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
14th Judicial Circuit

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000003

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn,
of Whom Mark K. Quinn is the Appellant. Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On September 13, 2012, The Callawassie Island Club, Inc. ("CIMC") brought a breach of contract action against Mark K. Quinn and Sherry B. Quinn (the "Quinns"), for the collection of delinquent dues, fees and assessments.[1] (Complaint). The action alleged that the Quinns, as club members, had an ongoing obligation to pay dues until such time as their membership was reissued to a new member. The Quinns answered alleging that their resignation or expulsion relieved them of any further liability for dues, even though their membership had not transferred to a new member. (Answer, Para. 34,

[1]For purposes of this Brief, the monetary damages sought by CIMC, which include dues, fees, assessments, costs and attorneys' fees, are hereinafter referred to as "dues" unless more specificity is required by the context.

44; Amended Answer, Para 36, 47; 2nd Amended Answer Para 36, 48). Additionally, the Quinns brought numerous counterclaims of which only two remain, negligent misrepresentation and breach of contract.

CIMC moved for summary judgment arguing that the Quinns' obligation to pay dues until their membership reissued to a new member was clear and that the various defenses and counterclaims were either barred or unsupported by any evidence. Specifically, CIMC argued it did not own the club, and in fact was not even in existence, at the time the Quinns purchased and therefore was not capable of making any misrepresentation upon which the Quinns could have relied. CIMC filed a Memorandum in Support of Motion for Summary Judgment, with supporting Affidavits on March 7, 2014,[2] and the Quinns responded with a Memorandum in Opposition, filed the morning of the hearing on May 19, 2014. CIMC's motion for summary judgment as to Defendant, Mark K. Quinn ("Quinn") was granted by Order dated June 24, 2014 ("Initial Order"). Summary judgment as to Quinn's wife was denied, pending the completion of additional discovery, with leave to refile. (Initial Order, p. 1).

The Quinns filed a Motion for Reconsideration pursuant to Rule 59, SCRCP, on July 7, 2014 (the "Rule 59 Motion"), to which CIMC filed a Memorandum in Opposition on October 28, 2014. Prior to oral argument on November 3, 2014, the Quinns retained new counsel. At the hearing, the Quinn's present counsel argued for the first time and over the objection of CIMC, that the trial court's award of attorneys' fees was

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[2]CIMC filed Affidavits of Jeff Spencer and Ehrick K. Haight, Jr., which were updated by Supplemental Affidavits filed May 19, 2014.

unauthorized by the governing documents. The trial court directed the parties to submit alternative proposed orders on the issue. (Motion for Reconsideration Transcript p.27, lines 15-21). The Quinns, however, submitted a Supplemental Brief in Opposition to Plaintiff's Summary Judgment. On December 16, 2014, the trial court denied the Quinns' Motion for Reconsideration and affirmed summary judgment against Gregory L. Quinn, which he now appeals (the "Final Order").

FACTS

On or about July 3, 1997, the Quinns purchased a membership in what was then the Callawassie Island Club, Inc., which owned and operated the majority of the recreational amenities, including the golf course, tennis facilities, swimming pools, clubhouses, and dining facilities. (Complaint, Ex. "A"). At that time, the Callawassie Island Club, Inc. was controlled by Callawassie Island Company, L.P. (the "Developer"). (CIMC Memo Support Summ. Jmt., p. 2; Aff. G. Harman Switzer, 3rd, p.1, para. 7). As indicated in The Callawassie Island Club Membership Purchase Agreement executed by the Quinns, membership in the Callawassie Island Club was governed by the 1994 Plan for the Offering of Memberships, the corporate By-laws attached thereto, and the General Club Rules (the "1994 Governing Documents"). (Complaint, Ex. "A"). Central to this case is the obligation set forth in the 1994 Governing Documents, which requires:

> An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club **until his or her equity membership is reissued** *(emphasis added)* by the Club. *(Plan for the Offering of Memberships, April 1, 1994, Rev. July, 1994; "Payment of Dues by Resigned Equity Member", Page 9, in force at the time Quinn acquired Membership).*
>
> *See also:*

> Any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees and charges shall accrue against the resigned equity membership **until the resigned equity membership is reissued** *(emphasis added)* by the Club. *(By-Laws, Callawassie Island Club, 9(a), pg. B-11, in force at the time Quinn acquired Membership).*
>
> *And:*
>
> Any member may terminate membership in the Club by delivering to the Secretary written notice of termination in accordance with the By-Laws. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) *(Callawassie Island Club General Club Rules "Suspension and Termination of Membership, page C-3, in force at the time Quinn acquired Membership).*

As is common in residential communities in the area, the development plan further contemplated the transfer of the recreational amenities to a member owned and managed organization following the Developer's control period. (1994 Plan, p. i). To effectuate that intent, CIMC was created and registered as a §501(c)(7) not for profit organization under the Internal Revenue Code. (Complaint, p. 1, CIMC Memo. Support Summ. Jmt., p. 2; Affidavit, G. Harman Switzer, 3rd, p.1, para. 5). Following the Quinns' purchase, the Callawassie Island Club's assets were transferred to CIMC and it commenced the maintenance and operation of the club amenities under a new Plan for the Offering of Memberships dated August 8, 2001 (the "2001 Plan"), which included the By-laws and General Club Rules (collectively, and as amended, the "CIMC Governing Documents"). (CIMC Memo. Support Summ. Jmt., p. 2; Affidavit, G. Harman Switzer, 3rd, pp. 1-2, para. 5-7). The Quinns, as existing members, were entitled to continue their membership in the newly formed club pursuant to Section 2.2.2, which provided that "[e]ach existing equity member as of the date of this Plan will be entitled to continue his

or her equity membership under this Plan without having to pay any additional or new membership contribution to the Club. (2001 Plan, Section 2.2.2, p. 2). Consistent with the 1994 Governing Documents, the CIMC Governing Documents contained similar language mandating that members continue to pay dues until their memberships reissued to a new member. (2001 Plan, Section 2.4.9, p. 5; 2001 General Club Rules, Section 14.2.3, p. 9). It is absolutely uncontroverted in the record that the Quinns elected to continue their membership following CIMC's acquisition of the assets for many years, enjoying the benefits and privileges of membership up until their purported resignation or expulsion in 2009. (Complaint, Ex. "B"; Affidavit of Jeff Spencer, Supplemental Affidavit of Jeff Spencer; Answer, para. 7, 10, & 40; Amended Answer, para. 7, 10, & 42).

In the wake of radically declining real estate prices precipitated by the latest recession, however, a few members, including the Quinns, sought to terminate their ongoing obligations to CIMC without honoring their obligations. They simply resigned without selling or otherwise transferring their membership to a new member and ceased payment. There are two ways in which a membership may be re-issued. The first is to place the membership on a re-sale list and wait for it to be sold in turn. Alternatively, a member may sell his or her property with the attendant membership. (1994 Plan, p. 7). A membership may be placed on the re-sale list voluntarily at the request of a resigning member, or involuntarily through termination which forces surrender of the membership certificate. (1994 General Club Rules, p.C-3). These methods of re-issuance remained constant throughout Quinns' membership. (2001 General Club Rules, p. 9, Sec. 14.1.5;

2007 General Club Rules, p.14, Sec. 14.1.5; 2009 General Club Rules, p. 15, Sec. 14.1.5).

Prior to the recession, CIMC had "very few delinquencies" as those who could no longer afford their membership found it relatively easy to sell their property. (Depo. P. Kilian, p. 71, line 25 - p. 72, line 5). Rather than sell his property in this difficult market, Quinn defaulted in his financial obligations to CIMC and this action was commenced for the collection of the unpaid account.

ARGUMENT

I. QUINN FAILED TO PRESERVE SEVERAL ISSUES FOR APPELLATE REVIEW.

Quinn makes several arguments that were raised for the first time during the motion for reconsideration and in his Brief, including but not limited to those outlined below.

A. ISSUE I: IMPROPER LEGAL STANDARD.

Quinn takes issue with the legal standard recited in the Initial Order, contending Judge Kinard's Order fails to mention the "mere scintilla" standard used in a summary judgment context. (Brief p.9). While Quinn briefly noted this concern in his Motion for Reconsideration[3], he employs entirely new arguments in his Brief.

Quinn contends the failure to include the "mere scintilla" language in the Order "appears to be driven in part by the trial court judge's background in drafting restrictive covenants for property owner subdivisions . . . and current status as the president of a country club." (Brief pp.9-10). Quinn's argument seeks to cast a cloud of doubt over

[3] Motion for Reconsideration pp.1-2.

Judge Kinard's ability to impartially adjudicate this matter. However, at no time during the proceedings of this matter did Quinn question Judge Kinard's fitness to hear the case nor did he request Judge Kinard's recusal. Accordingly, his argument and belated questioning of Judge Kinard's fitness is unpreserved for appellate review. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 643 (2011) (stating it is axiomatic that an issue cannot be raised for the first time on appeal) (Citations omitted).

Quinn further asserts other shortcomings, including failure to include official "findings of fact" and "conclusions of law;" improperly shifting the burden of proof to the non-moving party; and treating the matter as "only a debt collection problem." (Brief pp.9-10). Quinn has raised these arguments for the first time in his Brief. *See Id.* Accordingly, they are not preserved for appellate review and should not be considered by this Court. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) (stating an appellate court will not consider issued on appeal which have not been preserved for appellate review) (Citations omitted).

B. ISSUE III(B) WAIVER ARGUMENT.

Quinn challenges Judge Kinard's reliance upon and citation to the 2014 General Club Rules governing expulsion. (Brief pp.29-32). In doing so, Quinn contends CIMC's act of amending its Club Rules in 2014, to reflect that an expelled member will remain "liable for all Charges until Membership is re-issued," operates as a waiver of CIMC's argument and an admission that the un-amended version of that provision was open to

differing interpretations.[4] (Brief pp.33-34). This argument was not presented to Judge Kinard, either through oral argument, written memoranda, or in Rule 59 Motion. *See Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court). Accordingly, the argument is unpreserved and should not be considered by this Court.

C. ISSUE III(E) ATTORNEYS' FEES.

Quinn takes issue with Judge Kinard's award of attorneys' fees to CIMC, claiming CIMC failed to cite statutory or contractual authority for recovering its attorneys' fees. (Brief pp.33-37). Quinn then attempts to dissect CIMC's governing documents, reading then in light of his argument, to impugn Judge Kinard's award. (Brief p.37). Quinn levies further attacks on Judge Kinard's Orders by asserting he relied on generalized statements in CIMC's documents and disregarded specific provisions and improperly revised documents. (Brief pp.39-40).

At the hearing of CIMC's Motion for Summary Judgment, both in oral argument and in his supporting memorandum of law, Quinn contended awarding attorneys' fees was improper because the affidavit accompanying the request for attorneys' fees was untimely. (Motion for Summary Judgment Transcript p. 17, lines 17-19; p.29, lines 20-25; Defendant's Memorandum of Law p.25). Quinn never challenged CIMC's contractual authority to request attorneys' fees. The only argument presented to Judge

[4] It is important to note that Judge Kinard's reference to the 2014 Club Rules was merely illustrative of the Club's consistent policy that all members are responsible for the payment of dues, fees, and assessments until such time as the membership is reissued.

Kinard prior to his initial ruling was the challenge to the timeliness and reasonableness of the affidavit of attorneys' fees.

Admittedly, over CIMC's objection, Quinn raised arguments about the source of authority for attorneys' fees to Judge Kinard during the hearing on the motion for reconsideration. (Motion for Reconsideration Transcript p.6, line 24-p.7, line 21; p.19, lines 6-10). However, a party may not raise a new issue previously not raised to the court in a Rule 59 motion. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment). Accordingly, because Quinn has not challenged the award of attorneys' fees based on these arguments raised to Judge Kinard prior to issuance of the Initial Order, Quinn has waived his challenge of the attorney fee issue. *See First Union Nat'l Bank v. S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (stating a failure to challenge a ruling is an abandonment of the issue and an unchallenged ruling, right or wrong, is the law of the case).

D. ISSUE IV(A) STATUTORY VIOLATION CLAIM

Quinn asserts Judge Kinard erred by dismissing his statutory violation claim under S.C. Code Ann. §33-31-621, because CIMC is time barred from challenging Quinn's mandatory expulsion. (Brief pp.41-42). Quinn asserts CIMC's collection action against him amounts to a challenge of his expulsion from the Club. (Brief pp.41-42). Quinn cites section 33-31-621 for the proposition that a challenge to an expulsion must be commenced within one year of that expulsion. (Brief pp.41-42). As a threshold manner, section 33-31-621 clearly applies in the context of an expelled member

challenging an expulsion. However, the Court need not reach this argument as it is not preserved for appellate review.

In his second amended answer and counterclaim, Quinn pled a cause of action claiming a violation of sections 33-31-620, 621. In pleading this cause of action, Quinn did not assert any argument regarding the statute of limitations, but noted the statute of limitations as separate affirmative defense. (Second Amended Complaint pp.6-7;p.11). During the briefing and arguments at the summary judgment stage, Quinn never argued CIMC's debt collection amounted to a time-barred challenge to Quinn's purported expulsion. Furthermore, Judge Kinard did not specifically rule on this argument and Quinn did not raise it in his motion for reconsideration. Accordingly, this issue was not properly presented to Judge Kinard for consideration, was not ruled on by Judge Kinard, or raised in Quinn's Motion for Reconsideration. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court). Accordingly, the arguments presented in Quinn's Issue IV(A) are not preserved for appellate review and should not be considered by this Court.

E. ISSUE IV(B) QUINN'S NEGLIGENT MISREPRESENTATION CLAIM

Quinn contends Judge Kinard erred in dismissing Quinn's negligent misrepresentation claim because CIMC's act of providing methods for certain members to leave the club without owing more than their equity contribution "aligned with Appellant's understanding . . ." (Brief pp.41). This specific argument in favor of Quinn's negligent misrepresentation claim was never presented to Judge Kinard for consideration and is not preserved for appellate review. *See Elam*, 361 S.C. at 23, 602

S.E.2d at 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court).

II. CIMC DEMONSTRATED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BY CONCLUSIVELY ESTABLISHING (A) QUINN WAS A MEMBER, (HAVING PAID DUES FOR THE USE OF CIMC'S AMENITIES); (B) THAT THE GOVERNING DOCUMENTS (FROM THE TIME QUINN ACQUIRED HIS MEMBERSHIP FORWARD) OBLIGATED HIM TO REMAIN IN GOOD STANDING UNTIL HIS MEMBERSHIP REISSUED; AND (C) THAT QUINN HAD NOT MADE PAYMENT IN ACCORDANCE WITH THE AGREEMENT.

A. MEMBERSHIP IN CIMC IS A CONTRACTUAL OBLIGATION

The required elements of a contract are offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). All of these elements are conclusively established by the record in this case.

When Quinn acquired his membership in CIMC's predecessor, the Callawassie Island Club, Inc., the terms and provisions governing membership were memorialized in the 1994 Governing Documents. (Complaint, Ex. "A"). Quinn signed an Application for Membership and The Callawassie Island Club Membership Purchase Agreement (the "Agreement"). (Complaint, pp. 1-2, Ex. "A"; Answer & Amended Answer, Para. 2). In so doing, he expressly agreed to be bound by the 1994 Plan (Complaint, Ex. A). Quinn's purchase of a membership is not in dispute. Nor is there any controversy over the fact that CIMC provided, and Quinn enjoyed, the benefits of membership; or that Quinn paid dues, fees and assessments for nearly a decade. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct."

Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997). In this case, we have ample evidence of all three.

As for consideration, our courts have held it may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998). A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. *Shayne of Miami, Inc. v. Greybow, Inc.*, 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957). Clearly, the provision of benefits and services in exchange for the observance of the duties and obligations of membership qualifies as adequate consideration.

There being no question that Quinn was offered membership subject to the 1994 Governing Documents, accepted membership in accordance with the 1994 Plan, and was accorded the rights and privileges of membership pursuant thereto; the trial court rightly concluded that a contract existed. "By applying for a membership and purchasing same, Defendant became contractually bound by the 1994 Plan for the Offering of Memberships and the Exhibits thereto, which included the By-laws and the General Club Rules . . . ." (Initial Order, p.2).

The 1994 Plan specifically contemplated the transfer of the Callawassie Island Club's assets to the membership, which occurred in late 2001, when CIMC assumed control. (1994 Plan, p. i; Affidavit, G. Harman Switzer, 3rd, p.1, para. 6). Following CIMC's acquisition of the club assets, Quinn continued his membership as allowed under the CIMC Governing Documents. Section 2.2.2 of the 2001 Plan states in part: "Each equity member as of the date of this Plan will be entitled to continue his or her equity

membership under this Plan without having to pay an additional or new membership contribution to the Club." It is clear in the record that Quinn availed himself of the benefits of membership in CIMC from the time of its acquisition until he ceased payment of his dues. (Complaint, Ex. "B"; Affidavit of Jeff Spencer; Supplemental Affidavit of Jeff Spencer).

The trial court found: (a) that a contract exists, (b) that CIMC has the right to enforce it, (c) that Quinn continued to use the club amenities, and (d) paid dues to CIMC. Because these findings are wholly supported by the record and not reasonably subject to any other inference, they should not be disturbed on appeal. (Initial Order, p. 4).

B. OBLIGATION TO PAY DUES UNTIL MEMBERSHIP REISSUED.

Having satisfied itself that a contract did exist under the 1994 Governing Documents, as amended, the Trial Court next addressed its interpretation. At all times during Quinn's membership, the applicable governing documents mandated that members remain obligated for dues, fees and assessments until such time as the membership was reissued.[5] The following excerpts leave no room for contrary interpretation:

Relevant Plan Excerpts:

> An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club **until his or her equity membership is reissued** *(emphasis added)* by the Club. *(Plan for the Offering of Memberships, April 1, 1994, Rev. July, 1994;*

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[5] At the time Quinn acquired membership, the governing documents included The Plan for Offering Memberships dated April 1, 1994, Rev. July, 1994, and the By-Laws and General Club Rules issued by CIC. A full copy of the 1994 Plan, 2001 Plan, 2007 Plan and 2008 Plan, together with the 1994 General Club Rules and By-laws, along with all later versions, amended and adopted by CIMC during the Quinn' membership, were provided to the trial court (Trans., May 19, 2014, p. 4, lns 21-22), the relevant excerpts of which are set forth herein above.

"Payment of Dues by Resigned Equity Member", Page 9, in force at the time Quinn acquired Membership).

An Equity Member who is on the waiting list to sell his/her Membership will be obligated to continue to pay to the Club all Charges associated with his/her Membership **until his/her Equity Membership is reissued by the Club** *(emphasis added). (Plan for the Offering of Membership, Amended as of February 1, 2008, 5.11 "Payment of Dues and Charges By Resigned Members", in force at the time of Quinn attempted resignation).*

Relevant Excerpt from By-Laws:

Any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees and charges shall accrue against the resigned equity membership **until the resigned equity membership is reissued** *(emphasis added)* by the Club. *(By-Laws, Callawassie Island Club, Article X, Sec. 9(a), pg. B-11, in force at the time Quinn acquired Membership).*

The ByLaws impose identical obligations (for ongoing payment of dues, fees, charges, until the membership is reissued) upon expelled members.

Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to the Club Facilities under any circumstances. An expelled member shall be so notified by registered mail and shall have the obligation to surrender his or her membership certificate **for reissuance by the Club to a new member in accordance with the provisions of Article X, Section 9 of these By-laws** *(emphasis added). (By-Laws, Callawassie Island Club, Article XIV, Sec. 5, pg. B-15, in force at the time Quinn acquired Membership).*

The Club shall have a lien against each membership for any unpaid assessments, fees, annual dues or other charges . . .[and] **may also** *(emphasis added)*, at its option, sue to recover a money judgment for unpaid annual dues or other charges . . ." *(By-Laws, Callawassie Island Members Club, March, 2009, Article XI, pg. 8, in force at the time Quinn attempted resignation - showing Club is not limited to recovery against equity only).*

Relevant Excerpts from the General Club Rules:

Any member may terminate membership in the Club by delivering to the Secretary written notice of termination in accordance with the By-Laws. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) *(Callawassie Island Club General Club Rules*

"Suspension and Termination of Membership, page C-3, in force at the time Quinn acquired Membership).

Any member may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for the Offering of Club Memberships. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) **until the membership is sold** *(emphasis added). (The Callawassie Island Members Club, Inc. General Club Rules as of February 23, 2009, Sec. 14.2.1, in force at the time Quinn attempted resignation).*

Any Member of the Club, who has been expelled shall not again be eligible for membership nor admitted to Club Facilities under any circumstances. An expelled member shall be so notified by registered mail and shall have the obligation to surrender his or her membership certificate **for reissuance** by the Club to a new member. *(The Callawassie Island Members Club, Inc. Gneral Club Rules as of February 23, 2009, Sec. 14.1.5, in force at the time Quinn attempted resignation).*

Notwithstanding any termination or suspension of membership, the member **shall remain liable for any unpaid club account or membership dues, fees, charges and assessments**...*(The Callawassie Island Members Club, Inc. Gneral Club Rules as of February 23, 2009, Sec. 14.2.3, in force at the time Quinn attempted resignation).*

There is no triable issue of fact for a jury to consider when the language of the applicable contract is clear and unambiguous. "When a contract or agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *ESA Services, LLC v. S.C. Dept. of* Revenue, 392 S.C. 11, 20, 707 S.E.2d 431, 436 (2011). "it is a question of law for the court whether the language of a contract is ambiguous." *Id., see also: Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). The trial court, after carefully reading the documents as a whole and giving the language its plain meaning, concluded Quinn had a clear and unambiguous obligation to pay ongoing

dues until his membership reissued. (Initial Order, p. 3; Final Order, p.1). In so doing, the trial court correctly applied the cardinal rule of contract interpretation by ascertaining and giving 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).

The Trial Court was thoroughly briefed regarding Quinn's contention that expulsion somehow absolved him from any further liability and the matter was extensively argued at each hearing. While he readily admits that a "resigning" member has a duty to continue paying dues in his Brief to this Court, Quinn asked the Trial Court to disregard the plain meaning of the above excerpted provisions and adopt the notion that there are "multiple exit tracks" depending on whether a member voluntarily resigns, has his membership terminated by the Board, or is expelled by operation of the agreement. He suggests that by defaulting and forcing his own expulsion, a member can simply dispense with his obligations or otherwise cap his damages at his equity contribution. In support of his contention, Quinn refers to the following provision:

> Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to the Club Facilities under any circumstances. Any expelled member...shall have the obligation to surrender his or her membership certificate **for reissuance** *(emphasis added)* by the Club to a new member...*(1994 By-laws, p. B-15, incorrectly cited as p. B-11 in Appellant's Brief; an identical provision also appears in the 2001, 2007 and 2009 General Club Rules at Section 14.1.5).*

Quinn then, in a leap of logic wholly unsupported by the evidence, and contrary to the specific provisions of the contract documents, concludes that expulsion prematurely terminates the obligation to pay dues until the membership reissues. Such a contention is not only counter to the clear intent of the parties, but is also specifically contradicted by

the clear provisions of the by-laws. As confirmed by the provisions of Articles X and XIV of the club by-laws, there are not multiple "exit tracks." Article XIV, Section 5 of the 1994 By-laws, entitled "Expulsion," specifically refers back to Article X, Section 9, both of which are cited hereinabove, and both of which impose identical obligations upon resigning or expelled members. Section 9(a) states: "[d]ues, fees and charges shall accrue against a resigned equity membership until . . . reissued by the Club." It is clear that the manifest intent is to force the surrender and "reissuance" of the membership, and that "reissuance" alone is the method by which a member may conclude his or her financial responsibilities. Quinn does not, and cannot, cite to any provision, in any version of the governing documents that waives this obligation. Thus, regardless of whether the termination is effected by resignation or expulsion, the resigning and/or expelled member remains liable, under the explicit provisions of the club documents, for payment of dues, fees and charges until the membership is reissued.

Nor can Quinn cite to any provision in the governing documents which limits his damages to the value of his equity membership. While several provisions do authorize the Club to accrue dues against the equity, there is absolutely no language which indicates a lien against the equity is CIMC's sole remedy. In fact, the 1994 Governing Documents clearly authorize a suit for damages, stating, it "**may also** *(emphasis added)*, at its option, sue to recover a money judgment for unpaid annual dues or other charges . . ." (By-Laws, Callawassie Island Members Club, March, 2009, Article XI). Indeed, to read the governing documents as Quinn suggests would completely invalidate the numerous provisions cited above.

Rather than contradict the clear and unambiguous intent and application of these provisions, the testimony tendered by Quinn in support of his interpretations serves to underscore its plain meaning. Former Board member James Carling testified that the Club would continue to try and collect from individuals who simply tried to walk away from their obligations. (Depo. J. Carling, p. 32, lines 17-25). Former Board member Karen Norwood testified that expulsion meant a permanent loss of privilege (as opposed to a termination of obligations). (Depo. K. Norwood, p. 84, lines 15-23). What she **did not** say is that expulsion terminated a members' obligation to pay dues until the membership re-issued. Longstanding Board member, Philip C. Kilian corroborated Ms. Norwood's testimony, stating "the underlying club documents require that membership in good standing be maintained by even a member who was expelled or suspended." (Depo. P. Kilian, p. 87, lines 4-6). Even Quinn's own witness clarified that surrender of a membership merely placed it with the Club for resale. (Depo. M. Aulton, p. 50, lines 23-25).

Despite Quinn's concerted efforts to torture the plain meaning of the governing documents; reading various sections in isolation; and introducing extrinsic evidence to impute terms that are nowhere present in the documents themselves, a contract must be read as a whole document so that ambiguity is not created by a single sentence or clause. *McGill, at 185, 574.* Whether or not the governing documents are ambiguous is a question of law for the court and does not present any genuine issue of material fact. *Id.*

The trial court acknowledged the standard set forth in *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, in the face of such

clear and unequivocal language, the trial court had a duty to enforce the agreement as written. "(W)hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Holmes v. East Cooper Community Hosp., Inc.,* 408 S.C. 138, 758 S.E.2d 483 (2014), citing *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct.App.1997) (citation omitted). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). "It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine." *Priest v. Brown,* 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). Accordingly, summary judgment was appropriate.

C. FAILURE TO PAY.

CIMC conclusively established the existence of a contract and proved Quinn's breach thereof and damages in the form of its verified Complaint and Affidavits. (Complaint, Ex. "B"; Aff. of J. Spencer, pp. 1-3 and Ex. A; Support Aff. of J. Spencer, pp. 1-3 and Ex. A). Quinn introduced absolutely no evidence challenging the correctness of these charges, other than to assert that through resignation, expulsion or termination he should be absolved of further liability. Rule 56(e), SCRCP provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

III. THE REQUIREMENT TO PAY DUES UNTIL REISSUANCE DOES NOT VIOLATE THE SOUTH CAROLINA NON-PROFIT CORPORATION ACT. AS IS THE CASE WITH NEARLY ALL PROPERTY OWNER ASSOCIATIONS, QUINN NEED ONLY SELL HIS PROPERTY AND MEMBERSHIP TO ANOTHER PARTY TO RELIEVE HIMSELF OF FURTHER OBLIGATION AND THE FACT THAT HE CHOSE NOT TO DOES NOT RENDER THE REQUIREMENT UNLAWFUL.

Quinn cites S.C. Code Ann. §33-31-620, of the South Carolina Nonprofit Corporation Act (the "Act"), for the proposition that assigning liability for continuing obligations post-resignation is statutorily prohibited. Quinn's argument conveniently ignores subpart (b) to that section, which specifically obligates a resigning member to meet any obligations incurred or commitments made before the resignation. Likewise §33-31-621 reinforces the notion that members who are terminated or expelled remain liable for obligations or commitments made while members. The official comment to both sections makes the legislative intent patently clear. Members are to be held accountable for previously agreed upon continuing obligations, even beyond resignation.

In determining that these statutes permitted CIMC to charge dues until the membership reissued, the trial court correctly ascertained and effectuated the intent of the legislature. The court gave the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E. 2d 877, 881 (2011). "In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. Unless there is something in the statute requiring a different

interpretation, the words used in a statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Anderson v. S.C. Election Com'n*, 397 S.C. 551, 556-557, 725 S.E.2d 704, 706-707 (2012), *citations omitted.*

The Official Comments to §33-31-620 recognize that a "member in joining the organization may promise to use its facilities or services for a specific period of time." In this case, the specific period of time is "until their membership is reissued." The trial court recognized such requirements are quite common, particularly in Beaufort County, where nearly all developments utilize non-profit corporations to collect dues for the maintenance of common areas and recreational amenities within their community. (Trans., May 19, 2014, p. 22, lns 4-19). It is illogical to assert that S.C. Code Ann. §33-31-620, absolves homeowners from liability for dues incurred prior to sale under the rational that members of a not-for-profit corporation have a "right to resign at any time". However, that is the conclusion to be drawn from Quinn's tortured reading of the statute.

The fact that Quinn may have found it economically inconvenient to sell his property at 32 River Marsh Lane, does not excuse his financial responsibilities. Nowhere in any of the governing documents is Quinn guaranteed a profitable return on his investment. The 1994 Plan specifically advised that the memberships were for recreational purposes and not to be relied upon as an investment. (1994 Plan, p. iii). No matter how disadvantageous the requirement may prove in today's economic climate, the fact remains that allowing a member to unilaterally resign without selling or transferring

his membership to a new, dues paying, member, would have devastating consequences to all of the other members on Callawassie Island who rely upon, and who have contributed to a steady source of funding to maintain their amenities. It is clear from the statutory language and comments that such an application is consistent with the stated purposes and intent of the Act.

IV. QUINN'S REMAINING AFFIRMATIVE DEFENSES AND COUNTERCLAIMS DID NOT SURVIVE SUMMARY JUDGMENT AS THEY LACKED THE NECESSARY ELEMENTS AND/OR WERE UNSUPPORTED BY ANY EVIDENCE.

A. COUNTERCLAIMS

Only two of the various counterclaims initially asserted by Quinn were before the Trial Court, the remainder having been dismissed by prior order. The first, that CIMC breached its contract by not expelling him for non-payment; and the second, that CIMC made negligent misrepresentations upon which he relied to his detriment. The Trial Court determined that regardless of a member's expulsion, suspension, termination or resignation, the 1994 Governing Documents and all subsequent amendments thereto, plainly required a member to pay dues until his or her membership re-issued. (Initial Order, p. 2). As the construction of a clear and unambiguous contract is the province of the trial court and not a jury, summary judgment was appropriate on this issue as previously discussed.

Summary judgment in favor of CIMC is also appropriate as to Quinn's only other remaining counterclaim. CIMC could not have made a representation upon which Quinn relied when purchasing his membership. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548. 559, 671 S.E.2d 79, 85 (stating summary judgment is appropriate when the non-

moving party fails to establish an element of its case). The elements of a cause of action for negligent misrepresentation are: 1) a false representation made by CIMC to the Members; 2) a pecuniary interest by CIMC in making the statement; 3) a duty of care owed by CIMC to see that truthful information was communicated to the Members; 4) a breach of the duty owed by CIMC by failing to exercise due care; 5) justifiable reliance on the representation; and 6) pecuniary loss as a direct and proximate result of reliance on the representation. *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). A false representation must be false at the time it was made. *GSM Dealer Services, Inc. v. Chrysler Corp.*, 32 F.3d 139 (4th Cir. 1994).

Quinn acquired his membership at the time, the club was owned and operated by the Callawassie Island Club, which was controlled by the Developer. (CIMC Memo Support Summ. Jmt., p. 2; Aff. G. Harman Switzer, 3rd, p.2, para. 7). CIMC did not come into existence until November 16, 1999, and did not acquire and manage the assets of the club until June 29, 2001. Therefore, the representations allegedly relied upon by Quinn at the time of his purchase cannot be ascribed to CIMC. (Affidavit, G. Harman Switzer, 3rd, p.1, para. 6).

The 1994 Plan admonished members to "carefully read all the attached documents" and "consider seeking professional advice to evaluate these documents." (1994 Plan, p. ii). Additionally, Quinn's own witness, Sandra Aulton, affirmed that to the extent any representations were made by the Developer, they were never incorporated into the written documents. (Depo. S. Aulton, p. 35, lines 7-15). Even when examined in the light most favorable to Quinn, it is clear he cannot establish the necessary elements. There

was no representation by CIMC, no justifiable reliance and therefore no damage, no breach of duty by CIMC, and no pecuniary interest realized on the part of CIMC.

Once Quinn acquired his membership, he was contractually bound by the governing documents. None of the deposition testimony in the record suggests that anyone ever told Quinn that if he stopped paying, he would simply be expelled without further obligation. What he was told, and what is not at odds with any of the governing documents, is that he could terminate his membership. As amply illustrated herein, membership can be terminated, either at the request of the member or involuntarily, but in either event, the member remains liable until his membership is re-issued. Even if Quinn had received contrary advise (which CIMC denies) the 1994 Plan and the CIMC Governing Documents, specifically Section 1.8 of the 2001 Plan, Section 12.3 of the 2007 and 2008 Plans, plainly state: "No person has been authorized to give any information or make any representation not contained in this Membership Plan and, if given or made, such information or representation must not be relied upon as having been authorized..."

V. FOLLOWING EXTENSIVE DOCUMENTARY PRODUCTION, DEPOSITIONS AND INTERROGATORIES, THE TRIAL COURT CORRECTLY CONCLUDED THAT THE CONTRACT WAS CLEAR AND UNAMBIGUOUS, MAKING FURTHER DISCOVERY OF EXTRINSIC EVIDENCE IMMATERIAL.

CIMC's Motion for Summary Judgment was brought after two years of litigation, and a full and fair opportunity for thorough and complete discovery. A detailed member history report was attached to the verified Complaint (see Exh. B), and further updated via the affidavits of Jeff Spencer, CIMC's general manager. (Affidavit Jeff Spencer, Supplemental Affidavit, Jeff Spencer). Quinn was given every opportunity to depose Mr.

Spencer and failed to do so. He cannot now cry "foul" and allege he was not afforded adequate discovery. (Motion for Summ. Judgment Transcript p.31, lines 2-5). Further, the Trial Court recognized that any parol evidence sought by Quinn would not be admissible in light of his determination that the contract was unambiguous. (Initial Order pp.5-7).

VI. THE AWARD OF SUMMARY JUDGMENT SHOULD BE AFFIRMED AS A MATTER OF PUBLIC POLICY AND FOR ADDITIONAL SUSTAINING GROUNDS

The old adage, "it takes a village to raise a child" could readily be adapted to the concept of sustaining a resort golf community. Without the continuing participation of its members, the cost to keep up Callawassie's twenty-seven (27) hole course, club house, restaurant, pools, tennis courts, pavilions, and dock would be unsustainable. That is why as early as 1994, the Plan for the Offering of Memberships provided that a member would be required to continue to pay dues until his or her membership reissued. (1994 Plan, p. 9; Gen. Club Rules C-3; By-laws B-15). That is why the membership formed CIMC and continued that obligation in 2001, when they took over the management of the assets from the Developer. (2001 Plan p.5; 2001 Gen. Club Rules p.9). And that is why the residents of Callawassie Island voted overwhelmingly to require anyone purchasing property on Callawassie Island after 2001, to purchase a membership in CIMC. (Complaint p.2; Motion for Summ. Judgment p.2; Memo in Opp. to Mot. Summ. Judgment p.4). Callawassie's development model, like so many other communities across the state, relies upon the financial contributions of the residents to maintain the amenities, which clearly

provide a material benefit to the real property interests of the landowners. (Complaint p.2; Motion for Summ. Judgment p.3; Memo in Opp. to Mot. for Summ. Judgment p.4).

The Court should consider, in weighing the issues, that failing to uphold the clear and unambiguous obligations challenged here may usher in a flood of other similar challenges and not just within Callawassie Island. This is true particularly if the Court reads the Act as Quinn suggests. Although Callawassie Island has chosen to have its resort amenities owned and managed by a non-profit club rather than a non-profit homeowner's association[6], for all intents and purposes, the application of the statute is the same. If Quinn may "resign at any time" without regard to his commitment to continue paying dues until his membership reissues, every homeowner in every deed restricted community could likewise declare himself "resigned" and cease to pay dues without further liability.

As for additional sustaining grounds, CIMC calls this Court's attention to those defenses set forth in its Replies. CIMC asserts that to the extent any representations were made (which CIMC denies) they were either merged into the 1994 Governing Documents, as amended, or were parol evidence outside the terms of the agreement. CIMC further asserts that to the extent Quinn claims some right under earlier versions of the various governing documents that were later abrogated by an alleged unauthorized change, CIMC asks this Court, under Rule 220(c), SCACR, to sustain the trial court's decision on the ground that the statute of limitation for challenging actions has run.

Similarly, Quinn is barred by the doctrine of laches, estopped or has otherwise waived, his right to challenge any actions on the part of CIMC in exercising its business

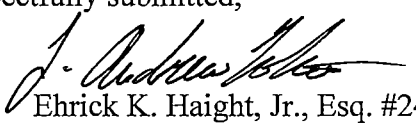
[6] Other common property, such as the roadways and certain landscaping, are owned and managed by The Callawassie Island Property Owners Association.

judgment. The 1994 Governing Documents admonished applicants to "carefully read all of the attached documents" and further to "consider seeking profession advice to evaluate these documents". (1994 Plan, p. ii). Additionally, the 1994 Governing Documents stated in bold, capitalized print, that "MEMBERSHIPS SHOULD NOT BE VIEWED OR ACQUIRED AS AN INVESTMENT AND NO PERSON PURCHASING A MEMBERSHIP SHOULD EXPECT TO DERIVE ANY ECONOMIC PROFITS FROM MEMBERSHIP IN THE CLUB." (1994 Plan, p. iii). Based on the foregoing, Quinn assumed the risk of incurring ongoing obligations, despite economic hardship or declining property values.

CONCLUSION

In the face of clear and unequivocal contractual obligations, which specifically require Quinn to pay dues until his membership reissued, summary judgment in favor of CIMC is appropriate. Quinn's negligent misrepresentation claim failed because he did not and indeed cannot, attribute any of the alleged misrepresentations to CIMC. Further, Quinn has produced absolutely no evidence to support that CIMC breached its contract with him. Based on CIMC's showing that no issue of material fact existed as to Quinn's obligations or the amounts owed, the trial court's award of summary judgment should be upheld.

Respectfully submitted,



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June 15, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
14th Judicial Circuit

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000003

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn,
of Whom Mark K. Quinn is the Appellant. Appellant.

PROOF OF SERVICE

I certify that I served the Initial Brief of Respondent on Gregory Martin by depositing a copy of it in the United States Mail, postage prepaid, on this 15th day of June, 2015, addressed to his attorneys of record, Ian Ford and Neil Thomson, Ford Wallace Thomson, LLC 715 King Street Charleston, SC 29403.

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June 15, 2015

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Re: The Callawassie Island Members Club, Inc. vs. Mark K. Quinn and Sherry B. Quinn
Appellate Case No: 2015-000003
Civil Action No.: 2012-CP-07-03216
Our File No: 10809 8 SPH

Dear Ms. Kitchings:

Please find enclosed herewith for filing an original and one copy of the Initial Brief of Respondent, together with the Designation of Matter, with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

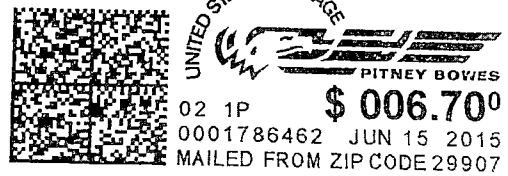
By copy hereof to all counsel of record, I am providing them with a copy of the same.

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

J. Andrew Yoho

JAY/cab
Enclosure
cc: Ehrick K. Haight, Jr., Esquire – w/ enclosure
Ian S. Ford, Esquire - w/ enclosure
Neil D. Thomson, Esquire – w/ enclosure



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