IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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 IN SUPPORT OF PETITION FOR REHEARING

Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
FORD WALLACE THOMSON LLC
715 King St., Charleston, SC 29403
(843) 277-2011

Attorneys for Respondents Ronnie D. Dennis and Jeanette Dennis

RECEIVED

OCT - 8 2018

S.C. SUPREME COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

ARGUMENT

The Dennises primarily rest on the arguments put forward in their Petition for Rehearing but briefly reply to the Club's Return, as follows.

I. The Majority Opinion is flawed for its lack of support in the Record and the law, and Rehearing is necessary and proper.

If anything, the Club's Return highlights instances in which the Majority Opinion misapprehends the law and overlooks matters in the Record, and it underscores the multiple unresolved questions of fact that made summary judgment inappropriate in this case.

A. The Majority Opinion's construction of the contract is unfounded.

As the Club observes in its Return, the Majority Opinion cites only to *Williston on Contracts* in support of its decision that the contract at issue is unambiguous, rather than applying the rules of contract construction set forth by this Court:

- "A contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire agreement." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46-47, 747 S.E.2d 178, 184 (2013).
- "Although as a general rule contracts are to be construed by the court, where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to the jury." *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1996).
- "[T]he law existing at the time and place of the making of the contract is part of the contract." *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007).

At oral argument in this case, Justice Kittredge questioned whether there was any point at which law or equity would step in to correct the never-ending nature of the Club's particular contract.[1] The answer is that the law already has stepped in. At the time that the Dennises became Club members, they did so against the backdrop of the legislative guarantee that they could "resign at any time." S.C. Code § 33-31-620(a). The plain meaning of the word "resign" does not contemplate the perpetual membership to which the Dennises are bound by the Majority Opinion's interpretation of the contract. As the Dissent points out, the contract—as the Club and Majority Opinion would interpret it—is against public policy. (Op. at 14, 16, Hearn, J., dissenting). At the least, the conflict between the statute and the membership agreement renders the terms of the contract ambiguous.

Because the membership contract properly should be construed in accordance with the law at the time and place of its making, against the drafter, and in the light most favorable to the Dennises, the Majority Opinion to the contrary warrants reconsideration.

B. The contract asserted by the Club is not in the Record.

As the party seeking to enforce the contract, the burden was on the Club to prove its existence and terms. *See Fici v. Koon*, 642 S.E.2d 602, 372 S.C. 341 (2007) (burden of proof is on party seeking to enforce contract). At the summary judgment stage, all evidence and inferences going to that question should have been resolved in favor of the Dennises, who were the non-moving party. *See Carolina Chloride Inc. v. South Carolina Dep't of Transp.*, 391 S.C. 429, 434, 706 S.E.2d 501, 504 (2011).

---

1 http://media.sccourts.org/videos/2016-002187.mp4 at minute 7:50.

In its Return, the Club pronounces that the Majority "properly recognized, unlike the dissent, that **the Rules cannot be read in a vacuum, separate and apart from the Bylaws and the Plan**, in order to find an ambiguity that does not exist." (Return, p. 3, fn. 1, bolding added). Moreover, the Club declares, "the Rules include language stating that '[a]ll rules and regulations contained herein shall be subject to and controlled by the applicable provisions of the By-Laws.'" (*Id.*, quoting App. 626). And yet, despite its theoretical recognition of the necessity of proving an integrated contract, the Club never adequately demonstrated the existence of one to the trial court. Hence, the Order from which the Dennises appeal quotes a hodge-podge of provisions from various years of documents, including: the 1994 Plan, the 2001 Bylaws, a version of the Plan without sufficient citation to determine its origin, the 2007 Rules, and a version of the Bylaws without sufficient citation to determine its origin. (App. 145-147).

The Club is wrong that the absence of the 2009 documents in the Record "is the Dennises' fault." (Return, p. 5). When they compiled the Record on Appeal, the Dennises sought to include those materials relevant to the trial court's Order on appeal. Rule 209, SCACR. They therefore included documents quoted by the court, as well as those in support of their issues on appeal (that the documents were ambiguous; that they had not been amended properly; that they were in contravention of the law; and that the Club had failed to meet its burden to demonstrate a valid, integrated contract, *inter alia*). The lower court <u>never</u> quoted the 2009 documents as a basis for its holding.

In its own Designation of Matter, the Club continued along its imprecise path of pointing to a jumbled potpourri of contract provisions. It cannot now assert that the 2009

Rules should apply, and that those "Rules cannot be read in a vacuum," when it has put before this Court a total of three (3) pages from the 2008 Plan, two (2) pages from the 2009 By-Laws, and two (2) pages (one of which is the cover sheet) from the 2009 Rules (App. 651-657).

The Circuit Court's failure to resolve the question of fact as to which documents constitute the agreement of the parties was error. It compounded that error by quoting documents that it had previously acknowledged had been amended. (*See* App. at 146-147). Its grant of summary judgment should be reversed by this Court and the case remanded, as was recognized by the Court of Appeals. In affirming the trial court's Order, and in purporting to interpret a contract not contained in the Record, the Majority Opinion misapprehends the law. A rehearing is justified.[2]

C. The Record reveals that questions exist as to whether the Dennises were suspended, as well as to the appropriate limit of their liability.

The Club's Return, in discussing its own interpretation of the meaning of the "S" status and the testimony of its membership director as to the Dennises' suspension, further reveals the ambiguity, inconsistency, and questions of fact that made summary judgment inappropriate in this case. (Return, p. 6-7). The Club also incorrectly claims that the Dennises' argument in its Petition as to a cap on its damages "is a new argument." (Return, p. 9). In fact, the Dennises argued before the Court of Appeals that their liability

---

[2] If, as the Club suggests in its Return, this Court orders supplementation of the Record with complete copies of the 2009 documents, then a rehearing should be granted, and briefing should be permitted based on those materials. (*See* Return, p. 5, fn. 2).

should be capped at the amount of their membership contribution.[3] (App. pp. 76-80). As set forth in the Petition for Rehearing, the Majority Opinion overlooks evidence in the Record going to both of these issues, which should have been resolved in the Dennises' favor at the summary judgment stage.

D. The Majority Opinion improperly grounds its holding on facts not in the Record.

The Club incorrectly contends that the Majority Opinion's broad factual characterizations "are not pertinent to any dispositive claim or issue." (Return, p. 12). As an initial matter, *even the Club* does not claim that the challenged factual characterizations in the Majority Opinion are supported by this Record. The Club knows they are not.

A review of the Majority Opinion reveals that the Opinion's misapprehension of the facts is at the heart of its holding. Despite its proviso against extrinsic evidence, the Majority Opinion actually relies in significant part upon unsupported—and entirely extrinsic—perceptions of social clubs, such as the one on Callawassie Island.

The Majority Opinion's holding, that the membership documents are unambiguous, is based on its (unsupported) finding that the "provisions of the membership documents that require members to continue to pay their membership dues until their membership is reissued are necessary to ensure the Club remain viable in the future." (Op. at 6). Further, within the same paragraph that it purports to rely on the "plain language of the applicable provisions of the membership documents," the Majority Opinion reveals that its holding is vindicated by an extrinsic theory that "these

---

[3] This issue was not reached by the Court of Appeals, and remand would be appropriate if this Petition for Rehearing is denied.

provisions . . . are the very feature of the membership documents that enable[] the Dennises and other members to sustain a viable Members' Club on Callawassie Island, which in turn increases the value of their membership and their property." (Op. at 7). These complex factual assertions by the Majority Opinion are not supported by the Record. The question of their validity should properly be resolved by remand to a jury, and it was error for the Majority Opinion to evaluate the contract with reference to them.

E. The Majority Opinion misapprehends the Nonprofit Corporation Act.

As it stands, the Majority Opinion gives credence to a fictional resignation process that violates the clear language of the Nonprofit Corporation Act as set forth in § 33-31-620(a). In its Return, the Club engages in verbal gymnastics in an attempt to legitimize the ultimate result in this case. According to the Club: "the Dennises were *permitted* to resign," and . . . yet . . . they "were *required* to pay their dues, fees and other charges until their membership is reissued," which, as the Dissent observes, may very well occur long after they have gone on to the great highlands golf course in the sky.[4] (Return, p. 11). As a salve for this wound, the Club touts the fact that, even after their apparently meaningless resignation, the Dennises might still have been entitled to the use of Club facilities. (Return, p. 7). In reality, if the Club's "policies" are determined to be legal, then this Court allows the Club to circumvent the law.

---

4 *See* Return to Petition for Rehearing, filed amicus curiae by the Community Associations Institute (p. 4).

II. If this Petition for Rehearing is denied, remand to the Court of Appeals is proper.

The Club's arguments in opposition to the Dennises' Motion for Remand to the Court of Appeals do not comport with the Appellate Court Rules. The Club first argues that the Dennises should have re-asserted their previously-raised issues on appeal as "additional sustaining grounds" for the Court of Appeals' decision. (Return, p. 13). But because the issues in question had not even been considered by the Court of Appeals, they could hardly have sustained its opinion.

The Club next contends that the Dennises did not raise the unreached issues in their Return to the Club's Petition for Writ of Certiorari. (Return, p. 14, fn. 6). However, no return is necessary to a petition for certiorari,[5] and, where one is filed, it need only address the questions presented for review. Rule 242, SCACR. It is a stretch of logic to suggest that the Dennises somehow failed to preserve their remaining issues by filing an optional return that was only required to speak to the particular questions raised by the Club in its Petition.

Finally, the Club argues that the issues for which the Dennises seek remand are encompassed within this Court's decision. This argument fails because this Court had before it on certiorari only the issues presented to it by the Club for its consideration and

---

5 "Note, the respondent is not required to file a return, and there are many petitions for writ of certiorari filed in the Supreme Court to which no return is filed. Unlike a direct appeal, the respondent does not consent to the grant of the writ by failing to file a return." Toal, Jean Hoefer, et al. *Appellate Practice in South Carolina*, 3rd ed., South Carolina Bar Continuing Legal Education Division, 2016, p. 307.

review, and the Club presented solely the issues actually ruled upon by the Court of Appeals. Furthermore, to any extent that the Majority Opinion may have touched on the Dennises' remaining issues, it did not do so in accordance with the Record or the law, as set forth above and in the Petition.

CONCLUSION

For the foregoing reasons, and for those stated in their Petition for Rehearing and by the Dissent, the Respondents respectfully request that this Honorable Court would grant their Petition for Rehearing.

Respectfully submitted,

FORD WALLACE THOMSON LLC

Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
715 King St., Charleston, South Carolina 29403
(843) 277-2011

Attorneys for Respondents Ronnie D. Dennis and Jeanette Dennis

October 5 , 2018
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-002187
South Carolina Court of Appeals Opinion 5434

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

v.

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

PROOF OF SERVICE

I certify that I have served the Reply in Support of Petition for Rehearing on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on October 5, 2018, addressed to their attorneys of record:

Stephen P. Hughes, Esq.
Howell, Gibson and Hughes
P.O. Box 40
Beaufort, SC 29901

M. Dawes Cooke, Jr., Esq.
John Fletcher, Esq.
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402

Andrew F. Lindemann, Esq.
Davidson & Lindemann, P.A.
P.O. Box 8568
Columbia, SC 29202

RECEIVED

OCT - 8 2018

S.C. SUPREME COURT

FORD WALLACE THOMSON LLC

Ian S. Ford, Esq.
Neil D. Thomson, Esq.
715 King Street
Charleston, SC 29403
T. 843.277.2011
Attorneys for Respondents Ronnie D. Dennis and Jeanette Dennis

RECEIVED

OCT - 8 2018

S.C. SUPREME COURT