THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
J. Ernest Kinard, Jr. Circuit Court Judge

Appellate Case No. 2015-00002

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

v.

Michael J. Frey and Grace I. Frey..... Defendants.

Of whom Michael J. Frey is.....Appellant.

RESPONDENT'S PETITION FOR REHEARING AND INCORPORATED MEMORANDUM IN SUPPORT THEREOF

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AND NOW COMES Respondent The Callawassie Island Members Club, Inc. ("CIMC" or "the Club") and files the following Petition for Rehearing. For the reasons that follow, CIMC hereby petitions the Court for rehearing of its Opinion Number 2018-UP-179, filed on May 2, 2018, which affirmed in part and reversed in part the entry of summary judgment for CIMC.

INTRODUCTION

It is often said that hard cases make bad law.[1] In this case, the Court of Appeals — relying upon a prior opinion that is presently pending review in the South Carolina Supreme Court — mistakenly believed that the governing documents of the Callawassie Island Members Club doomed the Defendants to eternal membership in the Club. This mistake led the Court to find ambiguities in the documents that do not exist and to misinterpret the plain language of the Nonprofit Corporation Act in a way that threatens the very existence of all community associations and many other nonprofit clubs and associations. For the reasons that follow, CIMC respectfully requests that the Court of Appeals grant this Petition for Rehearing and vacate its May 2, 2018 Opinion in this matter.

BACKGROUND

This case is before this Court on appeal from the entry of summary judgment in favor of Plaintiff-Respondent CIMC. CIMC, a member-owned amenities club on Callawassie Island, Beaufort County, South Carolina, filed this lawsuit to enforce its contractual rights. The Club's central purpose is to provide amenities (such as a world-class Tom Fazio golf course, a clubhouse, tennis facilities and swimming pools) for

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[1] "Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words." *Northern Securities Co. v. United States,* 193 U.S. 197 (1903) (Holmes, J., dissenting).

residents of Callawassie Island, rather than having the property owners' association (which is a separate entity) provide those amenities.

In a nutshell, CIMC filed the action seeking to recover dues and other amounts due from Defendants Michael J. Frey and Grace I. Frey ("Defendants"), who are equity members of CIMC. (R. at 25-46). CIMC claims that, under the governing documents, Defendants agreed to and are required to continue to meet their financial obligations until CIMC reissues their membership to a new member. Reissuance can occur either by transfer in connection with the sale of Defendants' property on Callawassie Island or sale via the membership resale list. The Club has operated in that fashion for more than 22 years.

CIMC has a finite number of members — and, consequently, a finite funding source — because it is organized alongside the Callawassie Island real estate community that it serves. The Club's survival depends upon *all* of its members paying their share of operating costs until a new member takes over their membership. This is what every member agrees to when he or she purchases a membership in CIMC.

Several controlling documents, which have been amended and revised over the years, have governed membership in the Club. Those documents include, in descending order of primacy, CIMC's By-Laws, Membership Plans and General Club Rules.

Defendants, however, have asserted counterclaims and argued, for various reasons, that they are not obligated to remain members of CIMC and can abandon their financial responsibilities to their fellow members whenever they want. In Defendants' Amended Answer and Counterclaims, they asserted counterclaims for: (1) breach of contract; (2) statutory violations; and (3) negligent misrepresentation. (R. 62-77).

The trial court correctly granted CIMC summary judgment as to Appellant Michael J. Frey ("Appellant") because the unambiguous documents provide that CIMC is entitled to the relief demanded. The trial court denied summary judgment as to Defendant Grace I. Frey (his wife), pending the completion of further discovery. (R. at 4). Appellant filed an appeal to this Court.

This Court affirmed in part and reversed in part the trial court's entry of summary judgment in favor of CIMC, holding that:

(a) The trial court correctly held that a contract existed between CIMC and Appellant;

(b) The trial court improperly granted summary judgment to CIMC on its claims as to whether Appellant's resignation from the Club immediately ended all of his obligations to the Club, in light of this Court's opinion in *The Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016), *cert. granted* (S.C. Sup. Ct. Order dated September 8, 2017) ("*Dennis*");

(c) The trial court improperly granted summary judgment to CIMC on its claims because there is a scintilla of evidence that whether Appellant was "expelled" from the Club and whether the Club's governing documents were improperly changed on the issue of expulsion;

(d) The trial court improperly granted summary judgment to CIMC on its claims because, pursuant to this Court's ruling in *Dennis*, S.C. Code Ann. § 33-31-620 does not require a resigning member of the Club to continue paying dues until reissuance of their membership, notwithstanding the parties' clear agreement to the contrary;

(e) The trial court improperly granted summary judgment to CIMC as to Appellant's breach of contract counterclaims, because (as set forth above) there are ambiguities in the governing contract documents;

(f) The trial court properly granted summary judgment to CIMC as to Appellant's negligent misrepresentation counterclaims;

(g) Appellant failed to preserve his argument that the trial court improperly granted summary judgment to CIMC as to Appellant's statutory violation counterclaims;

(h) In light of the foregoing rulings, this Court also reversed the grant of attorneys' fees to CIMC; and

(i) In light of the foregoing rulings, this Court did not address CIMC's additional sustaining grounds, pursuant to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate court need not address remaining issues when resolution of prior issue is dispositive).

For the reasons that follow, this Court should grant rehearing in this matter and reverse its holdings as to all issues upon which it ruled against CIMC and reversed the trial court.

ARGUMENTS

A. The Court Incorrectly Determined That Genuine Issues of Material Fact Exist for Trial With Regard to the Issue of Resignation Under the Contractual Documents

The Court found that an ambiguity existed between the governing documents concerning the obligations of members upon resignation of their memberships. As will be shown below, no ambiguity actually exists.

When Defendants purchased their membership in the Club, they acknowledged receipt of the Plan for the Offering of Memberships in the Callawassie Island Club dated April 1, 1994 (and all exhibits thereto)[2] ("1994 Plan") and "agree[d] to be bound by all of their respective terms and conditions." (*R.* at 41). The 1994 Plan 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*.

(R. at 1280 (emphasis added)). Similarly, the 1994 Callawassie Island Club ("CIC") By-Laws, an exhibit to the 1994 Plan, provide that "[d]ues, fees and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club." (R. at 1319, ¶ 9(a)). These provisions state in plain and unambiguous language that a member of the Club is required to continue paying dues and other charges to the Club until their membership is "reissued." There is nothing contradictory or unclear about those provisions. They unambiguously provide that a resigning member is obligated to continue meeting his financial commitment until his or her membership is reissued. Additionally,

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[2] The Exhibits to the Plan include the By-Laws of The Callawassie Island Club, Inc. (CIMC's predecessor) ("1994 CIC By-Laws") and the General Club Rules ("1994 General Rules"). (R. at 1271).

this language is contained in future versions of the contractual documents governing Appellant's membership in the Club:

- Under the 2001 Membership Plan, a resigned member "will be obligated to continue to pay all Charges to the Club until his or her equity membership is reissued by the Club." (R. at 1370 ¶ 2.4.9).

- Under the 2008 Membership Plan, a resigned member "will be obligated to continue to pay to the Club all dues, fees and other Charges associated with his/her membership until his/her Equity Membership is reissued by the Club." (R. at 1453-54 ¶ 5.11).

- Under the 2012 Membership Plan, a resigned member "will be obligated to continue to pay to the Club all dues, fees and other Charges associated with his/her membership until his/her Equity Membership is reissued by the Club." (R. at 1531 ¶ 5.11(a)).

However, the Court — relying in part on its prior opinion in *Dennis* — found an ambiguity from the language in a provision of the 1994 General Rules: "[a]ny member may terminate membership in the Club by delivering to the Club's 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 any food and beverage minimums)." (R. at 1331). Other later versions of the General Club Rules included similar language, including the 2009 version: "Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold." (R. at 1477 ¶ 14.2.1; *accord* R. at 1441 ¶ 14.2.1 (2007 General Club Rules); (R. at 1513 ¶ 14.2.1 (2009 version)).

The *Dennis* Court determined that this provision was potentially ambiguous because "[t]he term 'unpaid' is not defined in the documents. It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation." *See Dennis,* 790 S.E.2d at 438. However, as discussed herein, even if the term "unpaid" as used in that section only "refers to unpaid dues owed at the time of resignation," this does not conflict with the Membership

Plan provision about continuing obligations because it addresses a different subject, a resigning member's liability for unpaid dues owed at the time of resignation. It does not state or imply that a resigning member is released from his commitment to pay dues in the future.[3]

"An action to construe a contract is an action at law." *See McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (*citing Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Assn.*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001)). Thus, the application of unambiguous contracts is a question of law for the court:

> The construction of a clear and unambiguous contract is a question of law for the court. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App.1992). A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation. 17A Am. Jur.2d *Contracts* § 338, at 345 (1991). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Id.* It is a question of law for the court whether the language of a contract is ambiguous. 17A Am. Jur.2d *Contracts* § 339, at 346 (1991).

See Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). Therefore, if the provisions that the Court cited in its opinion do not create an ambiguity, summary judgment was proper:

> A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation. 17A Am. Jur. 2d Contracts § 338, at 345 (1991). "A contract is ambiguous

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[3] In addition, in construing the documents, the Court failed to take into account the hierarchy of the documents. By way of example, the General Club Rules provide that they "shall be subject to and controlled by the applicable provisions of the By-Laws." In essence, this Court has 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. Thus, this Court failed to read the term "unpaid" in conjunction with the explicit language in the 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.*" (Emphasis added).

> when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Id.*

See Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "'Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity.'" *Stribling v. Stribling*, 369 S.C. 400, 404, 632 S.E.2d 291, 293 (Ct. App. 2006) (*quoting Gamble, Givens Moody v. Moise*, 288 S.C. 210, 215, 341 S.E.2d 147, 150 (Ct. App. 1986)). "In making this determination [of whether an ambiguity exists], the court must examine the entire contract and not merely whether certain phrases taken in isolation could be interpreted in more than one way." *See Gaffney v. Gaffney*, 401 S.C. 216, 222, 736 S.E.2d 683, 687 (Ct. App. 2012) (citation omitted). "'A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract." *See Williams v. Government Employees Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705 (2014) (citations omitted).

As this Court has previously held in similar circumstances, where an agreement contains provisions creating contractual rights, one of which is more inclusive than the other, there is no ambiguity where the entire agreement clearly defines the parties' rights and obligations:

> In finding the arbitration agreement ambiguous, the circuit court held:
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> > The first paragraph of the agreement references "WMAS, its officers, directors, agents, registered representatives and/or employee." ... The [] paragraph [immediately following] states, in pertinent part: I (we) understand that: (1) ARBITRATION IS FINAL AND BINDING ON THE PARTIES (i.e., YOU AND WMAS).... This Court finds that this second paragraph is set forth with greater emphasis than the first and is inconsistent with the preceding paragraph as to who is to be controlled by the arbitration agreement.

> We find there is no inconsistency or ambiguity between the clauses. Even acknowledging a difference, the most logical explanation is that the language of the first paragraph actually creates the agreement to arbitrate, and the second paragraph merely summarizes that agreement.

See Buice v. WMA Sec., Inc., 380 S.C. 149, 157, 668 S.E.2d 430, 434 (Ct. App. 2008). In this case, the various versions of the CIMC Membership Plan state, in the simplest language possible, that an equity member who has resigned from the Club remains obligated to continue to pay dues and food and beverage minimums until the Club reissues his or her equity membership. No other document says or implies anything to the contrary. The foregoing authorities counsel against seeking out ambiguities in the documents merely because they use different words to address similar subjects.

B. There Is No Issue of Fact as to Whether Appellant Had a "Right" to Be Expelled or, If So, Whether Expulsion Excused Him from His Commitments to the Club.

In its Opinion, this Court concluded that an ambiguity also exists with regard to whether a member of the Club has a right to be expelled four months after expulsion. (Slip Op. at 4-6). In reaching this conclusion, the Court relied upon the following language of the 2001 General Club Rules, which the *Dennis* court also heavily relied upon:

> Any member whose account is delinquent for sixty (60) days from the statement date may be suspended by the Board of Directors. . . . Any member whose account is not settled within the four (4) months' period following suspension shall be expelled from the Club.

(*R.* at 1350, ¶ 13.3.1). This language was subsequently changed in 2007 to make expulsion discretionary even as to suspended members: "Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club." (R. at 1440 ¶ 13.3.1). Even though this new language was in effect at the time Appellant stopped paying on his membership, the Court held that there is an ambiguity or issue for trial as to whether CIMC was required to expel him from the Club within four months after being suspended. That ruling is in error.

1. Plaintiff Has Not Created a Genuine Issue of Material Fact as to Whether the Expulsion Provisions Were Properly Amended in 2007

The Court first agreed with Appellant that there is a genuine issue of material fact as to whether this provision was properly changed. In so ruling, this Court relied upon the following language of the CIMC Membership Plans:

> The Board of Directors may, in its sole discretion, amend or modify *this Plan* from time to time, so long as such amendments or modifications do not materially and adversely affect the rights of the Equity Members. Any amendment or modification which materially and adversely affects the rights of the Equity Members must be approved by a majority of the votes held by the Equity Members so affected.

(R. at 1374, ¶ 10.1 (2001 Membership Plan); R. at 1457, ¶ 11.1 (2008 Membership Plan); *accord* R. at 1288 (1994 version)). Under this provision, the Court further cited Appellant's affidavit testimony that "I have never voted to change the requirement that a member must be expelled after 4 months of suspension and have never been made aware of any vote to do so, nor have I voted to restrict my right to transfer my property or membership." (R. at 443, ¶ 8).

However, unlike the provision that the Court relies upon, the expulsion provisions are not contained in any Membership Plan. Rather, these provisions are contained in General Club Rules, which the Board of Directors can amend at any time. The 2007 and 2009 versions of the General Club Rules provide that "[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. 1430 ¶ 1.3 (2007 version); R. at 1465, ¶ 1.3 (2009 version); R. at 1501, ¶ 1.3 (2009 version); *accord* R. at 1330 (1994 version); R. 1343, ¶ 1.3 (2001 version)). Appellant does not cite to any evidence suggesting that the General Club Rules were not properly amended under this provision. He cites to no contractual document that required a vote of the members to approve changes to the General Club Rules.

Moreover, even applying the Court's quoted amendment language from the 2007 and 2012 Membership Plans, the revisions to the General Club Rules were appropriate. The Membership Plans only require votes for a change that "materially and adversely affects the rights of the Equity Members." This change plainly did not adversely affect the rights of members of the Club. It did not limit their access to any Club amenities. It did not restrict their contractual rights. It only made express that the Club was not forced to expel members for nonpayment of dues; rather, the Club possessed the discretionary authority to do so. Appellant's suggestion that member rights were adversely affected because they no longer had a "right" to be automatically expelled from the Club does not pass scrutiny.

2. Under Governing General Club Rules, CIMC Was Not Obligated to Expel Appellant

Under the December 1, 2001 General Club Rules, CIMC's Board of Directors may suspend a member whose account is delinquent for 60 days. (R. at 1350, ¶ 13.3.1). Under those rules, a member who was suspended and whose account was not thereafter settled within four months "shall be expelled from the Club." (R. at 1350, ¶ 13.3.1). There is no evidence that Appellant was expelled under the 2001 General Club Rules, since Defendants stopped paying their dues, fees, assessments and charges in 2009. (R. at 42)

Similarly, under the 2007 amendments to the CIMC General Club Rules, a member whose account is delinquent for 60 days "may be suspended" by the Club's Board of Directors. (R. at 1440, ¶ 13.3.1). However, under the 2007 version of the CIMC General Club Rules (unlike the 2001 version), a member who is suspended and whose account is not settled within four months "*may* be expelled from the Club." (R. at 1440, ¶ 13.3.1). In other words, this revision made clear that the decision to expel a member for nonpayment (after failing to settle his account four months after suspension), even after suspension, was *permissive, not mandatory*; as always, the decision to suspend in the first instance is discretionary. Subsequent versions of CIMC's Rules are consistent up to the present date.

(*R.* at 1476 ¶ 13.3.1). All of the post-2001 General Club Rule provisions — which would have been in effect at the time Appellant stopped paying — make expulsion discretionary. To the contrary, even if Appellant was "suspended" from the Club, he did not have the right to automatically "expel" himself by simply remaining delinquent for four more months.

3. Even if CIMC Expelled Appellant, He Remained Obligated to Fulfill the Obligations of His Membership Until the Reissuance of His Membership

This Court should reconsider its opinion because, even if Appellant was "expelled" as he contends, he would remain bound to fulfill the duties of a member of CIMC until his membership reissues. Under the 1994 By-Laws, the following provisions governed the expulsion of a member of the Club:

> Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club property 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.

(R. at 1323, Art. XIV.5). CIMC's 2001 and subsequent General Club Rules reiterate that, upon the expulsion of a member, such member must "surrender his or her membership certificate for reissuance by the Club to a new member." (R. at 1351, ¶ 14.1.5; R. at 1441, ¶ 14.1.5; R. at 1477, ¶ 14.1.5).

The *only* methods for the reissuance of a membership in any governing document are either to the purchaser of the member's property or via the resale list in accordance with the list's governing documents. Thus, expulsion is, in essence, the forcing of a membership onto the resale list. Under whatever version of the CIMC Membership Plan that might have been in effect when Appellant stopped paying his dues and other charges, any member on the waiting list *remains obligated as a member until reissuance*:

> 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 dues. fees and other*

> *Charges associated with his/her membership until his/her Equity Membership is reissued by the Club.* Any unpaid dues, fees and other Charges plus interest accrued under the then prevailing terms of the General Club Rules will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership. A resigned member will be entitled to use the Club Facilities so long as the resigned member is obligated and continues to pay all dues, fees and other Charges associated with the resigned Equity Membership.

(R. at 1453-54, ¶ 5.11; *accord* R. at 1280; R. at 1370, ¶ 2.4.9; R. at 1531, ¶ 5.11(a)).

Consequently, the plain language of the documents makes abundantly clear that, even if Appellant was (or should have been) "expelled" from the Club, he would still remain obligated to fulfill his membership obligations until the reissuance of his membership. As discussed above, the documents are consistent that an expelled member is obligated to surrender his or her membership for the Club to reissue to a new member. The *only* methods of "reissuance" referenced in the documents before the Court are: (a) reissuance to the purchaser of the member's property or (b) sale via the resale list. Such reissuance presupposes that the member will honor the financial obligations of his membership until such reissuance.

Therefore, even if Appellant was "expelled" from the Club, he is nevertheless obligated to pay dues until his membership is reissued (either through the wait list or the sale of his property).

4. The Court's Construction of the Governing Documents Is Not a Sensible and Reasonable Construction

The Court's (and Appellant's) "mandatory expulsion" argument violates a fundamental principle of contract interpretation that:

> "Instruments should receive a sensible and reasonable construction and not such a construction as will lead to absurd consequences or unjust results." [Citations omitted.] "A principle of construction which is also well settled is, that where one construction would make a contract unusual and extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." [Citation omitted.]

See Mishoe v. General Motors Acceptance Corp., 234 S.C. 182, 107 S.E.2d 43(1958). In holding that Appellant might be *entitled* to expulsion and thus relieved of his financial obligations, the Court indulged a most unusual and extraordinary reading of the documents. Under this strained reading, a member who resigns his membership and follows the procedures prescribed for resignation would remain financially obligated until his membership was reissued. On the other hand, a member who unilaterally stops paying dues in violation of his membership agreement would be "entitled" to be expelled and relieved of further obligation. In other words, resigning members would be rewarded for flouting their contractual obligations. There is no evidence whatsoever in the record that the parties ever intended such an anomalous result, and the words used in the CIMC governing documents do not permit such a result.

Appellant's "mandatory expulsion" argument is the product of revisionist interpretation of the documents comprising their membership agreement. Surely nobody would seriously think that the Club's founders designed a program wherein members who wish to leave are encouraged to break the rules and simply stop paying, to force the Club to expel them. A party "is not permitted to reinterpret written contract terms midstream because he is unhappy with the contract he executed." *See Silver*, 376 S.C. at 593, 658 S.E.2d at 543 (*citing Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007) ("Parties [to a contract] are governed by their outward expressions and the court is not at liberty to consider their secret intentions."); *Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984) ("Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made. It does not depend on the subjective, after the fact meaning one party assigns to it.").

Respectfully, the Court should reconsider its ruling in this case because Appellant's construction of the expulsion provisions is not reasonable and leads to an absurd result.

5. The Court Improperly Relied on Statements Attributed to Ellen Padgett

The Court also relied upon "the testimony of the membership coordinator for CIC and CIMC, who stated she understood the expulsion provision to mean that after four months of delinquency, a member would lose his or her membership." (Slip Op. at 5). In *Dennis,* this Court relied upon that testimony, noting that:

> Appellants presented evidence that prior to joining CIC they were assured by CIC employee Ellen Padgett that they would never be obligated to pay for more than four months of past dues. Ronnie Dennis testified Padgett informed him his "maximum liability was for four months," and Jeanette Dennis testified Padgett told her if Appellants wanted to leave the club they would only be responsible for four months of dues. Padgett testified in her deposition that she understood section 13.3.1 to mean that after four months of delinquency, a member would lose his or her membership.

The Callawassie Island Members Club, Inc. v. Dennis, 417 S.C. 610, 617, 790 S.E.2d 435, 439 (Ct. App. 2016), *cert. granted* (S.C. Sup. Ct. Order dated September 8, 2017) (Slip Op. at 6). For the reasons that follow, the Court erred in allowing Appellant to evade contractual obligations through such alleged representations.

Under the 1994 Plan for the Offering of Memberships in the Callawassie Island Club (in a paragraph labeled "Rely Only on Information in This Membership Plan and Its Exhibits") — as well as subsequent versions:

> 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 by the Partnership or the Club.

(R. at 1269; *accord* R. at 1366 ¶ 1.8; R. at 1458 ¶ 12.3; R. at 1538 ¶ 12.3). In this regard, Defendants expressly agreed that they did not (and could not) rely on any alleged representations by Ms. Padgett (or anyone else for that matter). South Carolina law will enforce the parties' agreement that prior representations are not to be relied upon to add to the representations contained in the agreement. *See Redwend Ltd. P'ship v. Edwards,* 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003) ("The parol evidence rule prevents the

introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument."); *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 127-28, 713 S.E.2d 799, 805 (Ct. App. 2011) ("A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement.").[4]

For the foregoing reasons, this Court should grant CIMC's Petition for Rehearing and should vacate its opinion in this matter.

C. The Court Misconstrued the South Carolina Nonprofit Corporation Act

The Court concluded that CIMC's governing documents and/or conduct violated a provision of the South Carolina Nonprofit Corporation Act ("Act"), which governs the resignation of members from nonprofit corporations. *See* S.C. Code Ann. § 33-31-620(a)-(b). This Court's opinion relies on its prior decision in *Dennis* to the effect that Section 620 of the Act prevents CIMC from agreeing with its members to remain committed to paying dues and fees following resignation from CIMC. In *Dennis,* this Court stated:

> Section 33-31-620 obligates resigned members to pay any dues incurred before resignation. This section does not require resigned members to continue to pay any dues that accrue after resignation. To do so, we believe, would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations. . . .
>
> Appellants state in their brief it is undisputed that CIMC membership is no longer available to non-Callawassie property holders. With only 85 lots remaining for development and every fourth purchase coming off the resale list, it is possible only 21 names will ever come off the list. Appellants are 72nd on the resale list. Therefore, it appears unlikely Appellants will ever be able to sell their membership. We find section 33-31-620 protects club members from such continuing liability after resignation.

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[4] In addition, 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 respectfully erred in considering the testimony of Ellen Padgett, which is extrinsic evidence used to find an ambiguity existed.

The Callawassie Island Members Club, Inc. v. Dennis, 417 S.C. 610, 618-19, 790 S.E.2d 435, 439 (Ct. App. 2016), *cert. granted* (S.C. Sup. Ct. Order dated September 8, 2017). For the reasons that follow, the Court's decision is premised upon a critical factual inaccuracy and misinterprets plain language of the relevant provisions of the Act. In so doing, the Court interprets the Act in a way that will prevent people from coming together to form community associations (or many other kinds of nonprofit organizations) whose financial viability depends upon regular, predictable contributions from a finite pool of members.

1. The Court Misunderstood Key Facts in Concluding That the South Carolina Nonprofit Corporation Act Bars Enforcement of the Parties' Agreements.

The Court's conclusion that the CIMC membership agreement violates the Act is based on an important factual inaccuracy that undercuts all logical reasoning. Specifically, the Court relied upon its prior statement in *Dennis* that CIMC's construction of the Act "would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations." *The Callawassie Island Members Club, Inc. v. Dennis,* 417 S.C. 610, 618, 790 S.E.2d 435, 439 (Ct. App. 2016), *cert. granted* (S.C. Sup. Ct. Order dated September 8, 2017). In reality, members of CIMC can terminate and forever end any membership obligations through the reissuance of their memberships, not just through the resale list, but also by selling their property and transferring their Membership to their purchasers.[5] The original 1994 Plan for the Offering of Memberships and later versions of the Membership Plans provide that members who own property in Callawassie may arrange for the Club to reissue his or her resigned membership to the purchaser of his or her property. (R. at 1278; R. at 1369, ¶ 2.4.1; R. at 1451, ¶ 5.2; R. at 1452-53, ¶ 5.8; R. at 1527, ¶ 5.2; R. at 1530, ¶ 5.8). Appellant has not presented any

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[5] Actually, under the covenants and declarations applicable to Defendants' property since 2001, a purchaser *must* obtain an equity membership in CIMC.

evidence that Defendants could not sell their property and have their membership reissued to the purchaser.

As discussed above, such reissuance of the membership would relieve the member of ongoing membership obligations. In other words, Appellant could end his membership obligations by selling his property and having the purchaser obtain his reissued membership. Appellant offers no evidence that this would not be a viable way to end his membership commitment. If Defendants sell their property and complete the required paperwork, Appellant can end his membership and any further obligations. This process assures continuity of membership and furthers the Callawassie community's ethos – expressly embodied in the 2001 covenant amendments (R. at 1378-1427) – that Club membership goes hand in hand with property ownership.

Further, at the time Defendants purchased their membership, it was reasonable for all parties to believe that there would be a ready market for Club memberships and that resignation and reissuance through the resale list would be a viable alternative means of exit from the Club. It is common knowledge that the market for club memberships has declined since the Defendants bought their membership.[6] This has brought hardship to all amenity-based communities, many of which have not survived. CIMC's survival depends upon each member's shared commitment to remain responsible for a share of the cost of running the Club unless and until the membership is reissued to a new member. Everyone who became an equity member assumed the risk that membership could someday become an unwelcome financial burden.[7] The membership agreement, like all contracts, embodies

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[6] *See, e.g.*, "More Americans Are Giving Up Golf", THE NEW YORK TIMES (FEBRUARY 21, 2008) (HTTP://WWW.NYTIMES.COM/2008/02/21/NYREGION/21GOLF.HTML?_R=0)

[7] Under the various governing documents, Defendants were advised that their purchase of a membership in the Club was solely for recreational purposes and was not intended to provide any economic benefit to them or serve as an investment. (R. at 1270; R. at 1366, ¶ 1.9; R. at 1458, ¶ 12.4; R. at 1538, ¶ 12.4).

a voluntary allocation of risks and benefits. Everyone who purchased a membership in the Club agreed to pool their financial resources for the common good. Each member agreed to bear the risks of changes in his lifestyle choices, changes in his financial situations, or changes in other circumstances, rather than require fellow Club members to bear those risks. Appellant and his spouse agreed, as did their fellow Club members, to retain the burdens of membership until the reissuance of their membership. This collective agreement is the lifeblood of CIMC, and Defendants enjoyed its benefits for many years.

As noted at the outset of this Petition, hard cases make bad law. CIMC respectfully posits that the illusory specter of hapless club members being trapped forever in the Club influenced the Court to find a way out for Appellant. However, interpreting the Nonprofit Corporation Act to nullify long term membership agreements will, quite simply, deprive ordinary people of the ability to pool their resources to create clubs and community associations that allow them to enjoy amenities that they could never afford on their own. Indeed, no homeowners' association could survive under the Court's interpretation of the Act. The Attorney General noted in a February 3, 2014 opinion that the Act's provisions governing resignation are applicable to homeowners' associations." *See* 2014 WL 1398587, at *1 (S.C.A.G. Feb. 3, 2014) ("S.C. Code § 33-31-620 and § 33-31-621 regarding resignation and termination apply to a South Carolina nonprofit corporation such as a homeowner's association incorporated pursuant to S.C. Code § 33-31-101 et seq. and registered with the South Carolina's Secretary of State's Office.").

The essence of most homeowners' associations is that those who own property within the association, and thus enjoy its amenities and other benefits, must belong to the association and pay dues for as long as they own their property. Yet, under this Court's decision, such requirement is void because this Court seemingly believes that Club members must be allowed to resign and permitted to avoid their financial obligations at any time. Community associations cannot survive this way. One trial court resolved this dilemma by cogently recognizing that mandatory membership does not violate the Act,

because the member "may resign from the HOA at any time by selling his . . . property." *See Jarmuth v. International Club Homeowners Ass'n, Inc.*, 2013 WL 6832934, at *4 (S.C. Com. Pl. Horry March 11, 2013). Likewise, Appellant and his spouse can resign from the Club any time and may end their financial obligation by selling their property and transferring their membership to their buyer, who governing covenants require to become an equity member. They have presented no evidence that CIMC has done anything to prevent them from selling their property. This Court should find that this arrangement satisfies the Act's requirement that members be allowed to resign.

2. The Court Made an Error of Law and Misconstrued the Plain Language of the South Carolina Nonprofit Corporation Act

Additionally, the Court's construction of the Act is not consistent with its plain language. The Court concluded that CIMC's governing documents and/or conduct violated the following provision of the Act:

(a) A member may resign at any time.

(b) 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 Ann. § 33-31-620(a)-(b). (Emphasis added). The Court concluded that Section 33-31-620 prevents CIMC members from committing to paying dues and fees following resignation from CIMC. The Court's interpretation of the Act is contrary to its plain meaning.

The rules governing the construction of a statute are well-settled in South Carolina:

> The Court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420

> S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993).
>
> Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). "*A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.*" *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted).

See State v. Sweat, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575 (2010) (emphasis added). Although the Act does permit members of nonprofit corporations to resign, Section 33-31-620(b) qualifies that right, stating that "[t]he 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." (emphasis added). A "commitment" is "a pledge or promise; obligation." (*See* http://www.dictionary.com/browse/commitment?s=t (accessed Aug. 4, 2016)). In other words, the statute plainly provides that a member of a nonprofit corporation may not escape the promises he or she has made to the corporation by simply resigning.

The Official Comments to the Section of the Act at issue makes clear that subsection (b) permits members to be bound after resignation to pre-resignation promises:

> Under section 6.20(b) a person may be liable for obligations incurred or *commitments made* prior to the resignation. *These commitments may extend beyond the time the member resigns.*
>
> Resignation from membership will not allow a person to avoid liability for goods or service already provided or for ongoing obligations to which the member agreed prior to resignation. Section 6.20(b). This provision is particularly important to corporations that provide benefits or services to members' businesses. The member in joining the organization may promise to use its facilities or services for a specified period of time. *While section 6.20(a) allows a member to resign at any time, section 6.20(b) allows the corporation to enforce or obtain damages for violation of a member's agreement.*

See S.C. Code Ann. § 33-31-620, Official Comments (emphasis added). The Court ignored the plain language of the Official Comments. Clearly, Appellant is obligated to fulfill his contractual obligations to pay the expenses of his Club membership until that membership is reissued. The Court did not properly interpret Section 620 of the Act and the Official Comments to the Act, both of which nonprofit corporations have relied upon for over twenty years. The Court's misinterpretation of the Act will result in broad and serious negative financial impact to nonprofit corporations in South Carolina, something the Court likely did not intend.

CIMC does not seek to prevent its members from resigning. Rather, CIMC asks the Court to enforce the commitments that the Club's members made years before resigning. Specifically, the Club seeks to enforce Appellant's commitment to remain financially responsible for his membership until it is reissued to a new member. As discussed in the previous section, this commitment – combined with the identical commitments made by every other member – is the lifeblood of the Club. It cannot be gainsaid that CIMC, or almost any other nonprofit club or association, cannot survive without being able to enforce these constitutive pre-resignation commitments.

Contrary to the Act's plain language, the Court determined that the Act only "obligates resigned members to pay any dues incurred before resignation." (Slip Op. at 7). However, the Court's holding appears to take into account only one of the phrases in subsection (b), "obligations incurred." To hold that subsection (b) means that resigning members remain liable only for dues incurred before resignation renders subsection (b) absolutely meaningless. Surely, the Court would not hold that — but for this language — the Act would allow resigning members to walk away from debts already incurred. It goes without saying that people have to pay for goods or services that they have already received; a statutory requirement for this would be superfluous. Moreover, the Court disregarded the "commitments undertaken" language of that subsection. If the language of

subsection (b) means anything, it must mean that pre-resignation executory contracts remain enforceable after resignation.

D. The Court Erred in Reversing the Grant of Summary Judgment as to Appellant's Breach of Contract Counterclaims

For the reasons discussed above, this Court has misconstrued CIMC's clear and unequivocal governing documents (and South Carolina statutory law). Under those documents, there is no legitimate dispute that — irrespective of whether he resigned or was expelled — Appellant agreed to continue to fulfill the obligations of membership until his membership is reissued. As a result, the trial court correctly granted summary judgment for CIMC on Appellant's breach of contract counterclaims.

E. The Court Erred in Reversing the Grant of Summary Judgment as to CIMC's Claim for Attorneys' Fees

For the reasons discussed above, CIMC's clear and unequivocal governing documents (and South Carolina statutory law) entitled CIMC to summary judgment in this matter. The trial court correctly granted summary judgment for CIMC on its breach of claim for attorneys' fees.

CONCLUSION

The Court's opinion reflects that it perceives the CIMC governing documents as unfairly oppressive and largely inharmonious. This perception is mistaken. The documents, though sometimes using different words to deal with similar subjects, leave no doubt as to what the Club's founders meant and what every member, including Appellant, agreed to. CIMC is a first-class club, offering amenities that no member could ever afford alone. CIMC, like other amenity-based clubs and community associations, is a remarkable product of collective will. It has no revenue source except for the dues and fees paid by its limited pool of members. It depends for its very existence upon every members'

commitment to pay his share of the cost of running the Club until his membership passes to a new member. The membership agreement between CIMC and Appellant leaves no doubt about this. It is not ambiguous, unfair, or illegal; for the sake of every other member, the Court should enforce it according to its clear terms.

For the foregoing reasons, Respondent The Callawassie Island Members Club, Inc. respectfully requests this Honorable Court to grant its Petition for Rehearing, vacate its Opinion and affirm the trial court's grant of summary judgment to CIMC.

Respectfully submitted,

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May 17, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent, does hereby certify that service of **Respondent's Petition for Rehearing and Incorporated Memorandum in Support Thereof** 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 17th day of May 2018:

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May 17, 2018

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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RE: The Callawassie Island Members Club, Inc. v. Michael J. Frey and Grace I. Frey
Appellate Case Number: 2015-000002
Civil Action Number: 2012-CP-07-3209
Our File Number: 79.20033

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of **Respondent's Petition for Rehearing and Incorporated Memorandum in Support Thereof** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. I have also enclosed my firm's $25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: M. Dawes Cooke, Jr., Esquire *(w/ Enclosure)*
John W. Fletcher, Esquire *(w/ Enclosure)*
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