THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-002187
Lower Court Case No. 2011-CP-07-3322

The Callawassie Island Members Club, Inc., ... Petitioner,

v.

Ronnie D. Dennis and Jeanette Dennis, ... Respondents.

REPLY BRIEF OF PETITIONER

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I. The Court of Appeals misconstrued the South Carolina Nonprofit Corporation Act in a manner that is contrary to statutory interpretation canons and may irreparably harm nonprofit corporations.

In its opinion, the South Carolina Court of Appeals ruled that S.C. Code Ann. § 33-31-620 "obligates resigned members to pay any dues incurred *before* resignation," but the statute "does not require resigned members to continue to pay any dues that accrue *after* resignation." (App. 7). (Emphasis in original). The Court of Appeals reasoned that an interpretation that required members to meet their obligations to make future payments "would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations." (App. 7). In its opening brief, the Petitioner Callawassie Island Members Club, Inc. (CIMC) explained that the Court of Appeals misconstrued the plain language of S.C. Code Ann. § 33-31-620 and overlooked the impact of subsection (b) of the statute.

In their response brief, the Respondents Ronnie D. Dennis and Jeanette Dennis ("Dennises") have similarly misinterpreted S.C. Code Ann. § 33-31-620 and have suggested, without proof, that CIMC has "re-interpreted" the governing documents to prevent the Dennises from resigning from the Club. That is not the case and is unsupported in the record.

In their brief, the Dennises include an erroneous reading of the governing documents to suggest that there are three separate methods to allow a member to "quit" -- termination, resignation, and expulsion. As discussed in more detail below, "termination" and "expulsion" are two forms of disciplinary action that may be initiated by the CIMC Board of Directors. "Termination" is defined to mean an *involuntary* resignation, that is, where the Board of Directors votes to request the resignation of a member. (App. 657). "Expulsion" is a process whereby a member who refuses to resign may be removed by the Board of Directors. (App. 657). Those processes are not governed by S.C. Code Ann. § 33-31-620. Instead, the statute is designed to allow a member to "resign."

The CIMC governing documents allow for a member to resign; however, consistent with the express language of S.C. Code Ann. § 33-31-620(b), the resignation does not relieve members of their financial obligations to the organization, including both prior indebtedness and future financial obligations that were commitments made prior to resignation. In this case, it is undisputed that the Dennises voluntarily resigned from CIMC. (App. 311, 314). They were never asked to resign, i.e., "terminated," nor were they expelled by the Board. As a result of their resignation, the Dennises remained financially obligated for future dues consistent with the governing documents until their membership was reissued either by resale of the membership alone or by the sale of their property. That

scenario is consistent with the plain language of S.C. Code Ann. § 33-31-620 and its Official Comments.

Not surprisingly, the Dennises seek to parse the language of the Official Comments in an attempt to alter the intended meaning of S.C. Code Ann. § 33-31-620. They address the terms "obligations incurred" and "commitments" and suggest in a conclusory fashion and without supporting authority that those terms cannot "realistically" include the payment of dues beyond the date of resignation. They also treat the terms as being essentially synonymous, despite the fact that the statute and Official Comments address them as different terms separated by the disjunctive "or."

In actuality, S.C. Code Ann. § 33-31-620(b) and the Official Comments address the precise scenario arising in this case and fully validate CIMC's position. As discussed in greater detail in CIMC's opening brief, the Official Comments expressly state that "a person may be liable for obligations incurred or commitments made prior to the resignation" and that "[t]hese commitments may extend beyond the time the member resigns." *See*, S.C. Code Ann. § 33-31-620, Official Comments. The comments further provide that a member may remain financially obligated beyond the resignation date, and that language obviously contemplates *future* obligations. In fact, the use of the term "commitment" is

significant in that its plain and ordinary meaning connotes a future obligation or pledge including a future financial obligation.

The Dennises also attempt to relitigate an issue that they have already lost and is now the law of the case. They insist that there is "no evidence" that they incurred an obligation or made a commitment beyond the date of their resignation. Yet, the Court of Appeals already affirmed that the Dennises were members of CIMC and that they received the benefits of membership. (App. 4). As a result, they are legally bound by the terms of that membership including the obligations explicitly stated in the By-Laws, which include the following: "Any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club." (App. 615). That obligation is also explicitly stated in the 1994 Plan for the Offering of Memberships, which provides that "[a]n 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 by the Club." (App. 591). That language fits squarely within the meaning of "commitments made prior to resignation" as used in S.C. Code Ann. § 33-31-620(b) and the Official Comments. Thus, there is no question that the Dennises -- prior to their resignation from the Club -- made a commitment to pay dues until their membership is reissued. The

trial court was correct in holding the Dennises liable for that commitment, and that ruling should be affirmed.

In their response brief, and elsewhere, the Dennises fail to mention that they have at all times during this dispute and still currently own property and a home on Callawassie Island. It is important to re-emphasize that the Dennises are receiving significant value for their property and home for the dues they owe and are not paying beyond the date of their resignation from the Club, a point that the Dennises not surprisingly fail to acknowledge or even mention in their response brief. Significantly, an amendment to the restrictive covenants in 2001 made CIMC membership mandatory, and as a result, when the Dennises sell their property, the purchaser will be required to purchase their membership. Thus, regardless of whether the Dennises choose to use the Club facilities following their resignation, it is clear that the they derive substantial property value enhancement from the availability of CIMC and its amenities. In addition, the Dennises absolutely do control when their membership will be reissued. Upon the sale of their property, their CIMC membership will be reissued to the purchaser and will end their commitment to pay dues. Thus, the Dennises' commitment to pay dues is not open-ended or "in perpetuity," as they suggest, but is rather something completely within their control. In short, the Dennises have chosen to maintain ownership of their property on Callawassie Island, and as a result, the amenities provided by

CIMC, for which they claim to have no obligation to pay, continue to add value to their property; yet, they unfairly seek to make others pay their share of the cost of those amenities which is contrary to the financial commitment they made to CIMC when they voluntarily joined.

Notably, the Dennises have failed to cite any case law from this State or any other jurisdiction to support their interpretation of Section 620 of the Model Nonprofit Corporation Act. The Dennises do cite to the case of *Hirsch v. Jupiter Golf Club, LLC*, 232 F.Supp.3d 1243 (S.D. Fla. 2017), which is distinguishable from the present case. In *Hirsch*, a member was allowed to resign his membership but remained obligated to pay dues, fees and other charges until the membership was re-issued to another individual. During the period of time, the resigned member could continue to use the club amenities. However, upon change of ownership of the golf club, the new owner of the club refused to allow persons on the resignation list to have access to the club. As a result, the litigation ensued, and the federal district court ruled that the denial of any further right of access to resigned members must be construed as a recall of the membership. The court never ruled whether the process in place before the change in club ownership, which was comparable to the facts of this case, was invalid or in violation of law. In addition, the court did not address any statute similar to S.C. Code Ann. § 33-

31-620 or Section 620 of the Model Nonprofit Corporation Act from which the South Carolina statute is derived.

Finally, the Dennises suggest that CIMC has attempted to make a "pivot" to now call itself a property owners' association. That is not a fair characterization of CIMC's arguments or the record in this case. CIMC very clearly states in its opening brief that it is a member-owned amenities association and is the sister entity to the Callawassie Island Property Owners Association, Inc. While not calling itself as a property owners' association, CIMC is indeed the same sort of nonprofit corporation as a property owners' association. CIMC did discuss in detail the detrimental impact that the Court of Appeals' interpretation of S.C. Code Ann. § 33-31-620 will have on all nonprofit corporations including property owners' associations and horizontal property regimes. The Dennises ignore the public policy concerns raised by CIMC and the real impact of this decision on all nonprofit corporations. Instead, they argue at length that CIMC is not a property owners' association, which is a distinction without a legal difference.

In sum, the Court of Appeals erred in its construction of S.C. Code Ann. § 33-31-620 by overlooking the express language of the statute which permits a nonprofit corporation such as CIMC to enforce legal obligations and commitments made by members prior to their resignation. The decision of the trial court correctly applies S.C. Code Ann. § 33-31-620, and should be affirmed.

II. The Court of Appeals incorrectly determined that issues exist with regard to whether the parties' agreements are ambiguous.

In their response brief, the Dennises largely disregard the arguments made by CIMC regarding the meaning and import of the CIMC governing documents. The Dennises argue that the Court of Appeals was correct in finding the governing documents were ambiguous and must be construed against the drafter, that being CIMC. While the Court of Appeals did find "some ambiguity" in the documents, the Court never construed the language against CIMC, but rather concluded that there was a genuine issue of material fact for trial. (App. 5-6).

In particular, the Court of Appeals ruled that "there is some ambiguity in the governing documents as to whether club members are liable for dues accruing after resignation." (App. 5). To recap, the Court of Appeals initially focused on the 1994 documents, specifically the 1994 Plan for Offering of Memberships in the Callawassie Island Club, the 1994 By-Laws of Callawassie Island Club, Inc., and the 1994 General Club Rules. In construing the 1994 documents, the Court of Appeals noted a potential discrepancy between the General Club Rules and the other documents, but in making that ruling, it is important to recognize that the Court disregarded the explicit language in the General Club Rules stating that "[a]ll rules and regulations contained herein shall be subject to and controlled by the applicable provisions of the By-Laws." (App. 626). In fact, the very language in

the General Club Rules relied upon by the Court of Appeals states that the termination of a membership must be "in accordance with the By-Laws." (App. 627).

The Court of Appeals also found that the term "unpaid" in the General Club Rules was undefined and thus ambiguous; however, the Court again failed to read that term in conjunction with the explicit language in the controlling By-Laws, which states as follows: "Any equity member may resign from the Club by giving written notice to the Secretary. *Dues, fees and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club.*" (App. 615). (Emphasis added). The General Club Rules are subordinate to and controlled by "the applicable provisions of the By-Laws." (App. 626). Thus, the Court of Appeals clearly erred in reading the General Club Rules in a vacuum, separate and apart from "the applicable provisions of the By-Laws," in order to find an ambiguity that quite simply does not exist.

Importantly, South Carolina law provides that the "cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties." *South Carolina Department of Transportation v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7, 12 (Ct. App. 2008). "To determine the intention of the parties, the court must first look at the language of the contract." *Id.* "When the language of a contract is clear and unambiguous, the determination of the parties'

intent is a question of law for the court." *Laser Supply & Services, Inc. v. Orchard Park Associates*, 382 S.C. 326, 676 S.E.2d 139, 143 (Ct. App. 2009). In addition, "[w]hether an ambiguity exists in the language of a contract is also a question of law." 676 S.E.2d at 144. "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571, 574 (2009). In this case, as the arguments above demonstrate, the contract language is clear and unambiguous -- particularly where the General Club Rules are read as subordinate to and controlled by "the applicable provisions of the By-Laws."

Strangely, instead of addressing the specific rulings by the Court of Appeals, the Dennises argue in their response brief that CIMC disregards the "three different methods of exiting the Club" -- resignation, termination and expulsion -- and treats them as the same. That is not the case. Instead, it is undisputed in the record that the Dennises voluntarily resigned from the Club. (App. 311, 314). Thus, the only contract provisions with any relevance are those applicable to resignations, and it is those resignation provisions that CIMC and the trial court have correctly addressed.

Nevertheless, CIMC notes that the General Club Rules reflect that the terms "termination" and "expulsion" refer specifically to disciplinary action taken by the Club to involuntarily remove a member. For example, in Section 14 of the 2009

General Club Rules, which is captioned "Discipline," the term "Termination" is defined to mean an *involuntary* resignation, that is, where the Board of Directors votes to request the resignation of a member. (App. 657). "Expulsion" is a process whereby a member who refuses to resign may be removed by the Board of Directors. (App. 657). Thus, contrary to the Court of Appeals' ruling, any provisions in the General Club Rules that refer to "termination" or "expulsion" have no applicability to a scenario where the member has voluntarily resigned, which is the case with the Dennises. Indeed, the very language that the Court of Appeals cited as creating "some ambiguity" is contained in the "Discipline" section of the General Club Rules and is inapplicable to a voluntary resignation.

In addition, the Dennises' discussion of the "suspension" and "expulsion" processes is irrelevant. The Dennises were not suspended or expelled by the Board; they voluntarily resigned and that is undisputed. (App. 311, 314). As CIMC discusses at length in its opening brief, the governing documents cannot be reasonably construed as creating a "right to expulsion." For these reasons, the Court of Appeals' suggestion that the "suspension" and "expulsion" provisions create an ambiguity is simply untenable and incorrect.

Finally, the Dennises' arguments continue to demonstrate the error by the Court of Appeals in its consideration of extrinsic evidence to find an ambiguity in the governing documents that does not appear on their face. Importantly, it is well

established that extrinsic evidence is not admissible to create an ambiguity or to show the intent of the parties. *Kirven v. Bartell*, 266 S.C. 385, 223 S.E.2d 597, 599 (1976) ("extrinsic evidence is to be admitted to resolve ambiguities, not create them"); *Bellamy v. Bellamy*, 292 S.C. 107, 111, 355 S.E.2d 1, 3 (Ct. App. 1987) ("[e]xtrinsic evidence is admissible to resolve ambiguities, not to create them where none exists"). The Court of Appeals clearly erred in considering the testimony of Ellen Padgett, which is extrinsic evidence used to find an ambiguity existed.[1] The Dennises compound that error by improperly citing in their response brief to other extrinsic evidence, including testimony of witnesses regarding the implementation of the "suspension" and "expulsion" provisions and the purported financial obligations of an expelled member. The law is clear that such extrinsic evidence may not be admitted for purposes of identifying or creating an ambiguity where one does not appear on the face of the documents.

In sum, focusing on the resignation provisions, the *only* language in the governing documents that addresses a member's financial obligations upon resignation is clear and capable of only one construction. The By-Laws clearly provide that "[d]ues, fees and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club." (App. 615). That language is indisputably consistent with the provisions contained in the

[1] Ellen Padgett was employed by the developer, Callawassie Island Company, L.P., and was never an employee or agent of CIMC.

1994 Plan for the Offering of Membership and all subsequent membership plans. (App. 591, 652-653, 659). It is those documents that specifically address the liability of a resigned member for dues to be paid after resignation and are controlling in this case, as the trial court correctly ruled. That ruling should be affirmed.

CONCLUSION

Based on the foregoing discussion, the Petitioner renews its request that this Court reverse in part the decision of South Carolina Court of Appeals and affirm the trial court's grant of summary judgment to CIMC.

Respectfully submitted,

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January 8, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Petitioner, does hereby certify that service of the **Reply Brief of Petitioner** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 8th day of January 2018:

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