THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Court of Common Pleas
Fourteenth Judicial Circuit

Edgar W. Dickson, Circuit Court Judge
Case No. 2018-000-707

Marc Haas, Susan Haas, Rob Star and Melissa Starr, Appellants,

v,

TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10, Respondents,

And

TI Oldfield Operations, LLC and SF Operations, LLC, Third Party Plaintiffs,

v,

Oldfield, LLC and Crescent Communities, LLC f/k/a/ Crescent Resources, LLC, Third Party Defendants.

PLAINTIFFS-APPELLANTS' FINAL BRIEF ON APPEAL

Denise L. Savage, Esquire
Savage Law, PLLC
705 Greene Street
Beaufort, South Carolina 29902
843.522.0058
Attorney for the Plaintiffs

Merritt Abney, Esquire
Nelson Mullins, Esquire
151 Meeting Street, 6th Floor
Charleston, SC 29401
843.853.5200
Attorney for Respondents
TI Oldfield Operations LLC, SF Operations LLC

Ian Ford, Esquire
Hunter H. James, Esquire
Ford Wallace Thomson LLC
715 King Street
Charleston, SC 29403
843.277.2011
Attorneys for Respondents, Oldfield Club Board of Directors, Oldfield Club

Robert Ethridge, Esquire
Suzanne Deters, Esquire
Ethridge Law Group
P.O. Box 20969
Charleston, SC 29413
843.614.0007
Attorney for Respondents, Oldfield Community Association

Christopher Ogiba, Esquire
Charles Scarminach, Esquire
Moore & Van Allen
78 Wentworth Street
Charleston, SC 29401
843.579.7000
Attorneys for Oldfield LLC, Crescent Communities LLC, Crescent Resources LLC

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Plaintiffs-Appellants, Marc Haas, Susan Haas, Rob Star and Melissa Star (collectively, the "**Plaintiffs-Appellants**"), file this brief on appeal of the Circuit Court's order (the "**Order**" (**R. at 4**))[1] granting summary judgment in favor of the Defendants-Respondents, Oldfield LLC and TI Oldfield Operations, LLC (collectively, "**TI**"), Oldfield Club ("**OC**"), and Oldfield Community Association's ("**OCA,**" together with TI and OC, the "**Defendant-Respondents**"), and respectfully set forth and represent:

QUESTIONS PRESENTED

I. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, IN ADAPTING AN OPINION WRITTEN BY COUNSEL FOR THE DEFENDANTS, INSTEAD OF DRAFTING ITS OWN DECISION?

II. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, BY FAILNG TO RENDER A DECISION WITH SUFFICIENT SPECIFICITY EXPLAINING ITS BASIS FOR FINDING THAT THERE WERE NO GENUINE ISSUES OF FACT IN DISPUTE, AND ERR AS A MATTER OF FACT AND LAW BY FINDING THAT THERE WERE NO MATERIAL FACTS IN DISPUTE PRECLUDING SUMMARY JUDGMENT?

III. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, BY DISREGARDING THE EXPRESS TERMS OF THE TERMINATION AGREEMENT AND FINDING THE DEFENDANTS-APPELLANTS HAD NOT BREACHED ANY DUTY OWED, IN FAVOR OF IRRELEVANT TERMS SET FORTH IN THE OLDFIELD COMMUNITY'S "GOVERNING DOCUMENTS?"

IV. TO THE EXTENT THE "GOVERNING DOCUMENTS" ARE DETERMINED TO BE RELEVANT IN THIS ACTION, DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, IN ITS INTERPRETATION OF THE "GOVERNING DOCUMENTS" ANNEXED TO THE SUMMARY JUDGMENT MOTION PAPERS?

V. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, THAT THE PLAINTIFFS' FAILED TO TIMELY FILE THE COMPLAINT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS?

VI. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, IN RULING THAT THE DEFENDANTS SUFFERED NO DAMAGES?

[1] References to the Record on Appeal filed in the Appeal shall be designated as "**R. at ____.**"

STATEMENT OF THE CASE

This appeal arises from entry of summary judgment in the above captioned action by the lower court in favor of the Defendants-Respondents. The Plaintiffs-Appellants filed the complaint commencing the action before the Lower Court arising from an alleged breach of the terms of a so-called "Termination and Release Agreement," (the "**Termination Agreement**")**(R. at 675 filed under seal**) wherein, Plaintiffs-Appellants alleged that a portion of dues and fees (collectively, the "**Social Dues**") that they respectively pay, as members of the Oldfield Community in Okatie, South Carolina, to OCA (the homeowner's association) and the OC (the social club and golf club), have been, and continue to be, shifted by the social club of the OC to illegally and improperly to support the OC Golf facilities, of which the Plaintiffs-Appellants are not golf members.

A review of Section 2 of the Termination Agreement reveals that, "*notwithstanding any contrary provisions" in the alleged "Governing Documents"* (defined below and referenced in part in the lower court's Order Granting Summary Judgment in favor of the Defendants-Respondents) which may permit the Defendants-Respondents to allocate dues and fees paid by Oldfield members as a whole to support the OC golf facilities (which the Plaintiffs-Appellants reject as a premise as discussed more fully below), Plaintiffs-Respondents' Oldfield Dues may *not* be applied to the maintenance and operations of the OC golf facilities. ")**(R. at 675 filed under seal)**

The Lower Court Order, now on appeal before this august bench, inexplicably disregards the express language of the Termination Agreement (i.e. "Notwithstanding any terms...") and instead determined that the irrelevant terms of the "Governing Documents" of Oldfield

Community allow the OC to allocate Plaintiffs' social and HOA dues to support the maintenance and operation of the OC golf facilities ")(**R. at 675 filed under seal**).

In the Order, the Lower Court Order also concluded, without a scintilla of analysis of voluminous documents and correspondence annexed to affidavits filed in support of the Plaintiffs' objections to summary judgment, that the Plaintiffs-Appellants were barred by the applicable statute of limitations. The correspondence and documents (discussed more fully below) submitted as exhibits to affidavits filed by the Plaintiffs, reflect that Plaintiffs-Appellants were repeatedly misled as to the allocations made by the OC of social dues paid by the Plaintiffs, repeatedly notifying the Plaintiffs-Appellants that the allocations were *not* being applied to the OC golf facilities.

Finally, the Lower Court held that the Plaintiffs-Appellants failed to prove that they were damaged. This finding is clearly wrong as the Defendants-Respondents admitted at the hearing before the Lower Court that, in fact, voluminous evidence filed by Plaintiffs-Appellants demonstrating that incomplete and inaccurate financials were produced by the Defendants-Respondents and that the Defendants-Respondents failed to comply with an order of the Lower Court directing them to produce revised, audited financials.

Based upon all of the foregoing, it is respectfully asserted that the Lower Court's Order granting summary judgment in favor of the Defendants-Respondents must be reversed.

JURISDICTION AND VENUE

This Court has jurisdiction over this Appeal pursuant to South Carolina Code Section 14-8-200(a) and the venue of this Appeal complies with South Carolina Code Title 15, Chapter 7.

APPLICABLE STANDARD OF REVIEW ON APPEAL

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid–South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

APPLICABLE FACTS ON APPEAL

1. The within action (the "**Action**") was commenced by the Plaintiffs-Appellants on March 10, 2016 by the filing of a summons and complaint (the "**Complaint**"). **R. at 16**.
2. The Action arises from breach of the Termination Agreement, dated September 17, 2009, executed by and among each of the Plaintiffs, on the one hand, and TI (as successor in interest to Crescent Communities LLC and f/k/a Crescent Resources LLC ("**Crescent**"))(**R. at 675**)(**filed under seal**).
3. Oldfield Community is a gated, planned community comprised and operated by two (2) separate entities: the OCA and the OC.
4. The OCA, a not-for-profit limited liability corporation, collects mandatory homeowners' association dues on a monthly basis from members (i.e. homeowners) (the "**Residential Dues**"). A portion of the HOA Dues are transferred to the OC to assist in maintaining non-golf related facilities operated by the OC (the "**Social Facilities**"). *See* Declaration of Recreational Covenant of Oldfield Club (the "**OC Declaration**" (**R. at 416, 432**)); *See also* Oldfield Club Amended Bylaws, Effective October 2, 2002 (the "**OC Bylaws**"), Section 1.3 (**R. at 444**) and Article II (**R. at 451**).
5. The OC, a not-for-profit limited liability corporation, operates two (2) separate functions. The first function is to collect mandatory social dues (the "**Community Dues**") from all members of the Oldfield Community. *See* OC Declaration (**R. at 418-422**). The Community Dues are to be applied *only* to maintain Non-Club Facilities which, pursuant to the Termination Agreement (**R. at 675**) discussed in detail below, include the River House (restaurant), an Outfitters Center with boats, kayaks, and fishing gear and an Activity Center with a swimming pool, tennis court, and fitness center (**R. at 419-421**).

6. The OC Declaration declares the following:

> By this Covenant, Declarant desires to provide for issuance of a Community Membership [] in the Club for each home or homesite within the Residential Property ("Residential Unit") and *to establish the obligation of the owner(s) of each Residential Unit to pay such periodic dues for Community Membership as the Club may establish from time to time in accordance with this Covenant.*

7. OC Declaration at 2 (Fourth "Recital" clause, **R. at 418**)(emphasis added). Thus, the OC Declaration ***only*** governs payment of Community Dues paid by residents, ***and does not relate to Golf Club membership, other than to declare that "the Community Members shall not be subject to assessment for operating deficiencies or capital improvements related to golf facilities or golf operations."***

8. The OC Declaration further declares that the Community Membership entitles each of the residential owners in Oldfield to:

   a. Use of food and beverage facilities as the Club Operator may designate and the community dock, if any, operated by Club Operator on the Club Property;
   b. Use the boats, kayaks, and fishing gear provided at the Outfitters Center, if any, operated by Club Operator on the Club Property;
   c. Use the swimming pool, tennis courts and fitness center comprising the Activity Center, if any, operated by Club Operator on the Club Property;
   d. Participate in such social activities as the Club Operator may sponsor from time to time for holders of Community Memberships ("Community Memberships"); and
   e. Such additional privileges, if any, as the Club Operator may specify.

   OC Declaration at Article II (**R. at 418**). *See also* OC Bylaws, Article II (**R. at 451**).

9. Annexed to the Star Affidavit 2 is a true and correct copy of the "First Amendment to the Declaration of Recreational Covenant for Oldfield Club." (the "**Declaration Amendment,**" annexed to the Star Affidavit 2, *Exhibit 1, pp. 1-3*)(**R. at 635**). The purpose of the Declaration Amendment was "for the purpose of creating two dues categories for Community Members, one category for Residents and one category for non-residents..." Declaration Amendment at 1 (Third "WHEREAS" Clause, **R. at 635**).

10. Amended Section 3.1 of the Declaration Amendment (cited, in part, in the Lower Court Order), entitled "Covenant to Pay," provides in relevant part:

> Each Owner, by accepting title to a Residential Unit, covenants and agrees to pay to the Club Operator assessments, annual dues, and minimum usage fees in such amount as Club Operator shall specify from time to time, *except that Community Members shall not be subject to assessment for operating deficits or capital improvements related to golf facilities or golf operations*.

Declaration Amendment, Section 3.1. (**R. at 636**).

11. Pursuant to the Declaration Amendment, the Community Dues are to be applied **not** to be applied to operating deficits or capital improvements related to golf facilities or golf operations, but only to "a reasonable share of the overhead expenses associated with general operation and administration of the Club, including:

    a. the costs of utility service (including water, sewer, electricity, natural gas, and cable or similar television) provided to facilities;

    b. the costs of janitorial service, maintenance and repair; property and liability insurance; and similar ongoing expenditures related to such facilities; and

    c. the costs of maintaining, repairing and replacing the buildings, fixtures, furnishings, equipment and systems located within or that serve such facilities, which may include a reasonable contribution to a reserve fund for repair and replacement of such items;

    d. That portion of the costs that Club Operator incurs in sponsoring activities in which the Community members are invited to participate; and

    e. administrative and overhead costs related to such facilities, services and programs or membership administration generally, including labor and payroll expenses.

Second Affidavit of Rob Star, Exhibit 1, Declaration Amendment at 3, Section 3.1. (**R. at 636**)

12. The OC has an additional membership class entitled "Equity Golf Membership." *See* OC Bylaws, Article II (**R. at 635-637**). An Equity Golf Membership encompasses the following rights and privileges:

> Equity Golf Membership entitles the Member or its Designee and other Authorized Users of the Membership to use all of the Golf Facilities and all of the Social Facilities during operating hours and subject to the Club Rules. After the Turnover Date, Equity Golf Members shall be entitled to one vote per Equity Golf Membership held with respect to any matter on which the Equity Golf Members are entitled to vote pursuant to the Articles and these Bylaws.

OC Bylaws, Article II at 6 (**R. at 451**).

13. While Community Membership in, and Community Dues paid by Oldfield residential owners is *mandatory* upon obtaining a residence in Oldfield (*See* OC Declaration at 5, Section 3.2 (**R. at 420**), Oldfield residents may *choose* to apply for an Equity Golf Membership and, upon acceptance as an Equity Golf Member, are then mandated to pay Equity Golf Member Dues and obtain voting rights with respect to all issues relating to the Golf Facilities. Community Members have no voting rights with respect to the Golf Facilities. *See* OC Bylaws at 5 (**R. at 452**).

14. As an Equity Golf Member of OC, such a member must pay annual golf dues and pay assessments related to the maintenance and operation of the Golf Facilities. The Golf Dues are to be applied *only* to OC club facilities (the "**Golf Facilities**"). The Golf Facilities, defined in the Termination Agreement (**R. at 675**), discussed below, include the 18-hole golf course, golf practice facilities, a Golf House with men's and women's locker rooms, a golf shop, and grill.

15. "Membership Fees" are defined in the OC Bylaws to mean "the Membership Contribution as well as all dues, assessments and other charges payable to the Club by any Member." OC Bylaws at 3, Section 1.3 (**R. at 450**).

16. "Membership Contribution" is defined in the OC Bylaws to mean "the purchase price paid by a Member for a specific Membership in the Club." OC Bylaws at 3, Section 1.3 (**R. at 450**).

17. "Assessments" are addressed in the OC Bylaws in Section 7.3 (**R. at 477**). Section 7.3 states as follows:

> Prior to the Turnover Date, there shall be no assessment of the Members. After the Turnover Date, the Club may assess Equity Golf, Cottage Golf, Corporate Golf, and Community Members, subject to the following:
>
> a. Any Assessment for capital improvements shall be subject to the approval of at least two-thirds of the Voting Power of Equity Golf, Cottage golf, and Corporate Golf Members and two-thirds of the Voting Power of Community Members, *except that Community Members shall have no right to vote on, and shall not be subject to, any assessment for capital improvements to the Golf Facilities or which benefit only Golf Members.*
>
> b. Any assessment for operating deficits or unbudgeted repairs, maintenance or replacements shall require the approval of a majority of the Voting Power held by Equity Golf, Cottage Golf, and Corporate Golf Members and a majority of the Voting Power held by Community Members, *except that Community Members shall have no right to vote on, and shall not be subject to, any assessment for operating deficits or unbudgeted repairs, maintenance or replacements relating solely to the Golf Facilities or golf operations.*

OC Bylaws at 30, Section 7.3 (emphasis supplied)(**R. at 477**).

18. The only Membership Classifications authorized in the OC are those set forth in Article II of the Bylaws and as further revised by the Declaration Amendment. *See* OC Bylaws, Article II, Section 2.1(a)("The Club is authorized to issue equity and non-equity

---

2

Memberships as follow:....(c) Additional Classifications. Until all Authorized Golf-Memberships have initially been sold, the sponsor reserves the right to create additional categories of Membership, provided that the total number of Authorized Golf Memberships is not exceeded. Thereafter, the Board of Directors may create additional categories of Membership by amending these Bylaws in accordance with Section 9.10. Within a Membership Classification, the Board may establish different dues categories based on the Member's status as a Resident or Non-resident, as defined in Section 7.2.") OC Bylaws at 5-6, Article II (**R. at 452-453**).

19. There is not a single document in the Governing Documents, much less any document produced by the Defendants'-Respondents, which identify a new Membership Classification, other than set forth in Article II of the OC Bylaws and the Declaration Amendment elucidated hereinabove.

20. On February 20, 2013, TI filed a mandated property report (the "**Property Report**") pursuant to federal law, 15 U.S.C. §1703.[3] The Property Report represents as follows:

---

[3] ILSA was intended to "protect purchasers from unscrupulous sales of undeveloped home sites" and to "curb abuses accompanying interstate land sales." *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 853 (11th Cir. 2009) (quoting *Winter v. Hollingsworth Props., Inc.*, 777 F.2d 1444, 1448 (11th Cir.1985)). The statute provides:

> It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—
> . . .
> (2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1702(a) of this title—
> (A) to employ any device, scheme, or artifice to defraud;
> (B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or [*6] subdivision;
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser; or
> (D) to represent that roads, sewers, water, gas, or electric service, or recreational amenities will be provided or completed by the developer without stipulating in the contract of sale or lease that such services or amenities will be provided or completed

Merritt v. Lyons Heritage Pasco, LLC, No. 8:09-cv-1201-T-27TGW, 2010 U.S. Dist. LEXIS 96509, at *5-6 (M.D. Fla. Sep. 15, 2010)

Recreational Covenants

A Recreational Covenant for Oldfield Club has been recorded in the Office of the Register of Deeds for Beaufort County, South Carolina. The Recreational Covenant obligates each property owner to be a Community Member of the Oldfield Club and to pay dues which will entitle the Community Member to use and enjoy the *Social Facilities* of Oldfield Club.

Property Report at 9 (emphasis added)(**R. at 599, 608**).

21. The Property Report represents that Community Members will have access to the *Social Facilities*, demarcated as: Activity Center with Swimming Pool, Tennis Courts, and Fitness Center, the River House, the Outfitters Center and the Community Dock.

Property Report at 19 (**R. at 599, 617**).

22. The Property Report also represents that:

> Restricted to use by Golf Members. For Golf Membership, there is currently a Club Membership Contribution of $15,000 due at time of application. In addition, the Club may establish minimum usage fees to ensure a minimum level of revenue from operations. *Golf Membership is a completely separate fee structure.*

Property Report at 19 (emphasis added) (**R. at 617**).

23. In or around 2006, the OC Board notified Oldfield Community Members that they would each be entitled four (4) rounds of golf at the prevailing rate of $109 before noon and $79 after noon; thus, the Community Members were being charged per round, should they choose to play). On February 14, 2013, the OC Board notified Community Members that:

> [The four (4) round] offering will be changed effective April 1, to allow for ten *complimentary* rounds (including cart fee) per year.
>
> [] Our hope is that with this increased level of access, our current homeowners will bring guests and family members to experience Oldfield and this will, to some degree, restore those promotional efforts to expose the Club.

Email dated February 14, 2013 from Oldfield Club to Robert Wilson (**R. at 510**)

24. Upon buying homes in Oldfield, the Plaintiffs-Appellants each executed a Membership Agreement (the "**Membership Agreement**" (**R. at 489**)), dated May 7, 2007, making them Equity Golf Members of the OC. In short, the Membership Agreement gave the Plaintiffs-Appellants unlimited access to the Golf Facilities and voting rights with respect to the Golf Facilities.

25. During discovery in this Action, the Defendants-Respondents purported to produce accurate financial statements to the Plaintiffs-Appellants for 2015 and 2016. As set forth on an Auditor's Report (annexed as **Exhibit 2** to the Star Affidavit (**R. at 630**)), dated January 13, 2017, reflecting an audit of the OC and OCA financial statements for year ending 2015, Plaintiffs-Appellants now know that the financial statements produced by the OC and OCA are wholly unreliable. Accordingly, it is manifest that the Defendants-Respondents engaged in a pattern of misconduct, misrepresentations and misinformation to mislead the Plaintiffs-Appellants as to the application of the Plaintiffs-Appellants' Dues.

26. Ultimately, even though the Lower Court entered an order, on January 27, 2017, compelling OCA to produce accurate and updated financial statements, the Plaintiffs-Appellants have not received re-stated financial statements for 2015 based upon the Auditor's Report, and have never received financial statements for the year ending 2016. Further, with respect to OCA financial statements produced for the period 2009 through 2014, OCA failed to produce supporting documentation for the General Administrative Expenses reflected thereon. Thus, the Defendants-Respondents are in violation of this

Court's January 27, 2017 Order and SCRCP 26 and 36 (which prescribe a continuing duty to produce demanded documents).

27. Because the Defendants-Respondents have failed to produce all demanded *and ORDERED documents, they are precluded from questioning the Plaintiffs' assessment of their damages.*

28. On June 10, 2009, Crescent filed a voluntary petition for bankruptcy under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Western District of Texas (the "**Bankruptcy Court**").

29. On July 22, 2009, the Plaintiffs-Appellants filed a motion in the Bankruptcy Court seeking an order setting a deadline by which the Debtor, Oldfield LLC must assume or reject the Membership Agreements under 11 U.S.C §362 (the "**Bankruptcy Motion**").

30. To resolve the Bankruptcy Motion, Crescent and the Plaintiffs-Appellants each executed the Termination Agreement **(R. at 675)** which, *inter alia,* terminated the Plaintiffs' equity golf memberships and mandated that none of the Plaintiffs' HOA Dues paid to OCA or Social Dues (collectively, the "**Plaintiffs' Dues**") paid to the OC would be applied to the Golf Club.

31. As expressly set forth in the Termination Agreement, the "Golf Club" at Oldfield is defined as follows:

> WHEREAS, the Sponsor is the owner of certain real property in Okatie, South Carolina, a portion of which has been developed as a planned community that includes an 18-hole-golf course, golf practice facilities, a Golf House with men's and ladies' locker rooms (collectively, the "Golf Course"), a golf shop, and grill (collectively, and including the Golf Course, the "Golf Facilities") and the River House (a dining and banquet facility with three community docks), an Outfitters Center with boats, kayaks, and fishing gear and an Activity Center with a swimming pool, tennis courts, and fitness center (collectively, the "Social Facilities") and together with the Golf Facilities, the "Club Facilities");

32. Section 2 of the Agreement, entitled "Termination of Membership Agreement," states:

> (A) The parties hereto agree that, *notwithstanding anything to the contrary contained in the Membership Agreement, the Amended Bylaws of the Club, any operating or governance document of the Club or Sponsor, the Amended Plan for Offering Memberships or any other agreement between the Member, on the one hand, and Crescent Entities*, on the other hand (collectively, the "Club Documents"), as of the Effective Date, the terms and provisions of the Membership Agreement that relate to or are attributable to the Member's use, access, rights, duties, liabilities and obligations concerning the Golf Course attributable solely to being a member of the Club, including the Member's obligation to pay in full its Membership Contribution, shall automatically be terminated, canceled, and extinguished and shall be of no further force and/or effect.
>
> (B) For the purposes of clarity, the termination and extinguishment of certain terms and provisions in the Membership Agreement contained in Section 2(A) above shall in no way affect, or have any impact on, the Member's right to use and have access to the Club Facilities, other than the Golf Course, pursuant to all applicable provisions of the Club Documents.

Termination Agreement, Section 2 (emphasis added)(**R. at 675**) (**filed under seal**)).

33. Consistent with the Declaration Amendment, TI and OC represented since at least 2014 *that none of the Plaintiffs' (and other OCA members') dues* were remitted to the OC for use in the golf course, golf maintenance or the golf shop. (*inter alia at* **R. at 153-191**).

34. While the Community Members were granted "**complimentary**" "limited golf access" in February 7, 2013 (*See Exhibit 1, pp.4-5 to Star Affidavit 2* (**R. at 638-639**)), by email dated March 4, 2013, OCA Members were assured that "[a]ll Community Dues Income is reflected in the Administration Department and pays for administration and maintenance of all Club Facilities, **not the Golf Course, Golf Maintenance or Golf Shop**." (the "**Golf Facilities**") (*See Exhibit 1, pp.6-7 to the Star Affidavit 2* (**R. at 640-641**)).

35. Regardless of the complimentary limited golf access, in March 2013, it was further represented by Jamie Selby, the OCA and OC General Manager, that "[d]ues for the Community Membership *are applied only to overhead costs and costs of operating,*

*maintaining and repairing the amenities to which Community Members have access, including **only** the following amenities: Food & Beverage, Sports Center, Outfitters Center, Equestrian, Greeter's Store, Lodging, Facility Maintenance, Membership Department and Administration Departments. Star Affidavit 2, Exhibit 1, pp.6-7* (**R. at 640-641**)).

36. By email dated March 11, 2013, Phillip Galbreath, a board member and principle of TI (the Oldfield Sponsor), reassured Star's friend Robert Wilson that "you are not subsidizing the golf course with this dues increase." *Star Affidavit 2, Exhibit 1, p. 8* (**R. at 642**).

37. By letter to the Oldfield Community Counsel (OCC) Board Members, dated May 5, 2013, Star demanded "written assurances that ALL golf overhead, including Administrative costs, annual reserve needs, deferred reserve needs and any and all deferred repairs and maintenance will be the *sole responsibility of the golf members...[w]e are specifically asking for a pledge to the membership that...the Oldfield Club will function as a Club that has a financial firewall between golf and the Community...*" *Star Affidavit 2, Exhibit 1, pp. 10-12.* (**R. at 644-646**).

38. The response to Star's May 5, 2013 letter to the OCC, the OCC stated, among other things, that "*we are unable to provide you any assurances of Club dues not being applied to golf operations. Whether there should be a "financial firewall" between golfers and non-golfers is not for the Board to decide while the Club is managed by the sponsor....The Board does note the possibility of some Club dues being applied to golf operations, particularly if golf membership revenues do not increase. Star Affidavit 2, Exhibit 1, pp. 13-15.* (**R. at 647-649**).

39. On November 5, 2013, Star joined the Oldfield Finance Committee. *Star Affidavit 2, Exhibit 1, p.16.* (**R. at 650**).

40. On November 15, 2013, the OC released the proposed 2014 Budget. *Star Affidavit 2, Exhibit 1, pp.17-21.* (**R. at 651-655**). In the 2014 Budget, a line item "Marketing and Advertising Expense," increased by $96,000.00, without any explanation or information addressing the increase. (**R. at 654, 670**)

41. On July 24, 2014, Richard Price sent an email with "Key Assumptions" regarding the upcoming production of 2015 OC Financials. The Key Assumptions included in relevant part: "...(2) We will continue to operate as we do today including:.... (d) No additional changes in allocations-Club to OCA and within Club between golf and non-golf;...(4) Further bifurcation of golf/non-golf accounting within Club, essentially treating golf like the OCA (e.g. separate golf and non-golf Reserves)." *Star Affidavit 2, Exhibit 1, p.22.* (**R. at 656**).

42. On August 7, 2014, the Finance Committee, of which Star was a member at that time, was provided with the proposed 2015 OC Budget with "A Guide to the Club Model" prepared by Richard Price for the Finance Committee. *Star Affidavit 2, Exhibit 1, pp.23-28.* (**R. at 657-662**).

43. On September 3, 2014, a so-called "Run 3 Club Model" was distributed to members of the Finance Committee, including Star. For the first time, the financials disclosed a $96,000.00 allocation from OCA Dues was being *"Allocated to Golf," deeming it "hard-wired"* into the budget for 2014 (modified) through 2018. *Star Affidavit 2, Exhibit 1, pp. 31-32.* (**R. at 655-666**).

44. In response to receiving this Run 3 Club Model, Star emailed Richard Price asking:

> Can someone please tell me how we can go forward with this $96K charge to the community members when the golf committee has said they are profitable by that amount? What happens to that "profit" and if the golf club does not need those funds why aren't they getting redistributed to the Club for other much needed funding?

Star Affidavit 2, Exhibit 1, pp. 29-30. (**R. at 663-664**).

45. On September 16, 2014, Star demanded a copy of the July 24, 2014 Board Minutes to confirm that Star's objection to the Run 3 Club Model was included. *Star Affidavit 2, Exhibit 1 at p.33.* (**R. at 667**). The text of this objection was:

> Please understand why I feel my objection and treatment in the [Financial Committee] meeting needs to be documented. All I seek in this process, at a very important juncture in our community, *is full transparency of all the financials and a complete understanding of the precedent that has been set by TI...*

Star Affidavit 2, Exhibit 1, pp.33. (**R. at 667**).

46. Star's objection, set forth hereinabove, arose from opaque references by Richard Price that the $96,000.00 was "hard-wired" in the 2015 Model budget because it was a "precedent" set by TI. (**R. at 660, 670**).

47. On June 8, 2016, the "final" 2016 OC budget summary was distributed to Oldfield members. A review of the 2016 Budget reflects that the "hard-wired" $96,000.00 line-item disappeared and appears to be part of the "Marketing & Advertising" line item again. *See Star Affidavit 2, Exhibit 1, pp. 34-39.* (**R. at 660, 670**).

48. Upon further review of the OC Summary Profit and Loss statement for 2016, it reflects a line item entitled "Marketing and Advertising" in the sum of $134,987.00 (updated). A "comment" adjacent to this line-item states "*[i]ncludes $96K golf course access assessment.*" *Star Affidavit 2, Exhibit 1, p.36.* (**R. at 670**).

49. On November 29, 2016, Star emailed certain OC Board Members asking the following:

> Can you please share with the community where in the documents the Clubhouse overhead can be shifted to the Social Member's P&L? Can you please show where in the docs the OCA should pay any inter-company allocation that pays for the overhead of the Clubhouse? And can you please share with the Members where you are permitted to charge the social members a *marketing fee* for the benefit of the Golf P&L?

Star Affidavit 2, Exhibit 1, p. 40. (**R. at 674**)

50. It is clear from the above recitation of relevant facts and correspondence that the unrequested ten (10) rounds of golf provided to the Social Members of the OC were deemed "**complimentary**" by the OC and OCA's former General Manager, Jamie Selby. That Jaime Selby represented that OCA Members were assured that "[a]ll Community Dues Income is reflected in the Administration Department and pays for administration and maintenance of al Club Facilities, **not the Golf Course, Golf Maintenance or Golf Shop**." (*See Exhibit 1, pp.6-8 to the Star Affidavit 2* (**R. at 640-642**)).

51. It is also clear from the above facts and correspondence, that Board Members of OC, OCC and OCA, and TI in its role of Sponsor, failed to disclose use of Community and Social Member Dues for the Golf facilities, in violation of Section 3.1 of the Declaration Amendment (*Star Affidavit 2, Exhibit 1, pp1-3* (**R. at 635-637**)) and representations made in the federally mandated Property Report filed with HUD, annexed as *Exhibit 1 (p.19 and 20*[4] (**R. at 653-654**)) *to the first Star Affidavit* filed in support of the initial Objection filed to the Motions.

[4] "For Golf Membership...., Golf Membership is a completely separate fee structure..." (p.19). Under "Who May Use the Facilities," "[y]ou automatically acquire a Community Membership in Oldfield Club at closing and you will be required to maintain it. This membership permits use of all of the Social Facilities, *but does not permit use of the golf course or golf practice facilities*.(p.20)

52. Finally, the above recitation of facts and correspondence *proves* that Community Members *are indeed* being charged for Golf Facilities in violation of the Governing Documents.

53. After years of falsehoods and obfuscation (see Rob Star Affidavit and Second Rob Star Affidavit (**R. at 197, 205**)), in and around September 2014, the Plaintiffs-Appellants finally discovered that the Plaintiffs' Social Dues (i.e. non-golf dues) paid to OC were being improperly allocated to the OC Golf Facilities in violation of Section 2 of the Termination Agreement (**R. at 675**)(as more fully set forth, and incorporated herein, in the Plaintiffs' Complaint commencing this Action) and in violation of the OC Declaration, OC Bylaws and HUD Property Report filed by TI in 2013. (**R. at 599**).

54. While the Plaintiffs-Appellants have not received accurate financials from the OC and OCA in discovery during this Action to ascertain the exact sum of the misallocation, the Plaintiffs-Appellants assert that at least one-third (1/3) of the Plaintiffs' Dues (approximately $1500.00 per year for 4 properties since 2009 and $1500.00 a year for 1 property) has been improperly allocated to upkeep of the Golf Facilities. **R. at 372-373.**[5]

55. Manifestly, viewing all of the Governing Documents and the Property Report together and in their entirety, Plaintiffs-Appellants assert that it is abundantly clear that Social Members may *not* be charged in any way, shape or form to support the Golf Facilities, regardless of the right to play ten (10) rounds of golf offered by the OC (compared with the infinite numbers of rounds of gold all Equity Golf Members may play via their Equity Golf Membership).

[5] Moreover, since the filing of the Appeal, the Plaintiffs-Appellants have been notified that the 2015 Financials are now the subject of an IRS audit.

56. The Lower Court Order pivoted on two (2) factors: (i) that the Plaintiffs-Appellants(and other Social Members) access to four (4) or more rounds of golf, and; (ii) by cherry-picking provisions of the Governing Documents (and wholly ignoring the Property Report), the Court concluded that the Governing Documents and limited access to the Golf Facilities allowed by Social Members authorized the OC to apply Social Dues to Golf Facilities, without regard to proportion of access and apparently without any limitation.

57. Further, the Lower Court Order, without any analysis of the voluminous emails reflecting how the Plaintiffs-Appellants were continually misled by the OC and OCA boards that *none* of the OC Social Member Dues were being applied to the Golf Facilities and the OC and OCA board acknowledgments that *no* Social Member Dues should or could be utilized in any manner or mode with respect to the Golf Facilities.

58. These misleading emails from the OC and OCA Boards further explain why the Plaintiffs-Appellants did not commence the Lower Court Action sooner, as they were led to believe, after repeated inquiries, that *none* of the OC Social Members' Dues were being applied to operation and upkeep of Golf Facilities; a fact not analyzed or even mentioned in the Lower Court Order.

59. Based upon the foregoing facts and the applicable law, set forth below, it is respectfully submitted that the Lower Court erred in awarding summary judgment to the Defendants.

ARGUMENT

I. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, IN ADAPTING, VERBATUM, AN OPINION WRITTEN BY COUNSEL FOR THE DEFENDANTS-RESPONDENTS, AND, THUS FAILING TO ENGAGE IN AN INDEPENDENT ANALYSIS OF THE LAW, FACTS AND EVIDENCE?

The Lower Court did not write the Lower Court Order. Instead, five (5) months after the September 19, 2017 Hearing, the Lower Court asked all the Parties to filed "proposed orders" with the Court. All parties filed "proposed orders" with the Court. **(R. at 689, 704)**

The Lower Court entered the proposed order filed by the Defendants, OC, TI and Oldfield Club Board of Directors, without a single revision or modification.

With all due respect, while a South Carolina Circuit Court Judge may sign a proposed order filed by party (as long as all parties have the right to file a proposed order and all such proposed orders are noticed on all parties (*Anderson v. Bessemer City*, 470 U.S. 564, 571-573 (1985)), it is nonetheless incumbent on the Lower Court to undertake an independent review of the evidence filed in support of and against summary judgment by the parties.

Notably missing from the Lower Court Order is any evaluation of the evidence filed by the Plaintiffs-Appellants which clearly create a genuine issue of dispute as to when the statute of limitations for filing the Action commenced and, thus, expired.

> We must deal at the outset with the Fourth Circuit's suggestion that "close scrutiny of the record in this case [was] justified by the manner in which the opinion was prepared," id., at 156 — that is, by the District Court's adoption of petitioner's proposed findings of fact and conclusions of law. The court recalled that the Fourth Circuit had on many occasions condemned the practice of announcing a decision and leaving it to the prevailing party to write the findings of fact and conclusions of law. *See, e.g., Cuthbertson v. Biggers Bros.*, Inc., 702 F.2d 454 (1983); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (1983); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 (1961). The court rejected petitioner's contention that the procedure followed by the trial judge in this case was proper because the judge had given respondent an opportunity to object to the proposed findings and had not adopted petitioner's findings verbatim. According to the court, the vice of the procedure lay in the trial court's solicitation of findings after it had already

> announced its decision and in the court's adoption of the "substance" of petitioner's proposed findings.
>
> We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. *See, e.g., United States v. El Paso Natural Gas Co.*, 376 U. S. 651, 656-657 (1964); *United States v. Marine Bancorporation*, 418 U. S. 602, 615, n. 13 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor. See J. Wright, The Nonjury Trial — Preparing Findings of Fact, Conclusions of Law, and Opinions, Seminars for Newly Appointed United States District Judges 159, 166 (1962). Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *United States v. Marine Bancorporation, supra*, at 615, n. 13; *United States v. El Paso Natural Gas Co., supra*, at 656-657.

Anderson v. Bessemer City, 470 U.S. 564, 571-573 (1985).

Here, the Lower Court made *no* preliminary findings, nor did it announce or publish a decision on which the Parties submitted their respective proposed orders. There is no indication from the Lower Court Order (which is the exact proposed order submitted by the Defendants-Respondents for signature by the Court) that the Lower Court undertook any independent analysis of the evidence submitted and legal arguments made by the Plaintiffs.

Thus, it is implicit that the Lower Court Order apparently failed to engage in any independent analysis, abdicating the very duty Courts serve.

Having failed to engage in an independent analysis of the evidence filed and the applicable law, it is respectfully submitted that the Lower Court Order must be reversed.

II. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, BY FAILNG TO RENDER A DECISION WITH SUFFICIENT SPECIFICITY EXPLAINING ITS BASIS FOR FINDING THAT THERE WERE NO GENUINE ISSUES OF FACT IN DISPUTE, AND ERR AS A MATTER OF FACT AND LAW BY FINDING THAT THERE WERE NO MATERIAL FACTS IN DISPUTE PRECLUDING SUMMARY JUDGMENT?

a. Applicable Law

The Motions filed by the Defendants-Respondents were purportedly filed pursuant to Rule 56 of the South Carolina Rules of Civil Procedure ("**SCRCP**"), which provides in relevant part:

> **Rule 56. Summary Judgment.**
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. *The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing.* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage
>
> *Rule 56, SCRCP*

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c): summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); *see also Laurens Emergency Med. Specialists*, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003); *Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App.

2001); *see also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Under Rule 56(c), SCRCP, the *party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Regions Bank*, 354 S.C. at 659, 582 S.E.2d at 438; *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). *Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case*, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank*, 354 S.C. at 660, 582 S.E.2d at 438. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); *Peterson v. West American Ins. Co.*, 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

> Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation,* 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999). "Additionally, even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted." *Hill v. York County Sheriff's Dep't,* 313 S.C. 303, 305, 437 S.E.2d 179, 180 (Ct. App. 1993). In determining whether a triable issue of fact exists, the evidence and reasonable inferences from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). When evidence is susceptible to more than one reasonable inference, the [***6] issue should be submitted to the jury. *Vaughan v. Town of Lyman,* 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006). "At the summary judgment stage of the proceedings, it is only

necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." *Hill*, 313 S.C. at 308, 437 S.E.2d at 182; *see also Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (clarifying and reaffirming in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment).

Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009)

b. The Lower Court Order factual findings are Clearly Erroneous

It is respectfully submitted that, because the Lower Court failed to review the evidence and affidavits filed by the Plaintiffs-Appellants (which contain abundant evidence that there are material issues in dispute with respect to each of the Lower Court's findings), and further failed to explain why the affidavits and evidence filed by the Plaintiffs-Appellants did not demonstrate that there are, indeed, material issues in dispute, thus precluding summary judgment,

The Lower Court Order ruled, *inter* alia, that:

i. The Plaintiffs-Appellants failed to demonstrate that the Defendants-Respondents breached any duty owed under the Termination Agreement (Lower Court Order at 5 (**R. at 8**))

ii. The OC Governing Documents permit the OC to charge the Plaintiffs-Appellants for the four (4) rounds (now ten (10) rounds (Email from Oldfield Club Board to OC Members, dated February 7, 2013 (**R. at 9**)) via Community Member Dues and such dues may be applied to the Golf Facilities (Lower Court order at 7-8 (**R. at 9-13**)).

iii. Plaintiffs-Appellants' claims are barred by the statute of limitations, S.C. Code §15-3-530,[6] finding there is no genuine

[6] South Carolina Code section 15-3-530(1) provides for a three-year statute of limitations for "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520." S.C. Code Ann. § 15-3-530(1) (2005). Under the discovery rule, "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "The discovery rule applies to breach of contract actions." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010). "Pursuant to [***8] the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the [*125] date the aggrieved party either

dispute that the Plaintiffs-Appellants "were aware of the facts and circumstances giving rise to their claim regarding use of Community Member fees to pay for golf facilities before March 10, 2013" (Lower Court Order at 9 (**R. at11-12**)); and

iv. Plaintiffs-Appellants submitted no evidence of damages (Lower Court Order at 10 (**R. at 13**)).

The Plaintiffs-Appellants allege in this Appeal that the Lower Court Order is erroneous for the following reasons:

i. The Lower Court's finding Defendants-Respondents breached any duty owed under the Termination Agreement is clearly erroneous because:

A. The Defendants-Respondents are signatories to the Termination Agreement (TI as the admitted successor-in-interest to Crescent)(Termination Agreement at 1 (**R. at 675 (filed under seal)**) and Third Party Complaint filed by TI at 1, *et.seq.*, filed November 18, 2016 (**R. at 93**);

B. Section 2 of the Termination Agreement expressly provides that the Plaintiffs-Appellants may not be charged dues for any Golf Facilities (Termination Agreement at 2-3 (**R. at 675 (filed under seal)**));

ii. The Lower Court's finding that the Governing Documents permit Community Member's annual dues to be applied to the Golf Facilities is clearly erroneous as the Lower Court because:

A. The Termination Agreement unequivocally states that its terms are to be applied "notwithstanding" anything to the contrary in the "Governing Documents." (Complaint at 7 (**R. at 24**));

B. Even if the Governing Documents are relevant, a review of the Governing Documents and HUD Property Report (**R. at 416, 432, 444, 482, 568, 635** and **R. at 599**), (specific provisions of which are set forth hereinabove at ¶¶ 1-22) clearly reflect that in no event are Community Members' dues to fund OC Golf Facilities.

---

discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 124-25, 781 S.E.2d 126, 131 (Ct. App. 2015)

C. Ultimately, if this Court finds any ambiguity in the Governing Documents relating to whether OC Community Members may be charged for complimentary use of the Golf Facilities, such ambiguity must be interpreted against the Defendants as the Governing Documents are adhesion contracts drafted by Defendants;[7]

D. The four (4) rounds of golf referenced in the Lower Court Order ((Lower Court Decision at 6 (**R. at 9**))) warranted OC Community Members' Dues to be applied to the Golf Facilities, is clearly erroneous because the original four (4) rounds of golf offered to Community Members required a payment for each round (*See ¶23* hereinabove); and

E. The Lower Court never mentioned the Lower Court Order the new ten (10) *complementary* golf rounds access for Community Members and how the *complementary* golf rounds (which it was expressly represented would not subsidize the Golf Facilities) vie with Lower Court's finding that the Governing Documents permit Community Members Dues to be increased to subsidize the Golf Facilities;

iii. The Lower Court's finding that Plaintiffs-Appellants failed to file the Action prior to the expiration of the statute of limitations because Plaintiffs-Appellants "were aware of the facts and circumstances giving rise to their claim regarding use of Community Member fees to pay for golf facilities before March 10, 2013" (Lower Court Decision at 9 (**R. at 12**)), is clearly erroneous because:

A. A review of all correspondence by and among the OC Board, on the one hand, and the OC Community Members, on the

---

7 Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994). Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party. *Myrtle Beach Lumber Co., Inc. v. Willoughby,* 276 S.C. 3, 274 S.E.2d 423 (1981). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." *Bazzle v. Green Tree Financial Corp.,* 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), *vacated on other grounds*, 539 U.S. 444, 156 L. Ed. 2d 414, 123 S. Ct. 2402 (2003). A contract is read as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity." *Schulmeyer v. State Farm Ins. Co.,* 353 S.C. 491, 579 S.E.2d 132 (2003), *citing Yarborough v. Phoenix Mut. Life Ins. Co.,* 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976).

S. Atl. Fin. Servs. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003)

other hand (*See ¶¶ 33-53* hereinabove), reflect that the OC Board (1) repeatedly represented that the OC Community Members were not being charged for, nor in any manner subsidizing, the Golf Facilities, and (2) tried to bury the Golf Facilities charges to the Community Members by putting line items in financials reflecting the funds were being transferred for a different use (i.e. Marketing);

B. Such misrepresentations continued through 2017 relating to each annual financial statement produced by the OC since the filing of the Action (*See ¶¶ 33-55 hereinabove*); and

C. The Plaintiffs-Appellants undertook more than reasonable diligence to ascertain if the Community Members' Dues were being used to subsidize the Golf Facilities. Each inquiry met with denials of such dues application from the Defendants (*See ¶¶ 33-55 hereinabove)*;

D. Finally, as the OC Financial Statements were only produced annually (not monthly), until such time as the Financial Statements were disclosed each year, the statute of limitations would run anew from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). Thus, even if this Court finds that the statute of limitations had run from the year 2013, it would run anew upon the disclosure of financial statements in subsequent years.

iv. The Lower Court erroneously ruled that the Plaintiffs-Appellants failed to adduce evidence of damages.

A. The Plaintiffs-Appellants were not in possession of accurate financial statements of the OC as all OC Financial Statements had been audited and required restatement (Transcript at pp. 58:7-25, 59:1-25, 60:1-9, 64:2-7 (**R. at 400,-402, 406**); *Order Compelling Discovery Responses from OCA*, dated January 27, 2017 (**R. at 1**)) from which they could quantify damages;

B. In the Defendants-Respondents' Motions, they admit that OC Community Members' Dues were being applied to subsidize the Golf Facilities (*Memorandum in Support of Defendants and Third Party Plaintiffs TI Oldfield Operations, LLC and SF Operations, LLC's Motion for Summary Judgement* at 7-12 (**R. at 139**); Oldfield Club's and Oldfield Club Board of Directors' *Memorandum in Support of Motion for Summary Judgment* at

7-12 (**R. at 153**). Thus, Plaintiffs-Appellants were, indeed, having their Community Dues applied to subsidize the Golf Facilities. However, without having possession of all restated financial statements from the OCA and OC, Plaintiffs-Appellants are unable to quantify these damages.

c. *The Lower Court failed to interpret the evidence, and make all reasonable inferences drawn from it, in the light most favorable to the nonmoving Plaintiffs-Appellants, and failed to apply the legal mandate that the nonmoving party is only required to submit a mere scintilla of evidence to defeat summary judgment*

As discussed in POINT II(a) hereinabove, the Lower Court disregarded the legal mandate to interpret all evidence and make all reasonable inferences from therefrom, in the light most favorable to the non-movants (i.e. Plaintiffs-Appellants). The Court further failed to discuss why the voluminous, unrebutted documentation and affidavits that Plaintiffs-Appellants' filed in support of their objections to the Motions, did not arise to, or even exceed the "mere scintilla" of evidence required to defeat summary judgment. See POINT II(a).

In fact, the glaring absence of reference to a single document or affidavit filed by the Plaintiffs-Appellants in support of their objection to the Motions, ipso facto, reflects the lack of specificity in the Lower Court's analysis of the Motions and Objections filed to the Motions.

It is respectfully submitted that by failing to explain why:

(1) the express terms of the Termination Agreement (i.e. Section 2) (**R. at 675 (filed under seal)**) were disregarded by the Court in support of its ruling that the Termination Agreement was not breached;

(2) the multitude of correspondence and affidavits filed by the Plaintiffs-Appellants (with all reasonable inferences therefrom viewed in the light most favorable to the Plaintiffs-Appellants), did not demonstrate genuine issues of material facts with respect to all rulings by the Court;

(3) and why Section 2 of the Termination Agreement and all of the documents and affidavits filed by the Plaintiffs-Appellants did not arise to, or even exceed, the "mere scintilla" of evidence required to defeat summary judgment,

the Lower Court Order is clearly erroneous in its findings of fact and application of the law and mandates reversal by this Court.

III. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, BY DISREGARDING THE EXPRESS TERMS OF THE TERMINATION AGREEMENT AND FINDING THE DEFENDANTS-APPELLANTS HAD NOT BREACHED ANY DUTY OWED, IN FAVOR OF IRRELEVANT TERMS SET FORTH IN THE OLDFIELD COMMUNITY'S "GOVERNING DOCUMENTS?"

See POINT II(b) HEREINABOVE

IV. TO THE EXTENT THE "GOVERNING DOCUMENTS" ARE DETERMINED TO BE RELEVANT IN THIS ACTION, DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, IN ITS INTERPRETATION OF THE "GOVERNING DOCUMENTS" ANNEXED TO THE SUMMARY JUDGMENT MOTION PAPERS?

See POINT II(b) HEREINABOVE

V. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, IN FINDING THAT THE PLAINTIFFS' FAILED TO TIMELY FILE THE COMPLAINT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS?

See POINT II HEREINABOVE(b)

VI. DID THE LOWER COURT ERR, AS A MATTER OF FACT AND LAW, IN RULING THAT THE DEFENDANTS SUFFERED NO DAMAGES?

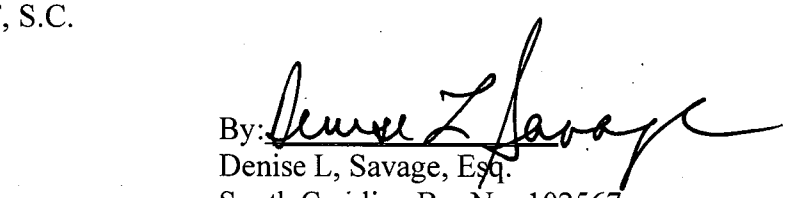
See POINT II(b) HEREINABOVE.

CONCLUSION

WHEREFORE, the Plaintiffs-Appellants respectfully request that this Court enter an order:

1. Reversing the Lower Court Order *in toto* for the reasons and law set forth hereinabove;
2. Awarding the Plaintiffs-Appellants' attorneys' fees and costs incurred in responding to the wholly unsubstantiated and unmeritorious Motions and filing this Appeal; and
3. For such other and further relief as this Court deems necessary, just and proper.

Date: October 8, 2018
BEAUFORT, S.C.

By: 

Denise L, Savage, Esq.
South Carolina Bar No. 102567
Savage Law, PLLC, Attorneys for the Plaintiffs-Appellants
705 Greene Street
Beaufort, South Carolina 29902
Phone: (843) 522-0058
Fax: (843) 522-2152
Email: dsavage@savagelitigation.com

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Court of Common Pleas
Fourteenth Judicial Circuit

Edgar W. Dickson, Circuit Court Judge
Case No. 2018-000-707

Marc Haas, Susan Haas, Rob Star and Melissa Starr, Appellants,

v,

TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10, Respondents,

And

TI Oldfield Operations, LLC and SF Operations, LLC, Third Party Plaintiffs,

v,

Oldfield, LLC and Crescent Communities, LLC f/k/a/ Crescent Resources, LLC, Third Party Defendants.

PLAINTIFFS-APPELLANTS' CERTIFICATE OF COUNSEL UNDER SCACR, RULE 211(a)

The undersigned certifies that Plaintiffs-Appellants' **Final** Brief on Appeal (*with the corrected caption*), complies with SCACR, Rule 211(a).

Date: October 25, 2018
BEAUFORT, S.C.

Denise L. Savage, Esq.
South Carolina Bar No. 102567
Savage Law, PLLC, Attorneys for the Plaintiffs
705 Greene Street
Beaufort, South Carolina 29902
Phone: (843) 522-0058
Fax: (843) 522-2152
Email: dsavage@savagelitigation.com

Service List: Via USPS, First Class Mail, Postage Prepaid on October 25, 2018

Attorney for TI Oldfield Operations, LLC and SF Operations, LLC
Merritt G. Abney, Esquire
Nelson Mullins Riley & Scarborough, LLP
151 Meeting Street, 6th Floor
Charleston, SC 29401

Attorney for Oldfield Community Association
Suzanne E. Hogg, Esquire
Ethridge Law Group
P.O. Box 20969
Charleston, South Carolina 29413

Attorney for Oldfield Club and Oldfield Club Board of Directors
Ian S. Ford, Esquire
Ford Wallace Thompson, LLC
715 King Street
Charleston, SC 29403

Attorney for Oldfield, LLC, Crescent Communities, LLC
Christopher A. Ogbia, Esquire
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401

ORIGINAL

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

The Court of Common Pleas

Fourteenth Judicial Circuit

Edgar W. Dickson, Circuit Court Judge

Case No. 2018-000-707

Marc Haas, Susan Haas, Rob Star and Melissa Starr, Appellants,

v,

TI Oldfield Operations, LLC, SF Operations, LLC, Oldfield Club, Oldfield Community Association, Oldfield Club Board of Directors and John Does 1-10, Respondents,

And

TI Oldfield Operations, LLC and SF Operations, LLC, Third Party Plaintiffs,

v,

Oldfield, LLC and Crescent Communities, LLC f/k/a/ Crescent Resources, LLC, Third Party Defendants.

CERTIFICATE OF SERVICE OF FINAL BRIEF ON APPEAL (*WITH CORRECTED CAPTION)*

The undersigned certifies that on October 25, 2018, a true and correct copy of Plaintiffs-Appellants' **Final** Brief on Appeal (*with the corrected caption*), and a copy of *Plaintiff-Appellant's Certification of Counsel under SCACR Rule 211(a)*, in the above-captioned matter was served upon all counsel of record, via regular, first class, USPS Mail, postage prepaid, at the addresses below:

Attorney for TI Oldfield Operations, LLC and SF Operations, LLC
Merritt G. Abney, Esquire
Nelson Mullins Riley & Scarborough, LLP
151 Meeting Street, 6th Floor
Charleston, SC 29401

Attorney for Oldfield Community Association
Suzanne E. Hogg, Esquire
Ethridge Law Group
P.O. Box 20969
Charleston, South Carolina 29413

Attorney for Oldfield Club and Oldfield Club Board of Directors
Ian S. Ford, Esquire
Ford Wallace Thompson, LLC
715 King Street
Charleston, SC 29403

Attorney for Oldfield, LLC, Crescent Communities, LLC
Christopher A. Ogbia, Esquire
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401

Date: October 25, 2018
BEAUFORT, S.C.

Denise L. Savage, Esq.
South Carolina Bar No. 102567
Savage Law, PLLC, Attorneys for the Plaintiffs
705 Greene Street
Beaufort, South Carolina 29902
Phone: (843) 522-0058
Fax: (843) 522-2152
Email: dsavage@savagelitigation.com