'s Motion for Summary Judgment and Denying Dennis' Motion to Reconsider on June 10, 2014.

Defendants/Appellants timely filed a Notice of Appeal in the instant case on July 3, 2014 seeking to have both the Order granting Summary Judgment of January 15, 2014 and the subsequent Amended Order of June 10, 2014 order amending the granting of the Plaintiff's Motion for Summary Judgment and Denying the Defendant's Motion to Reconsider reversed and asking that the Plaintiff's Motion for Summary Judgment be denied.

ARGUMENT

I. Did the Trial Judge err by failing to apply the proper legal standard in its' granting of the Plaintiff's motion for summary judgment.

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "Summary Judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Id. at 122, 708 S.E.2d at 769; see also Rule 56(c), SCRCP. "to determine whether any triable issue of fact exists , the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." McLaughlin v. Williams, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct.App.2008). To withstand a motion for

summary judgment, in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

The case law has clearly set forth that"[t]he party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct.App.2005)." Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, ... the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. (citation omitted.) (Froneberger v. Smith, 748 S.E.2d 625, 406 S.C. 37 (S.C.App. 2013)

In the instant case the Hearing Judge improperly shifted the burden of proof for the motion and in the Order[1] fails to apply the proper standard in making her determination to grant the Plaintiff's Motion for Summary Judgment. In setting forth the standard of review utilized in this case the Hearing Judge fails to apply the standards set forth above but instead relies upon Gauld v. O'shaughnessy Realty Co., for the proposition that "A complete failure of proof concerning an essential element of the [non-moving] party's case necessarily renders all other facts immaterial." (Order of 6/10/14 p. 5-6). However, reliance

[1] referring to the ***Amended Order Granting The Callawassie Island member's Club, Inc.'s Motion for Summary Judgment and Denying Dennis' Motion to Reconsider*** filed June 10, 2014, but also in as much as the Amended Order does not supersede the **Order Granting The Callawassie Island Members club, Inc.'s Motion for Summary Judgment** filed January 16, 2014 then Order also refers to that previous Order as well.

on such a case in this instance is misplaced since such "failure of proof" refers to "an element essential to the party's case **on which that party will bear the burden of proof at trial**" (citing, Boone v. Sunbelt Newspapers, Inc. 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App.2001) (Gauld v. O'shaugnessy Realty Co., 380 S.C. 548 (S.C.App. 2008), 671 S.E.2d 79, 85. In this case the burden of proof is first on the Plaintiff to prove that there is no genuine issue of fact as to each and every element of the cause of actions alleged by them. As will be further elaborated upon later in this brief, the Plaintiff clearly fails to do so. However, in this instance the Plaintiff bears the burden of proof in this case and not the Defendant, except perhaps as to those counterclaims asserted by the Defendant.

Likewise, our Supreme Court has recently made clear that virtually any evidence at all that demonstrates a dispute exists in the case is sufficient to require the denial of a summary judgment motion. Further, the burden of proving that no fact exists is upon the moving party (the Plaintiff) in this case so that the non-moving party is not denied an opportunity for the matter to be heard in full by a jury. As stated above, to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a ***mere scintilla*** of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (Emphasis Added). Applying the standard, as articulated by the Supreme Court, in the case would necessitate that the Plaintiff's motion for summary judgment in this case be denied.

The hearing Judge fails, not only to cite to the appropriate standard for summary judgment in her Order, but as the facts will demonstrate herein to follow, also fails to apply the "mere scintilla" standard of review disregarding the considerable evidence offered by the Appellants.

II. Did the Trial Judge improperly grant summary judgment where the Appellants presented more than a mere scintilla of evidence showing a genuine issue of numerous material facts;

A. Genuine dispute of material facts concerning the controlling documents which may govern the relationship between the parties, (the Order fails to indicate which documents it is applying) and whether there exists a contractual relationship between the parties at all.

The Appellants presented at least a mere scintilla of evidence as to a genuine issue of material fact refuting the claims of the Respondent with regard to which governing documents should be applied to interpret the relationship of the parties and whether the Respondent has a contractual relationship with the Appellants.

In this case the Respondent has contended that the Appellant's 1999 purchase of a golf club membership in the Callawassie Island Club bound it to the 1994 Plan for the Offering of Memberships (Complaint p.2), which they now contend would make the Appellant obligated under the Respondent's governing documents following an alleged purchase of the assets of the Callawassie Island Club by the Respondent, though there is no reference to any document of the Respondent in the Complaint in this matter (Complaint). Since filing of the

Complaint the Respondent has now claimed that the Appellants are also obligated as to the governing documents of the Respondent, but that has nowhere been set forth in the pleadings in this case, is in dispute, and is basis for denial of the Respondent's motion for summary judgment. It is fundamental that the Plaintiff in an action must establish that a contract exists in order to pursue a breach of contract claim. In summary judgment proceedings the Defendant need only show a mere scintilla of evidence that the issue is in dispute, as clearly is the case here.

The lack of clarity as to the nature of a possible contract between the parties is evidenced in the Order, where the Court appears to rely upon a range of different "governing" documents, taking versions of CIC and Respondent documents from various years without explanation and without ever making a finding as to which documents actually control the parties in the case. In many instances the Court references various documents which may be "governing" documents of one or more of the various entities that purport to have run the golf club located on Callawassie Island. However, in many of those references the documents are often not identified with any specificity, are not pertinent to these Appellants, and/or are inaccurate representations of the content of the referenced documents.

As noted, in 1999 the Appellants applied for membership in the Callawassie Island Club (an entity with a similar name as the Plaintiff) and paid an equity contribution of $31,000.00 for that membership (Exhibit A to Memo in Opp to Motion for SJ). Although the Order further finds that the Appellants membership was transferred to the Plaintiff, there is **no evidence** in the record to

provide proof for this assertion. (Order p. 3). In fact, the Appellants never entered into any membership agreement with the Respondent but instead signed a Purchase Agreement with the Callawassie Island Club in October 1999 (See Exhibit A and p. 2 of Defendants' memorandum in Opposition to Summary Judgment). Because the Respondent failed to evidence that a contractual relationship exists, their motion for summary judgment should be denied on that ground.

However, assuming arguendo, that the Defendants are members of the Respondent Club, the Court's Order makes reference to Club documents including General Club Rules of 2007, 2008 and 2009 as well as Plan for the Offering of Membership of 2001, 2007, 2008, 2012, By-Laws of June 29, 2001 (p.3, 4, & 5 Order) and the Callawassie Island Club Plan of April 1 1994 (The CIC Plan) (Order p.2) but fails to identify what documents would control.

In granting summary judgment the Court relies upon language from the variously amended documents of the Respondent, without uniformity and without consistency. For instance, on page 4 the Order refers to the CIMC General Club Rules amended 2007, but does not give a basis for picking that version of the Club Rules, which is neither the version closest in time to when the Appellants joined the Callawassie Island Club, nor is it the most recent version of those Club Rules made by the Respondent. In fact earlier in the Order on page 3 the Court finds that the General Club Rules have been amended numerous times including the year prior, 2008, and year after, 2009. The reference to the 2007 Club Rules in

the Court's Order is confusing and evidences that there exists an issue of fact as to which governing documents should apply to the case at hand.

Likewise, on page 4 where the Order quotes from a version of the Plan of Offering of Membership it also does not provide a year for the document to which it quotes and it is believed that such documents was not entered into the record at the hearing, or only entered at the subsequent motion to reconsider hearing though the reference was there from the earlier summary judgment hearing.

Page 4 of the Order in the final paragraph finds that Article VI of the CIMC Bylaws grants certain powers but again this section does not reference what version of the Bylaws to which it is referring.

In the "Analysis" section of the Order at page 6 the Court finds that the contracts and "documents are unambiguous" but again does not specify what "documents" are not ambiguous nor does it specify what documents create the contract. By failing to do so, the Defendants are left with an inability to fully address the courts findings that those unspecified documents ""clearly and consistently require a member to pay dues until his membership is reissued." (p. 6 -7 of Order)

As another example, the Order also makes reference to unspecified "governing documents" found to "expressly bind a member to ongoing liability even if he is suspended, terminated, **or expelled**." (Emphasis added). The Court's reference to a binding liability for an expelled[2] member is particularly at odds

[2] "Expelled" members are expressly defined in the 2001 Club Rules to no longer have membership after 4 months of suspension following automatically from delinquency (See 13.3.1 indicating "Any member whose account is not settled within the four (4) months period following suspension

with the language of the Club Rules (at 13.3.1 - 2001 version) and is **not found in <u>any</u>** of the governing documents. The finding is, if not blatantly contradicted, at least arguably disputed by the governing provisions and the fact that the documents on record in the case do not "expressly" provide that an expelled member is bound for ongoing liability. This is significant because the Respondent wants to include expelled members as having ongoing liability, because the Respondents testified that they understood they would be expelled without ongoing liability and because evidence and argument was provided to support that belief, including : the 1) 2001 Club Rules 2001 13.3.1, (2001 Club Rules) 2) the depositions of the Appellants in which they claim they were told prior to purchasing the memberships that their liability was limited to 4 months; (depo R Dennis p 24 ln 13 –p 25 ln 13 and J Dennis p 16 ln 13 – p 14 ln 13) 3) deposition testimony of the Club Director Ellen Padgett that in fact she also understood that members would face no more than 4 months of liability; (Depo E. Padgett pp 138 ln 22 – p147 ln 20) 5) letters and evidence of other members being suspended with no further obligation (Exhibit E to Memo In Opp) 6) testimony of Club Board members confirming no further obligation after expulsion (depo excerpts Norwood p. 56 ln 2 – p 57 ln 11 & p 82 ln 12- p 84 ln 23, depo Switzer p 138; depo Carling p 7 ln 12 – p8 ln 10; p27 ln 12-p28 ln 11; p30 ln 1- 18, 23- p. 31 ln 4; p 32 ln 6- 10; p 57 ln 6- 13, depo Killian p 5 ln 25 – p 6 ln 8; p93 ln 3 – p 94 ln

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shall be expelled from the Club." The Club Rules then go one to define "Expulsion" 14.1.5 and distinguish it from both "Suspension" 14.1.3 and "Termination" 14.1.4. The Club Rules at 14.2.3 then discuss that members that have been <u>suspended</u> or <u>terminated</u> "shall remain liable for any unpaid account or membership dues, fees, charges and assessments and such member shall not be entitled to a refund of any part thereof paid by the member to the Club".

16; and depo Padgett p 138 ln 22- p 147 ln 20) and 7) Club documents which evidence that the membership equity amount ($31,000) would be the extent of any membership liability.

In this case, to be granted summary judgment, the Respondent has the burden of proof to establish that there is a contract and the terms of that contract are not in dispute. Certainly at least a mere scintilla of evidence exists as to whether these parties are in a contractual relationship and if so, as to the terms of the contract in this case are in dispute and the grant of Summary Judgment should therefore be reversed.

II. Did the Trial Judge improperly grant summary judgment where the Appellants presented more than a mere scintilla of evidence showing a genuine issue of numerous material facts;

B. There is a genuine dispute as to the interpretation and application of the documents governing the relationship between the parties

In its Order the Court avoids addressing the numerous provisions in the referenced "governing documents" which support the arguments of the Appellant and which would require that the motion for summary judgment be denied. The Appellant points to numerous provisions in the potential governing documents which evidence that the liability for "unpaid dues" ends after 4 month of delinquency by the mandatory process of expulsion; is limited to the amount of the equity membership, accrues against a membership not the member; violates state law if enforced as advocated by the Respondents; and creates an

unreasonable situation in which the Respondent could refuse to allow a person to ever terminate their membership obligations.

First, the 2001 Club Rules require expulsion after 4 months of an account being delinquent (See 13.3.1 indicating "Any member whose account is not settled within the four (4) months period following suspension **shall be expelled** from the Club."(Emphasis Added) (2001 Club Rules 13.3.1) The Club Rules then go one to define "Expulsion" 14.1.5 and distinguish it from both "Suspension" 14.1.3 and "Termination" 14.1.4. The Club Rules at 14.2.3 then discuss that members that have been suspended or terminated "shall remain liable for any unpaid account or membership dues, fees, charges and assessments and such member shall not be entitled to a refund of any part thereof paid by the member to the Club". Please note that this is not applicable to members that have been expelled. As further proof the Appellant submitted deposition excerpts of the Respondent's SCRCP 30(b)(6) designee Harmon Switzer and a past Board President of the Respondent, Karen Norwood, James Carling and Lindsay Cooler. These witnesses confirm that suspension is automatic after a delinquency of 3 months.(See Deposition Excerpts –Exhibit to Memo in Opposition to Summary Judgment inclusive depo Norwood p 56 ln 24 – p 57 ln 1; depo Cooler p 5 ln 1 - 5; p 56 ln 5 -25; depo Killian p 71 ln 15 -p 73 ln 24). Also, the past actions and policies of Respondent evidence that it does in fact expel members and acknowledge that they have no further obligations by way of letter "releasing you from further obligation" (Exhibit E to Memo in Opp to Mtn for SJ- see Letter 11/13/02 to H Knearl, Depo J Carling p. 21 ln 11 – p 28 ln 1 – 25, p 31 ln 12 –

p31 Depo L. Cooler pp 56 ln 5- ln 25). Again, this is evidence that the documents in question are rightly understood to require expulsion when a member is more than 4 months delinquent and that use of the word "shall" established that expulsion after four months of suspension for account delinquency is mandatory. See South Carolina Depart. Of Highways and Public Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986). Accordingly, the Appellants[3] had the right to be expelled from the club once their membership had been suspended for four months due to delinquency. The Respondent now contends that it never expelled the Respondents. However, based on the May 22, 2012, Resale List, at least fifteen members have been expelled from Respondent Club. (See Exhibit D - May 22, 2012 Resale List). Thus, the Respondent has expelled some members but have not expelled all members who meet the criteria for expulsion. Expelled members were sent expulsion letters such as the letters contained in Exhibit E which also infer that there is no ongoing relationship or obligation of any kind. (Exhibit E to Memo in Opp to SJ Motion)

Next, the Appellant set forth that provisions in the potential governing documents would result in limited or no liability for them in the case. The Appellants point to Section 14.2.3 (on page 4 of the Order) the 2001 CIMC General Club Rules document referring to terminated members and states that "such member shall not be **entitled to a refund** of any part thereof paid by a member to the Club" which bolsters the Appellants contention that a member's liability is no more than the amount paid into the Club. The language in fact states

[3] Again it is not admitted that the Appellants are members of the Respondent club

that a terminated or suspended member shall "remain liable for any unpaid club account..." (14.2.3) but does not state that such a member is liable for ongoing or later acquired accounts. The Appellants interpretation that "unpaid" refers to being unpaid at the time of resignation or termination also conforms to the South Carolina Non-Profit corporations statute which declares that a member must be able to resign from a non-profit (§33-31-620). This statute is rendered meaningless if the Appellants receive no benefit from resignation, as is the effect in the Court's Order and interpretation of the documents in this case. Bear in mind that the Respondent chose to operate as a nonprofit corporation and while receiving those benefits should also be required to comply with the requirements of that decision. Regardless of whether this argument is ultimately convincing to the jury in this case, it is at least sufficient to require denial of the Respondent's motion for summary judgment and reversal of the Order in this case.

The Appellant also reference the 1994 Plan for the Offering of Membership which supports their defense and counterclaim at p.8 that when a resigned membership is reissued the equity member receives back either the equity contribution paid ($31,000.00) or 80% of the equity amount paid by the new purchaser (whichever is greater) and that if any amount is owed it is deducted from the amount to be paid to the resigned member. (1994 Plan pp 8) Again, the document does not say that the member is obligated beyond that amount and at least is evidence of an issue of fact as to whether or not they are so obligated. In fact, nowhere in any of the evidence submitted in the case is there any evidence to contradict this interpretation of the agreement. The "Transfer Upon Death"

provision at page 9 of that document (1994 Plan p. 9) further supports this interpretation saying only that the "deceased member will be entitled **to receive the amount** of the membership contribution which would otherwise have been payable to the deceased member" (emphasis added) and not stating that there could be any further or ongoing obligation beyond this amount. Finally, at "Payment of Dues by Resigned Equity Member" on page 9 the document specifically states that an obligation of an equity member who has resigned will "**accrue against and be deducted from the amount to be paid** to the resigned member upon the reissuance of his or her resigned membership" (Emphasis added). (1994 Plan p 9) Again, the contractual provision at least presents a mere scintilla of evidence in the case supporting the defenses and sufficient to defeat the Plaintiff's summary Judgment request. Also, on page 10 of that document the "Dues, Fees and Charges Prorated Upon Reissuance of Resigned Membership" section speaks only of payments and refunds to the members and not any amounts which can accumulate in excess which would become actionable by the Club. (1994 Plan p. 10)

The Appellant also submitted and relies upon the 1994 Bylaws at the hearing in this matter. Page B-9 of the 1994 Bylaws, provision 3(i) is applicable to the counterclaim and defenses alleged by the Appellants in which they claim that they were denied the right to swap memberships (their Golf for a Social) despite having a willing Social member desiring to conduct that transaction with them (See Defendant's Motion to Reconsider and Memo in Opposition to Plaintiff's Motion for Summary Judgment, depositions excerpts of the Defendants

R. Dennis and J Dennis). This claim is supported by provision 3(i) at page B-9 and 6(b) at page B-10, (194 By-Laws B 9 -10) which specifically allows such a swap, and the evidence and testimony of this denial (such swap would greatly reduce the amounts of dues and fees which the Appellants would be charged and to which the Respondent could be awarded in this case) is set forth sufficient to present evidence of a material issue of fact and to defeat the Respondent's motion for Summary Judgment.

At page B-11 the 1994 Bylaws presents a particularly striking statement under provision 8(b) that "Whenever any person shall **cease to be an equity member**, whether by death, resignation, recall, expulsion or other provision of these By-Law..." (emphasis added) is a clear indication that the person ceases being a **member** at resignation or expulsion. (1994 By-Laws B 11) Although the Club may claim that the obligations accrue against the **membership** until it is reissued, this paragraph supports the argument of the Appellants that the agreement states that there exists no personal liability, but that the liability thereafter accrues against the membership and is deducted from what the resigned or expelled member is owed. This is a valid interpretation which, when all inferences are viewed in the light most favorable to the non-moving party requires the motion of the Respondent for summary judgment be denied. This interpretation is supported further at page B-11 part 9 (a) which states that the dues and fees accrue against the "**membership**" and at B-12 9(b) which set forth the amounts to be **paid to** the resigned member, but nowhere mentions any amounts which would be owed by, or paid by the member, beyond losing the

value of the membership equity. Again, see B-13 at 10 (iv) and 11 (a) which both discuss only the amounts to be paid to the member upon reissuance. ("amount **due to the resigned member**"). (1994 By-Laws B10-12)

At page B-15 the 1994 Bylaws recount that the Club has a "Lien" (3) against the membership and discusses that once expelled a person is **no longer a member** and therefore can have none of the obligations of membership Article XIV (5). (1994 By-Laws B 15)

The Appellants also submitted and contend that the 1994 General Club Rules create multiple issues of fact sufficient to defeat summary judgment in this matter. Page C-3 at Suspension and Termination of Membership at section 1, the Club Rules set forth that the member may terminate membership but will remain liable for unpaid club account. (1994 Club Rule C-3) In this case the Defendants had no unpaid account when their membership was terminated. There may some issue of fact as to what encompasses "unpaid accounts" but it is certainly reasonable, given that the Appellants did not draft the documents, and taking all inferences in the light most favorable to the Appellants, that there exists a scintilla of evidence sufficient to deny summary judgment on this issue.

Newer documents (specifically the 2001 CIMC Club Rules which were argued by the Appellant at the hearing in this matter) directly support the defenses of the Appellant and directly grant the protections which the Appellants claim in their Answer, namely that they must be expelled after 4 months of delinquency. (See Defendants' Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment) Use of the word "shall" established that expulsion after four

months of suspension for account delinquency is mandatory. See South Carolina Depart. Of Highways and Public Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986). Accordingly, the Defendants had the right to be expelled from CIMC once their membership had been suspended for four months due to delinquency. This is evidence supporting the testimony of the Appellants that they were specifically told by Club agents that that their liability extended to four months of dues and fees at most. Those representations and assertions are detailed in greater detail in this brief below.

In the order granting summary judgment the Hearing Judge largely avoids the above arguments and the document references which evidence proof of the Appellants contentions. For instance, on page 4 of the Order it gives only a partial quote of 2.4.9 of the Plan for Offering of Membership and removes a single sentence of that provision where it quotes "is issued by the Club ..." (omitted portion) the Order picks up at "A resigned members will be". The removed portion of the Plan is believed to state[4] "Any unpaid Charges plus interest accrued under the then prevailing terms of the **General Club** rules **will be deducted** from the amount to be paid to the resigned member upon the reissuance of his or her resigned membership." (emphasis added). This removed portion offers and supports two defenses advocated by the Appellants in this case and set forth at the hearing of the subject motion that 1) The Plan of Offering refers and defers to the General Club rules to determine the charges that are owed and these General Club Rules require expulsion of the Defendants after 4 months of past due fees which

[4] The Plan date is not specifically identified in the Order, but may refer to the 2001 Plan

terminates all dues and fees accumulating and 2) the removed portion supports the Defendants contention that even if they are liable for some amount that the damages should be limited to their equity investment, or alternately their equity investment should at least be deducted from the total amount of any judgment against the membership but not assessed as to the member individually. In this case, the court ignored the factual and interpretive dispute of the parties on this issue, refusing to consider or apply this removed provision to its analysis as to determination of liability or damages awarded in the case.

Finally, the Respondent's interpretation of dues and fees being ongoing until reissue in all situations creates a situation in which some members have no possible means to rid themselves of the liability of membership, and all members are entirely at the whim of the Respondent to determine if it will allow them to rid themselves of that liability. This is so because of the following facts: It is undisputed that membership is no longer available to non- Callawassie property holders. The Resale list has so many people on it, with so few properties left to sell that there is virtually no way the Appellant, nor any other later placed members, ever have a chance to exit the Resale List. (Exhibit D to Defendants Memo in Opp to Motion for SJ, Depo Excerpts of Respondent's Rule 30(b)(6) SCRCP Designee p 1, 56, 57) This fact was testified to by Harmon Switzer, the 30(b)(6) designee of the Plaintiff. At his deposition he admitted that because there are only 90 remaining home site s (lots) on Callawassie, and since nearly all existing property owners had a membership, that no more than 12 memberships were ever going to be sold off the Resale List. These Defendants are 72nd (see

Exhibit D -May 12, 2012 Resale List) on the Resale List and are behind numerous persons that have "conceded" their memberships to the Respondent without ongoing obligation and behind members that have been expelled that also have no ongoing obligation to the Respondent (May 12, 2012 Resale List and Exhibits E-F submitted with Defendants Memorandum in opposition to Motion for Summary Judgment).

The only other way in which a member could possibly attempt to terminate their membership with the Respondent Club is to sale a piece of Callawassie Island property (if they own any) and potentially sale the unwanted membership with the property. This option also offers no guarantee because the subsequent buyer is not obligated to purchase the membership from the selling member, and because the Respondent has "sole authority to determine the qualifications of a member" and in deciding to accept or refuse the buyer as a new member.(Club Plan of Offering 2001 at 3.3). This intolerable situation allows the Respondent the ability to keep the Appellants, and others, obligated indefinitely to a non-profit golf club, no matter what actions the member took to end the relationship. [5] While such perpetual obligation is believed to violate state law, it also is an interpretation of the parties' agreement for which the Appellant has presented sufficient evidence, taking all inferences in favor of the non-moving party, that there exists at least a scintilla of evidence to dispute.

[5] It is worth noting that this Respondent has similar ongoing lawsuit against members that do not own property on Callawassie Island (see Callawassie Island Member's Club Inc. v Michael A. Aulton and Sandra D Aulton 2009-CP-078-4648)

In addition, the Appellant has defended this action by contending and evidencing that allowing dozens of other members to concede membership or in expelling members, but by refusing that treatment to the Appellants, the Respondent has caused an ongoing and perpetual injury for which the Appellant seeks damages and which has been set forth as a defense to any claimed damages of the Respondent. This has been evidenced with concession and expulsion letters, the Resale List which documents the members conceded or expelled, and with testimony of witnesses regarding the fact that such deals have been made by the Club for nearly ten years, with understanding that there is no ongoing liability thereafter as evidenced by Board members and Membership Director Lindsay Cooler in her deposition. (see May 12, 2012 Resale list and Exhibits D, E, F, depo Excerpt Carling p 30, Cooler depo p 56 to Defendants' memo in opposition to SJ).

For these reasons, there exist multiple issues of fact which merit a full hearing to determine the issues of dispute in the case. Therefore, the Respondent's motion for summary judgment should be denied and the Order of the Hearing Judge reversed.

II. Did the Trial Judge improperly grant summary judgment where the Appellants presented more than a mere scintilla of evidence showing a genuine issue of numerous material facts;

C. Evidence of representations made to the Appellants which support their defenses and/or which present claims for the Appellants which would also mitigate damages if awarded

The Appellants in this case were given verbal assurance by the Callawassie Island Club Inc.'s director[6], prior to signing any Agreement, that they would never be obligated for more than 4 months of past dues and fees. (see depo of R. Dennis p 25 ln 4-, p 27 ln 11-18, 89 ln 10-14; J Dennis p 16-17 and full excerpt Ellen Padgett). This representation is not contradicted in any signed writing of the parties and evidences that the terms of any agreement is in dispute.

The Appellant went into significant detail in its Memo in Opposition to the Plaintiff's Motion for Summary Judgment to explain and prove these statements and their importance in the litigation in at least evidencing an a genuine issue of dispute of material fact. Noting that these representations came from Ellen Padgett who worked in the Callawassie Sales Office, was an acting Membership Secretary, and maintained the Resale List, and testified in her deposition that CIMC would inform her when a member had been expelled and was thus no longer a member. See Exhibit I - Excerpts of Ellen Padgett Deposition (pages 8, 88-90, 108). Our courts have recognized that written contracts may be orally modified by the parties, even if the writing itself prohibits oral modification (S.C. Nat'l Bank v Silks, 295 S.C 107, 109-10 (Ct.App 1988). In this case, it is well established by testimony of numerous witnesses (including the Respondent's own 30(b)(6) witness) and in the many documents prepared by and signed by Respondent in which Ellen Padgett was referred to as the membership secretary, membership administrator, membership coordinator that she acted for many years as an agent of CIMC, specifically with regard to membership issues. Ms. Padgett

[6] This is a reference to Ellen Padgett who also later served as Membership Director for the Plaintiff Club. (See depo Excerpts Padgett)

in fact dealt with several specific matters alleged as part of the defense in this action, including, but not limited to, her attendance and involvement in the Defendant's purchase of membership in the Callawassie Island Club. The Defendants' both testified that they spoke to her specifically with regard to the obligations of membership and expulsion and were assured that they would face no more than 4 months of delinquency ("**my maximum liability was four months**",(Depo Dennis p.25 ln 4-6, p27 ln 11-18, p 89 ln 10-16; J Dennis depo p 17 ln 7-pg 18 ln 25) Ms. Padgett also testified to the facts surrounding the Club's action for years secretly allowing some members to concede and/or resign memberships, as to the extremely slow progression of the Club Resale List (which Ms. Padgett was tasked with maintaining), as to the Club's change in policies from how the Club was run by the Developer, as to her understanding of the Club Rules and what constituted the governing documents of the Club (which she was tasked with providing to new members), as to how resignations were handled and virtually all other aspects of membership. (depo Padgett full excerpt)

As further evidence that Ellen Padgett was serving as agent regarding membership for the Respondent even after 2001, in a letter to Mr. and Mrs. Homer Knearl dated November 13, 2002[7], Bill Hawkins, then CIMC President, referred to Ms. Padgett as "Ellen Padgett, Membership Administrator, CIMC". Numerous other documents support that Ellen Padgett was held out to the members (and the Appellants specifically) as the agent of the Club. For instance, the 2004 Intent to Resign Form signed by Mr. and Mrs. Michael Aulton states that

[7] After the 2001 date the Plaintiff claims it purchased the predecessor Club assets

the form should be returned to "Callawassie Island Members Club, Inc. ATTN Ellen Padgett" and the note written on the bottom seems to indicate it was sent from Ms. Padgett as well. In a September 20, 2006, email to Sandy Aulton, Ms. Padgett refers to "her involvement with the Club as membership director" In a May 13, 2002 letter to Ralph Zezza. Bruce McGinn, the general manager of Callawassie Island Club (CIC), CIMC's predecessor, referred to Ellen Padgett as the "C.I.C. Membership Coordinator." (see Exhibits to Defendant Memo in Opposition to Plaintiff Motion for SJ)

In her deposition, Ellen Padgett testified that she acted as membership secretary and handled all CIMC memberships and that she was called the membership secretary. Padgett Dep.p.8, lines 20-24. Ms. Padgett fulfilled the following membership secretary functions:

•Made membership certificates, got them signed, and kept them (Def's Memo in Opp to Sum Judg pp 6-7);

•Maintained the member mailing list (Def's Memo in Opp to Sum Judg pp 6-7); Provided CIMC with the resale list to be published in the minutes (Def's Memo in Opp to Sum Judg pp 6-7);

•Maintained a hard copy of the resale list (Def's Memo in Opp Sum Judg pp 6-7);

•Attended some Club marketing team meetings (Def's Memo in Opp to Sum Judg pp 6-7);

•Fielded calls from members (Def's Memo in Opp to Sum Judg pp 6-7);

•Mailed out proposed membership plans to all the members (Def's Memo in Opp to Sum Judg pp 6-7);

•Maintained membership applications (Def's Memo in Opp to Sum Judg pp 6-7);

•Made copies of documents to be sent to members regarding votes, stuffed envelopes and mailed them out (Def's Memo in Opp to Sum Judg pp 6-7);

•Received the calls and letters requesting to be on the resale list (Def's Memo in Opp to Sum Judg pp 6-7);

•Maintained files with letters from members (Def's Memo in Opp to Sum Judg pp 6-7);

•Maintained copies of membership plans, applications, and other documents to be given to property purchasers (Def's Memo in Opp to Sum Judg pp 6-7);

•Would switch membership privileges from golf to social (Def's Memo in Opp to Sum Judg pp 6-7);

•Notified accounting of membership changes (Def's Memo in Opp to Sum Judg pp 6-7);

•Provided information, as requested, for committee meetings (Def's Memo in Opp to Sum Judg pp 6-7);

•Started and maintained the resale list (Def's Memo in Opp to Sum Judg pp 6-7) and

•Was "very familiar" with the Plan for Offering of Memberships, General Club Rules, and By-Laws (Padgett Dep.p.135, lines 3-17).

Further, members of Respondent Club have testified that they believe Ellen Padgett was an agent of CIMC. For example, Sandy Aulton testified that Ellen Padgett was the "Club Manager and not a salesperson." S. Aulton Dep.p.35, lines 3-4. She also described Ellen Padgett as the "membership

person." S. Aulton Dep.p.52, lines 14-16. In addition, Michael Aulton stated that Ellen Padgett was the manager of membership for the Club. M. Aulton Dep.p.49, line 15-p.50, line 2; p.84, line 17-p.85, line 4. Further, Appellant Ronnie Dennis testified that Ellen Padgett was the Membership Director of the Callawassie Island Club. Dennis Dep.p.20, lines 11-15.

Finally, the Rule 30(b)(6) designee Harmon Switzer stated that while he did not know if she was employed by CIMC per se, Ellen Padgett fulfilled the roles of office manager and membership administration. (30(b)(6) depo .p.75, lines 11-17). The 30(b)(6) designee testified that after the 2001 asset transfer from the developer to CIMC, Ellen Padgett "had various roles at the sales center or welcome center, probably that of record keeper, management of member correspondence. How that worked as to whether it was an administrative services contract or not, I'm really not aware of, but she was always around the office and handling either billing or membership issues, questions, brochures." (30(b)(6) depo.p.76, lines 10-17). The 30(b)(6) designee could not say when she was no longer doing any of these services, noting that "[i]t was always a fluid arrangement." (30(b)(6) depo .p.77, lines 9-16.

Pursuant to the doctrine of apparent authority, a principal is bound by the acts of a person or agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. E.g., Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996). Further, agency may be implied or

inferred and may be shown directly or circumstantially. E.g., Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982). Indeed, "such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf." Genovese v. Bergeron, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997) (quoting 3 AM.JUR.2d Agency § 79, at 584 (1986)).

In the instant case, Ms. Padgett fulfilled all of the functions of a membership secretary or administrator for CIMC. Accordingly, any person who dealt with her – prospective member or current member - would believe that Ms. Padgett had authority to act as membership secretary or administrator for Respondent and CIC. Further, CIMC did much more than passively permit Ms. Padgett to appear to a third person as its agent. CIMC actually stated that she was the membership administrator for CIMC.

The point of Ms. Padgett is expanded on to this degree not only because the Appellants in this case, and several other witnesses, have testified that she represented to them that they had no more than 4 months of delinquency liability, but also because she stated in her deposition that the Rules do in fact require expulsion after 4 months. In fact at pages 146 and 147 of her deposition she agrees that the language in the Club Rules at 13.3.1 is reasonably understood by her to mean that after 4 months of delinquency the member would lose their membership. (p146 ln 8 – p 147 ln 19 Padgett Depo) If this is not an admission by the Plaintiff requiring judgment on this issue it is at least enough to demonstrate a

dispute of a genuine issue of a material fact such that the Respondent's motion should be denied and the Hearing Court Order reversed.

Ms. Padgett also testified with regard to the members on the Resale List stated as "Expelled" or "Conceded" that it was when the members took over (2001) that they put all "these expelling and conceded happened on this- were put here on this list after the members took over." (p. 133 ln12-13 Padgett Depo). When questioned about the basis for expulsion Ms. Padgett indicated that it was because "they owed so much money..." (P.134 ln 10 Depo Padgett).

Upon review of documents in her deposition Ms. Padgett testifies that it appeared to her that the governing documents relevant to the issues of delinquency of membership dues are the Bylaws at Article 11, the Club Rules 13.3, Plan for Offering at 5.5 and Club Rules at 14.2 and possibly the CIPOA Covenants contain some references to that topic. (Padgett depo p. 135 ln 23 thru p. 147). These documents all support, or at least can reasonably be interpreted to support, the position of the Appellants in this matter thereby requiring a denial of the Respondent's motion for summary judgment.

In addition, James Carling, who served on the respondent Board of Directors from approximately 2000 to 2007 as President and Treasurer (pp. 7, 8 & 57 Depo Caroling) at different times, and then again on the board in 2010 serving on the finance committee, testified to several fact which support the claims of the Appellants and which compel reversal of the Hearing Judge's order. First, in his deposition, Mr. Carling acknowledges that there have been past offers made to members for them to concede their membership while he was on the Board, but

that he did not know the specifics of the terms or situations of those offers (p.17 ln 15 – 18 ln 25). Mr. Carling stated that although he did not know, he wouldn't think that persons that conceded memberships would continue to pay dues and fees. (p.21 ln 17-18 Carling depo.). In his deposition Mr. Carling identified a letter signed by him on behalf of the Club to Bernard Carpenter in which he references 13.3.1 of the Club Rules (See Exhibit _ Letter to B Carpenter) and confirmed that members who do not bring their accounts current within four months "Following suspension they're expelled from the club, yes." (p.24 ln 15 – ln 24 and p.27-ln 15 - p28 ln 11. depo Carling). Mr. Carling again confirms this 4 month suspension followed by expulsion when asked in reference to the quoted letter: "Would you agree that the—the rule at that time was that a member would – would be expelled from the club if they were suspended for more than four months and did not settle their accounts?" Carling Answer: "Yes." (P. 30 ln 6 -18 depo Carling) and would not again be eligible to be a member (p 30 ln 12- 18 Carling Depo).

Mr. Carling also testified that during his time on the board that a member could not resign. (p. 30 ln 23 to p 31ln 4 Carling Depo). He elaborated on this statement stating that he would have told someone trying to resign that they "Can't do it." (p.44 ln 15 Depo Carling).

Another past Board President of the Respondent, Karen Norwood, (p. 3 ln 20-21 Depo Norwood) also testified that members simply are not allowed to resign (p.11 ln 12-13). This is in violation of state law. She also testified that persons acquiring membership prior to the 2001 passage of the CIPOA Covenants

were "grandfathered" (P. 28 ln. 13) (the Appellants' membership was acquired in 1999).

Most significant in Ms. Norwood's deposition is that she confirms that when the Respondent claims to have changed the Club Rule 13.3.1 language from "shall be expelled" to "may be expelled" it was done without discussion among the Board and without presentation to the members of the Club. (P. 82 ln 12 thru p84 ln 19 Norwood Depo). And that the change was made because **they did not like the previous language which suggested that a member would "absolutely have to be expelled"** (see p.84 ln 16 Norwood Depo) and they wanted to change that. This presents far more than a scintilla of evidence that the Appellants interpretation of this provision is warranted in this case. It also supports that these changes were not properly made.

Current Board Member, Secretary and Committee Member, (P 6 ln. 3- 8 depo Kilian) Phil Killian testified in his deposition that members are suspended after 60 or 90 days (P 72 ln 8 -12 depo Kilian) but claimed he was unaware of any member that has ever been expelled (p. 76 ln 10-12 depo Kilian). Mr. Killian also was unable to explain when or how the 13.3.1 Rule language changed from "shall" to "may". (P. 80 ln 10 –ln 21 depo Kilian). Mr. Kilian also admitted that under the definition of "resignation" being put forth by CIMC in the current action that resignation in fact provides no benefit to the member (P. 94 ln.16 depo Kilian)., thus supporting the Appellants contention that it violates state law, as outline herein below.

In addition the Defendants hereby provide the court with letters of concession or expulsion relative to Ralph Zezza, Homer Knearl (November 13, 2002), Phillip Thomas (April 14, 2010), Margaret Brice, McBee Butcher, Marshall Field, Jaqueline Leffers, John Reid (Expulsion- December 23, 2004), Jacquelyn Wallace –Expulsion -October 17, 2003).

Testimony of both Richard Carling and Karen Norwood also supports the claims and defenses of the Appellants, (See Amended Answer) that the Respondent was reaching secret and concealed deals to allow select members to concede their membership to the Club (depo Norwood p55. ln 22 –p 56 ln 1). Mr. Carling testified that, although he was serving on the finance board during the time a settlement was reached with the Developer (CIC) that he did not know the details of that settlement and that the terms of that settlement were not discussed with the Finance Committee. (p.16 ln 23 –p17 ln 14 depo Carling). The Appellant has set forth an agreement between the Respondent and the Developer of Callawassie Island (CIC) in which the Developer was allowed to allow concede to the Respondent 187 memberships without ongoing liability and with rights to have such memberships sold in front of those memberships on the Resale List in an alternating fashion. (See Omnibus Settlement Agreement). The Appellants contend that this agreement has damaged them in several ways including, causing increased dues and fees, in allowing some members rights to concede memberships but not them in violation of SC law, and in so saturating the Resale List that Sale therefrom is virtually impossible.

II. Did the Trial Judge improperly grant summary judgment where the Appellants presented more than a mere scintilla of evidence showing a genuine issue of numerous material facts;

D. Evidence of damages incurred by the Appellants due to the actions and misrepresentations of the Respondent

Because this has been touched upon here prior in this brief the Appellant will refer to previous arguments and evidences for the proposition that the Appellants have been injured because they have not been allowed to concede their membership and have not been expelled as they should. The Appellants have also been damaged because they were denied the ability to swap a Golf membership with another membership holder with a less costly Social membership.

The Appellants testified that they were denied the ability to swap the Golf membership (Golf membership) for another member's Social membership in 2005 (See the deposition of Jeanette Dennis pp 74-76) despite both holders being ready willing and able to make such a swap. The reason the Appellants were given by the membership coordinator at the time, Lindsay Cooler, was that the members with whom they wanted to swap (the Allreds) had not been members long enough (5 years) and that the Allreds were not allowed to make such a swap. Shortly thereafter the Allred's swapped memberships with some other member and were told this (undocumented) supposed "5 year requirement" had since been abandoned. In fact, the Club has never produced any documentation to support that there was ever any 5 year requirement or the basis for their denial. As a result the Appellants have been unjustly paying the more expensive golf dues and fees and therefore overpaying on their dues since 2005. The Appellants have made a

claim seeking return of the difference between the charges and dues of a Golf versus a Social membership plus interest for those years up until his resignation. This defense was not considered by the Court though it clearly creates at least some evidence of dispute as to what amounts, if any, the Appellants would owed in this matter.

III. Did the Trial Judge, in granting of summary judgment, fail to take all reasonable inferences in the light most favorable to the Appellants and rely upon findings for which there was no evidence in the record supporting such finding, or for which the evidence available contradicts the findings made.

The Court made findings which took unsupported allegations of the Respondent as true despite the lack of evidence of such allegations where the burden of proof was upon the Plaintiff to prove each element of its case.

For instance the Order finds that there was a " vote by the members" to acquire the club assets and operate the club (Order p.2). This statement was not made in the pleadings in the matter and there has been no evidence submitted which supports it.

The Order also finds that the Respondent has amended its Plan for Offering of Membership in 2007, 2008 and 2012 (p 3 Order) and that the "requirement that a member is obligated to pay dues until that membership is reissued remains consistent." (Order p. 3), but fails to provide supporting reference for such an assertion.

Further, the Order makes findings regarding how the "governing documents" may be amended (p.5 Order) but this finding is made without any reference as to where such findings are found in any documents filed in this case. This finding also crucially omits that the Appellants have argued that the amendments which have been alleged to be made denying basic rights of membership, and making new more onerous obligations and requirements of membership liability, were improperly made as amendments to the Club Rules in a deliberate attempt by the Respondent to avoid taking the votes which such changes would require by the members negatively and materially affected by such changes. The Plan for Offering in fact establishes that the Club Rules were meant to govern the usage of Club facilities (p. 5 Plan of 1994 "Membership Privileges in the Club") and are nowhere set out to be the proper mechanism to change fundamental transfer rights of a member. The Respondent has attempted to make major changes to governing policies, such as removing the language in the Club Rules which sets a limitation on liability of four months triggering expulsion to make those Rules reference an optional expulsion, while inserting language to attempt to include ongoing liability even to expelled members (16.5 2014 Club Rules). All of this was done without vote of the membership, and without approval of the Appellants.

Further, the Respondent has entered into an agreement with the Callawassie Island developer to violate Club policies by allowing the developer to concede over 150 memberships to the Respondent with an agreement by the Respondent to insert such memberships into the Resale list and to pay the

developer a large portion of the sale proceeds of each membership when sold (Omnibus settlement Agreement). This agreement, and other concession agreements, not only costs the members a significant amount of forfeited dues and fees, but also resulted in packing the Resale List with these non-obligated memberships to the detriment of the Appellants (See Resale List May 2012). Certainly these actions negatively impacted the rights of members without a vote of those members affected, with the Respondent claiming they need no vote based upon either splicing these changes into the Club Rules, which are more rightly designed to establish Club hours of operation and determine golf cart usage and guest privileges, or simply by concealed executive order with no information or explanation to the membership as to how such agreements and changes are made.

At page 8 of the Order the Court dismisses the argument, made by the Appellant, that the Respondent is relying upon language in governing documents which was changed in violation of the rights of the Appellants, and by so doing the Court fails to give all presumptions in favor of the Appellant in its review of the applicable documents. The Appellant calls to the attention of the Court the recent case of Joshua Bell v. Progressive Direct Insurance Co., No 27381 SC Supreme Court (April 9, 2014) in which the court set forth that a Summary Judgment motion should be denied where "further inquiry into the facts of the case is desirable to clarify application of the law' and 'should not be granted even when there is no dispute as to the evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts"' Citing Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. at 362, 563 S.E.2d at 333 (2002). The

court should "review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party..." Id. In this case the court has failed to do so and the Order should be reversed and summary judgment denied.

IV. Did the Trial Judge err in failing to properly apply South Carolina law and the Nonprofit Corporations Act, including, among other laws S.C. Code Ann. § 33-31-302(18), §33-31-610, and§33-31-621(e).

The Order of the Court also denies the defenses raised by the Appellants with regard to the applicable statutes such as **Section 33-31-611.** The law provides in pertinent part:

"(c) Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member. "

The Order finds that amendments and changes to the Club Rules in recent years were done properly. However, The changes made have sought to deny the Appellants the protections provided by the expulsion provision of the Club Rules of 2001 Section 13.3.1 (as quoted above) which, when enforced as written, results in the complete end to all membership rights and obligations upon expulsion. However, there is no evidence in this case that the Appellants ever approved any change in this right and in fact they deny even having knowledge that the Club Rules were changed. See the Defendants Memorandum in Opposition to the

Plaintiff's Motion for Summary Judgment where the deposition testimony supports that this change was done without voting of any kind by the members.

The Appellants also contend that they were treated differently from other members in violation of state law SC § 33-31-610 which requires that "All members have the same rights and obligations with respect to...transfer...(and) any other matters,..."). however page 7 of the Order holds that in reference to such argument that the "record clearly demonstrates that to the extent members were treated differently, such treatment was in furtherance of the negotiated settlements of debt owed to CIMC." This finding of the Order is not supported by the record in this case as the Respondent is not believed to have presented any evidence to refute that submitted by the Respondent which demonstrated that numerous club members had been allowed to concede memberships (See Defendants exhibits to the Memo in Opposition to Motion for Summary Judgment) and that numerous members had been expelled from the Club (See Defendants exhibits to the Memo in Opposition to Motion for Summary Judgment – specifically the Resale List). The Respondent's *arguments* on this matter are not evidence or documents properly to be considered without supporting documentation or affidavit, for which there was none. It is unknown how these transactions occurred and after numerous depositions and discovery in the case, including the Respondent's 30(b)(6) designee, the Respondent is unable to explain how or why members used to be expelled from the Club, likewise, the concessions were allowed in numerous circumstances which clearly violate the rights of the Appellants who have not been "allowed" to concede their membership where others of the same class of

membership have been. The Board of CIMC has no right to violate state law, even in negotiations of settlement and in fact SC Code §33-31-302 at part 18 expressly states just that. The Order improperly relies upon unspecified governing documents and a statutory provision which does not support the contention in finding that the Board was authorized to violate the Appellants' rights found under §33-31-610.

The Appellant contends that they either resigned and/or should be found by the court to no longer be a member of Respondent Club, or have been unfairly prohibited from resigning or terminating membership with the Respondent in violation of South Carolina Code of Laws, including but not limited to § 33-31-620 and SC Code § 33-31-621. (see Amended Complaint p. 8) SC Code § 33-31-620 clearly establishes a right of a members to resign. The Official Comment describes how such liabilities incurred prior to resignation may extend beyond resignation for a pre-agreed "specified period of time" (see Official Comment). For this provision to have any force and effect, the resignation must provide a benefit to the member. In the current case, if the Respondent's claim of an unlimited obligation is allowed to win the day then the member effectively has no right of resignation. Further, numerous witnesses have testified that there is no ability to resign. Specifically, Lindsay Cooler (current Membership Director for the Respondent) at her August 30, 2012 deposition testified that Respondent, to her knowledge, does not have a method for a member to resign (depo L Cooler p. 18 ln 23- p19 ln 6). Likewise former and current Board officers testified that there is no means to resign from the Respondent Club. James Carling serving on the

Board finance committee at the time of his deposition in September 2012 testified that a member "could not resign". (Carling depo p. 30 ln 23 – p 31 ln 4). These witnesses stated the policy of the Respondent as practiced by the respondent. It is only during the course of the current litigation and after being confronted with the law, that the Respondent is attempting to shoe-horn its practices into conformity with the law. However, for the definition of "resigned" constructed by the Respondent offers no benefit to the member and should be rejected by this Court.

Likewise, as to page 8 the Order improperly interprets §33-31-621(e) to apply to obligations incurred after resignation where that code section clearly states that it applies to "obligations incurred or commitments made **before resignation**." (emphasis added) Official Code Comments further support this interpretation and that the Courts interpret such provisions governing expulsion and termination under a fairness and reasonableness standard. Such analysis at the summary judgment level would require denial of the motion for summary judgment and reversal of the Hearing Judge's Order.

V. Did the trial Judge improperly awarded damages to the Respondent, including the award of attorneys' fees and damages based upon an affidavit not served upon the Appellants, nor presented at the hearing, and upon which the Appellants were never allowed to cross-exam the Respondent.

The Order in this case should be reversed because in awarding damages the Order in this matter relies upon affidavits filed with the Court on November 8, 2013, the day of the hearing of this matter, and not provided to, nor served upon, the Appellants (see page 9 of the Order) in violation of the SC Rules of Civil

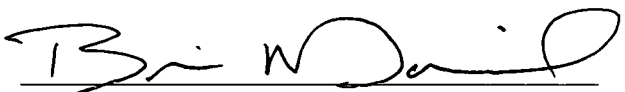
Procedure including Rule 6. In fact, the Defendants were not made aware of the contents of the affidavits until after the hearing. At the hearing the Respondent's counsel made only a nondescript reference that they were planning to "supplement" the affidavits previously submitted when the motion was filed (hearing transcript p. 33 ln 24-25). The undisclosed affidavits included attorney fees not previously presented to the Court. (Plaintiff's Affidavits) By the Court's relying on these late filed affidavits for its award of damages and attorneys' fees in this case, the Appellants were denied the opportunity, not only to review the amounts being claimed, but also to present evidence and affidavits which would contest the amounts claimed. It was error for the Court to rely upon these affidavits, which appear to include amounts not previously claimed, including amounts for attorney's fees for which the court makes findings of reasonableness without the submission of any such evidence or testimony as to any of the factors at the hearing of this matter. Interestingly, the Order of January 15, 2014 sets forth a lengthy footnote of an analysis applied to the acceptance of the attorney fee affidavit, but that footnote is removed in the Amended Order of June 10, 2014. Regardless, the finding as to damages based upon such unserved affidavit was in error and the Court should amend to remove those damages, reverse and deny the motion for summary judgment.

CONCLUSION

For the reasons set forth herein and as may be raised in any supplemental or reply brief, and as allowed in oral arguments, the Orders of May 14, 2013 and

July 17, 2013 should be reversed for the reasons set forth above and the court should order that the Appellant is entitled to a trial by jury in this matter and that the matter be returned to be heard by a jury trial.

Respectfully submitted,
LAW OFFICE OF BRIAN MCDANIEL, LLC



Brian McDaniel
2015 Boundary Street, Suite 216
PO Box 2085
Beaufort, South Carolina, 29901
SC BAR # 68618
Phone: 843-379-5117
ATTORNEY FOR APPELLANTS
RONNIE D. DENNIS and
JEANETTE DENNIS

Beaufort, South Carolina
November 5, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No.: 2014-001524

The Callawassie Island Members Club, Inc., Respondents

v.

Ronnie D. Dennis and Jeanette Dennis, Appellant

PROOF OF SERVICE

I certify that I have served the Revised Initial Brief of the Appellant to be included in the record on appeal on The Callawassie Island Members Club, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on November 5, 2014, addressed to its attorneys of record, Ehrick K. Haight, Jr., Esquire, P.O. Drawer 6067, Hilton Head Island, SC 29938; Howell, Gibson & Hughes, P.A., Stephen P. Hughes, Esquire, William T. Young, Esquire, P. O. Drawer 40, Beaufort, SC 29901-0040.

November 5, 2014

Brian McDaniel
Law Office of Brian McDaniel, LLC
Post Office Box 2085
Beaufort, South Carolina 29901
(843) 379-5117
Attorney for Appellant

Appellate Case No.: 2014-001524

Other Counsel of Record:

Minor, Haight & Arundell, P.C.
Ehrick K. Haight, Jr., Esquire
P.O. Drawer 6067
Hilton Head Island, SC 29938
Attorney for the Plaintiff/ Respondent

Howell, Gibson & Hughes, P.A.
Stephen P. Hughes, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Plaintiff / Respondent

Howell, Gibson & Hughes, P.A.
William T. Young, Esquire
P. O. Drawer 40
Beaufort, SC 29901-0040
Attorney for the Plaintiff/ Respondent

Law Office of
BRIAN McDANIEL, LLC

bmcdaniel@attorneymcdaniel.com

VIA US MAIL
November 5, 2014

The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

RE: Callawassie Island Members Club, Inc. v. Ronnie D. Dennis and Jeanette Dennis;
Appellate Case No 2014-001524.

Dear Ms. Kitchings:

I recently received correspondence from Mr. Rick Haight, attorney for the Respondent, concerning a request that I clarify and revise a few of the references to the record in the Appellant's Initial Brief, and file a Revised Initial Brief. In review of those specified references, I have agreed that references on pages 10-13, 24 and 25 of the Initial Brief warranted some clarification. I have made those revisions, which do not materially change the substance of the submitted Initial Brief, but which clarify those references to the record, and I am submitting for filing this revised Initial Brief which includes those revisions.

Please let me know if there are any questions about this filing. Thank you for your assistance.

Sincerely,

Brian D. McDaniel
Law Office of Brian McDaniel, LLC
Attorney for Appellant
SC Bar # 68618

Enclosure: Revised Initial Brief

Cc: Minor, Haight & Arundell, P.C., Ehrick K. Haight, Esquire, Post Office Box 6867, Hilton Head Island, SC 29938;
Stephen Hughes, Esquire, Howell Gibson and Hughes, PA, PO Box 40, Beaufort, SC 29901

Law Office of Brian McDaniel, LLC
www.attorneymcdaniel.com
Post Office Box 2085
Beaufort, South Carolina 29901

To The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211