IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000002

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

v.

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

Of Whom Michael J. Frey is the Appellant.

BRIEF OF APPELLANT

Ian S. Ford
Bar no. 12463
Neil D. Thomson
Bar no. 71209
FORD WALLACE THOMSON LLC
715 King Street
Charleston, South Carolina 29403
843-277-2011

Attorneys for Appellant

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Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err when it failed to apply the "scintilla of evidence" standard to Respondent's motion for summary judgment?

II. Did the trial court err when it disregarded the voluminous evidence presented by Appellant in opposing Respondent's motion for summary judgment?

III. Did the trial court err when it awarded damages under the incorrect legal document provisions and under incorrect interpretations of the applicable documents?

IV. Did the trial court err when it granted summary judgment in favor of Respondent on Appellant's counterclaims when Appellant had submitted evidence raising numerous issues of a material fact?

V. Did the trial court err when it granted summary judgment prematurely, because Appellant did not have a full and fair opportunity to complete discovery?

STATEMENT OF THE CASE

On September 11, 2012, Respondent Callawassie Island Members Club, Inc., (the "Club") filed a Summons and Complaint in the Court of Common Pleas for Beaufort County, alleging claims of breach of contract and quantum meruit against defendants Michael J. Frey and Grace I. Frey (the "Freys"). On November 21, 2012, the Freys filed an Answer and Counterclaim, alleging counterclaims of breach of contract, violations of South Carolina Code § 33-31-620, 621 *et seq.*, "Failure to allow Members to approve fundamental changes," misrepresentation, and breach of fiduciary duty. On December 20, 2012, the Freys filed an Amended Answer and Counterclaims, to which the Club responded on January 18, 2013, with its Reply to Defendants' Amended Answer and Counterclaims.

On August 1, 2013, the Club filed a Motion to Dismiss, alleging that the Freys' second, third, fifth and sixth causes of action failed to state a claim. In particular, the Club argued that the breach of fiduciary duty claim must be pled as a derivative action. On November 6, 2013, the Freys filed an opposition to that motion to dismiss, arguing that they were seeking redress for their individual losses, which did not need to be filed derivatively.

On March 7, 2014, the Club filed a Motion for Summary Judgment, seeking judgment as a matter of law in favor of the Club on all of the Club's claims, and seeking judgment as a matter of law dismissing all of the Freys' counterclaims.

On April 10, 2014, the Circuit Court granted in part the Club's Motion to Dismiss, holding that the breach of fiduciary counterclaims, and certain other counterclaims, must be plead as derivative claims. On May 7, 2014, the Freys filed a Second Amended Answer and Counterclaim, alleging counterclaims for breach of contract, violation of South Carolina Code §§ 33-31-620, -621 *et seq.*, violation of South Carolina Code § 33-31-611, misrepresentation, and South Carolina Code § 33-31-610 *et seq.*, in addition to numerous affirmative defenses. The Club filed its response to that pleading on May 16, 2014.

On May 19, 2014, the Freys filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. On May 19, 2014, a hearing was held in Beaufort before The Honorable J. Ernest Kinard, Jr., Circuit Court Judge, on the Club's Motion for Summary Judgment. On June 27, 2014, Judge Kinard issued an order granting the Club's Motion for Summary Judgment on all claims and counterclaims as to Michael Frey, but denying the claims as to Grace Frey.

On July 7, 2014, the Freys filed a Motion to Reconsider Order Granting Summary Judgment Against Michael J. Frey. A supporting Memorandum and attachments were filed on July 16, 2014. The Club appears to have filed a Memorandum in Opposition to Defendants' Motion to Reconsider on or about October 28, 2014. On November 3, 2014, Judge Kinard heard oral arguments on the Motion to Reconsider. On November 17, 2014, the Freys filed, at Judge Kinard's direction, a Supplemental Brief in Opposition to Plaintiff's Motion for Summary Judgment Demanding Attorneys' Fees. On December 22, 2014, Judge

Kinard issued an Order Denying Defendants' Motion for Reconsideration and Affirming Summary Judgment Against Defendant Michael J. Frey.

The Freys filed a timely Notice of Appeal on January 2, 2015.

FACTS

Callawassie Island is a community outside of Beaufort. Its property owners association is the Callawassie Island Property Owners Association, Inc. ("CIPOA"). Membership in CIPOA is not in dispute.

Respondent Callawassie Island Members Club, Inc., (the "Club") is a social club on Callawassie Island. When Michael and Grace Frey (the "Freys") purchased property on Callawassie Island in 1995, Appellant Michael Frey submitted an application to purchase a membership in a different organization, the Callawassie Island Club, Inc. ("CIC"). (R. p. 38). The Application for Membership signed by the Freys indicated it shall not be binding until the acceptance below is signed by representatives of the CIC. (R. p. 40). The Club's copy of the Application for Membership (attached to the Complaint) is unsigned by the CIC. (R. p. 40). There is no evidence in the record that the Freys signed an agreement with the Club, only with CIC.

Equally as important, the Freys were told—and the Club documents at the time stated—that Michael Frey could end his membership at any time, which is consistent with a member's right provided by the South Carolina Nonprofit Corporation Act. Specifically, the Club documents and witnesses' testimony

show that there are at least three methods of exit from the Club: resignation; termination; and expulsion.

1. **Resignation:** A member may "resign" by submitting their resignation and having their membership placed on a resale list. While the membership is on the resale list, the resigned member may continue to use the Club facilities, and must continue to pay certain charges. Once the membership is re-issued, the resigned member gets 80% of their equity contribution back. Equity contributions have increased over the years, up to $45,000. (R. pp. 1369-1370) (R. pp. 238-240) (R. pp. 318-319).

2. **Termination:** A member may "terminate" their membership. This involves submitting a notice to the Club that voluntarily terminates the membership. The member remains responsible for dues and charges up to the date of termination. A member who "terminates" his or her membership is **not** entitled to a refund of their equity share in the club (up to $45,000 in some cases). This is a substantial penalty borne by the member to cancel the membership and end any further financial obligations to the Club. Under the Club's "termination" provision, a member may have full membership privileges restored, if the board of directors approves. (R. p. 1351) (R. pp. 238-240) (R. pp. 318-319).

3. **Expulsion:** A member may be "expelled." A member who is sixty days delinquent on dues is "suspended." After four months of non-payment, the member is "expelled" and must surrender their membership certificate to the Club. An expelled member forfeits their equity contribution to the Club (often as much as $45,000), and has no further financial obligation to the Club. An expelled member may never again be admitted to the Club facilities "under any circumstances" and is not eligible for Club membership again—the person is *verboten*. (R. pp. 1350-1351) (R. pp. 238-240) (R. pp. 318-319). This is the exit method that applies to Michael Frey.

In spite of these provisions, the Club now seeks to block anyone from leaving the Club by insisting that members who relinquish or lose their memberships have on-going obligations that extend until a member's membership is sold and transferred to a new member who is acceptable to the Club. Yet, the record and witnesses' testimony show that the Club has a history of expelling members. (R. pp. 1557-1558) (R. pp. 1571-1572) (R. pp. 487, line 19-p. 488, line 24) (R. p. 494, lines 10-11) (R. p. 486, lines 6-18) (R. p. 508, lines 2-17) (R. pp. 527-528) (R. pp. 630, line 9-p. 633, line 18) (R. p. 644, lines 1-15) (R. pp. 681, line 7-p. 682, line 12) (R. p. 685, lines 16-20) (R. p. 698, line 16-p. 699, line 8) (R. p. 708, lines 8-9) (R. p. 735, lines 3-13) (R. p. 764, lines 6-18) (R. p. 894, lines 5-18) (R. p. 920, lines 2-17) (R. p. 944, lines 9-25) (R. p. 963, lines 22-24) (R. p. 1122, lines 1-13) (R. p. 1124, lines 3-8). Furthermore, there is no provision in the documents

from 1994 through 2013 binding members who have terminated their memberships, or been expelled, to pay dues and other charges after they have left the Club. Instead, after "termination" or "expulsion" the Club is entitled to keep the terminated or expelled person's equity contribution ($22,000 for Michael Frey), a substantial penalty that serves to fairly compensate the Club. That equity contribution more than covers any purported dues and charges accrued during the four-month suspension period leading up to expulsion.

Under these terms and circumstances, Michael Frey was expelled in or about January of 2010, if not earlier. He has been barred from the Club since then. The trial court's Order is incorrect when it states that "Defendant continued to use the club amenities" after expulsion. (R. p. 7).

In its lawsuit, the Club overreaches and now claims that Michael Frey continues to owe dues, fees, assessments, and other charges since his expulsion five years ago. Evidence from Club records show the Club sought to generate even more compensation to support its declining financial situation by insisting that "terminated" and "expelled" have perpetual obligations.

The Club also claims that Michael Frey no longer has the right to resign or terminate his membership. The Club further alleges that Michael Frey, despite having been expelled from the Club and losing his $22,000 equity contribution, has unlimited additional liability for allegedly overdue, and future, dues payments. This contradicts the Club's own governing documents that indicate that financial obligations accrue against the "membership," not the "member,"

and are thereby limited to a member's original equity contribution. (R. pp. 1350-1351) (R. pp. 1279-1280) (R. pp. 442-443) (R. pp. 348-349) (R. p. 258). The Freys have submitted extensive evidence challenging the Club's claims. (*See id. & supra*).

The Club moved for summary judgment before the Circuit Court, arguing that the Club's documents are unambiguous and therefore summary judgment should be granted in the Club's favor. (R. p. 224). Evidence shows the documents are ambiguous in many places and that there is a trail of significant changes made over several years by the Club to try to clean up what Harman Switzer (past president and treasurer) testified were "inconsistencies" in the language. (R. p. 1162, lines 24-25) (R. p. 1163, lines 1-8) (R. p. 1060, lines 21-24) (R. p. 1185, lines 17-23) (R. p. 1187, line 23). In opposition, the Freys submitted voluminous documents and deposition transcripts showing areas of known ambiguity as well as supporting their individual defenses and counterclaims. (R. p. 742, lines 4-5 & 17-18) (R. p. 977, lines 17-19) (R. pp. 1557-1558) (R. pp. 1571-1572) (R. pp. 487, line 19-p. 488, line 24) (R. p. 494, lines 10-11) (R. p. 486, lines 6-18) (R. p. 508, lines 2-17) (R. pp. 527-528) (R. pp. 630, line 9-p. 633, line 18) (R. p. 644, lines 1-15) (R. pp. 681, line 7-p. 682, line 12) (R. p. 685, lines 16-20) (R. p. 698, line 16-p. 699, line 8) (R. p. 708, lines 8-9) (R. p. 735, lines 3-13) (R. p. 764, lines 6-18) (R. p. 894, lines 5-18) (R. p. 920, lines 2-17) (R. p. 944, lines 9-25) (R. p. 963, lines 22-24) (R. p. 1122, lines 1-13) (R. p. 1124, lines 3-8). Michael Frey submits

this appeal seeking a reversal of the order granting summary judgment, so that he may have a trial on the claims and counterclaims.

LEGAL STANDARD

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. *Young v. S. Carolina Dep't of Disabilities & Special Needs*, 374 S.C. 360, 365, 649 S.E.2d 488, 490 (2007). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof (such as this case), the non-moving party is only required to submit a mere scintilla of evidence. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The appellate court, like the trial court, must view all ambiguities, conclusions, and all inferences arising in and from the evidence in a light most favorable to the non-moving party. *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001). Summary judgment is a drastic remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008).

ARGUMENT

The Club's primary cause of action was breach of contract.[1] The elements for breach of contract are the existence of a contract between these parties, its

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[1] The Club's Complaint alleges an "alternative" cause of action of quantum meruit. (R. pp. 28-29). The trial court's Order appears to grant summary judgment on the breach of contract action, rendering the "alternative" cause of

breach, and the damages caused by such breach. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). As discussed below, there are genuine issues of material fact as to whether a contract existed between these parties, what that purported contract's terms were, and what damages were available or incurred due to the alleged breach by Michael Frey. On each of those points, the Freys submitted more than a "mere scintilla" of evidence to the trial court.

I. The trial court's Order should be reversed because it applied the wrong legal standard.

In its Order, the trial court failed to apply the "mere scintilla" standard required by the South Carolina Supreme Court. *See Turner*, 392 S.C. at 122, 708 S.E.2d at 769; *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. In articulating the legal standard the trial court applied, the Order recites only part of the required law:

> Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to judgment as a matter of law.

(R. p. 5, citing *Hancock* and S.C. R. Civ. P. 56(c)). The Order omits a key part of the legal standard, that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla

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action moot. In the event this Court determines that the quantum meruit claim also is pending, the same arguments apply as for the breach of contract claim, with the additional argument that, if no contract exists, there can be no continuing obligation for dues after expulsion. Additionally, there is no evidence that the Freys "benefitted" from or used their Club purported membership; the only evidence the Club provided was that the Club continued to send bills to the Freys.

of evidence in order to withstand a motion for summary judgment." *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

The omission of the "mere scintilla" requirement is more than a drafting efficiency in the Order. As discussed in Section II, below, the Order ignores the movant Club's requirements of (a) establishing the elements of its claims, and (b) showing that the voluminous evidence submitted by the Quinns fails to meet the "mere scintilla" standard. Instead, the Order largely assumes that the movant Club had met all its elements of proof—the Order does not make any clear "findings of fact" or "conclusions of law," or discuss the elements of proof required by the movant Club. This approach appears to have been driven in part by the trial court judge's background in drafting restrictive covenants for property owner subdivisions (a different type of legal instrument and obligation than the alleged contract at issue here) and current status as the president of a country club. (R. p. 1262, line 10-p. 1263, line 14) (R. p. 1226, lines 15-17). .

Having made that assumption, the Order then effectively shifted the burden of proof onto the Freys. This is demonstrated, for example, by the Order's statement that Michael Frey "cannot establish the essential elements for a negligent misrepresentation claim . . . ." (R. pp. 7-8). The trial court incorrectly treats the liability case as only a debt collection problem and appears to rely upon a trial standard—that the Freys must produce a preponderance of evidence on each element of their counterclaims—rather than viewing all ambiguities,

conclusions, and all inferences arising in and from the evidence in a light most favorable to the non-moving party. *Osborne*, 346 S.C. at 4, 550 S.E.2d at 319.

II. The trial court's Order should be reversed because the Freys presented more than a mere scintilla of evidence establishing genuine issues of material fact.

The Freys presented a huge amount of evidence—documents, transcripts, affidavit—supporting their claims and defenses. The trial court's Order largely disregards that evidence, and entirely fails to address the numerous genuine issues of fact raised by that evidence.

A. The Freys presented more than a mere scintilla of evidence challenging the Club's interpretation of the alleged agreement, and whether the alleged agreement exists.

The Freys presented significant evidence challenging the Club's interpretation of the alleged agreement, and challenging whether the alleged agreement exists. The trial court's Order failed to address that evidence, or explain why it does not rise to the "mere scintilla" standard. Moreover, the evidence summarized below establishes that the trial court's conclusion that "the agreement between the parties is unambiguous" was erroneous.[2] (R. p. 9).

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[2] In the alternative, even if the alleged contract was unambiguous, Michael Frey is still entitled to a trial on disputed issues of fact, such as (i) whether and when Michael Frey was expelled from the Club (as opposed to "resigned" or "terminated"); (ii) whether the Club may allow certain members to concede their memberships back to the Club, but deny that right to other members such as Michael Frey; and (iii) whether Michael Frey owes money to the Club, or how much is owed. (R. pp. 1350-1351) (R. pp. 442-443) (R. p. 742, lines 4-5 & 17-18) (R. p. 977, lines 17-19) (R. (R. pp. 1557-1558) (R. pp. 1571-1572) (R. pp. 487, line 19-p. 488, line 24) (R. p. 494, lines 10-11) (R. p. 486, lines 6-18) (R. p. 508, lines 2-17) (R. pp. 527-528) (R. pp. 630, line 9-p. 633, line 18) (R. p. 644, lines 1-15) (R. pp. 681, line 7-p. 682, line 12) (R. p. 685, lines 16-20) (R. p. 698, line 16-p. 699, line 8) (R. p.

Similarly, the trial court's exclusion of extrinsic evidence based to that purported lack of ambiguity was in error.[3] (R. p. 9).

(1) The Order fails to establish the terms of the alleged agreement.

The Club never established, and the Order fails to address, exactly what agreement purportedly binds the Freys, and what the terms of the agreement were. The Order quotes six documents on which it relies, most of which do not apply to the Freys because (i) the documents are dated after Michael Frey had been expelled, and (ii) the quoted excerpts refer to different tracks of exiting the Club—to "resignation" or "termination" of members, rather than "expulsion" of members. (R. pp. 6-7).

Of the six documents relied on by the Order, three are dated 2013 and 2014 (after the lawsuit was filed in 2012), and two are undated. The Order does not explain how it legally applies 2013 and 2014 documents to the Freys, when the evidence shows that Michael Frey was expelled by 2010 and the Freys were sued in 2012. (R. pp. 6-7). The Order itself indicates that the trial court

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708, lines 8-9) (R. p. 735, lines 3-13) (R. p. 764, lines 6-18) (R. p. 894, lines 5-18) (R. p. 920, lines 2-17) (R. p. 944, lines 9-25) (R. p. 963, lines 22-24) (R. p. 1122, lines 1-13) (R. p. 1124, lines 3-8).

[3] *See Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007) ("A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. . . . Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.").

considered governing documents after 1994 to be irrelevant to its ruling. (R. p. 5). In sum, the trial court's Order does not establish what purported contract applies, let alone what the terms were. Without identifying the applicable terms, the trial court's conclusion that those terms were "unambiguous" also was in error. (R. p. 9).

(2) The trial court erred by disregarding the abundant evidence that the Freys had been expelled from the Club and had no further obligation.

The Order improperly mixes up, or disregards, the differences among a "resigned" member, a "terminated" member, and an "expelled" member under the Club documents. It also fails to recognize that the Club surreptitiously made changes to its governing documents (some improper) to clear up ambiguity, despite arguing the opposite in trial court, i.e., that the documents are unambiguous. One of the Freys' arguments is that they (or, more specifically, Michael Frey as the only "member") were "expelled" from membership after four months of non-payment of dues (so, in 2010), and their charges up to that expulsion date would be deducted from their $22,000 in equity. This argument is based on the distinct sections in the Club Rules addressing expulsion of members:

> 13.3.1 Any member whose account is delinquent for sixty (60) days from the statement date may be suspended by the Board of Directors. Suspended members may not use any Club facilities, participate in any Club activities, or vote on any Club matters. Suspended members may be reinstated by the Board of Directors within four (4) months of their suspension upon payment of all indebtedness plus all dues, fees, assessments and charges (including any food and beverage minimums) accrued since the

> initial time of delinquency, plus interest calculated at the rate of one and one half percent (1.5%) monthly. Any member whose account is not settled within the four (4) months' period following suspension **shall be expelled from the Club**.
>
> 14.1.5 **Expulsion**. Any Member of the Club who has been expelled **shall not again be eligible for membership nor admitted to Club Facilities under any circumstances**. An expelled member shall be so notified by registered mail and **shall have the obligation to surrender his or her membership certificate for reissuance by the Club to a new member.**

(R. pp. 1350-1351, emphasis added). It is undisputed that the Freys had been suspended, thereby triggering this expulsion requirement after four months of non-payment. (R. p. 1576, Suspended Member List 11/15/2011). In contrast to "expulsion," the "resignation" track of exiting the Club involved a different section of the Club rules, allowed the member to continue using Club facilities during the time their membership was on the resale list, and ended (in theory) in the member receiving 80% of their equity back.[4] (R. pp. 1369-1370) (R. pp. 1350-1351). And "termination" from the Club was another exit option entirely.[5] (R. p. 1351) (R. pp. 239-241) (R. p. 355-356). The trial court's Order, however, relies only

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[4] The evidence shows that, in practice, the Club's "resale list" was, and is, defunct, and that resigned members stay on the list in perpetuity, in a type of resigned member purgatory. (R. p. 521, lines 24-25) (R. p. 522, lines 16-19) (R. p. 578, lines 17-18) (R. p. 745, lines 16-17) (R. p. 769, lines 3-22) (R. p. 893, lines 9-14) (R. p. 934, lines 3-6) (R. p. 1171, lines 14-18).

[5] The "termination" track for exit from the Club involved an affirmative act of the member providing a written notice of termination, under § 14.2.1 of the Club Rules. (R. p. 1351). A terminated member could have full membership privileged restored (§ 14.2.5), unlike an expelled member who could never be admitted to Club facilities "under any circumstances" (§ 14.1.5). (R. p. 1351). The provision makes the terminated member responsible for "any unpaid club account, membership dues and charges (including any food and beverage minimums)" – meaning, for such dues up to the date of termination.

on sections from the governing documents (many of which post-date the Freys' expulsion) that pertain to the "resignation" or "termination" options—entirely different exit tracks. In its analysis of the governing documents, the trial court incorrectly ignored "expulsion" as a means of disassociation from the Club, on which the Freys relied and submitted evidence. [6]

The Freys' interpretation of the expulsion provision, and the actions required by the Club therein, are supported by testimony of the Club's representatives, by Club documents, and by sworn affidavit. For example, Ellen Padgett (membership secretary for the Club, among numerous other positions) testified that after four months of non-payment, members would be expelled and were then no longer members. (R. p. 976, line 8-p. 977, line 19) (R. pp. 241-246) (R. pp. 354-355). She testified that § 13.3.1 of the Club Rules is reasonably understood by her to mean that after four months of delinquency the member would lose their membership.[7] (R p. 976, line 8-p. 977, line 19) (R. p. 917, line 25-

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[6] The sixth quote in the Order does refer to "expulsion," but that document is dated January 1, 2014, long after the Freys were expelled and this lawsuit was filed. Additionally, the evidence shows that that provision was improperly enacted, without consultation with the board or a vote by the members, in a litigation-driven attempt to try to eliminate expelled members' right to stop paying dues after expulsion. (R. p. 565, lines 3-5) (R. p. 1066, lines 7-11) (R. p. 1088, line 23-p. 1089, line 3).

[7] Padgett is a long-time Club representative and agent who has held numerous positions for the Club. She generally fulfilled the role of membership administrator and membership secretary. (R. p. 838, lines 6-24) (R. p. 852, line 11-p. 853, line 21) (R. p. 862, lines 17-25) (R. p. 938, lines 5-13). Ample evidence showed that she had authority, and apparent authority, for the Club. *See, e.g., Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996); *Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997) (doctrine of apparent authority).

p. 918, line 2). Other members, such Ronnie Dennis and Jeannette Dennis, testified that Padgett (on behalf of the Club) told them that they would face no more than four months of delinquency. (R. p. 708, lines 8-9) (R. pp. 734, line 22-p. 735, line 7). Dick Mercier (another member) also testified that he was told he could end his membership at any time. (R. p. 241) (R. p. 630, line 19-p. 631, line 22). The Club's 30(b)(6) designee (Harmon Switzer) and past Club president (Karen Norwood) testified that the suspension was automatic after a delinquency of several months, and James Carling (Club president and treasurer) confirmed that members who do not bring their accounts current within four months are expelled: "Following suspension they're expelled from the club, yes." (R. p. 494, lines 10-11) (R. p. 558 (trans. P. 56, line 24-p. 57, line 1)) (R. p. 1060, lines 21-24). He also testified that:

> Q. Would you agree that the—the rule at that time was that a member would—would be expelled from the club if they were suspended for more than four months and did not settle their accounts?
>
> A. Yes.

(R. p. 496, lines 6-11). Carling also stated that an expelled member would not again be eligible to be a member (unlike, for example, a "terminated" member, who could reapply for membership). (R. p. 496, lines 12-18). Norwood testified that § 13.3.1 of the Club Rules meant that a member would "absolutely have to be expelled." (R. p. 565, lines 15-19). She also testified that, disturbingly, in later years the mandatory expulsion wording was changed from "shall be expelled" to "may be expelled" without discussion among the board and without

presentation to the members of the Club. (R. p. 565, lines 3-5) (R. p. 1066, lines 7-11) (R. p. 1088, line 23-p. 1089, line 3). The only plausible explanation for these hidden changes is that they were an egregious attempt to try to force expelled members to continue to pay dues for the foreseeable future.

Documents produced by the Club show that certain members were automatically suspended and then expelled. (R. p. 1557-1558) (showing at least 15 expelled members). Although not consistent in its procedures, the Club sometimes would send letters to members who had not paid dues for four months, declare them "expelled, " and tell them to "surrender your membership certificate to the club to the attention of the Membership Director Ellen Padgett . . . ." (R. p. 1571-1572).

Under the documents, "expulsion" ended a person's obligations to the Club. The by-laws state that "expulsion" causes a person to "cease to be an equity member," meaning they no longer have member responsibilities such as dues and other charges. (R. p. 1319). Michael Frey's affidavit states that his understanding from the Club, and from the Club documents on which he relied, was that he would ("shall") be expelled after four months of delinquency and have no obligation going forward. (R. pp. 442-443). As remedy, the Club would get to keep the person's equity contribution ($22,000 for Michael Frey), which would amply cover any purported dues and charges accrued during the four-month suspension period leading up to expulsion.

Despite this evidence, the trial court's Order incorrectly held that:

> It is clear under all of the relevant documents, from the time Defendant initially acquired his membership until the present, that the obligation to remain a member in good standing and pay dues, fees, assessments and other charges continues until the membership is re-issued to a new member.

(R. p. 5) The Order incorrectly holds that there is "no room for contrary interpretation."[8] (R. p. 6). The Order failed to address, or even mention, the ample evidence—testimony, documents, affidavit—submitted by the Freys showing the Club's failure to abide by its own required expulsion process. Taking all inferences in the light most favorable to Michael Frey, there is more than a "mere scintilla" of evidence supporting his arguments. And there are issues of fact as to whether Michael Frey was expelled, when he was expelled, and as to the amount of money he owed, if any.

(3) The trial court erred by disregarding abundant evidence that the Freys had no obligation beyond their equity interest in their purported Club membership.

The Freys argued to the trial court that, based on the Club's governing documents, any liability they might have is limited to Michael Frey's equity

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[8] The Club has argued that all Club members must remain members in good standing as long as they own property on Callawassie. However, that interpretation is flatly incorrect because it would mean a member could not resign or terminate his membership (or be expelled), even though the governing documents clearly allow resignation, termination, and expulsion. Instead, the resignation, termination, and expulsion provisions show that there are numerous avenues a member may take to no longer be a Club member while still owning property on Callawassie. The obligation to remain a member in good standing must therefore be viewed to co-exist separately from a member's "resignation" and "termination" rights. Nowhere in Club's rules does it state this obligation permits the Club to override, interfere, or supersede in anyway a member's free choice to leave the Club at any time.

investment of $22,000 in the Club. Without a legal basis, the Order disregarded this requirement and instead incorrectly awarded the Club $67,876.46 in damages. (R. p. 11).

Michael Frey testified in his sworn affidavit that the terms of his membership required that any liability for dues and fees were restricted to the amount of his equity in the Club. (R. p. 442-443). This is true regardless of which exit option the member used (resignation, termination, or expulsion). For example, the 1994 Plan states that, for resigned members, unpaid dues would "accrue against and be deducted from" the member's equity in the Club. (R. p. 1280). The 1994 Club Rules are similar: a "member" may resign, but "[d]ues, fees and charges shall accrue against a resigned **equity membership** until the resigned **equity membership** is reissued by the Club." (R. p. 1319)(emphasis added). The term "membership" is defined to mean an "an ownership interest in the Club," rather than the person himself (since the Club is clearly not reissuing the "member"). (R. p. 1316). This is consistent with the "Transfer Upon Death" provision, which indicates that a deceased member's estate's financial responsibility accrues against the deceased member's membership contribution, and is limited to that person's membership contribution (rather than against the estate itself). (R. p. 1280). And the "Proration" provision provides only that resigned members' dues and other charges accrue against the equity membership, rather than the member himself. (R. p. 1281).

Similarly, the 2001 Club Rules distinguish between a "member" and the "membership," and state that "the Club shall have a lien against each **membership** for any unpaid dues or other charges made by that member of the Club . . ." and that "[a]ny other liens placed against each **equity membership** shall be junior to the Club's lien." (R. p. 1350).

In sum, the governing documents limit a member's liability for dues and other charges to the amount of his equity membership. The Club drafted the documents, and a court is required to "construe any doubts and ambiguities in an agreement against the drafter of the agreement." *Mathis v. Brown & Brown of S. Carolina, Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); *Ecclesiastes Prod. Ministries*, 374 S.C. at 499-500, 649 S.E.2d at 502. At the least, the submitted evidence rises to the level of a "mere scintilla" such that summary judgment should have been denied and Michael Frey should be permitted to have a trial on these issues.[9]

(4) The trial court erred by ruling that Michael Frey has an on-going liability.

The Order incorrectly issues a judgment of $67,876.46 against Michael Frey, and indicates that the Club may continue to levy "dues, fees, assessments, and other charges" going forward. (R. pp. 10-11). This is legally incorrect under

[9] Alternatively, the Order incorrectly failed to allow Michael Frey a credit of $22,000 for his equity contribution, toward the judgment amount. The documents specify that unpaid dues are to be "deducted from" a member's equity in the Club. (R. p. 1370).

the terms of the governing documents, and under the South Carolina Nonprofit Corporation Act, § 33-31-620 *et seq.*

Nowhere in the governing documents does it state that a member is responsible for dues and other charges after termination or expulsion. The 1994 and 2001 Club Rules state, for example, that "[n]otwithstanding termination, the member shall remain liable for any **unpaid** club account, membership dues and charges (including any food and beverage minimums)." (R. p. 1351, emphasis added) (R. p. 1331). The term "unpaid" indicates that the dues and charges were accrued before termination. For example, a person could not terminate his membership and thereby erase his unpaid bar and restaurant charges, or past-due Club dues. The term "unpaid" cannot reasonably mean future dues, fees, assessments, and other charges that the Club chooses to unfairly assess against Michael Frey for years to come. This is particularly true for expelled members (such as Michael Frey) who are required to surrender their membership certificate to the Club and may not be admitted to the Club facilities "under any circumstances." (R. p. 1351). The Club cannot expel someone, bar them from all Club facilities, keep their equity contribution—and still demand that they pay dues, fees, assessments, and other charges for years to come.

Admittedly, the term "unpaid" is somewhat ambiguous, given that its common meaning is "Not yet paid: *unpaid bills.*" American Heritage College Dictionary 1478 (3rd ed. 1997). When ambiguity exists, a court is required to construe the term most strongly in favor of the party who did not write or

prepare the contract; "any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." *Ecclesiastes Prod. Ministries*, 374 S.C. at 499-500, 649 S.E.2d at 502. Here, the trial court did the opposite: the Order construes the Club's ambiguous language strictly against Michael Frey, and in favor of an unconscionable and perpetual obligation for expelled members.

This conclusion is supported by the language of the South Carolina Nonprofit Corporation Act, which requires that members be permitted to leave a nonprofit organization such as the Club:

> (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.

S.C. Code Ann. § 33-31-620 (2015). It is contrary to the letter, and intent, of this statute for the trial court to interpret the Club's documents to require Michael Frey to continue paying ever-increasing Club "dues, fees, assessments, and other charges" for years after he left the Club. Such a ruling effectively eliminates a person's right to "resign" from a nonprofit corporation under the statute. (A number of Club witnesses went so far as to testify that members could no longer "resign" either. (R. p. 510, lines 12-15) (R. p. 547, lines 12-13)). While the statute also refers to obligations incurred or commitments made before resignation, there is no indication that the Legislature meant to empower social clubs such as

the Club to invoice former members in ever-increasing amounts, more than five years after the person has left, and been barred from, the Club.

(5) The trial court erred in ruling that the Club had met its burden of proving that a contract existed between Michael Frey and the Club.

The Club failed to meet its burden of proving that a contract existed between Michael Frey and the Club. The only signed document submitted to the trial court was a "Membership Purchase Agreement" in which Michael Frey applied for membership in a different organization, the Callawassie Island Club, Inc. (R. p. 31). The Club has not submitted a signed agreement evidencing a contract between Michael Frey and the Club. Nor has the Club submitted a signed agreement whereby Michael Frey agreed to continue to pay dues and fees until his purported Club membership was reissued.

A party pursuing a breach of contract claim must prove that a binding contract exists between the parties to the lawsuit. *See Branche Builders*, 386 S.C. at 48, 686 S.E.2d at 202; *see also Clardy v. Bodolosky*, 383 S.C. 418, 429, 679 S.E.2d 527, 533 (Ct. App. 2009) (generally, one not in privity of contract with another cannot maintain an action against him in breach of contract). In its motion for summary judgment, the Club failed to meet that burden, and the trial court's Order incorrectly skips over that critical requirement. Michael Frey's sworn affidavit states that the Membership Purchase Agreement he signed (with the predecessor entity, CIC) in September 1995 did not indicate that he was agreeing to amendments or changes to the Plan for Offering of Memberships dated April 1,

1994. (R. p. 442-443). At the least, a genuine issue of material fact exists as to whether a binding contract exists between Michael Frey and the Club, what the terms of any such contract may be, whether those terms were breached, and what damages are owed, if any.

(6) The trial court erred in disregarding evidence that the governing documents had been improperly changed by the Club.

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). The Freys raised a genuine issue of material fact as to whether the Club improperly changed its governing documents to attempt to prohibit people such as Michael Frey from exiting the Club. (R. pp. 247-248) (R. p. 565, lines 3-5) (R. p. 1066, lines 7-11) (R. p. 1088, line 23-p. 1089, line 3). The Club governing documents do not permit the Club board to unilaterally change the basic rights of membership by making those memberships inalienable and perpetual. Nor is the Club's board permitted to refuse to enforce the requirement of expulsion, or to refuse to deduct amounts owed from membership equity only. Instead, the board is only permitted to make narrow changes to certain Club Rules, such as issues relating to the use of the Club facilities (dress code, etc.). (R. p. 1373). Changes to the governing documents affecting a member's financial obligations must be approved by the persons so affected. (R. p. 1374).

Here, there is a genuine issue of material fact as to whether the documents on which the Club relies were properly adopted or amended. For example, Michael Frey's sworn affidavit states that he has never voted to change the requirement that a member must be expelled after four months of suspension. And he was never made aware of any vote to do so. (R. pp. 442-443). Club president Norwood testified that the Club changed language in the governing documents (from "shall be expelled" to "may be expelled") without discussion among the Club's board and without presentation to the members of the Club. (R. p. 565, lines 3-5) (R. p. 1066, lines 7-11) (R. p. 1088, line 23-p. 1089, line 3). The trial court's Order incorrectly disregarded that Michael Frey presented more than a "mere scintilla" of evidence on this point.

B. The Freys presented more than a mere scintilla of evidence in support of their defenses, which would defeat the Club's claims.

The Freys presented more than a mere scintilla of evidence supporting their defenses, including waiver, laches, payment, and misrepresentation. (R. pp. 52-61). Consistent with the requirements of the governing documents, the Club had a practice of requiring expulsion of non-paying members after four months of delinquency, which would end that person's obligation to the Club (but forfeit their equity payment). (R. pp. 1557-1558) (R. pp. 1571-1572) (R. p. 742, lines 4-5 & 17-18) (R. p. 977, lines 17-19) (R. pp. 1557-1558) (R. pp. 1571-1572) (R. pp. 487, line 19-p. 488, line 24) (R. p. 494, lines 10-11) (R. p. 486, lines 6-18) (R. p. 508, lines 2-17) (R. pp. 527-528) (R. pp. 630, line 9-p. 633, line 18) (R. p. 644, lines 1-15) (R. pp. 681, line 7-p. 682, line 12) (R. p. 685, lines 16-20) (R. p. 698, line 16-p. 699, line 8)

(R. p. 708, lines 8-9) (R. p. 735, lines 3-13) (R. p. 764, lines 6-18) (R. p. 894, lines 5-18) (R. p. 920, lines 2-17) (R. p. 944, lines 9-25) (R. p. 963, lines 22-24) (R. p. 1122, lines 1-13) (R. p. 1124, lines 3-8). This was Michael Frey's understanding, based both on the Club's practices and on the Club's documents. (R. p. 442-443). His understanding and reliance were reasonable, as confirmed by testimony of the Club's membership director (Padgett) and other witnesses. (*See id*). Indeed, Padgett testified that for years the Club allowed members to concede their memberships without the penalties that the Club now seeks to foist on the Quinns. (R. p. 920, lines 1-18) (R. p. 936, lines 13-19) (R. p. 944, line 9-p. 945, line 1) (R. p. 977, lines 17-19).

A party may waive an alleged right by speech, writing, and conduct inconsistent with that alleged right. *Cf. South Carolina Tax Comm'n v. Metro. Life Ins. Co.*, 266 S.C. 34, 40, 221 S.E.2d 522, 524 (1975). Written contracts may be orally modified by the parties, even if the writing itself prohibits oral modification. *South Carolina Nat'l Bank v. Silks*, 295 S.C. 107, 109, 367 S.E.2d 421, 422 (Ct. App. 1988). Here, more than a mere scintilla of evidence exists supporting Mark Quinn's defenses such as waiver, and the trial court erred in granting summary judgment on those defenses in favor of the Club.

III. The trial court erred in its award of damages to the Club.

The trial court Order awards $67,876.46 to the Club, which is comprised of dues, assessments, interest, and fees through May 9, 2014. (R. pp. 10-11). The trial court's damages award is based on an erroneous legal conclusion that Michael

Frey was obligated on an ongoing basis to continue to pay all dues and charges until his equity membership was reissued by the Club to a new member.

Assuming *arguendo* that Michael Frey is liable as matter of law for breach of contract (and his counterclaims fail), the Club's damage recovery should still be limited pursuant to the express language of the **applicable** contractual provisions governing Frey's alleged failure to pay the required membership dues, fees, and charges.

"In a law action, the measure of damages is determined by the parties' agreement, while in equity, 'the measure of the recovery is the extent of the duty of obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff.'" *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004); *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000) (quoting *United States Rubber Prods., Inc. v. Town of Batesburg*, 183 S.C. 49, 55, 190 S.E. 120, 126 (1937)).

In fact, there is ample evidence—certainly more than a scintilla—supporting Frey's position that he was **not** obligated to continue to pay all dues and charges until his equity membership was reissued by the Club to a new member. Therefore, the trial court's Order should be reversed and the damages awarded, if any, should be re-measured accordingly.

A. The trial court erred by classifying Frey as a "resigned" member, and thus invoked the wrong measure of damages.

The trial court's conclusion is erroneous because it wrongly assumes that Michael Frey had "resigned" from the Club, and thus, his obligations should be governed under Paragraph 2.4 "Transfer of Equity Membership" of the 2001 Plan for the Offering of Memberships (and subsequent iterations of the Club Plan up through 2010). The trial court based its damage calculation under Paragraph 2.4.9 "Payment of Dues by Resigned Equity Member": "[a]n equity member who in [sic] on the waiting list to sell their Club membership will be obligated to pay all Charges to the Club until his or her equity membership is reissued by the Club." (R. p. 1370).

However, the record is void of any evidence that Michael Frey "resigned" as an equity member from the Club or demonstrated an intent to resign or receive a refund on his equity upon a re-issuance of his membership to a new member. The record is void of any evidence that Michael Frey was placed on a waiting list to sell his Club membership, pursuant to the resignation provision.

For a damages analysis, this is a non-payment of dues case. A delinquency case.[10] Due to their own financial constraints, the Freys were unable to maintain their monthly dues obligations. Therefore, the applicable Club documents governing alleged damages for delinquency and non-payment are Paragraphs 13 and 14 of the Club Rules, which, in turn, set forth rules for suspended and expelled members. (R. pp. 1350-1351).

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10 As discussed above, the liability case is more complicated.

The Freys have provided ample evidence in the record affirming that Michael Frey's non-payment of dues, fees, and charges amounted to a suspension and ultimately "expulsion" from the Club—but not a voluntary "resignation." (*See supra*). This distinction is critical because the express terms of the Club Rules and Club Plan provide for the differing consequences, from a damages perspective, if a member "resigns" versus being "terminated" or "expelled":

	RESIGNATION	**EXPULSION**
GOVERNING DOCUMENT	CIMC Plan for Offering Memberships[11]	CIMC General Club Rules[12]
TRIGGER	Voluntary; notify Club in writing of intent to resign; **not** triggered or contingent on non-payment of dues and fees	Mandatory; automatic trigger upon non-payment of dues for 4 consecutive months
EFFECTIVE DATE	Following closing of title and acceptance of purchaser of new unit/lot	Immediate; member "shall" be expelled after trigger of 4 months of non-payment
PRIVILEGES & BENEFITS	Maintain Club privileges until re-issuance to new, approved member; membership on waiting list; can later re-apply to Club	Immediate ban on Club privileges; surrender of membership certificate; forever barred from Club facilities; never eligible for membership under any circumstances

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[11] Applicable and expressly referenced in 2001 version (when Club acquired CIC assets) through subsequent amended versions of same through Quinn's 2010 expulsion and/or 2012 lawsuit filing.

[12] Applicable and expressly referenced in 2001 version (when Club acquired CIC assets) through subsequent amended version of same through Quinn's 2010 expulsion and/or 2012 lawsuit filing.

ENTITLEMENT TO EQUITY RETURN	Yes; member gets refund of 80% of their original equity ownership in the Club	No; Club keeps original equity (in some cases a loss of $45,000 to a member)
PAYMENT OBLIGATIONS OF DUES AND FEES / DAMAGE MEASUREMENT	Certain obligations ongoing – tied to re-issuance to new, approved member; no lien on membership (expectation is a return of equity deposit)	Forfeiture of equity deposit; automatic lien on membership; owe indebtedness of unpaid dues and fees accrued during suspension period + 1.5% interest monthly; **no reference in any applicable governing documents whereby, once expelled, there is an ongoing payment obligation contingent on re-issuance of membership to new, approved member**

(R. pp. 1341-1352) (R. pp. 1353-1362) (R. pp. 1363-1377).

"The words 'resign' and 'expel' have opposite meanings, as the word 'resign' is defined by Webster to mean, 'to give up; to surrender by a formal act; to yield; to relinquish; to give up one's office or position; to withdraw from;' and is synonymous to such words as 'abandon,' 'renounce,' etc., while the word 'expel' is defined by Webster to mean, 'to drive or force out; to eject; to cut off from membership in or the privileges of,' and is synonymous to the words 'exile,' 'oust,' 'dispossess,' etc." *Bigger v. Unemployment Compensation Commission*, 46 A.2d 137, 143 (Del. Super. Ct. 1946).

Michael Frey stopped making his dues payments on or about July of 2009. (R. p. 42). Under the applicable Club Rules, Frey was deemed expelled by roughly January of 2010, if not earlier.[13] (R. p. 1350) (*See supra*).

The trial court's Order errs in not acknowledging the above-referenced distinctions between "resignation" and "expulsion"; instead it incorrectly addressed Quinn's classification of expulsion as "irrelevant." (R. p. 5). The Order goes on to state: "It is clear under all of the relevant documents, from the time Defendant initially acquired the membership until the present, that the obligation to remain a member in good standing and pay dues, fees, assessments and other charges continues until the membership is re-issued to a new member." (R. p. 5). For purposes of this argument on damages, there is ample evidence to indicate that Michael Frey did not remain a member in good standing. His alleged non-payment obliged him to surrender his membership, whereby he was permanently expelled from the Club. The "Delinquency" provision of the applicable Club Rules, and its corresponding "Discipline" provision do not obligate—and it would be unreasonable and unfair to assert—that the expelled member must continue paying dues beyond the expulsion date. (R. p. 1350) (*See* supra). The governing documents do not obligate the expelled former member to continue paying dues and fees in perpetuity, until the Club re-issues the surrendered membership to a new, approved member acceptable to the Club.

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[13] The Club Rules are unclear and ambiguous as to whether the 60-day "suspension" period is in addition to, or included in, the four-month nonpayment period that leads to mandatory "expulsion."

(*Id*). In a light most favorable to Michael Frey, under the express terms of the governing documents, the suspended, then-expelled Michael Frey's damages should be capped at forfeiture of his $22,000 equity contribution. (*Id*).

B. The trial court erred by relying on the inapplicable 2014 Club Plan governing expulsion.

The trial court makes a critical error by relying on, and citing to, the 2014 Club Rules governing expulsion—because these amended rules: (1) contain materially different language with respect to dues obligations of an expelled member; and (2) were not applicable to Michael Frey, because they were purportedly enacted and effective a few years after his expulsion from the Club. (R. pp. 6-7).

The 2014 Club Rules governing expulsion purport to obligate the expelled member, for the first time, as "remaining liable for all Charges until the Membership is re-issued."(R. p. 6). It mimics the language and obligation of resigned members, thereby amending and adding an ongoing payment obligation for expelled former members. (*Id*). This language was not included in any of the Club Rules in effect during Michael Frey's years as a member; this language was not included in any of the Club Rules prior to the subject lawsuit being filed. (*See supra*).

The only expulsion provision the trial court Order cites to is the inapplicable § 16.5 of the 2014 Club Rules. (R. p. 6). It was not until 2014 that the Club purported to amend its Club Rules to tie an expelled former member's payment obligation as contingent on the re-issuance of that membership to a

Club-approved new member. (R. p. 6, 2014 Club Rules §16.5). While the trial court stated that the 2014 expulsion provision may "leave no room for contrary interpretation" favoring an ongoing payment obligation, it is inapplicable and unenforceable against Michael Frey.

On the contrary, the applicable expulsion provisions consistently found in the Club Rules from the Club's formation in 2001 up through Michael Frey's expulsion in 2010, provide ample room for a contrary interpretation from the trial court order. As referenced above, in a light most favorable to them, the Freys' damages should not include a component for ongoing payment obligations up through the membership's re-issuance to a new member. The Club's own governing documents do not provide for such a damage recovery, under Michael Frey's facts and circumstances. (*See supra*).

The trial court Order is premised, almost exclusively, on the holding that that the agreement between the parties was unambiguous. However, in 2014, after the Club filed certain collection actions against expelled former members, the Club took measures to amend the Club Rules' expulsion provision.[14] If the 2014 newly-amended expulsion provision—the one cited to and relied on—is clear-cut and unambiguous in binding expelled members to ongoing dues payments until the re-issuance of the membership to a new member, how does one classify and interpret the preceding Club Rules' expulsion provisions?

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[14] The Quinns further assert that the trial court erred in not confirming or finding the Club provided proper notice/due process in its actions taken to amend these material provisions to the Club Rules and/or Club Plan.

Not only is the Order's reliance of the 2014 expulsion provision inapplicable and misplaced, the glaring fact that the Club amended the Rules' expulsion language to comport with its longstanding "resignation" provision found in the Club Plan serves as the Club's waiver and admission that its prior expulsion versions were open to a differing interpretation. *See Ecclesiastes Prod. Ministries*, 374 S.C. at 499-500, 649 S.E.2d at 502.

With respect to damages, the applicable Club Rules' expulsion provisions (i.e., the several iterations prior to 2014) do not compel the expelled member to continue making ongoing payment obligations until the re-issuance of the membership to a Club-approved new member. (*See supra*). Rather, Michael Frey, as an expelled member, lost rights to a refund on his equity contribution ($22,000 levied by mandatory lien against his membership).

C. The trial court erred by awarding damages that exceed the value of the equity contribution ($22,000), regardless of the mode by which Michael Frey exited the Club.

The Club's governing documents support the reasonable interpretation that a member, even when deemed "resigning," shall only be liable in damages up to the amount of his equity contribution. The trial court's Order cites to the Bylaws which state that "any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees, and charges shall accrue against the resigned equity membership until the resigned equity membership is reissued." (R. p. 6). Note, the Bylaws did not mandate that the accrual would occur against the member, but rather the equity membership.

Further, while the 2001 Club Plan compels a resigning member to continue to pay all Charges to the Club until his equity membership is re-issued, it goes on to hold: "[a]ny unpaid Charges plus interest accrued under the then prevailing terms of the Club Rules will be deducted from the amount to be paid to the resigned member upon the reissuance of his of her resigned membership." (R. p. 1370). Therefore, it is reasonable to interpret that a resigned member's equity return will be reduced accordingly, if certain ongoing payments are not made. However, the fact that it ties the ongoing payment obligation to the resigning member's equity return can reasonably be interpreted to mean that said equity contribution would be the maximum loss attributable to the defaulting resigned member. This reference dovetails with the Bylaws' language, previously referenced, binding the equity membership, not the member.

D. The trial court erred by not addressing statute of limitations considerations on further limiting damages.

With respect to any unpaid dues, fees, and charges which may be attributable to the Freys, those damages should be further limited by the statute of limitations—to the extent the unpaid dues may have accumulated, in whole or in part, more than three years prior to the Club's filing of the action. The Freys raised this argument in their defense to the Club's Complaint and opposition to the Club's motion for summary judgment; some of the alleged accounting deficiencies reached back more than three years pursuant to Jeff Spencer's (Club general manager) affidavit; yet, the trial court Order was deficient in not addressing this further limitation on damages. (R. pp. 10-11).

E. The trial court erred in awarding attorneys' fees to the Club.

In this action for a money judgment, the trial court erred in ruling that the Club has the right to recover its attorneys' fees from Michael Frey. "In South Carolina, the authority to award attorneys' fees can come only from a statute or be provided for in the language of a contract." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238-39, 616 S.E.2d 431, 434 (Ct. App. 2005). "There is no common law right to recover attorney's fees." *Id.*

The Club did not claim a statutory source of authority for recovering its attorneys' fees. The Club relied solely on the terms of the Club Plan, By-Laws, and Rules as a contractual source of authority for its claim for attorneys' fees. "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n of S. Carolina*, 317 S.C. 452, 457, 454 S.E.2d 901, 905 (Ct. App. 1995). "[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement." *CoastalStates Bank v. Hanover Homes of S. Carolina, LLC*, 408 S.C. 510, 519, 759 S.E.2d 152, 157 (Ct. App. 2014).

The Plan contains the following provision concerning attorney's fees:

> CIMC [the Club] shall have a **lien against each membership** for any unpaid dues, fees and other Charges made by that member, which **lien shall also accrue reasonable attorneys' fees** incurred by the Club incident to the collection of such dues, fees and other Charges, or enforcement of such lien, whether or not legal proceedings are initiated. The lien may, but need not, be recorded among the public records of Beaufort County, South Carolina, by filing a claim therein which states the name of the member, the number of the membership and the amount claimed to be due, and

> said lien shall continue in effect until all sums secured by the lien, together with all costs incurred in recording and enforcing said lien, shall have been paid. Such claims of lien may be signed by an officer of the Club. Upon full payment, the member making payment shall be entitled to be reinstated as a member in good standing and shall be entitled to a satisfaction of lien to be prepared and recorded at the member's expense. **All such liens may be foreclosed by the Club**, in any action at law or in equity, with or without five (5) days prior written notice of the intended foreclosure, as may be deemed appropriate by the Club. **The Club may also, at its option, sue to recover a money judgment for unpaid dues, fees and other Charges**[15] **without thereby waving the lien securing the same**. The Board of Directors reserves the right to report members who are in arrears on their Club bills to an appropriate national credit reporting agency. Any other liens placed against a membership shall be junior to the Club's lien.

(R. p. 308, emphasis added). By its terms, the Plan provides two alternative remedies to the Club in the event that a member fails to pay membership dues: (1) foreclose its lien against the membership; or (2) sue to recover a money judgment. Attorney's fees incurred in collection efforts accrue only to the membership lien, and recovery of attorney's fees is only available in the event the Club elects to foreclose its lien on the membership. The Plan is silent as to the recovery of attorney's fees in the event that the Club elects to sue for a money judgment, which it has elected to do in the Quinns' case.

The Bylaws contain language concerning attorney's fees that is virtually identical to the language in the Plan:

> The Club shall have a **lien against each membership** for any unpaid assessments, fees, annual dues or other charges made by

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15 This Plan defines "charges" as "dues, fees, food and beverage minimums, assessments, charges, state taxes, service charges and other charges that the Club may establish from time to time . . . ." (*See* R. p. 306). It does not include attorneys' fees.

> that member of the Club, which **lien shall also accrue reasonable attorneys' fees** incurred by the Club incident to the collection of such annual dues or other charges, or enforcement of such lien, whether or not legal proceedings are initiated. The lien may, but need not, be recorded among the public records of Beaufort County, South Carolina, by filing a claim therein which states the name of the member, the number of the membership and the amount claimed to be due, and said lien shall continue in effect until all sums secured by the lien, together with all costs incurred in recording and enforcing said lien, shall have been paid. Such claims of lien may be signed by an officer of the Club. Upon full payment, the member making payment shall be entitled to be reinstated as a member in good standing of the Club and **all such liens may be foreclosed by the Club**, in any action at law or in equity, with or without five (5) days prior written notice of the intended foreclosure, as may be deemed appropriate by the Club. **The Club may also, at its option, sue to recover a money judgment for unpaid annual dues or other charges without thereby waiving the lien securing the same**. Any other liens placed against such equity membership shall be junior to Club's lien.

(R. p. 322 , emphasis added). Like the Plan, the By-Laws provide that attorneys' fees are recoverable only in the event that the Club elects to foreclose its lien on the membership. Like the Plan, the By-Laws are silent as to the recovery of attorney's fees in the event that the Club elects to sue for a money judgment.

Finally, the Rules contain the following provisions concerning attorneys' fees:

> In accordance with the By-Laws, the Club shall have a lien against each membership for any unpaid dues or other charges made by that member of the Club, which lien shall also accrue reasonable attorneys' fees incurred by the Club incident to the collection of such dues or other charges, or enforcement of such lien, whether or not legal proceedings are initiated. Any other liens placed against such equity membership shall be junior to Club's lien.
>
> If the Club commences any legal action to collect any amount owed, or to enforce any liability of a member to the Club, the member shall also be liable for all costs and expenses of the legal action and

reasonable attorneys' fees required in connection with appellate proceedings.

(R. p. 337, emphasis added). Under the Rules, the Club can only recover attorney's fees incurred in connection with any "appellate proceedings" when it elects to sue for a money judgment.

The plain terms of the applicable Plan and the By-Laws only entitle the Club to attorney's fees in the event that it elects to foreclose its lien for unpaid assessments against a membership. Here, the Club elected to sue the Quinns for a money judgment instead, in which case the Plan and the By-Laws do not provide for the recovery of attorney's fees. The Rules only entitle the Club to recover attorney's fees "in connection with appellate proceedings," which was not the situation before the trial court. The trial court's Order accordingly erred when it awarded attorneys' fees in favor of the Club.

In incorrectly awarding attorneys' fees to the Club, the trial court relied upon generalized statements in the by-laws and other documents about the board's authority to interpret the by-laws. (R. p. 4). However, those general statements do not allow the board to disregard clear limitations in the documents that limit attorneys' fees to situations when the Club attempts to recover on a lien. The trial court's Order to the contrary effectively disregarded specific provisions in the documents, and improperly revised the rules mid-litigation. At the least, a genuine issue of material fact existed as to whether later-enacted versions of the Club's Rules (i) were properly enacted, (ii) override other documents such as the

by-laws, etc., and (iii) are appropriate authority for the Club to attempt to foist attorney's fees on the Freys and others. [16]

IV. The trial court erred when it granted summary judgment in favor of the Club on the Freys' counterclaims.

In their Amended Answer and Counterclaim, the Freys asserted the following counterclaims: (1) breach of contract; (2) violation of S.C. Code §§ 33-31-620, 621 *et seq.*; (3) S.C. Code § 33-31-611 *et seq.*, failure to allow members to approve fundamental changes; (4) negligent misrepresentation; and (5) S.C. Code § 33-31-610 *et seq.*, disparate treatment of members. (R. pp. 99-105).

The Club has asserted an action against the Freys for alleged unpaid dues, fees, and charges. The Freys have alleged that they made certain payments to the Club in the past that were not accurately reflected in the Club's notification and accounting of the alleged debt. At a bare minimum, regardless of the appellate ruling on liability, the Freys are entitled to receive a verified accounting of the alleged debt, with an opportunity to cross-examine the Club's representatives concerning the proper receipt, deposit, and allocation of same.

A. The trial court erred by dismissing the Quinns' statutory violation claim (S.C. Code § 33-31-621), because the Club is time-barred from challenging the Quinn's mandatory expulsion.

The record indicates that Michael Frey stopped making dues payments in or about July of 2009. Under the applicable Club Rules, Frey was deemed expelled by January of 2010, if not earlier. (R. p. 42) (R. p. 1350).

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[16] Additionally, the trial court relied upon undocumented and improperly supported claims for attorney's fees, including unexplained "estimates" of future attorneys fees amounts. (R. pp. 10-11).

In turn, the Club filed this collection action on September 13, 2012, more than two years after Michael Frey's effective date of expulsion. (R. p. 25).

S.C. Code § 33-31-621(d) provides:

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

Thus, the Club's collection action, which seeks reimbursement for alleged unpaid ongoing dues and fees, challenges Michael Frey's expulsion. The Official Comment to S.C. Code § 33-31-621(d) indicates this time limitation is to "provide finality" with regard to a challenge involving a termination, suspension or expulsion from a non-profit entity.

Upon exiting the Club in 2010, the Freys did not assert a claim for a return of their equity contribution. They understood they had forfeited the right to their equity under the applicable Discipline provision of the existing Club Rules. (*See supra*). They complied with "finality," and absorbed the substantial financial consequences accordingly. In turn, the Club benefitted by keeping the Freys' $22,000 equity contribution, in full.

Yet more than two years after the Club expelled Michael Frey from the Club, as mandated under its own Club Rules, the Club filed a collection action wanting more. (R. p. 25). Two years after that, in 2014, the Club purported to amend the Club Plan to obligate expelled members to make ongoing dues payments until their forfeited membership was re-issued to a new, Club-approved member. (R. p. 6). The Club has violated the letter, and legislative

intent, of this statute by not adhering to finality of the Freys' exit from the Club. The underlying collection action is the Club's effort to substitute, and unlawfully enforce, a provision to a Club contract which was not enacted or enforceable (if at all) until three or four years after the Freys permanently exited from the Club.

The Freys affirmatively pled statute of limitations as a defense in their Answer; and they cited to the Club's violation of S.C. Code § 33-31-621 in their Counterclaim. However, the trial court Order disregards this dispositive time-bar to the Club's Complaint, and is therefore deficient on its face.

B. The trial court erred by dismissing the Freys' negligent misrepresentation claim as a matter of law, since more than a scintilla of evidence supporting the claim has been provided.

There is ample evidence in the record that representatives of the Club made certain statements or representations that its members could resign at any time and/or they would incur no more than four months' liability in any event.[17] The Club maintained a roster of certain members (during Frey's years of active membership) who had "conceded" their membership obligations as a means of exiting from the Club; further, they maintained a roster of expelled members. (R. pp. 1557-1558).

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[17] A summary of some of those representations can be found in Part II above, and in the Record on Appeal at the following citations: (R. p. 742, lines 4-5 & 17-18) (R. p. 977, lines 17-19) (R. pp. 1557-1558) (R. pp. 1571-1572) (R. pp. 487, line 19-p. 488, line 24) (R. p. 494, lines 10-11) (R. p. 486, lines 6-18) (R. p. 508, lines 2-17) (R. pp. 527-528) (R. pp. 630, line 9-p. 633, line 18) (R. p. 644, lines 1-15) (R. pp. 681, line 7-p. 682, line 12) (R. p. 685, lines 16-20) (R. p. 698, line 16-p. 699, line 8) (R. p. 708, lines 8-9) (R. p. 735, lines 3-13) (R. p. 764, lines 6-18) (R. p. 894, lines 5-18) (R. p. 920, lines 2-17) (R. p. 944, lines 9-25) (R. p. 963, lines 22-24) (R. p. 1122, lines 1-13) (R. p. 1124, lines 3-8).

These overt actions and representations made by the Club, in turn, induced the Freys to justifiably rely on certain processes and mechanisms for properly exiting the Club.

The trial court Order dismisses this negligent misrepresentation claim on the notion that the Club was not in existence at the time the Freys undertook their initial obligations. (R. pp. 7-8). However, the Freys do not maintain that the prior entity, Callawassie Island Club, by and through its governing documents, conveyed these false representations to them. At the time the Freys purportedly joined the Club, it was their understanding that they would never owe more than their equity contribution, regardless of the method by which they exited from the Club. (R. pp. 442-443). The Freys were never made aware of any treatment and action by the preceding entity (CIC) wherein members were charged and held to ongoing dues obligations subsequent to expulsion from the Club.

The false representations occurred after the Club took over in 2001: the Club, by and through its representations, provided methods for certain members to exit the Club without owing more than their equity contribution. (*See supra*) (R. pp. 1557-1558). Therefore, the Club's representations aligned with the Quinns' understanding since joining of their limitations on financial risk upon exiting.

However, subsequent to the Freys' exit, the Club demanded reimbursement for future payment obligations—which was a contradicting

position, action, and interpretation relative to prior representations made to the Freys and their fellow active members. (*Id.*) (R. pp. 442-443).[18]

To their ultimate detriment, the Freys justifiably relied on the Club's representations that they would be limited to a loss of equity contribution only, upon their exit from the Club. The Club's current demand for reimbursement of ongoing dues payments (as accounted for in its $67,876.46 prayer for relief) demonstrates that the Club's prior representations were false.

V. The trial court erred when it granted summary judgment prematurely, because the Freys did not have a full and fair opportunity to complete discovery.

Pursuant to South Carolina law, summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *cf.* 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983). As a central basis for its Motion for Summary Judgment against the Freys, the Club attached an executed affidavit from its general manager, Jeff Spencer. In the affidavit, Spencer purported to testify as to what documents the Freys had agreed to, as well as what type of notice the Freys received of the alleged deficiency. (R. pp. 414-423). The affidavit was executed on March 3, 2014; the Motion for Summary Judgment was filed on March 7, 2014. The Freys filed a

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[18] Additionally, the Freys assert that the evidence on record establishes the Club's liability sounding in breach of contract (including improperly amending material provisions of the Club's governing contracts), and submit the trial court Order erred by failing to address these meritorious counterclaims. (R. pp. 94-106).

Memorandum in Opposition to Summary Judgment on May 19, 2014, indicating their intent and need to depose Jeff Spencer. (R. p. 235). The Freys are entitled to an opportunity to cross-examine and explore the scope of his affidavit—and related relevant aspects of the Club's allegations.

The Club then filed a Supplemental Affidavit of Jeff Spencer on that same day, May 19, 2014—the day of the court hearing on the Club's Motion for Summary Judgment. The Freys' attorney protested that he had not been allowed to depose Spencer and had not received full discovery responses. (R. pp. 259-260). Importantly, the month before, on April 15, 2014, the Freys filed a Motion to Compel more substantive and complete responses to their written requests to the Club, and this Motion to Compel was granted on June 17, 2014. (R. pp. 1577-1578).

The Order Granting Summary Judgment was filed a mere ten days later, on June 27, 2014—**without Jeff Spencer having been deposed, and without the court-ordered compelled discovery having been produced by the Club to the Freys.**

The furtherance and completion of discovery is essential to the Freys' defense of the Club's claims, and in support of the Freys' prosecution of their counterclaims. For example, the Club has not provided adequate bases for its differential treatment in conceding and expelling some members without further financial obligation, but not others (such as the Freys); the Club has not provided sufficient testimony and documentation concerning its amendment of the

expulsion provision in the 2014 Club Rules—from the following standpoints: (1) the due process aspect of the amendment given its material effect on exiting members; and (2) its retroactive and dubious applicability to Michael Frey who was forced out of the Club by compelled expulsion in 2010. Further, the Freys seek the Club's sworn testimony regarding its delay in its challenge to their expulsion.

For the reasons set forth above, it is likely that further discovery will uncover additional relevant evidence, and does not amount to a "fishing expedition," as intimated by the trial court's Order.

CONCLUSION

For these reasons, this Court should reverse the trial court's Order granting summary judgment against Michael Frey and granting summary judgment in favor of the Club on the Freys' counterclaims.

Respectfully submitted,

Ian S. Ford
Bar no. 12463
Neil D. Thomson
Bar no. 71209
FORD WALLACE THOMSON LLC
715 King Street
Charleston, South Carolina 29403
843-277-2011

Attorneys for Appellant

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
BEAUFORT COUNTY
FOURTEENTH JUDICIAL CIRCUIT

J. Ernest Kinard, Jr., Judge

Appellate Case No. 2015-000002

The Callawassie Island Members Club, Inc., Respondent,

v.

Michael J. Frey, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

FORD WALLACE THOMSON LLC

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Ian S. Ford, Esq.
Neil D. Thomson, Esq.
715 King St.
Charleston, SC 29403
T. 843.277.2011
Attorneys for Appellant