

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

S.C. SUPREME COURT

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-002187

The Callawassie Island Members Club, Inc. Petitioner,

v.

Ronnie D. Dennis and Jeanette Dennis Respondents.

REPLY IN SUPPORT OF PETITION FOR *WRIT OF CERTIORARI*

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AND NOW COMES Petitioner The Callawassie Island Members Club, Inc. ("CIMC" or "the Club") and files the following Reply in Support of Petition for Writ of *Certiorari*.

ARGUMENTS

Defendants' Opposition to Petition for Writ of *Certiorari* ("Opposition") is replete with hyperbole and derisive witticism. However, it does not squarely address the critical legal issue that Petitioners are asking this Court to address. It does not discuss in any detail the language of the South Carolina Nonprofit Corporation Act ("Act") that is most important in this case. Moreover, it does not refute CIMC's observation that the Court of Appeals' Opinion poses a significant risk to CIMC and to all nonprofit corporations in this state. The Court should grant *certiorari* to correct the Court of Appeals' errors and ensure that nonprofit corporations are not irreparably harmed in their ability to manage their financial affairs.

A. Like the Court of Appeals, Defendants Disregard the Plain Language of the Statute

Defendants' Opposition argues that the Act allows members of nonprofit corporations to resign "at any time" *and*, in doing so, nullify all commitments previously made to the organization. Defendants argue that resigning members are only required to settle "all debt obligations," meaning only debt incurred for services or goods already obtained. Defendants, like the Court of Appeals, focus on the words "at any time," to the exclusion of other important language. On the other hand, CIMC's Petition sets forth a simple statutory construction that harmonizes the plain language of *all* relevant parts of this section with the realities of nonprofit corporate governance. The "at any time" language in Subsection (a) of Section 33-31-620 of the Act must mean that the resignation can be tendered at any time, *subject to Subsection (b)*, which provides:

The resignation of a member *does not relieve the member* from any obligations the member may have to the corporation as a result of obligations incurred *or commitments made before resignation*.

See S.C. Code § 33-31-620(b) (emphasis added). That language recognizes that, while the general rule is that a member of nonprofit corporation may resign at any time, the right of

resignation is subject to an important limitation and condition: that a member's voluntary promises to the nonprofit entity will continue to bind him. Indeed, this is precisely what CIMC's governing documents provide; a member may resign at any time, but he remains obligated to meet his financial obligations until a new member takes his place. Both Defendants and the Court of Appeals have ignored the most important words in this section of the Act, "commitments made before resignation." They have considered the phrase, "obligations incurred," to the exclusion of the remainder of the subsection. In doing so, they construe the Act in a way that ignores some of the most basic rules of statutory construction:

“When interpreting a statute, courts must presume the legislature did not intend to do a futile act.” *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008). “A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous. ...” *Id.* (quoting *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)). Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999). Further, “[i]n construing a statute, this Court is constrained to avoid an absurd result.” [*Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998).]

See Protection & Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 274, 789 S.E.2d 756, 760 (Ct. App. 2016), *reh'g denied* (Aug. 22, 2016). Subsection (b) makes clear that a member's right to resign at any time is subject to two qualifications: (1) "obligations incurred . . . before resignation"; and (2) "commitments made before resignation." A "commitment" is a promise to do something in the future:

The term “commitment” in a business context involves an agreement to do something in the future, “esp[ecially] to assume a financial obligation” (Black's Law Dictionary [9th ed 2009]; see Merriam-Webster On-line Dictionary, <http://www.merriam-webster.com/dictionary/commitment> [accessed May 9, 2013]).

Herbert v. Schodack Exit Ten, LLC, 107 A.D.3d 1119, 1121, 966 N.Y.S.2d 594, 596 (2013); *Johnston Health Care Ctr., L.L.C. v. N. Carolina Dep't of Human Res., Div. of Facility Servs., Certificate of Need Section*, 136 N.C. App. 307, 314, 524 S.E.2d 352, 357 (2000) (same); *accord Leonardo v. United States*, 63 Fed. Cl. 552, 558 (2005), *aff'd*, 163 F. App'x 880 (Fed. Cir. 2006)

("The court agrees with plaintiff that the term 'commitments' in Mr. Van Kerkhove's job description is synonymous with the term 'contracts.>"). As one court has noted, an "obligation[] incurred" is different from a member's "commitment made": "[o]bviously, the term 'commitments made' *means something different than a monetary obligation* because the statute also uses the phrase 'obligations incurred.'" *See Kidd Island Bay Water Users Co-op. Ass'n, Inc. v. Miller*, 136 Idaho 571, 573, 38 P.3d 609, 611 (2001) (emphasis added).

Respectfully, the terms "obligations incurred" and "commitments made" *must have different meanings*. "Obligations incurred" might well refer to financial obligations for goods or services already provided, as Defendants argue. But then, "commitments made" must refer to a member's promises to do things for the benefit of the corporation in the *future*. If the General Assembly intended to condition the right to resign at any time only upon the repayment of debts actually accrued at the time the member gives notice of resignation, it would not have included the words "or commitments made," which connote promises to do things in the future. Indeed, it would have been a simple matter to say exactly what the Court of Appeals and the Defendants read the statute to say: that a member of a nonprofit corporation may resign at any time but remains obligated to pay debts already incurred. Defendants' and the Court of Appeals' construction of the Act renders the words "commitments made" superfluous.

Defendants posit, relying on a secondary source, that resigning members are only required to keep their promises if the member has personally assumed some of the organization's obligations. (*See* Defs.' Opp. to Pet. for *Cert.*, at p.3). This remarkable claim is without any support in the language of 33-31-620. In fact, the plain language of the Act, along with its Official Comment, makes clear that the General Assembly intended that members be bound by their promises to the entity, including promises regarding future membership obligations.

The Court of Appeals and Defendants construe the Act in way that would bring about an absurd result. Specifically, they read the Act to prevent members of nonprofit corporations from making binding executory agreements with them. While some nonprofit corporations might easily survive if their members can simply walk away at any time, this is not so for complex

associations like CIMC, which own and must maintain expensive infrastructure and other assets. Nothing in the Act, or in logic, suggests that the General Assembly intended to prevent members of nonprofits from making financial commitments with their associations. The Dennises are equity members in CIMC, meaning that they own and are responsible for a share of CIMC. The Court should not lightly conclude that the General Assembly intended for this to mean nothing.

In their Opposition, Defendants erroneously seek to distinguish two cases that CIMC has cited, *Desert Mountain Club, Inc. v. Clark*, CV-2014-015334 (Maricopa Cty. Ariz. October 16, 2015), and *Jay Cty. Rural Elec. Memb. Corp. v. Wabash Valley Power Ass'n, Inc.*, 692 N.E.2d 905 (Ind. Ct. App. 1998). Defendants' protestations notwithstanding, both *Desert Mountain Club* and *Jay County* are relevant and applicable for the proposition that "commitments made" in the Act means exactly what CIMC says it does. In *Desert Mountain*, the court endorsed *precisely the same argument that CIMC makes here*: "Even if the statute allowed Defendants to 'resign,' they would not be relieved of their prior commitment to pay dues pending reissuance or resale of their membership, a 'commitment made prior to resignation.'" This holding is based on the same statutory language at issue in this case. Likewise, the *Jay County* court stated that, even if the statute permits resignation "at any time," a member remains bound to a prior commitment to remain a participating member. *See Jay Cty.*, 692 N.E.2d at 914. These cases support CIMC's contention in its Petition that a member's right to resign is subject to prior "commitments made" to the corporation.

The need for this Court to grant *certiorari* is reinforced by the fact that the Court of Appeals' Opinion was dominated by superfluous statements about the Act, which were not even necessary to its decision to reverse the entry of summary judgment. When a court denies summary judgment, it is typically sufficient to simply state that certain genuine issues of material fact exist that require a trial. In such a case, a plenary trial should take place on all facts and legal issues, free from any undue influence by the denial of summary judgment. Here, the Court of Appeals reversed the grant of summary judgment to CIMC and remanded this case *in toto* for trial. However, its Opinion goes much further and comments upon the Act, potentially

interfering with the results at trial upon remand. This is yet another reason why this Court should grant *certiorari* to correct the errors of the Court of Appeals.

CIMC asks that this Court review the Court of Appeals' decision and issue a ruling that both gives meaning to all of the provisions of the relevant portion of Section 33-31-620 and balances the Act with the legitimate needs of complex community associations.

B. Defendants Attempt to Create Ambiguity in CIMC's Governing Documents Where None Exists, by Referencing the Terms "Expulsion," "Suspension," and "Termination"

Defendants suggest that "the Club's original governing documents adhered to the statute and allowed numerous ways to quit", including (in addition to resignation) "termination" and "expulsion"/"suspension." (*See* Defs.' Opp. Pet. for Certiorari, at p.4). In other words, Defendants argue that CIMC's rules governing "resignation" are not the only way for members to end their club membership. They suggest that they could either "terminate" membership or be "mandatorily expelled" and that either method would immediately end any obligations or commitments to CIMC. For the reasons that follow, Defendants' reliance on those provisions is wholly misplaced, as they simply do not apply to the circumstances of a member who wishes to end a membership. To the contrary, the *only* way provided for a member to end a membership is through "resignation," under which the member remains bound to meet his financial obligations until the reissuance of the membership.

The 2001 CIMC General Club rules defined "suspension," "termination," and "expulsion" in terms that made clear – as common usage of these terms suggests -- that they referred to the suspension or ending of a membership *by the Club's action*:

14.1.3. Suspension. The Board of Directors may suspend a member and his or her family or guests from some or all the Club privileges for a period of up to one (1) year. Dues and other obligations shall accrue during such suspension and shall be paid In full before reinstatement to full privileges.

14.1.4. Termination. The Board of Directors may by a two-thirds (2/3) vote of the directors present request the resignation of any member of the Club for cause deemed sufficient to the Board. If the member does not resign at the request of the Board, the member may be expelled by the Board.

14.1.5. Expulsion. 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.

(See App., at p.648). Similar provisions are also contained in the February 23, 2009 version of CIMC's General Club Rules. (See App., at p.657). Tellingly, while Defendants cite various CIMC governing documents, they do not cite the 2009 provisions, which make clear that they are not methods for *members* to end their memberships; rather, they are ways for *CIMC* to end memberships.

CIMC already has addressed Defendants' curious "mandatory expulsion" argument — that they were "entitled" to have the Club expel them by simply not paying their dues — in its Petition for Writ of Certiorari, at pages 18-20). Far from creating rights for members, the expulsion provisions of CIMC's governing documents grant CIMC rights to expel memberships under certain circumstances. It is simply not reasonable to suppose that the parties intended that a member who complies with his contract by continuing to pay his dues must follow the provisions governing resignation, whereas another member can excuse himself from his commitment by breaching that promise.

Moreover, under the documents, "termination" is not a right of the member to end a membership without further obligations. To the contrary, it is a mechanism whereby a member can end a membership *at the request of CIMC's Board of Directors*. If a member does not "terminate" in response to such a request, he or she will be expelled. Defendants quote the procedure by which a member *who has been requested to resign* may accomplish such a "termination." There is no evidence in the record that the CIMC Board of Directors (upon a 2/3 vote) requested that Defendants resign from the Club. Nothing in CIMC's governing documents suggests that "termination" may apply in any other circumstances. The Dennises' membership was never "terminated" as provided under the governing agreements.

It is thus clear that "expulsion" and "termination" are not alternative methods by which a member can end a membership without the conditions attached to a "resignation." Instead, they

are means for CIMC's Board of Directors to remove members from the Club for various reasons. It is not reasonable to suggest that the inclusion of those powers for CIMC's Board was somehow meant to empower CIMC's members to escape their promises to remain obligated as members until reissuance of their memberships.

The foregoing interpretation of the terms "termination," "suspension," and "termination" is consistent with how they are used in the Nonprofit Corporation Act. The terms all involve *involuntary* ends to memberships in nonprofit entities and not methods for a member to walk away from a membership. The section of the Act immediately following the "resignation" section at issue in this appeal is entitled "Termination, expulsion, and suspension" and provides:

(a) No member of a public benefit or mutual benefit corporation may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith. . . .

(d) A proceeding *challenging* an expulsion, suspension, or termination, including a proceeding in which defective notice is alleged, must be commenced within one year after the effective date of the expulsion, suspension, or termination.

See S.C. Code § 33-31-621. Nothing in this section suggests that termination, expulsion or suspension are ways for a *member* to end membership in a club. To the contrary, these are tools for *the nonprofit corporation* to end a membership.

In summary, CIMC's governing documents are exquisitely clear that a member who wishes to leave the Club must follow the provisions for resignation, including remaining obligated to pay dues until a new member takes his or her place. This is a commitment that the Dennises cannot deny undertaking when they purchased their membership in CIMC.

C. Although CIMC is Not a Homeowners' Association, Its References to Homeowners' Associations in Its Petition Demonstrate Why the Court Should Grant *Certiorari*

Defendants devote a substantial portion of their Opposition to distinguishing CIMC from a homeowners' association. CIMC does not reference property owners' or homeowners' associations to suggest that CIMC is the same as them. To the contrary, an important reason why this Court should grant *certiorari* is that the brush with the Court of Appeals tars CIMC is

broad enough to tar many nonprofit associations, including homeowners' associations. CIMC has referenced cases involving community associations to emphasize to the Court the potential ramifications of the Court of Appeals' decision. It is not a "distraction" or a "feint." (*See* Def.'s Opp. to Pet. for *Certiorari*, at 10). It is an explanation of why this case is so important, not just to CIMC but to all nonprofit corporations (including community associations).

Although Defendants try to characterize the Court of Appeals' Opinion as "measured," the Opinion's misinterpretation of the Act is so broad that it will potentially affect *all nonprofit corporations with members*, be they clubs, homeowners' associations, or charities. This breadth and depth of misinterpretation of the Act are precisely why CIMC urges this Court to review this case. The recent Motion for Leave to File *Amicus Curia* Brief by the Community Associations Institute ("CAI") — which represents the interests of more than 68 million homeowners living in more than 380,000 community associations in the United States, including 1,330,000 South Carolinians living in 480,000 homes in nearly 6,675 community associations — evidences that the Court of Appeals Opinion does, in fact, threaten the interests of thousands of homeowners and community associations throughout South Carolina. CIMC is not "feinting" anything; community associations truly are in danger from the Court of Appeals' Opinion and are justifiably concerned.

In its *amicus* Brief, CAI further aptly observes that the South Carolina Horizontal Property Act, S.C. Code §§ 27-31-10, *et seq.*, embodies South Carolina's public policy favoring holding resigning community association members to pre-resignation commitments. The Horizontal Property Act recognizes that all property owners in the community benefit from the mutual promises of their co-owners and, as a result, can enforce the by-laws, rules, regulations, covenants, conditions and restrictions as to their co-owners. *See* S.C. Code § 27-31-170. In fact, that section requires that all owners in a horizontal property regime "strictly comply" with by-laws, as well as "the covenants, conditions and restrictions set forth in the master deed." Moreover, all property owners in a horizontal property regime are obligated to contribute their *pro rata* share of expenses. *See* S.C. Code § 27-31-190. The Horizontal Property Act expressly

prohibits owners from exempting themselves from this obligation by waiving their use or enjoyment of the property or amenities. *See id.* CAI notes that the Court of Appeals' Opinion is antagonistic to these provisions of the Horizontal Property Act, in that it grants owners the right to unilaterally "opt out" of their agreements. Thus, in the context of a horizontal property regime, as well as a community association comprised of single-family home owners, policy favors holding members to the promises they have made to their community.

In any event, Defendants' efforts to draw stark contrasts between CIMC and a community association are not accurate. Like many other club communities along the South Carolina coast, Callawassie Island created separate entities to serve as the property owners' association and the amenities club. However, those two entities share common interests and work together to serve the best interests of the entire community. In fact, in 2001, the Callawassie Island Property Owners' Association ("CIPOA") amended its governing documents to require that future purchasers of property obtain memberships in CIMC. This was intended to assure consistent, sustained financial support for the Club's amenities and the community. Clubs like CIMC often exist in a symbiotic relationship with a corresponding property owners' association, with each having its own sphere of responsibility to the community that they serve. Although the entities are separate, their interests are closely aligned. While CIMC is not itself a property owners' association, it shares many of the same interests of CIPOA and works closely with it.

D. Defendants Mischaracterize the Court of Appeals' Reliance on the Resale List

In their Opposition, Defendants assert that "[t]he Petition takes the resale list example in the Court of Appeals' decision . . . and attempts to flip it into a 'tail wags dog' argument, claiming that the example is the sole basis for the entire decision." Contrary to Defendants' characterization, the Court of Appeals did not discuss the resale list as an "example." To the contrary, the Court of Appeals specifically concluded that the Defendants' membership agreement might violate Section 33-31-620 of the Act *because of the status of the resale list.* (*See App.*, at p. 7). The Court of Appeals expressly stated its desire to prevent a situation where

a nonprofit corporation could "refuse to allow a member to *ever terminate* their membership obligations." (*See id.*). In doing so, the Court of Appeals only discussed the status of the resale list. It never even mentioned the possibility that Defendants could end their commitments to CIMC by selling their property and conveying their membership to the purchaser. Instead, it concluded that this might be a "Hotel California" situation because of the Defendants' particular position on the resale list. Plainly, the Court of Appeals did not present the resale list as an "example"; it directly relied on that list as the basis for its ultimate holding. It is often said that hard facts make bad law. CIMC respectfully submits that the Court of Appeals' misunderstanding of the facts skewed its reading of the Act, influencing it to adopt an incorrect and ultimately dangerous interpretation to avoid what it mistakenly considered to be an unfair result.

CONCLUSION

For the foregoing reasons, Petitioner The Callawassie Island Members Club, Inc. respectfully requests that this Honorable Court grant its Petition for Writ of *Certiorari* and, upon review of this case, vacate the Opinion of the South Carolina Court of Appeals and affirm the trial court's grant of summary judgment in favor of CIMC.

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PROOF OF SERVICE

I certify that I have served The Callawassie Island Member Club, Inc.'s Reply in Support of Petition for Writ of *Certiorari* on the above-referenced Respondents by depositing a copy of it in the United States Mail, postage prepaid, on December 12, 2016, addressed to their attorneys of record:

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