THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Court of Appeals Opinion No. 2019-UP-393
Originally Filed as 2018-UP-178, 2018-UP-179 and 2018-UP-180
Withdrawn, Substituted and Refiled December 18, 2019

Appellate Case No. 2020-000667

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

Of Whom Gregory L. Martin and Michael J. Frey are the Petitioners.

APPENDIX

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** In accordance with this Court's Order on the Appendix of April 16, 2021, the Petitioners have removed from the *Frey* Record on Appeal those documents that were merely duplicates of identical documents appearing elsewhere in the Appendix. With the exception of the documents that remain, the *Frey* Record was identical to that of Martin.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants,

Of Whom Gregory L. Martin, Michael J. Frey, and Mark K. Quinn are the Appellants.

Appellate Case No. 2015-000001

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-393
Originally Filed as 2018-UP-178, 2018-UP-179 and 2018-UP-180
Heard May 7, 2019
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AFFIRMED

Ian S. Ford and Neil Davis Thomson, both of Ford Wallace Thomson, LLC, of Charleston, for Appellants.

M. Dawes Cooke, Jr., John William Fletcher, and Bradley B. Banias, all of Barnwell Whaley Patterson & Helms, LLC, of Charleston; Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort; James Andrew Yoho, of Carlock Copeland & Stair, LLP, of Charleston; and Andrew F. Lindemann, of Lindemann, Davis & Hughes, PA, of Columbia, for Respondent.

PER CURIAM: Gregory L. Martin, Michael J. Frey, and Mark K. Quinn (collectively, Appellants) appeal the circuit court's order granting summary judgment to The Callawassie Island Members Club, Inc. We affirm.

INTRODUCTION

Appellants originally filed a motion to consolidate their appeals with *Callawassie Island Members Club, Inc. v. Ronnie Dennis*. However, this court denied the motion, proceeded with the appeal in *Dennis*, and filed an opinion reversing the grant of summary judgment to the Club and remanding the case to the circuit court. *See Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016).

Following the filing of the *Dennis* opinion, this court filed three unpublished opinions in the *Martin*, *Frey*, and *Quinn* appeals wherein we relied on our findings in *Dennis* and affirmed in part, reversed in part, and remanded to the circuit court. *See Callawassie Island Members Club, Inc. v. Martin*, No. 2015-000001, 2018 WL 2059555 (S.C. Ct. App. May 2, 2018); *Callawassie Island Members Club, Inc. v.*

Frey, No. 2015-000002, 2018 WL 2059557 (S.C. Ct. App. May 2, 2018); *Callawassie Island Members Club, Inc. v. Quinn*, No. 2015-000003, 2018 WL 2059558 (S.C. Ct. App. May 2, 2018).

After granting certiorari in *Dennis*, the supreme court reversed this court, reinstated summary judgment, and remanded for us to address the Dennises' remaining issues on appeal. *See Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). Thereafter, Frey, Martin, and Quinn filed petitions for rehearing asking this court to reconsider our opinions in their cases in light of the supreme court's holding in *Dennis*. These three cases are now consolidated under the caption and case number reflected above.

FACTS

Frey and his wife, Grace I. Frey (collectively, the Freys); Quinn and his wife, Sherry B. Quinn (collectively, the Quinns); and Martin and his wife, Rebecca L. Martin (collectively, the Martins) applied for and became members of what was then the Callawassie Island Club, Inc. (the Island Club), a private social club on Callawassie Island that owned and operated various recreational amenities, including swimming pools, tennis facilities, a golf course, clubhouses, and dining facilities, in September 1995, July 1997, and February 2001, respectively. Appellants and their wives also purchased real property on Callawassie Island.

The application for membership Appellants and their wives executed noted membership in the Island Club was governed by the 1994 Plan for the Offering of Memberships (1994 Plan). The application for membership also stated the governing documents, which included bylaws and general club rules (Rules), might "be amended from time to time."

In 2001, after the Quinns, the Martins, and the Freys each purchased property on Callawassie Island, the Island Club transferred its assets to The Callawassie Island Members Club, Inc. (the Club), a member owned and managed organization. In conjunction with the purchase, the Club issued an amended Plan and established its own Rules and bylaws. These governing documents were also revised in 2007, 2008, 2009, 2012, 2013, and 2014.

Quinn, Frey, and Martin ceased paying dues in 2009, 2009, and 2012, respectively, and they did not sell or transfer their memberships to new members. In September 2012, the Club filed complaints against Appellants and their wives, seeking to collect delinquent dues, fees, and assessments and alleging claims of breach of

contract and quantum meruit. The Club alleged Appellants and their wives, as Club members, had "continuing contractual obligations" to pay dues, fees, and assessments. Appellants and their wives answered, alleging their resignations or expulsions from the Club relieved them of any further liability for dues even if their memberships had not been transferred to new members. They contended the Club claimed Appellants remained liable for dues despite the terms of the governing documents and despite the fact that other members had been allowed to resign without an ongoing obligation to the Club. They also raised counterclaims, alleging breach of contract, violations of sections 33-31-620 through -621 of the South Carolina Code (2006), misrepresentation, and breach of fiduciary duty.

The Club subsequently moved for summary judgment, seeking judgment in its favor on all of its claims and Appellants' counterclaims. The Club argued Appellants' obligation to pay dues until their memberships were reissued to new members was clear and the various defenses and counterclaims raised by Appellants were unsupported by any evidence. The Club also attached to its motion for summary judgment copies of the governing documents that had been revised in 2013 and 2014.

Appellants filed a motion opposing the Club's motion for summary judgment. Martin, Frey, and Quinn each attached an affidavit to the motion in which they stated "the Plan for [the] Offering of Membership[s] and Club Rules did NOT obligate members to continue to pay dues, fees and assessments and other charges after 4 months of delinquency (at which point they were required to be expelled)" and "[t]he Plan [for the] Offering of Membership[s] . . . restricted a member[']s liability for dues and fees to the Club . . . to the amount of equity that membership had in the Club." They further contended they never voted to change the requirement that a member must be expelled after four months of suspension.

While the Club's motion for summary judgment was pending, Appellants filed a motion to compel discovery, arguing the Club failed to fully respond to their discovery requests. After holding a hearing, the circuit court granted Appellants' motion on June 5, 2014.

The circuit court held a hearing on the Club's motion for summary judgment in May 2014. During the hearing, the Club argued there was no provision in the governing documents that relieved Appellants of their obligation to pay dues, fees, and assessments. According to the Club, even if Appellants resigned or were expelled, they were obligated to continue making payments. The Club further noted the language governing the Club's expulsion of members for nonpayment

was amended and now stated that a member "may" be expelled rather than "shall" be expelled. The Club contended subsection (b) of the South Carolina Nonprofit Corporation Act of 1994 (the Nonprofit Corporation Act) did not prohibit continuing obligations after resignation if the obligations were incurred or made before resignation. The Club argued Appellants could resign their memberships by selling their properties with their memberships.

Regarding Appellants' counterclaims, the Club contended it was entitled to summary judgment on Appellants' negligent misrepresentation claims because Appellants purchased their memberships from the Island Club, not the Club, and the transactions were at arm's length and, thus, there was no justifiable reliance. The Club further argued it was entitled to summary judgment on Appellants' breach of contract and accounting claims because Appellants had not introduced any evidence to support their claims that their dues, fees, and assessments had been improperly handled by the Club.

Appellants moved during the summary judgment hearing to remove their wives from the action because only Appellants had applied to be members of the Club. According to Appellants, they had entered into a contract with the Island Club, not the Club. Appellants contended the language in the governing documents regarding expulsions was improperly changed from "shall" to "may." Appellants argued they had a reasonable basis to believe they would be expelled after four months of nonpayment and nothing in the governing documents indicated they would have to continue to pay dues, fees, and assessments until their memberships were reissued. According to Appellants, there was more than a mere scintilla of evidence to withstand the Club's summary judgment motion, including the fact that the Club had expelled members in the past and allowed people to concede their memberships and the fact that the governing documents stated the Club would have a lien against the membership for unpaid dues and fees at the time of resignation. Appellants contended the term "unpaid" in the governing documents did not mean a continuing obligation but referred to the amount of unpaid dues and fees at the time of resignation. Appellants argued the governing documents implied that a member's obligation would be limited by the amount of equity the member had in the Club.

In a June 24, 2014 order, the circuit court granted the Club's motion as to Appellants; however, it denied the Club's motion as to their wives pending the completion of additional discovery. In the order, the circuit court stated, "It is clear under all of the relevant documents, from the time [Appellants] initially acquired [their] membership[s] 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." The court found the governing documents left "no room for contrary interpretation" and cited to various excerpts from the governing documents, including the 1994 Plan, bylaws, and Rules; the 2013 Plan; and the 2014 Rules. Although the court cited to amended versions of the governing documents, it stated that because "the obligation to pay dues, fees and assessments until [their] membership[s] were re-issued was evident in the 1994 Plan, . . . [Appellants'] contention that [the Club] may have later failed to properly notice and/or meet the voting requirements for subsequent amendments is irrelevant." According to the circuit court, the Nonprofit Corporation Act "specifically obligates a resigning member to meet any obligations incurred or commitments made before the resignation" and "specifically recognizes a corporation's right to impose obligations on its members beyond termination of the membership." The court further found additional discovery was unnecessary because Appellants "failed to demonstrate the likelihood that further discovery [would] uncover additional relevant evidence" in light of the fact that the governing documents were unambiguous and extrinsic evidence would not be admissible to determine the intent of the parties.

Regarding Appellants' counterclaims, the circuit court determined the Club neither owned nor controlled the Club's assets at the time Appellants purchased their memberships; therefore, they could not establish the necessary elements for their negligent misrepresentation claims. It also found Appellants had failed to demonstrate any right to an accounting by the Club. Finally, the circuit court awarded attorney's fees to the Club.

Appellants filed motions to reconsider. The circuit court subsequently denied Appellants' motions to reconsider and affirmed summary judgment in favor of the Club. On appeal to this court, Appellants argue the circuit court erred in (1) failing to apply the "scintilla of evidence" standard to the Club's motion for summary judgment, (2) disregarding the voluminous evidence they presented in opposing the Club's motion for summary judgment, (3) awarding damages under incorrect contract provisions and under incorrect interpretations of the applicable documents, (4) granting summary judgment in favor of the Club on their counterclaims when they submitted evidence raising numerous issues of material fact, and (5) granting summary judgment prematurely because they did not have a full and fair opportunity to complete discovery.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the circuit 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 material 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.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Disregarding Evidence

Appellants argue the circuit court disregarded genuine issues of material fact, and, therefore, erred in granting summary judgment in favor of the Club.

A. Contract

Appellants first contend the Club failed to prove a contract existed because they applied for membership in a different organization, the Island Club. We hold a question of fact does not exist as to whether Appellants were members of the Club. The evidence in the record supports the circuit court's finding that Appellants' memberships in the Island Club transferred to the Club upon the sale of the club. The 1994 Plan expressly contemplated the transfer of the Island Club's assets to the members, which occurred in 2001 when the Club assumed control. Appellants also continued paying dues and receiving the benefits of membership well after the Club took control of the club.

B. Governing Documents

Appellants contend the circuit court disregarded (1) the differences among resigned, terminated, and expelled members; (2) the abundant evidence that they had been expelled by the Club, which included testimony from the Club's representatives and other club members regarding the expulsion process and documents showing the Club had previously expelled other members; (3) evidence that the governing documents had been improperly changed by the Club to prohibit

people from exiting the Club; and (4) the abundant evidence that they had no obligation beyond their equity interests in their club memberships.

1. Resignation

Appellants contend there are genuine disputes as to (1) which governing documents are controlling and (2) the interpretation and application of the governing documents as they relate to their obligations to pay dues.

In *Dennis*, this court reversed the grant of summary judgment to the Club after determining the governing documents were ambiguous regarding whether club members are liable for dues accruing after resignation. 417 S.C. 610, 616–17, 790 S.E.2d 435, 438 (Ct. App. 2016). This court noted the 1994 Rules provided that a member could terminate membership in the Club by delivering written notice of termination to the Club's secretary but would remain liable for any *unpaid* club account, membership dues and charges. *Id.* at 616, 790 S.E.2d at 438. However, this court found this language different from that in other documents. *Id.* at 616–17, 790 S.E.2d at 438.

Subsequently, the supreme court reversed this court and found the governing documents were unambiguous. *Dennis*, 425 S.C. at 200, 821 S.E.2d at 670. Citing section 5.11 of the 2008 Plan, the court held the Club's governing documents unambiguously provide that club members are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued.

Because the governing documents at issue in *Dennis* are the same documents at issue in the instant cases, we affirm the grant of summary judgment to the Club on its claims against Appellants.

2. Expulsion

Appellants also contend their liability for unpaid dues ended after four months of delinquency by the mandatory process of expulsion.

In *Dennis*, this court, relying on the 2001 Rules, found there was "an ambiguity as to whether Appellants were entitled to expulsion and thus exposed to a maximum liability of four months' of unpaid dues (plus any accrued expenses)." *Dennis*, 417 S.C. at 617–18, 790 S.E.2d at 439. The 2001 Rules provide the following:

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

(emphasis added). This court also considered the testimony of the membership coordinator for the Island Club and the Club, Ellen Padgett, who stated that she understood the above provision to mean that after four months of delinquency, a member would lose his or her membership. *Id.*

Like in *Dennis*, the record in the instant cases also contains the testimony of Padgett that she understood the Rules to mean that if a member did not settle his account in four months, he would lose his membership. There is also evidence Appellants had been suspended by the Club before the initiation of the Club's action against them and thus, should have been expelled under the 2001 Rules. The record contains a November 2011 list of suspended members that includes both Frey and Quinn. Additionally, the Club's General Manager, Jeff Spencer, stated in an affidavit that the Club had "been forced, owing to non-payment, to suspend" the membership rights and privileges of the Martins, the Freys, and the Quinns. However, the above provision from the 2001 Rules was amended in 2007 and the mandatory expulsion language was removed. It now reads as follows:

> Any member whose account is delinquent for sixty (60) days from the statement date *may* be suspended by the Board of Directors. . . . Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club.[1]

(emphasis added).

Pursuant to this revision, the Club would not have been obligated to expel Appellants despite their suspensions. However, Appellants contend the governing documents were improperly changed by the Club to prohibit people from exiting the Club. They point to the following provision, which prohibits modification of the governing document unless a majority of the members votes in favor of it:

> 2007 Plan:

[1] An identical provision was included in the 2009 Rules.

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

Frey, Quinn, and Martin each stated in an affidavit that they never voted to change the requirement that a member must be expelled after four months of suspension and stated they were not aware of any vote to do so.

We disagree with Appellants' assertion that the governing documents were improperly changed. The Appellants rely on language in the Plan rather than the amendment provision in the Rules. According to the 2007 and 2009 Rules,

> [t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships.

The Rules do not contain any provisions requiring a vote of the full membership to amend. Thus, the evidence does not raise a genuine issue of material fact regarding whether the governing documents were properly changed and whether the mandatory expulsion provision was still in effect at the time of Appellants' suspensions from the Club.

C. Nonprofit Corporation Act

According to Appellants, permitting the Club to continue to levy dues, fees, assessments, and other charges against Appellants is a violation of the Nonprofit Corporation Act because it eliminates a person's right to resign from a nonprofit organization; it also conflicts with the governing documents, which do not state a member is responsible for dues and other charges after termination or expulsion. Appellants argue 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."

Section 33-31-620 of the Act states that "[a] member may resign at any time" and "[t]he resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before the resignation." S.C. Code Ann. § 33-31-620 (2006).

In *Dennis*, this court addressed whether a member could be liable for continuing obligations post-resignation under the Act. 417 S.C. at 618, 790 S.E.2d at 439. We stated,

> Section 33-31-620 obligates resigned members to pay any dues incurred *before* resignation. This section does not require resigned members to continue to pay any dues that accrue *after* resignation. To do so, we believe, would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate [his or her] membership obligations.

Id. This court further found "section 33-31-620 protects club members from such continuing liability after resignation." *Id.* at 619, 790 S.E.2d at 439.

The supreme court found this court's reasoning ignored subsection 33-31-620(b), which contemplates two categories of debt for which a resigned member continues to be responsible after resignation: (1) "obligations incurred . . . before resignation" and (2) "commitments made before resignation." *Dennis*, 425 S.C. at 205, 821 S.E.2d at 673 (quoting S.C. Code Ann. § 33-31-620(b)(2006)). The supreme court held,

> [t]he dues, fees, and other charges the Dennises owe fall into the "commitments made" category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises resigned—both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges "until his or her equity membership is reissued by the Club." When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the

> period of time after resignation and before reissuance of the membership. *Therefore, we find the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620*.

Id. at 205–06, 821 S.E.2d at 673 (emphasis added).

In light of the supreme court's holding in *Dennis*, we have no choice but to hold the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by the Act.

II. Damages/Attorney's Fees

Appellants argue the circuit court erred in awarding damages to the Club because the awards were based on the erroneous conclusion that Appellants were obligated, on an ongoing basis, to continue to pay all dues and charges until their memberships were reissued. Appellants contend that based on the governing documents, their damages should be capped at forfeiture of their equity contributions. Finally, Appellants contend the circuit court erred in awarding attorney's fees to the Club because the governing documents only allow for the recovery of attorney's fees if the Club elects to foreclose its lien on the membership, not if it sues for a money judgment.

A. Damages

The circuit court found the Martins owed $33,300.11 in unpaid dues, fees, and other charges including interest. Additionally, the court found the Freys owed $58,744.23 and the Quinns owed $66,658.09.

In *Dennis*, the supreme court found club members are obligated to continue to pay dues, fees, and other charges after resignation until their memberships are reissued. The opinion also contains a dialogue between the majority and the dissent regarding the repercussions of the court's decision on the liability of club members. In the dissent, Justice Hearn expresses concern that the majority's opinion could lead to perpetual liability on the part of club members. The majority limited its holding by stating it was "*not* deciding whether the governing documents could support perpetual liability . . . ." *Dennis* at 202, 821 S.E.2d at 627.

We do not believe the language of the governing documents creates a cap on a resigned member's liability for unpaid dues and fees. Pursuant to the 2008 Plan,

> An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay the Club all dues, fees and other Charges associated with his/her membership until his/her Equity Membership is reissued by the Club. *Any unpaid dues, fees and other Charges plus interest accrued under the then prevailing terms of the General Club Rules will be deducted from the amount to be paid to the resigned member upon the reissuance of her/her resigned Equity Membership.*

(emphasis added). While this provision provides unpaid dues will be deducted from the amount paid for the equity membership, it does not provide that the maximum damages the Club can recover is capped at the amount paid for the membership. Furthermore, the governing documents do not contain any provisions that preclude the Club from collecting by other means the amounts in excess of the value of the equity membership. Accordingly, we find the circuit court did not err in awarding the Club damages.[2]

B. Attorney's Fees

The circuit court ordered the Martins to pay $8,630.13 in attorney's fees. In addition, the court ordered the Freys to pay $9,132.23 and the Quinns to pay $10,186.98 in attorney's fees.

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[2] The governing documents neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership. This apparent ambiguity, if read to authorize the collection of dues, could require club members to pay dues in perpetuity. The supreme court, however, specifically stated it was not ruling on the issue of perpetuity. Yet, the supreme court determined the membership documents unambiguously require the Dennises to continue to pay dues until their membership is reissued. Based on testimony presented by both sides, it appears the reissuance of the membership will almost assuredly never happen. As noted, the supreme court declined to call this obligation without a foreseeable end a "perpetual liability." Regardless of what term is used, it appears this is an obligation which could last forever.

Appellants contend the circuit court erred in awarding attorney's fees to the Club because the governing documents only allow for the recovery of attorney's fees if the Club elects to foreclose its lien on the membership, not if it sues for a money judgment.

We find this argument is unpreserved. Prior to the circuit court's grant of summary judgment to the Club, Appellants only questioned the timeliness and reasonableness of the attorney's fees affidavits. Appellants challenged the Club's contractual authority to collect attorney's fees at the hearing on Appellants' motions to reconsider; however, an issue may not be raised for the first time in a motion to reconsider. *See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (holding a party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment).

III. Counterclaims

A. Breach of Contract

We affirm the circuit court's grant of summary judgment to the Club on Appellants' breach of contract counterclaims. Our decision is based on the interrelated nature between Appellants' breach of contract counterclaims and the Club's breach of contract claim and, as stated above, the fact that our supreme court found the relevant provisions of the governing documents are unambiguous.

B. Negligent Misrepresentation

We affirm the circuit court's grant of summary judgment to the Club on Appellants' negligent misrepresentation claims.

> To establish liability for negligent misrepresentation, the plaintiff must show (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary

> loss as the proximate result of his reliance upon the representation.

Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (quotations omitted).

Appellants state in their briefs that they "do not maintain that the prior entity, [the Island Club], by and through its governing documents, conveyed these false representations." Instead, they argue "[t]he false representations occurred after the Club took over in 2001" and consisted of the Club providing "methods for certain members to exit the Club without owing more than their equity contribution." We find such acts by the Club are not sufficient to support these counterclaims because allowing certain members to leave the Club is not a *false* representation and it was not a representation that was made to Appellants. *See id.* (stating that to establish a claim for negligent misrepresentation, the plaintiff must show "the defendant made a *false* representation *to the plaintiff*) (emphases added)). Accordingly, we find Appellants failed to provide sufficient evidence to support their claims, and the circuit court did not err in granting summary judgment to the Club on these counterclaims. *See* Rule 56(c), SCRCP (stating summary judgment is proper when "there is no genuine issue as to any material fact and. . . the moving party is entitled to a judgment as a matter of law").

C. Quinn's and Frey's Section 33-31-621(d) Issue

Quinn and Frey argue the circuit court erred in dismissing their statutory violation claims because the Club brought its breach of contract action after the one-year statute of limitations of section 33-31-621(d) of the South Carolina Code (2006). That section states, "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." *Id*

To the extent Quinn and Frey are contending this is a separate counterclaim, we find this issue is unpreserved. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). The circuit court did not address this issue in its order granting summary judgment to the Club, and Quinn and Frey did not raise it in their motions to reconsider. Accordingly, we affirm the circuit court's ruling on this issue.

IV. Discovery

Appellants argue the circuit court erred in granting summary judgment before they had a full and fair opportunity to complete discovery. We find the circuit court acted within its discretion in granting summary judgment in light of the discovery issues raised by Appellants. As noted by the Club, the litigation was ongoing for two years and the circuit court found the contract was unambiguous, a ruling which was affirmed by the supreme court in *Dennis*.

V. Remaining Issues

The Club raises several additional sustaining grounds, which we decline to address. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

CONCLUSION

We affirm the circuit court's grant of summary judgment to the Club.

AFFIRMED.

LOCKEMY, C.J., and SHORT and MCDONALD, JJ., concur.

The South Carolina Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants,

Of Whom Gregory L. Martin, Michael J. Frey, and Mark K. Quinn are the Appellants.

Appellate Case No. 2015-000001

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

A.J.

Columbia, South Carolina

FILED

March 27, 2020

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001
Lower Court Case Nos. 2012-CP-07-03209, 2012-CP-07-03216, 2012-CP-07-03218

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants

Of whom
Gregory L. Martin, Michael J. Frey, and Mark K. Quinn
are the Appellants

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Appellants Gregory L. Martin, Michael J. Frey, and Mark K. Quinn hereby petition for rehearing as to this Court's Opinion No. 2019-UP-393, filed December 18, 2019 (the "Opinion"). As set forth below, Appellants respectfully submit that the Opinion overlooks material principles of law, and that it overlooks or misapprehends matters in the Record.[1]

I. This Court cannot in good conscience uphold an illegal contract.

As it stands, this Court's Opinion has condemned the Appellants, and any number of other members of the Callawassie Island Members Club, to an inescapable bondage, in which they are to be held captive indefinitely by a golf and social club. The idea of being a slave to a golf club seems almost comical . . . except that it's not. Because of the Opinion, the Appellants (and many others like them) are facing hundreds of thousands of dollars of ever-accumulating dues and fees, without any end in sight. Resignation is meaningless. Trying to sell their property is useless. No one in their right mind will step in to take their place, but that is exactly what seems to be required.[2]

When the Club first began to file its legion of lawsuits against its members, no one would have imagined this outcome of perpetual, inescapable liability. We know it is not what the hapless members of the Club signed up for—for who would? Foreseeing this possible aftermath of its decision in *Dennis*, the Supreme Court balked. Justice Few

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1 Citations to the Record on Appeal in this brief are to the Quinn Record on Appeal. The same documents are in the Records on Appeal in Martin and Frey. Appellants would be glad to provide parallel citations to the Records in Martin and Frey, if the Court so wishes.

2 And, of course—even if a such a martyr or maniac *were* to step in—the Club has the exclusive right to determine the qualifications for membership, and it reserves the sole authority to approve applications and to reject whom it pleases. (R. p. 1448).

hastened to make clear that his majority opinion was "*not* deciding" the question of perpetual liability. *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 202, 821 S.E.2d 667, 672 (2018) (emphasis in original) ("*Dennis* Opinion"). Justice Hearn, writing passionately for the dissent, cautioned against the very result at which this Court has arrived. This Court, too, recognizes the injustice of its decision; its footnote 2 quietly rebels against the prospect of perpetual liability; but the note ends with a shrug, as if to sigh: "but what can be done?" Op. p. 13 n.2.

Something **must** be done. This Court is not an agent of injustice. The members of the Club should be afforded relief on the simple grounds that the Club's practices and governing documents are illegal. They are illegal because they have been unilaterally warped and modified without notice to the members in order to create an inescapable servitude. They are illegal because their unbargained-for terms are unconscionable and against public policy. They are illegal because they are disparately enforced. They are illegal because the Opinion has mistakenly construed their terms in a way that allows the Club to circumvent the law.

This Court should "not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." *Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010) (disregarding issue preservation rules to find, *sua sponte*, that a contract was void for illegality).[3] "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance **in any way** towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal

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[3] *See, e.g.*, Reply Br. of App. at p. 15 (arguing that the Club's practices violate public policy).

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contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract." *McMullen v. Hoffman*, 174 U.S. 639, 654, 19 S. Ct. 839, 43 L. Ed. 1117 (1899) (emphasis added).

This Court misapprehends its own power. The *Dennis* Court expressly punted on the question of perpetual liability, and it sent the ball right back to this Court with these encouraging words from the dissent: "at some point courts are called upon to step in to alleviate a provision contrary to public policy." *Dennis*, 425 S.C. at 210, 821 S.E.2d at 676. **It has come to that point.** Perpetual contracts are against public policy. *See Childs v. City of D.C.*, 87 S.C. 506, 70 S.E. 296 (1911) (holding that "it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually" and noting that "courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other."); *see also Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994) ("Historically, perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract."). Courts do not enforce contracts that are against public policy. *White v. JM Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004) ("courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."), *citing Berkebile v. Outen*, 311 S.C. 50, 53–54, 426 S.E.2d 760, 762 (1993) (stating "[a]n illegal contract has always been unenforceable") *and Batchelor v. American Health Ins. Co.*, 234

S.C. 103, 107 S.E.2d 36 (1959) (noting that contracts violating public policy—as expressed in constitutional provisions, statutes, or judicial decisions—are void).

As further set forth below, this Court should withdraw its Opinion and substitute a decision that finds the Club's documents and practices to be illegal, that permits the contract to be terminated at will, or that remands the case for trial on the question of whether the Club's contract is (or has wrongfully become) perpetual and therefore unenforceable.[4]

II. There is a genuine issue of material fact as to whether the Appellants were disparately treated in violation of the Nonprofit Corporation Act.

In its recent ruling in *Dennis*, this Court correctly held that:

> We find the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed material issue of fact as to the claim that the Club violated the Nonprofit Corporation Act.

Op. No. 5696 at p. 5. The same disputed material issue of fact exists here.[5] As in *Dennis*,

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[4] The Club might respond by arguing that this issue has not been preserved for appellate review. To the contrary: (a) the question of whether the Club's documents create an illegal contract has been part of these disputes since 2012; furthermore, (b) the question of whether the Club's documents have been properly amended—having the result of creating a perpetual obligation—has also been at the forefront of this litigation since its inception.

[5] This issue was preserved and argued by Appellants, including pleading it as an affirmative defense (R. pp. 86–87, violation of S.C. Code § 33-31-610 *et seq.*); in their motions before the trial court (R p. 335: "The Defendant was denied the opportunity to concede his membership offered to other similarly situated members."), R. p. 333 ("In addition, the Defendant presented evidence that concessions were allowed in numerous circumstances which clearly violate the rights of the Defendant who has not been 'allowed' to concede his membership where others of the same class of membership have been."); in their Brief of Appellant at p. 2 (citing § 33-31-610), p. 5 (discussing expulsion of other members, but not Appellants), p. 17 (discussing expulsion of other members, but not Appellants), p. 25 (discussing Club's practice of expelling other members, but not Appellants), p. 26 (discussing testimony about the Club allowing other members to concede their memberships), p. 40 (citing § 33-31-610 "disparate treatment of members"), p. 42 (discussing the Club's roster of conceded members on which Appellants relied), p. 45 (arguing "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

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the Record here includes examples of the Club allowing some members to concede[6] their memberships and end all financial obligations to the Club, including concession letters from the Club (R. pp. 1551–1564), the Club's resale list, which identifies members who conceded their memberships, as well as members who were expelled, (R. pp. 510–511, 1548–1549), and deposition testimony from a former board member (R. p. 466, lines 3–5). Yet, the Appellants were not permitted to concede their memberships, and the Club contends that—although Appellants were suspended—they were not expelled like other members.

This is a "live by the sword, die by the sword" moment: if the Club's governing documents are to be strictly enforced against the Appellants, then the Club is also bound to adhere to their terms and to apply them consistently to its membership. The evidence in the Record of disparate treatment defies the mutuality of the parties' contract, and it flies in the face of the Nonprofit Corporation Act's definition that members' "rights are considered the same if they are determined by a formula **applied uniformly**." S.C. Code § 33-31-140 (emphasis added). In its *Dennis* ruling, this Court relied upon similar evidence of the Club's unequal application of its rules to its members, and it properly remanded for trial on the question. Under the law of South Carolina, the same facts compel the same disposition here; accordingly, this Court should remand Appellants' cases for a jury trial on Appellants' breach of contract and Nonprofit Act counterclaims.

[Appellants]"); and in the Reply Brief of Appellant, at p. 12 (discussing the Club allowing other members to concede their memberships, but not Appellants).

6 This argument applies equally to the Club's selective expulsion of some members, but not others such as Appellants.

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III. This Court errs in the Opinion's section on Disregarding Evidence.

This Court overlooks that the disputed facts in evidence made summary judgment improper. Affirmance of the circuit court's flawed order, which contains numerous errors of fact and law, is simply not just.

A. Contract and Governing Documents

The Opinion holds that the Appellants' obligations to the previous Island Club transferred to this Club. As a threshold matter, this Court overlooks that the Club's governing documents—particularly their provisions on liability, resignation, termination, and expulsion (which have been manipulated by the Club over the years to create a permanent payment obligation)—are against public policy. Furthermore, its current Opinion mistakenly applies the *wrong provisions* of the contract to the Appellants. Finally, the Court misapprehends that questions of fact exist as to whether the documents have been unlawfully amended and disparately enforced.

1. Resignation vs. Expulsion

This Court disregards the key detail that, with regard to exit paths, Appellants' cases are different from the *Dennis* case. The trial court's orders in Appellants' cases were written by a different circuit court judge (from *Dennis*), at a different time, and involving different factual and contractual issues. One of those different issues is Appellants' means of disassociation from the Club—in *Dennis*, the issue before the Supreme Court was the scope of the Dennises' obligations under the **resignation** provisions of the Club documents; here, the separate issue is the scope of the Appellants' obligations under the

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distinctly different suspension and **expulsion** provisions.[7] Yet the Opinion's section on the "Governing Documents" (§ I.B) improperly analyzes the Appellants' cases under the resignation provisions, rather than the expulsion provisions. In so doing, the Opinion misreads and fails to give meaning to the plain terms of the Club's governing documents.

a. Resignation is different from expulsion at issue here.

The Club's governing documents are clear that expulsion is distinct from resignation, with different procedures and legal ramifications. Under the governing documents, "expulsion" severs a member's relationship with the Club, and it ends a person's obligations to the Club. The bylaws 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. 1303 (B-11, § 8(b)); *see also* R. p. 1449 (2008 Plan, § 3.4(b), identifying "expulsion" as a way in which a "person shall cease to be an Equity Member.")). Even the 2009 Rules recognize that expulsion ends membership:

> 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 have the obligation to surrender his or her membership certificate for reissuance by the Club to a new member.

(R. p. 1512).

Similarly, the dissenting Supreme Court justices emphasized that expulsion ends membership:

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[7] Appellants' briefs are clear that the exit path at issue in their cases was expulsion, not resignation: "[Expulsion] is the exit method that applies to Mark Quinn" and "Under these terms and circumstances, Mark Quinn was expelled in or about May of 2010, if not earlier. He has been barred from the Club since then. . . ." Quinn, *Brief of Appellant*, Aug. 27, 2015, at pp. 5, 6. The same argument was made in the briefs of Martin and Frey, on the same pages.

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> Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so "shall be expelled from the Club," **ending their liability for future dues**.

425 S.C. at 677, 821 S.E.2d at 213 (emphasis added). That is different from resignation, under which a membership endures, and the resigned person may use the facilities until the membership is reissued to a new member of the Club's choice. *See* R. p. 1453 (2008 Plan, p. 12, § 5.11).

Therefore, the Opinion's error in focusing on resignation rather than expulsion carries significant weight, under the terms of the contract itself. Because the suspension and expulsion provisions apply here, there are issues of fact as to whether Appellants were expelled, when they were expelled, and the amount of money owed at expulsion, if any.[8]

b. This Court mistakenly applies the *Dennis* Opinion's conclusion on resignation to the expulsion at issue here.

In *Dennis*, the Supreme Court majority admonished that:

> In response to the "logical end" argument [by the Supreme Court dissent], we point out that—as in all cases before this Court—we decide only the issues before us in *this* case. **The "logical end" of our analysis goes no further** than required by the four corners of the governing documents **in this case when applied to the facts of this case**. . . .

425 S.C. at 202, 821 S.E.2d at 672 (italics in original; bolding added). The Supreme Court was clear that the *Dennis* facts and Opinion do not reach the expulsion issue:

> This provision makes it clear that **mandatory expulsion arises only after the board has suspended a member**, which is discretionary with the board.

---

[8] The *Dennis* Opinion rules that parol evidence cannot be admitted with regard to certain unambiguous provisions of the governing documents (specifically, § 5.11). However, that Opinion does not appear to prohibit referring to testimony relating to the Club's other practices, which raises an issue of fact, as set forth in the previous briefing which is incorporated herein.

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> Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered.

Id., 425 S.C. at 673, 821 S.E.2d at 204 (emphasis added). However, this Court's Opinion's first point under Governing Documents (§ I.B.1) mistakenly addresses a "resignation" of Appellants, and concludes that "Because the governing documents at issue in *Dennis* are the same documents at issue in the instant cases, we affirm the grant of summary judgment to the Club on its claims against Appellants." Op. p. 8. This reasoning mixes legal apples (resignation) and oranges (expulsion), and it defies the direct instruction of the Supreme Court. The Opinion therefore should be corrected and the case remanded for trial.

c. S.C. Code Ann. § 33-31-620 applies only to resignation, not to expulsion at issue here.

The Opinion's error also is significant because, by erroneously applying the resignation provisions of the governing documents here, the Opinion mistakenly relies on portions of the Nonprofit Corporation Act that apply only to resignation (not to expulsion). A large part of the *Dennis* decision focuses on statutory language that "A member may **resign** at any time." S.C. Code § 33-31-620(a) (2006) (emphasis added). Based on the this Court's mistaken understanding that this is a resignation case, the Opinion concludes that (based on *Dennis*) this Court has "no choice but to hold the requirement that members continue to pay dues, fees, and other charges **after resignation** until their membership is reissued is not prohibited by the Act [§ 33-31-620]." Op. p. 12 (emphasis added). But, again, this is not a resignation case; it involves Appellants'

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suspension (which is undisputed)[9] and their expulsion, which the documents state should have followed automatically, after four months' suspension. This is a different exit path from resignation, governed by different document provisions and law.

2. Expulsion

When the Opinion (§ I.B.2) does turn to expulsion, it acknowledges that Appellants were suspended, and that the Club's governing documents require expulsion after four months of suspension. That alone should mandate a ruling in favor of Appellants based on the Supreme Court's statement that "**mandatory expulsion arises only after the board has suspended a member.**" *Dennis*, 425 S.C. at 673, 821 S.E.2d at 204 (emphasis added).

The Opinion goes on to correctly identify testimony and evidence that properly should create a question of fact as to the Club's application of its expulsion provisions, such as the testimony of Ellen Padgett, the affidavit of Jeff Spencer, and the list of suspended members that includes Appellants—but it finds that it need not consider these facts because the Rules were revised in 2007 to remove the mandatory expulsion language. Op. pp. 9–10.[10] A jury trial on this issue is appropriate because, as set forth

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9 *See* R. pp. 1548, 1567.

10 Additionally, even later versions of the Club documents expressly state that a member may be suspended only for a period of up to one (1) year. By specifying a one-year term maximum for suspension, even the amended documents specifically contemplate that the member automatically is expelled after one year. (R. p. 1512: 2009 Rules: "14.1.3. Suspension. The Board of Directors may suspend a member and his or her family or guests from some or all Club privileges for a period of up to one (1) year. Dues and other obligations shall accrue during such suspension and shall be paid in full before reinstatement to full privileges.").

Even if, assuming *arguendo*, this Court were to hold that the Club properly amended the expulsion provision ("shall" to "may"), the Appellants' uncontroverted suspension status for a one-year period sent them to expulsion from the Club. There is no evidence in the Record that the Appellants paid in full during suspension (or paid at all), and thus they were not reinstated

below, questions exist as to whether the 2007 Rules were invalidly amended.[11] The Court's reasoning in this regard must be reconsidered.

3. Amendment

Relying on a passage from the most lowly of the governing documents, the Opinion inexplicably reverses this Court's previous holding that questions of fact exist as to whether the documents were properly amended.[12] In so doing, the Opinion overlooks that: (a) the effect of the amendments to the documents was to render the contract void as against public policy; (b) a question of fact exists as to whether the procedure for amendment was illegal; (c) a question of fact exists as to whether the amendments were in violation of superior provisions which should have operated to prevent them.

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as members under 2009 Rule 14.1.3. As such, the only allowable path for Appellants post-suspension—in accordance with the Club's own governing documents—is expulsion.

[11] Importantly, the circuit court's order (which is before this Court on appeal) erroneously and inappropriately cites Club Rules from 2014 in support of its holding that an expelled member would be liable to the Club for ongoing dues. (R. pp. 6-7). As previously argued, this Court should reverse the circuit court's holding because the provision cited by the order: (1) appeared for the first time in the rules *after the Club filed its lawsuits against Appellants*, (2) was not applicable to the Appellants, and (3) was the product of an invalid unilateral amendment procedure by the Club. *See* App. Br. pp. 31-32.

[12] This Court previously held, properly, that:

> [Appellant] contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club . . . [Appellant] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Appellant], there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of [Appellant's] suspension from the club.

(Unpublished Op. No. 2018-UP-180 at p. 6) (citing *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof)).

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a. If the Amendments were indeed properly made (which is disputed), their result was to render the contract illegal.

At the outset, it is worth noting that the Appellants did not enter into a perpetual contract with indefinite liability. The contract by which they agreed to be bound had a finite term, mandatory provisions for exit by expulsion, and it clearly limited liability to the amount of equity contribution. The contract **became illegal over time** because the Club unilaterally amended its provisions. The Appellants seek either an outright ruling from this Court that those amendments were invalid as a matter of law, or (at a minimum) that questions of fact exist for the jury as to whether the amendments were made in compliance with the law and enforced by the Club uniformly.

b. Evidence exists that the amendment of the Rules was unlawful.

In its analysis of whether the Rules were properly modified by the Club, which relies on a single provision found within the Rules themselves, the Opinion fails to take into account that **all of the governing documents are subservient to the law, which overshadows the documents' own hierarchy**. *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751, 756 (2007) ("[I]t is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract."). The law expressly prevents the Club from making the changes that it did, without a vote of the members.

Importantly, regardless of the moniker that the Club attaches to them, be it "Plan," or "Rules," or "Terms of Indenture," all of the Club's governing documents are actually

"Bylaws" as defined by the law of South Carolina. Specifically, the Nonprofit Corporation Act clearly sets forth in its Definitions:

> (4) "Bylaws" means the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation **irrespective of the name or names by which the rules are designated.**

S.C. Code § 33-31-140 (emphasis added). Thus, pursuant to the law of this state, the Club's "Rules" are truly corporation "Bylaws," and they are bound by the law's explicit requirements for their amendment.

This Court's Opinion overlooks that the Club ran afoul of the law when it amended its Rules, in secret, to change language that affected the rights of its members, including members' legal and financial obligations to the Club. South Carolina law puts the following limitations on the amendment of a nonprofit corporation's governing documents (*i.e.*, bylaws):

- "Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member." S.C. Code § 33-31-611.
- "A notice of a meeting for members at which bylaws are to be adopted, amended, or repealed shall state that the purpose, or one of the purposes, of the meeting is to consider the adoption, amendment, or repeal of bylaws and contain or be accompanied by a copy or summary of the proposal." S.C. Code § 33-31-1021.
- "Unless otherwise provided in the articles, an amendment to the bylaws which relates solely to the dues required for membership and which establishes or

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changes an amount for, or method of computation of, dues, must be approved by the members." S.C. Code § 33-31-1021.

As the Appellants have contended throughout the years of this litigation, a question of fact exists as to whether the Club provided the required notice, or sought the required membership approval, prior to stealthily amending the Rules (which are actually "bylaws") to affect the substantive rights and obligations of certain members of the Club. There is no evidence whatsoever within the Record of such notice or vote; in fact, the Opinion overlooks evidence to the contrary.[13] Importantly, if the amendments were invalid, it follows that the Appellants did not make a commitment to pay dues and fees in perpetuity.

Because the Club, as a matter of law, could not have unilaterally amended the documents to affect the substantive rights, the transfer rights, nor the liability of members, this Court's Opinion overlooks that a question of fact exists as to whether the process by which it altered the Rules violated the law.

c. Evidence exists that the Rules' amendments were in violation of superior provisions which should have operated to prevent them.

Additionally, the Opinion overlooks that the Club's documents themselves expressly prohibit the Club from secretly affecting the substantive rights and obligations

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[13] This Court had already concluded that such evidence exists. (*See* Op. No. 2018-UP-180 at p. 6: "[Appellant] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Appellant], there is a genuine issue of material fact regarding whether the governing documents were improperly changed.") It is unclear, to the Appellants, why this Court would have so radically reversed its previous holding in this regard.

of its members. The Opinion fails to contemplate the import of the very language that it cites in support of its decision. It quotes two sentences from the 2007 and 2009 Rules:

> [t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. **Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships.**

Op. p. 10 (emphasis added). The first quoted sentence indeed seems to permit certain amendment of the Rules by the Club board. However, the Club board's authority is clearly restricted by the second sentence, which indisputably subjects any such modification to the requirements of the higher governing documents.

The Opinion errs when it overlooks the fact that the higher-level governing documents require a vote of membership for "[a]ny amendment or modification" which materially and adversely affects the rights of the equity members.

The hierarchy of the Club's governing documents is that the Plan is supreme, the By-laws are next, and the Rules are the lowliest. The provisions of the Club Rules that the board is entitled to modify are those that pertain to day-to-day items such as hours of operation, pets in the pool area, golf tee times, clubhouse dress attire, dining room reservations, and "bona fide swimming attire." (*See, e.g.*, R. pp. 1313, 1316–1320). These standard operational issues within the Rules do not require a full vote of membership, which would be cumbersome to affect (from a practical standpoint) each time the Board experienced a change of heart on "cutoffs, dungarees, and bermudas." (R. p. 1318, ¶ 8). A vote is not required as to when the golf course "may be used by Juniors under thirteen

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years of age" because that change does not affect a fundamental modification of the legal rights and financial obligations of members.

But the Plan—to which the Rules are subject—governs the documents' provisions regarding the fundamental legal rights of members and the transfer of memberships. The Plan has always required a vote of members for important issues:

> **Any** amendment or **modification** which **materially and adversely affects the rights of the equity members** must be approved by a majority of the votes held by the equity members so affected.

(R. p. 1272) (emphasis added). The Bylaws explicitly state that *the Plan* applies to "Membership transfer provisions," which are at issue here (*inter alia*). (R. p. 1486, § 10.1(e)).

Similarly, the suspension and expulsion of members is governed by the Bylaws, which may only be amended by a vote of the members.[14] (R. p. 489: Bylaws Art. XIV, § 3 "Suspension"; § 5, "Expulsion"). The Bylaws state that equity membership certificates are not transferrable except as provided in the Bylaws. (R. p. 486 § 10.a).

The issues in this lawsuit—and the dozens of other similar lawsuits the Club is ravenously pursuing against its members—involve modifications of the fundamental

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[14] The By-laws provide that a vote of the members is required for amendments:

> After the Closing Date, these By-Laws may be altered, amended, or repealed by a majority vote of all of the members of the Board of Directors and a majority of the votes cast by the equity members of the Club entitled to vote, in person or by proxy, at any duly called or constituted annual or special meeting of the equity members of the Club at which a quorum of equity members is present. A proposed amendment must be set forth in the notice of the meeting.

(R. p. 491).

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legal rights and obligations of equity members. Modifications to the exit rights of equity members certainly "materially and adversely affect[ ] the rights of the equity members" and require a vote of the members, as do modifications to the provisions governing a member's liability to the Club upon disassociation. Such fundamental terms cannot be simply inserted into the Rules, disseminated to the members, put into practice by the Club, and then unilaterally changed by the Club's board; instead those provisions are expressly subject to and must follow the amendment process of the controlling governing documents, such as the Plan and the Bylaws. As the Supreme Court stated, "The three documents reference each other and are intended to operate together." *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670.

That the Club's board has tucked certain provisions in the Rules—and quietly massaged them over the years into something grotesque—does not change the fact that the process for modification of members' legal transfer rights is "**subject to and controlled by**" the amendment provisions of the higher-level documents (Plan and Bylaws). In contract terms, the Opinion's ruling on this point allows one party (the Club) to unilaterally change material terms of a contract (the membership agreement, bylaws, and rules) without consent of, or consultation with, the other party to the contract (the Appellants, and scores of other members). Such a "contract" is no contract at all—it is servitude. As the facts of this and many other Callawassie cases show, that servitude has become never-ending if the Club's interpretation is allowed.

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Accordingly, the Appellants respectfully submit that the Opinion errs when it holds the Rules' amendment provision prevails over the amendment provisions of the Plan and the By-laws.

B. Nonprofit Corporation Act

The Opinion mistakenly distills Appellants' arguments on the Nonprofit Corporation Act into a single line-item on resignation, and it incorrectly concludes that it must affirm based on the Supreme Court's decision in *Dennis*, which ruled only on the application of S.C. Code § 33-31-620. This limited holding in the Opinion improperly disregards that Appellants also argued that there was a question of fact as to whether the Club violated the Act by improperly amending the governing documents (*see supra*) and disparately enforcing the governing documents.[15]

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[15] *See Brief of Appellant*, p. 11, fn. 2 ("In the alternative, even if the alleged contract was unambiguous, [Appellant] is still entitled to a trial on disputed issues of fact, such as . . . whether the Club may allow certain members to concede their memberships back to the Club, but deny that right to other members such as [Appellant]"); p. 15 ("Ellen Padgett . . . testified that after four months of non-payment, members would be expelled"); p. 17 ("Documents produced by the Club show that certain members were automatically suspended and then expelled. Although not consistent in its procedures, the Club 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 . . . .'" (citing R. p. 1549, showing at least 15 expelled and numerous conceded members and R. pp. 1562–63); p. 25 ("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 . . . "); *Reply Brief of Appellant*, p. 12 ("After 2001 and during [Appellants'] membership, the Club maintained a roster of certain members who had 'conceded' their membership obligation as a means of exiting the Club . . . .").

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IV. Damages/Attorney's Fees

A. Damages

In affirming the circuit court's award of damages, the Opinion fails to take into account the Appellants' argument on set-off. Moreover, it overlooks that the documents were improperly amended to alter a member's ultimate liability.[16]

1. Any amount of damages awarded at trial should be offset by the amount of the Appellants' membership contribution.

Notwithstanding the question of amendment, the Opinion mistakenly disregards the Appellants' argument that the terms of the documents entitle them to a set-off in the amount of their equity contribution, as against any damages awarded.[17] This is incongruous, particularly since the Court cites the 2008 Plan and observes that "this provision provides unpaid dues **will be deducted from** the amount paid for the equity membership . . .". Op. p. 13 (emphasis added). Accordingly, the Opinion should be withdrawn and substituted with an opinion that finds that any damages awarded to the Club should be offset by Appellants' membership contribution, which has already been paid. To do otherwise would allow the Club an improper windfall.

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16 For the reasons stated herein, and in the previous briefing, Appellants specifically assert and preserve their arguments that any damages are limited, or capped, at the amount of Appellants' equity contributions.

17 *See, e.g., Brief of Appellant* at pp. 13, 17–20, p. 20 fn. 9 ("Alternatively, the Order incorrectly failed to allow Mark Quinn a credit of $26,000 for his equity contribution, toward the judgment amount [because the] documents specify that unpaid dues are to be 'deducted from' a member's equity in the Club."), p. 41; *Reply Brief of Appellant* at pp. 8–9, pp. 15–16; *Supplemental Brief of Appellant* at p. 10.

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2. The question of liability is inextricably linked to the question of amendment.

The Opinion fails to take into account that a question of fact exists as to whether the governing documents were improperly amended by the Club to affect a member's liability. Throwing its hands up in the air on the question, the Opinion notes that the documents seemingly "neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership." Op. p. 13, fn. 2. The Court goes on to describe this lack of clarity as an "apparent ambiguity." *Id.* Appellants respectfully suggest that one reason that the documents appear ambiguous **is because they have been improperly amended over time**. Given that the Club drafted the documents, and subsequently modified them, South Carolina law requires that they be construed against the Club and in favor of a trial on the issue.

As set forth in Section III, above, the Nonprofit Corporation Act forbids amendment to bylaws affecting the computation of dues without membership approval. S.C. Code § 33-31-1021. The Act also requires notice to members in advance of the amendment of bylaws. S.C. Code § 33-31-1021. The governing documents themselves prohibit amendments which "materially and adversely affect the rights of the equity members" without their approval. (R. p. 1272). As this Court at one time correctly ruled, the Appellants submitted more than a scintilla of evidence in support of their argument that the Club illegitimately amended its own documents in a manner which materially and adversely affected their rights and obligations. Op. No. 2018-UP-180 at p. 6; *see, e.g.*, R. pp. 244–245, Affidavit of Mark Quinn, ¶¶ 4–8.

A question of fact exists as to whether the Club improperly amended its documents in order to alter the Appellants' liability to the Club.[18] Accordingly, the circuit court's decision should be reversed to allow a jury to determine the appropriate measure of damages.

B. The Opinion overlooks that the question of attorney's fees was raised to and ruled upon by the circuit court.

The Opinion's determination on issue preservation mistakenly assumes that the question of attorney's fees was raised for the first time in Appellants' motion to reconsider. In fact, the question of the validity of the Club's claim for attorney's fees was

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[18] There can be no dispute that the provisions governing liability *have* been changed through the years. Compare these sections, for example, and note the intentional removal of material terms like "accrue against":

- An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club. **These dues will accrue against and be deducted from** the amount to be paid to the resigned member upon reissuance of his or her resigned membership.

  R. p. 1264 (emphasis added) (1994 Plan).

- An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees, and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club. Any unpaid dues, fees, and other Charges . . . will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.

  R. pp. 1452–1453 (2008 Plan) (removing the material term "accrue against," *inter alia*).

- Any equity member may resign from the Club by giving written notice to the Secretary. **Dues, fees and charges shall accrue against a resigned equity membership** until the resigned equity membership is reissued by the Club.

  R. p. 1303 (1994 Bylaws) (emphasis added)

  Note that this entire provision has been removed from the 2009 Amended and Restated Bylaws. (R. pp. 1489–1497).

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first raised by Appellants in their Answer, where they denied that the Club was entitled to the relief it sought. (R. p. 34). The Club's argument for summary judgment was grounded in its contention that it was entitled to relief based on the contract between the parties. The Club never actually cited nor argued the particular contractual provisions pursuant to which it claimed to be entitled to attorney's fees—it just made the broad claim that it was entitled to them. It is neither logical nor just that Appellants would have been required to argue *against* attorney's fees any more specifically that the Club was required to argue *in favor* of them. In fact, the circuit court's initial order granting summary judgment did not even cite any provision within the governing documents in support of its award of attorney's fees. (R. pp. 4–11). The purpose of a Rule 59 motion to reconsider is to obtain a ruling from the circuit court when it has failed to make one.

At the hearing on Appellants' Motion to Reconsider, Judge Kinard was particularly interested in the question of attorney's fees. *See, e.g.*, R. p. 1245 (Judge Kinard: "So I don't know about that. So just draft me an order confirming what I ruled before and address the attorney's fees. . . . And I am not ruling on that because I haven't studied that issue. I haven't studied that issue. . . ."). He requested that the parties provide supplemental briefing on the issue, which the Appellants submitted—and to which the Club did not object. (R. p. 265). After considering the supplemental briefing, the circuit court made a ruling on the question of attorney's fees. (R. p. 13). The Opinion overlooks that it is that particular ruling that is now properly before the Court on appeal.

The procedural fact that the circuit court indeed made a ruling on the question sufficiently establishes this Court's jurisdiction to review the judge's decision. *See Roche*

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v. S.C. Alcholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E. 2d 243 (1975) (explaining that the purpose of an appeal is to determine whether the trial judge acted erroneously); *see also I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (noting that "the long-established preservation requirement [is that] the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments . . . [which] enable[s] the lower court to rule properly after it has considered all relevant facts, law, and arguments."). Our Supreme Court "has cautioned that issue preservation 'is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants.'" *Johnson v. Roberts*, 812 S.E.2d 207, 422 S.C. 406, 412 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019), *quoting Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Further, "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Atl. Coast Builders & Contractors, LLC* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part).

For the reasons set forth in Appellants' briefs, the circuit court's decision on the question of attorney's fees was improper and should be reversed.

V. Counterclaims and Defenses

A. Breach of Contract

For numerous reasons, many of which have been detailed above, the Opinion is wrong to affirm the circuit court's grant of summary judgment to the Club on Appellants' breach of contract counterclaims. First, the Club's unilateral amendment of the contract—which amendment was unlawful, contractually void, and procedurally

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invalid—would itself constitute a breach of contract. Second, the questions of fact about the validity of the amendments (and the resulting uncertainty as to what terms apply) pertain as equally to the Appellants' counterclaims as they do to the Club's underlying breach of contract claim. Third, the evidence in the Record of the Club's disparate application of the terms of the governing documents to different members raises questions as to whether Club breached the contract by applying it unequally to its members—who were all to be treated the same under the terms of the contract and the umbrella of the Nonprofit Corporations Act. For these reasons, the Opinion should be withdrawn and substituted with a decision that returns the Appellants' cases to circuit court for trial on their breach of contract counterclaims.

B. Negligent Misrepresentation

The Opinion is mistaken in its analysis of the Appellants' misrepresentation claim. It correctly quotes the law, which is that "the plaintiff must show 'the defendant made a *false* representation *to the plaintiff*,'" but it goes on to misconstrue the law's application to the facts in the Record. Op. pp. 14–15, *citing Sauner v. Pub. Serv. Auth of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (emphasis added by Court in its Opinion).

Here, the Appellants are claiming that the Club's representations were the provisions of it governing documents, including the Rules, which supplied clear terms for various exit paths from membership (which governing documents should have been provided *to the Appellants*), together with the reassurances of its membership director *to the Appellants*, coupled with the Club's practice of publishing *to its membership* (including *to the Appellants*) its list of suspended, conceded, and expelled members. These

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representations basically represented to Appellants: "Hey. No worries if you don't want to be a member of the Club anymore. You can be suspended and expelled, and you won't need to pay dues anymore. It's easy. Just look at all these other folks who we've let out. **You'll be treated the same.**" Clearly, these representations were as false as this brief is long. If the Club's documents, and its broadcast practice of allowing members to conclude their liability by concession/termination/suspension/expulsion were actually true, then we all could have gone home and put our feet up, years ago.

At the very least (which is all that is required to deny summary judgment), this Court overlooks that Appellants raised a scintilla of evidence as to the falsity of the Club's statements regarding concession, termination, suspension, and expulsion, which evidence should have defeated summary judgment on the misrepresentation counterclaim. *See Breedin v. Smith*, 126 S.C. 346, 120 S.E. 64 (1923) ("the falsity of the alleged representations upon which they acted, was a question of fact for determination by the triors of fact under proper instructions of the court"); *Midland Mutual Life Ins. Co. v. Harrell*, 331 S.C. 394, 503 S.E.2d 189 (Ct. App. 1998) (stating that the truth or falsity of the representation is a question of fact for trial where evidence is presented to that effect).

C. Quinn's and Frey's Section 33-31-621(d) Issue

The Opinion rules that the statute of limitation issue was not preserved. (Op. p. 15). As discussed in Section III.B, above, "where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 333, 730 S.E.2d at 287. Here, Appellants repeatedly plead both statute of limitations and § 33-31-621 in their pleadings. (*See, e.g.*,

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R. pp. 51, 52, 59, 82, 83, 87). When the trial court did not explicitly address the statute of limitations issue in its order, Appellants properly requested a ruling in their Motion to Reconsider under Rule 59.[19] (R. p. 338: "In its Order the Court fails to rule on the Defendant's statute of limitations argument and the limitations on damages argument and rulings thereon are requested."). In their Brief of Appellant, Appellants argued that the Club's claim was time-barred, including under § 33-31-621. *See, e.g.*, Br. of App. pp. 40–41 ("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."). Mindful that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants,"[20] Appellants respectfully submit that this issue was preserved, and that the Club's claims are time-barred for the reasons articulated in their previous briefing, which is incorporated herein.

VI. Discovery

In light of this Court's decision in *Dennis*, which remanded that case for trial on the question of the Club's disparate treatment of its members, this Court should reconsider and reverse its decision on discovery in Appellants' appeal. *See* Opinion No. 5696 ("[W]e find a genuine issue of fact exists as to whether the Club violated the Nonprofit Corporation Act by allowing some members to concede their memberships

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19 "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." *Pye v. Est. of Fox*, 336 S.C. 1, 4, 633 S.E.2d 505, 510 (S.C. 2006) (internal quotations and citations omitted).

20 *Johnson*, 812 S.E.2d 207, 422 S.C. at 412 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019) (internal quotations and citations omitted).

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and not others."); *see also* Brief of Appellant, pp. 44-46 ("The furtherance and completion of discovery is essential to the [Appellants'] defense of the Club's claims, and in support of the [Appellants'] 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 [Appellants]) . . . .").

The Court's Opinion in this case notes that the circuit court's holding on discovery was based on its finding that the governing documents are unambiguous. However, this analysis overlooks the questions of fact raised by Appellants in their defenses and counterclaims, including the question of whether the Club failed to uniformly apply its governing documents to the members, in practice. The depositions that the Appellants sought to take pertained to factual issues **outside of** the terms of the documents, such as the Club's differential treatment in conceding and expelling some members without further financial obligation, but not others (such as the Appellants) (without any heed to what documents might have to say on the matter), as well as the question of what procedure (if any) that the Board might have used when it amended the Rules to alter the rights and obligations of its captive members.

The Court misapprehends that ongoing discovery on Appellants' pending counterclaims and defenses should have rendered summary judgment premature. Because the Appellants have already submitted Brobdingnagian evidence on the questions of whether the documents were amended improperly and applied disparately, those issues should be remanded for trial and further discovery permitted.

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VII. This Court's recognition of apparent ambiguity in the governing documents is grounds for trial.

This Court misapprehends that the Court is only legally authorized to interpret unambiguous contracts. The Opinion candidly observes:

> The governing documents neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership. This **apparent ambiguity**, if read to authorize the collection of dues, could require club members to pay dues in perpetuity.

Op. p. 13, fn. 2. When it goes on to make a ruling on documents that it finds to be ambiguous, the Court overlooks that it is invading the purview of the jury.

The Supreme Court in *Dennis* had before it only certain provisions, pertaining to resignation. It found those specific provisions to be unambiguous. However, the Supreme Court was not entirely clear as to whether was holding the entire contract to be unambiguous, or simply the limited provisions before it.[21] The Appellants have requested a jury trial for determination of the facts, and they have been arguing all along that the Club's documents, either because of their muddy "amendment" process, or their conflicting provisions, or their stark contrast with the Nonprofit Act, are ambiguous. If this Court agrees that the provisions on liability (which it has mistakenly interpreted to be perpetual—in violation of public policy) are ambiguous, then the Opinion misapprehends the law by failing to remand the matter for trial.

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[21] Since the Supreme Court had before it in the *Dennis* Record on Appeal only an incomplete smattering of the governing documents, and because the issue was not even before it on appeal, it seems very unlikely that Court could have made such a broad ruling, which would pertain to documents it had not even examined.

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VIII. Previous Points Preserved

To the extent not specifically discussed above, Appellants incorporate herein all of their previous briefs to this Court, so as to preserve for appellate review any undecided issues.

IX. Mmes. Martin, Frey, and Quinn

This Court's Opinion states that Appellants "and their wives" became members of the Club, and makes numerous statements about Appellants' wives in the "Facts" section. Op. pp. 4–6. Appellants anticipate that, with regard to the Club's claims against Rebecca L. Martin, Grace I. Frey, and Sherry B. Quinn still pending in the trial court, the Club will point to those statements as appellate determination of certain facts or legal matters related to Mmes. Martin, Frey, and Quinn, despite the fact that they are not appellants here. Appellants respectfully request that the Opinion clarify that this Court is not adjudicating any facts or legal conclusions specific to Mmes. Martin, Frey, and Quinn, to avoid confusion later in the lower court.

CONCLUSION

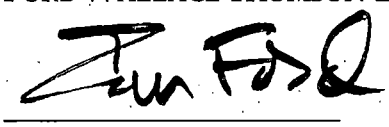
This Court should not uphold the contract at issue. The Opinion overlooks that questions of fact exist as to the validity of the Club's changes to the contract, the legality of the contract's increasingly perpetual nature, and the nonuniform manner in which the Club applied its ever-morphing provisions to its membership. The circuit court improperly disregarded evidence of those questions of fact; its order is erroneous, and it should be reversed.

- Appendix 2110 -

For the reasons set forth above, Appellants respectfully submit that this Court should withdraw its Opinion No. 2019-UP-393 and remand the Appellants' cases for trial by jury.

Respectfully submitted,

FORD WALLACE THOMSON LLC



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Attorneys for Appellants

January 30, 2020

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JAN 31 2020
SC Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001
Lower Court Case Nos. 2012-CP-07-03209, 2012-CP-07-03216, 2012-CP-07-03218

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants

Of whom
Gregory L. Martin, Michael J. Frey, and Mark K. Quinn
are the Appellants

CERTIFICATE OF SERVICE

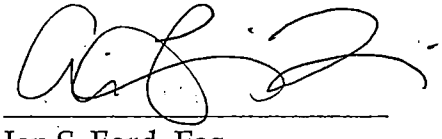
I certify that I have served the *Appellants' Petition for Rehearing* on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on January 30, 2020, addressed to their attorneys of record:

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ATTORNEYS AT LAW

January 30, 2020

VIA FEDERAL EXPRESS; OVERNIGHT DELIVERY

The Honorable Jenny Abbot Kitchings
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
JAN 31 2020
SC Court of Appeals

Re: *The Callawassie Island Members Club Inc. vs. Gregory L. Martin and Rebecca L. Martin*
The Calllawassie Island Members Club Inc. vs. Michael J. Frey and Grace I. Frey
The Callawassie Island Members Club Inc. vs. Mark K. Quinn and Sherry B. Quinn
SC Court of Appeals Case No.: 2015-000001

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of the Appellants' Petition for Rehearing, along with the filing fee and Certificate of of Service in the above-referenced matters.

Thank you in advance for your assistance with this matter. Should you have any questions or concerns, please do not hesitate to contact my office.

With kind regards, I am,

Very truly yours,

Ainsley F. Tillman
Ian S. Ford
Neil D. Thomson

AFT/ja
Enc. – as stated

cc: All Counsel of Record

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2015-000001

RECEIVED
FEB 13 2020
SC Court of Appeals

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

v.

Gregory L. Martin and Rebecca L. Martin, ... Defendants,

and

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

v.

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

and

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

v.

Mark K. Quinn and Sherry B. Quinn, ... Defendants,

Of whom, Gregory L. Martin, Michael J. Frey, and Mark K. Quinn are the ..... Appellants.

RETURN TO APPELLANTS' PETITION FOR REHEARING

The Appellants Gregory L. Martin, Michael J. Frey, and Mark K. Quinn have petitioned this Court for a rehearing of its recent unpublished opinion in *Callawassie Island Members Club, Inc. v. Martin*, Op. No. 2019-UP-393 (S.C. Ct. App. re-filed December 18, 2019). In response, the Respondent Callawassie Island Members Club, Inc. ("CIMC") submits that this Court properly ruled on all of the issues challenged by the Appellants in their petition for rehearing.

I. Governing Documents are Not an Illegal Contract

As an initial argument in their petition for rehearing, the Appellants make an exaggerated and melodramatic plea for this Court to intervene in the parties' contractual dealings and declare the governing documents to be "illegal," "unconscionable," and against public policy. The Appellants go so far as to ask this Court to issue "a decision that finds the Club's documents and practices to be illegal" and "unenforceable." *See*, Appellants' Petition for Rehearing, p. 4. Remarkably, this is relief that was not even sought in the court below.

Quite clearly, these claims of illegality, unconscionability, and unenforceability were never raised in the trial court and are not properly preserved for appellate review. The orders on appeal do not address such claims. The Appellants did not ask the trial court to declare that the governing documents are "perpetual contracts" that are contrary to public policy or that they are illegal, unconscionable, or otherwise unenforceable. These are arguments made for the

first time on appeal. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). *See also*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal").

This is clear from a review of the Appellants' Amended Answers and Counterclaims where defenses of illegality and unconscionability and unenforceability based on public policy were never affirmatively pled as counterclaims or defenses. In *H.G. Hall Construction Co., Inc. v. J.E.P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (1984), the Supreme Court held that illegality of contract is an affirmative defense. 321 S.E.2d at 271. The Supreme Court declined a request to set aside a verdict because a contract was illegal where the illegality of the contract was not raised as an affirmative defense in the answer. *See also*, Rule 8(c), SCRCP (specifically listing "illegality" as an affirmative defense). Likewise, in *D&D Leasing v. David Lipson, Ph.D. P.A.*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991), this Court ruled that unenforceability of a contractual provision is an affirmative defense. As mentioned, the prayers in the Appellants' Amended Answers and Counterclaims did not seek rescission nor any declaration that the governing documents are illegal, unconscionable, or unenforceable as a "perpetual contract" that is against public policy. Those are

issues that the trial court was not asked to decide. Accordingly, the Appellants should be precluded from now making such arguments for the first time on appeal.

That is particularly true because these arguments are actually being made for the first time *in a petition for rehearing*. The appellate courts have consistently ruled that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322, 322 (2001). *See also*, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

Additionally, and perhaps most importantly, these arguments are in direct contravention of the Supreme Court's decision in the companion case of *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). In *Dennis*, the Supreme Court analyzed the very same "membership arrangement and the membership documents that govern that arrangement" as are at issue in these cases. 821 S.E.2d at 670. The Supreme Court recognized that three documents -- the Bylaws, the Plan, and the Rules -- "govern the membership" and that "[t]he three documents reference each other and are intended to operate together." *Id.* The Supreme Court determined that "[w]hen the Dennises resigned in 2010, the

membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules." *Id.* The Supreme Court also found "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments." *Id.* In reinstating the summary judgment in favor of CIMC, the Supreme Court concluded that the Dennises made a commitment to pay dues, fees, and other charges until the reissuance of their membership and that contractual obligation was binding and legal under the South Carolina Nonprofit Corporation Act. The Appellants, however, are asking this Court, in essence, to disregard the *Dennis* decision which, as this Court has recognized correctly in its opinion, is controlling and dispositive.

In sum, the first issue for rehearing is not timely raised, is not preserved, and is entirely lacking in merit.

II. Disparate Treatment Claim

As their second issue, the Appellants claim that there is a genuine issue of material fact as to whether they were disparately treated in violation of the Nonprofit Corporation Act. They point to this Court's recent decision in the *Dennis* case where this Court ruled that "the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed issue of fact as to the claim that the Club violated the Nonprofit Corporation Act." Opinion No. 5696, at 5. This Court in

Dennis cited to S.C. Code Ann. §§ 33-31-610 and 33-31-611(c) of the Act.[1] Based on *Dennis*, the Appellants ask this Court to "remand Appellants' cases for a jury trial on Appellants' breach of contract and Nonprofit Act counterclaims." *See*, Appellants' Petition for Rehearing, p. 5.

In its opinion in these three cases, this Court did not address the "Appellants' breach of contract and Nonprofit Act counterclaims" based on disparate treatment, and correctly so. As the record reflects, *the Appellants have not brought any such counterclaims*. The Appellants attempted to bring such counterclaims originally, but those counterclaims were dismissed by Judge Carmen T. Mullen in her orders filed April 10, 2014. Judge Mullen dismissed four counterclaims "because the Non-Profit Corporations Act explicitly limits challenges to corporate authority to claims which are asserted derivatively" and "the claims the Defendants attempt to make must be asserted derivatively." (Quinn R. 17-18; Martin R. 6-7; Frey R. 19). That included a counterclaim based on S.C. Code Ann. §§ 33-31-610 and 33-31-611(c). Importantly, the Appellants have not appealed Judge Mullen's orders. The Notices of Appeal filed by the Appellants do not identify Judge Mullen's orders as being appealed.

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[1] CIMC has filed a petition for rehearing on this issue in *Dennis*. Therefore, this Court's decision in *Dennis* is not yet a final one. CIMC relies on and incorporates by reference the arguments made in its petition for rehearing in *Dennis* as additional bases for rejecting the Appellants' claims of disparate treatment in these consolidated cases.

The Appellants were permitted by Judge Mullen's orders to plead a "statutory defense" based on S.C. Code Ann. §§ 33-31-610 and 33-31-611(c). However, that statutory defense was never argued to Judge Ernest Kinard when he heard the motions for summary judgment. (Quinn R. 1187-1218; Martin R. 1183-1215; Frey R. 1205-1237). Likewise, Judge Kinard's orders in the cases do not address the statutory defense. (Quinn R. 4-11; Martin R. 11-18; Frey R. 4-11). Therefore, the issue is not properly preserved for appellate review.

Likewise, in their opening and reply briefs filed in this Court, the Appellants did not argue the statutory defense. There is no mention of the statutory defense in the Statement of Issues on Appeal.[2] There is no specific reference to or discussion of S.C. Code Ann. §§ 33-31-610 and 33-31-611(c) in the Argument sections of those briefs. There is no analysis of those Code sections with applicable case law or other authorities. At best, there may be a passing reference once or twice to some members being allowed to concede their memberships back to CIMC in settlement of a fees dispute. Tellingly, this Court did not address the statutory defense in its first opinion filed May 2, 2018 (now withdrawn) nor in its current re-filed opinion. That is obviously not an oversight but rather a recognition that the

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[2] Rule 208(b)(1)(B), SCACR, requires the statement of issues on appeal to be "concise and direct." In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), the Supreme Court reaffirmed the well-established rule of appellate law that "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." 692 S.E.2d at 903. Likewise, the Court reiterated that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Id.*

statutory defense was not asserted as an issue on appeal. Nonetheless, even if the issue was raised, it has certainly been abandoned. *See*, *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993) ("an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority"); *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (same).

III. Governing Documents

A. Resignation vs. Expulsion

The Appellants claim that this Court failed to properly distinguish between resignation and expulsion. The Dennises resigned from the Club, and as a result, the Appellants attempt to distinguish the *Dennis* decision by claiming that they were expelled. However, there is absolutely no evidence that CIMC Board expelled the Appellants from the Club.

In actuality, each Appellant alleged that he resigned or otherwise tried to force his expulsion from CIMC by non-payment. In his Amended Answer and Counterclaims, Martin sought "a finding that the Defendants obligations to the Club terminated at the time of [his] resignation in November 2011." (Martin R. 60). In later filings, Martin concedes that he "resigned from CIMC." (Martin R.

262). Similarly, in his Second Amended Answer and Counterclaims, Frey alleged that his "membership was terminated as of January 2010 (4 months after delinquency) or in the alternative was resigned as of May 2010." (Frey R. 101). In later filings, Frey also concedes that he "resigned from CIMC." (Frey R. 281). Likewise, in his Amended Answer and Counterclaims, Quinn sought "a finding that [his] membership was resigned as of December 2009." (Quinn R. 52). Later, in the Second Amended Answer and Counterclaims, Quinn pled that "the Defendant's membership was resigned and/or terminated as of December 2009." (Quinn R. 84). In later filings, Quinn also concedes that he "resigned from CIMC." (Quinn R. 265).

Therefore, based on the Appellants' own representations, they were no different from the Dennises in that they resigned their memberships. Nonetheless, it is immaterial whether the Appellants formally resigned or simply stopped making payments to try to force their expulsion. It is clear that each Appellant attempted to end or terminate their membership by non-payment. As the Supreme Court has explained, whether a member resigns his membership or is terminated in some other way, the member remains liable for unpaid dues, fees, and charges until the membership is re-issued.[3]

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[3] The Supreme Court in *Dennis* explained that "even if we were to treat the 'termination' provision and the 'resignation' provision as governing the same event, there is no ambiguity." *Dennis*, 821 S.E.2d at 671. Focusing on the 2009 Rules which applied not only to the Dennises' resignation but also to each of the Appellants' resignations or terminations, the Supreme Court explained as follows: "Any member may terminate membership in the Club. ...

The Nonprofit Corporation Act supports that conclusion. Relying on S.C. Code Ann. § 33-31-620(b), the Supreme Court in *Dennis* ruled that "the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620." *Dennis*, 821 S.E.2d at 673. S.C. Code Ann. § 33-31-620(b) states: "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(b). That language is virtually identical to S.C. Code Ann. § 33-31-621(e), which provides: "A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension." S.C. Code Ann. § 33-31-621(e). S.C. Code Ann. § 33-31-621(e) should be interpreted consistently with the similar language in S.C. Code Ann. § 33-31-620(b) per the Supreme Court's decision in *Dennis*. As a result, a member who is suspended or expelled will still be held liable to pay dues, fees, and other charges after the suspension or expulsion.

Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold." *Id.*

Hence, there is no material difference based upon the type of termination -- the member remains responsible for obligations incurred or commitments made.[4]

In sum, the Appellants attempt to draw a distinction between a resignation and some other type of "termination," but it is a classic distinction without a difference. They argue that S.C. Code Ann. § 33-31-620(b) only applies to a resignation. But, they ignore that S.C. Code Ann. § 33-31-621(e) creates the same liability to pay dues, fees, and other charges after a suspension or expulsion. Additionally, the Appellants try to argue that they did not tender their resignations and thus S.C. Code Ann. § 33-31-620(b) does not apply to them (unlike the Dennises). But, not surprisingly, their pleadings defy them. All three Appellants cite to S.C. Code Ann. § 33-31-620 in their Amended Answers and Counterclaims. But they also cite to S.C. Code Ann. § 33-31-621 in the alternative. (Quinn R. 82-83; Martin R. 83-84; Frey R. 99-100).

Remarkably, the Appellants also continue to press the debunked "mandatory expulsion" argument. The Appellants rely on language in the 2001 Rules stating: "Any member whose account is not settled within the four (4) months period following suspension *shall* be expelled from the Club." (Quinn R. 1335; Martin R.

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[4] The trial court likewise recognized that S.C. Code Ann. § 33-31-621(e) preserves the same liability as S.C. Code Ann. § 33-31-620(b). (Quinn R. 8; Martin R. 15; Frey R. 8) ("Likewise, § 33-31-621 reinforces the notion that members who are terminated or expelled remain liable for obligations, even beyond resignation").

1354; Frey R. 1350). (Emphasis added).[5] However, in 2007, the Rules were properly amended, and the "mandatory expulsion" language was removed. The 2007 Rules state: "Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club." (Quinn R. 1439; Martin R. 1435; Frey R. 1440). (Emphasis added). The 2009 Rules continued to use the same "may be expelled" language. (Quinn R. 1475; Martin R. 1471; Frey R. 1476). Citing that same language, the Supreme Court in *Dennis* explained that "the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition." *Dennis*, 821 S.E.2d at 673.[6] Those same 2009 Rules, as applied to the Appellants, show that expulsion was likewise not mandatory in the 2009-2010 time frame.

B. Amendment of Governing Documents

The Court is correct in ruling that there is no genuine issue of material fact to preclude summary judgment as to whether the governing documents were

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[5] Regrettably, the Appellants insinuate that the Supreme Court in *Dennis* ruled that "mandatory expulsion arises only after the board has suspended a member." *Dennis*, 821 S.E.2d at 204. *See*, Appellants' Petition for Rehearing, p. 10. However, when read in context, it is clear that the Supreme Court was addressing the 2001 Rules which they first point out "were not in effect when the Dennises resigned in 2010." *Id.* Yet, the Court proceeds to say "[e]ven if those rules did apply ...," and then makes the statement taken out of context by the Appellants. The bottom line is that the 2001 Rules do not apply. They do not apply to the Dennises' resignation, and they do not apply to the Appellants' resignations or terminations. As the Supreme Court states in the next sentence, "the 2009 Rules, which were in effect when the Dennises resigned, *do not make expulsion mandatory under any condition.*" *Id.* (Emphasis added).

[6] The Supreme Court also found "there is no ambiguity as to expulsion from the Members Club." *Dennis*, 821 S.E.2d at 673.

properly amended. In *Dennis*, the Supreme Court ruled that "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments." *Dennis*, 821 S.E.2d at 670. By footnote, the Supreme Court cited the provisions in those documents that authorized such amendments:

> The 1994 Bylaws provide the "Bylaws may be altered, amended, or repealed." The 1994 Plan provides the "Plan may be amended in accordance with the Bylaws." Similarly, the 1994 Bylaws provide the board of the Island Club have [sic] the authority to "[a]dopt, alter, amend, or repeal the Rules governing use of the Club."

Id., n.1.

Nevertheless, the Appellants now try to make a new argument for the first time on rehearing to this Court -- an issue that was not even made in their previous briefs or at oral argument. The Appellants argue that the General Club Rules should also be considered "bylaws" based on the definition contained in S.C. Code Ann. § 33-31-140(4), and as "bylaws," the Rules could not be amended except by a vote of the members. This new issue should be rejected on several procedural and substantive bases.

First, as mentioned, this issue has been raised to this Court as a new issue raised for the first time in a petition for rehearing, which is improper. *See*, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review).

Second, this issue was never raised to the trial court and, as a result, cannot be made for the first time on appeal. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). In fact, a review of the record shows that S.C. Code Ann. § 33-31-140(4) and its definition of "bylaws" were never cited in the trial court record nor in any appellate brief previously filed with this Court.

Third, the Appellants are arguing that the amendment of the governing documents made the contract "become illegal over time." *See*, Appellants' Petition for Rehearing, p. 12. However, a review of the Appellants' Amended Answers and Counterclaims shows that they never pled that the contract or the governing documents were illegal. Therefore, they should be precluded from now arguing illegality for the first time on appeal and particularly on rehearing.

Finally, even if the Court considers the merits, the Appellants' new theory fails. Even if the Rules are to be treated as "bylaws," as they now assert, the South Carolina Nonprofit Corporation Act does not preclude an amendment of the Rules without a vote of the members. Under South Carolina law, "[a] corporation can only exercise the powers granted to it by law, its charter or articles of incorporation, and any by-laws made pursuant thereto." *Baumann v. Long Cove Club Owners Assn.*, 380 S.C. 131, 668 S.E.2d 420, 424 (Ct. App. 2008). South Carolina law permits the board of directors of a nonprofit corporation to amend the

bylaws without a vote by the members in most cases. The Nonprofit Corporation Act provides that:

> (a) A corporation's board of directors may amend or repeal the corporation's bylaws unless:
>
> (1) the articles of incorporation or this chapter reserves this power exclusively to the members in whole or part or requires the consent of someone pursuant to Section 33-31-1030; or
>
> (2) the members in adopting, amending, or repealing a particular bylaw provide expressly that the board of directors may not adopt, amend, or repeal that bylaw or any bylaw on that subject.

S.C. Code Ann. § 33-31-1021(a). Thus, absent a reservation of the power to amend bylaws to the members, the board may amend the bylaws without a vote by the members. As the Supreme Court has already held in *Dennis*, the Bylaws granted the Board with the authority to "[a]dopt, alter, amend, or repeal the Rules governing use of the Club." *Dennis*, 821 S.E.2d at 670, n.1. The power to amend the General Club Rules was *not* reserved exclusively to the members. In effect, whether considered "bylaws" or not, the Rules could be adopted and amended by the Board without a vote of the members. Accordingly, this new argument offered by the Appellants does not impact or change the Supreme Court's ruling, based on the same evidentiary record as in these cases, that "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws,

Plan, and Rules in place at the time of the amendments." *Dennis*, 821 S.E.2d at 670.[7] It also does not impact or change this Court's ruling that "the evidence does not raise a genuine issue of material fact regarding whether the governing documents were properly changed." Slip Op. at 10.

IV. Damages/Attorney's Fees

A. Damages

This Court correctly ruled that the language of the governing documents do not create a cap on a resigned member's liability for unpaid dues and fees. Slip Op. at 13. The Court further explained that "the governing documents do not contain any provisions that preclude the Club from collecting by other means the amounts in excess of the value of the equity membership." Slip Op. at 13. Yet, in a footnote, the Court stated that "[t]he governing documents neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership" and describes this as an "apparent ambiguity." Slip Op. at 13, n.2. Seizing on that footnote, the Appellants suggest that this is an *actual* ambiguity, which it is not. As this Court has held previously, an actual ambiguity arises only

[7] In their petition for rehearing, the Appellants misstate the hierarchy of the governing documents. They suggest that the Plan for Offering of Memberships is "supreme" to the Bylaws. *See*, Appellants' Petition for Rehearing, p. 15. This is contrary to state law as well as the Supreme Court's decision in *Dennis*. The correct hierarchy provides that the Bylaws control, then the Plan, and lastly the General Club Rules. As the Supreme Court recognized, the "Plan may be amended in accordance with the Bylaws." *Dennis*, 821 S.E.2d at 670, n.1. Nonetheless, "[t]he three documents reference each other and are intended to operate together." 821 S.E.2d at 670.

when a contract "is inconsistent on its face or is reasonably susceptible of more than one interpretation." *Abu-Shawareb v. South Carolina State University*, 364 S.C. 358, 613 S.E.2d 757, 760 (Ct. App. 2005). Silence alone does not create an ambiguity. *Id. See also*, *Jordan v. Security Group, Inc.*, 311 S.C. 227, 428 S.E.2d 705, 707 (1993). Thus, the absence of language in the governing documents that actually *negates* a cap or expressly states that there is no cap on unpaid dues and fees does not render the documents ambiguous on that point.

Additionally, this Court includes the following language in its analysis: "[w]hile this provision provides unpaid dues will be deducted from the amount paid for the equity membership..." Slip Op. at 13. The Appellants seize on that language to suggest that the Court has recognized that an "offset" must be applied to the damages awarded by the trial court. The operative language from the 2008 Plan is as follows: "Any unpaid dues, fees and other Charges plus interest accrued under the then prevailing terms of the General Club Rules *will be deducted* from the amount to be paid to the resigned member *upon the reissuance* of his/her resigned Equity Membership." (Quinn R. 1452-1453; Martin R. 1448-1449; Frey R. 1452-1453). (Emphasis added). The Appellants, however, misread this provision as requiring an offset. Only if the dues and fees remain unpaid when the membership is reissued, then they will be paid first from the proceeds of the

reissued membership. No deduction occurs until the reissuance of the membership. Contrary to the Appellants' argument, there is no offset.[8]

B. Attorney's Fees

As this Court correctly ruled, the Appellants' argument that the governing documents do not provide for CIMC to recover attorney's fees was an issue raised for the first time in their Rule 59(e) motions, which makes the argument untimely. The trial court, in fact, recognized that "CIMC's authority to collect its attorney's fees ... was raised for the first time at the hearing for reconsideration." (Quinn R. 13; Martin R. 9; Frey R. 15). It is, however, well settled that "a party cannot for the first time raise an issue by way of a Rule 59(e) motion that could have been raised at trial." *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995). Here, the issue was not even raised in the Rule 59(e) motion but rather for the first time at the hearing on the Rule 59(e) motion, which is obviously not timely. (Quinn R. 329-330; Martin R. 333-334; Frey R. 352-353).

Nonetheless, even if the Court were to address the merits, the decision of the trial correct was correct. The governing documents are properly construed to

[8] The Appellants' "offset" argument is untimely asserted for the first time on rehearing. The Appellants have not previously claimed an offset in the trial court or on appeal. In fact, such an offset was not pled as an affirmative defense in their Amended Answers and Counterclaims. South Carolina law recognizes that a non-statutory offset is an affirmative defense that must be pled. *See*, *Gambrell v. South Carolina National Bank*, 250 S.C. 380, 158 S.E.2d 200 (1967); *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939). *See also, Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) (statutory right to setoff not an affirmative defense falling within residuary clause of Rule 8(c), SCRCP, because setoff was required by statute).

include the recovery of "all costs and expenses" to CIMC, including reasonable attorney's fees, if a legal action is commenced by CIMC "to collect any amount owed" or "to enforce any liability of a member to the Club." (Quinn R. 1475; Martin R. 1471; Frey R. 1476).

V. Counterclaims

A. Breach of Contract

The Appellants argue that this Court's affirmance of the summary judgment on the breach of contract counterclaims is in error in three respects. Their position is without merit.

First, the Appellants point to the alleged unlawful amendments of the governing documents. The Court correctly ruled on that issue for the reasons discussed above.

Second, the Appellants claim that there exist "questions of fact about the validity of the amendments." *See*, Appellants' Petition for Rehearing, p. 24. This appears to be a restatement of the first point.

Third, the Appellants argue that "the evidence in the [r]ecord of the Club's disparate application of the terms of the governing documents to different members raises questions as to whether Club breached the contract by applying it unequally to its members." *See*, Appellants' Petition for Rehearing, p. 24. This argument has

already been debunked. Contrary to the Appellants' apparent understanding, their counterclaims based on "disparate treatment" under the Nonprofit Corporation Act were dismissed by an unappealed order issued by Judge Carmen Mullen. The trial court dismissed those counterclaims because they were impermissibly brought as a direct claim rather than as a derivative action. (Quinn R. 17-18; Martin R. 6-7; Frey R. 19). Because Judge Mullen's order in each case was not appealed, those orders are the law of the case and the dismissal of those counterclaims cannot now be challenged on appeal. *See*, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case").

B. Negligent Misrepresentation

The Court's analysis of the negligent misrepresentation claim is correct. The Appellants' explanation of this cause of action is continually changing. In their petition for rehearing filed May 29, 2018, the Appellants argued that the expulsion language as contained in Section 13.3.1 of the 2001 Rules constitutes a representation that "members must be expelled after nonpayment." *See*, Appellants' Petitions for Rehearing, dated May 29, 2018, p. 3. However, as discussed above and as determined by the Supreme Court in *Dennis*, that expulsion provision was amended in the 2007 and 2009 Rules to be discretionary rather than mandatory. As a result, the Appellants have not shown that any false

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representation was made by the 2001 Rules. Instead, that representation was no longer in effect in the 2009-2010 time frame because the Rules had been amended in the interim.

Now, in the current petition for rehearing, the Appellants contend more generally that false representations are "the provisions of the governing documents ... together with the reassurances of its membership director to the Appellants." The Appellants then make up some non-existent dialogue that has no support in the record. *See*, Appellants' Petitions for Rehearing, pp. 24-25. That clearly cannot serve as a basis for reversing summary judgment on this claim.[9]

[9] In Section VIII of their petition for rehearing, the Appellants attempt to "preserve for appellate review any undecided issues" which presumably means any grounds for rehearing not expressly raised. That is contrary to Rule 221(a), SCACR, which mandates that a petition "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." *See*, Rule 221(a), SCACR. It is not proper to attempt to assert some "catch-all" language to later assert other issues.

CONCLUSION

Based on the foregoing discussion, the Respondent Callawassie Island Members Club, Inc. respectfully requests that this Court deny the Appellants' petition for rehearing.

Respectfully submitted,

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February 13, 2020

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FEB 13 2020
SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent The Callawassie Island Members Club, Inc., does hereby certify that service of the **Return to Appellants' Petition for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 13th day of February 2020:

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Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
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RECEIVED
FEB 13 2020
SC Court of Appeals

RE: The Callawassie Island Members Club, Inc. v. Gregory L. Martin and Rebecca L. Martin
Appellate Case Number: 2015-000001
Civil Action Number: 2012-CP-07-3218
Our File Number: 79.20032

RE: The Callawassie Island Members Club, Inc. v. Michael J. Frey and Grace I. Frey
Appellate Case Number: 2015-000002
Civil Action Number: 2012-CP-07-3209
Our File Number: 79.20033

RE: The Callawassie Island Members Club, Inc. v. Mark K. Quinn and Sherry B. Quinn
Appellate Case Number: 2015-000003
Civil Action Number: 2012-CP-07-3216
Our File Number: 79.20034

Dear Ms. Kitchings:

Please find enclosed for filing the original and eleven copies of the **Return to Appellants' Petition for Rehearing** in the above referenced matter. Please file copies in each matter and return a clocked-in copy to me by way of my courier. By copy of this letter, I am serving copies on all counsel of record.

If you have any questions, please advise.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosure)

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001
Lower Court Case Nos. 2012-CP-07-03209, 2012-CP-07-03216, 2012-CP-07-03218

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants

Of whom
Gregory L. Martin, Michael J. Frey, and Mark K. Quinn
are the Appellants

RECEIVED
FEB 24 2020
SC Court of Appeals

APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REHEARING

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The Club has chosen to scrap the fine musical and literary references that we once had going. Instead, it has taken up a trite and formulaic new theme song, which consists mostly of the following refrain:

> *Dennis* has subsumed everything in its path,
> leaving nothing to decide in its aftermath;
> Whatever they argue, we'll just say it's unpreserved,
> Yeah, 'cause victory for the Club is totally deserved.[1]

This Court should not allow the Club's superficial new tune to get stuck in its head.

As to the first couplet, the Supreme Court expressly limited its holding in *Dennis* to the issues in that case, the documents in the Record of that case, and the facts of that case. *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 202, 821 S.E.2d 667, 672 (2018). The issues in this case **are different from those in *Dennis***, the documents in this Record **are different from those in *Dennis***, and the facts of this case **are different from those in *Dennis***. The Club vastly exaggerates the decision's reach.

As to the refrain's second couplet, the Club's boilerplate issue preservation argument does not apply: (1) for the individual reasons discussed in separate sections below and in the previous briefing; (2) because Appellants have **not** raised new issues, they have simply argued existing issues using existing authority; but also (3) because issue preservation rules are not absolute, they are not jurisdictional, and this Court has the discretion to decide the issues before it. This Court's discretion is attested to by the South Carolina Appellate Court Rule on the content of an Appellant's initial brief, which anticipates this Court's flexibility to render decisions: "Broad general statements *may* be

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[1] Club, "Subsumption" *All Alone in the Clubhouse* (Prometheus Records 2020).

disregarded by the appellate court. *Ordinarily*, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR (emphasis added). There are numerous exceptions to issue preservation rules that should apply here, if necessary, both in South Carolina and nationwide; here is a short list of some of them:

- When to strictly apply issue preservation rules would have the effect of upholding a contract that is otherwise void as against public policy or statutory law. *Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010) (disregarding issue preservation rules to find, *sua sponte*, that a contract was void for illegality).
- In the interest of judicial economy, particularly where the question is likely to arise on remand for trial. *Jeter v. South Carolina Dept. of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 147 n.6 (2006) ("Regardless of preservation problems, we address this issue in the interest of judicial economy.").
- In order to avert manifest injustice. *State v. Johnson*, 416 P.3d 443, 453–54 (Utah 2017) ("[T]here may be exceptional circumstances when errors not excepted to are so clearly erroneous and prejudicial to the fundamental rights of a defendant that an appellate court will of its own accord take notice thereof.") (internal citations omitted).
- Where a party presents a new argument or authority in support of a previously raised question. *Kerbs v. California Eastern Airways*, 33 Del. Ch. 69, 90 A.2d 652, 34 A.L.R.2d 839 (Del. 1952) ("While the plaintiffs did not urge this precise reason for the illegality of the directors' act upon the Chancellor, they did,

however, argue its illegality. . . . when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered.").

- Where there is no prejudice to the responding party. *Blumberg Associates Worldwide, Inc. v. Brown and Brown of Connecticut*, 84 A.3d 840, 879 (Conn. 2014) ("In summary, we conclude that, although the defendants did not preserve the claim that the plaintiff's claim under the prevention doctrine failed as a matter of law because the allegedly hindering conduct occurred before the contract existed, the Appellate Court properly raised that claim sua sponte.")

This is *not* to imply that any of Appellants' issues are not preserved—they are—it is instead to note that the Club's flagship argument on issue preservation is leaky.

If this Court is nonetheless tempted to sing along with the Club's theme song, Appellants respectfully suggest that the question of whether the Club improperly amended its governing documents has always been squarely preserved (and, in fact, has already been decided in Appellants' favor by this Court—Unpublished Op. No. 2018-UP-180 at p. 6: "Viewing this evidence in the light most favorable to [Appellant], there is a genuine issue of material fact regarding whether the governing documents were improperly changed . . . ."). The amendment issue is independent grounds for complete reversal of the trial court's grant of summary judgment, and—to borrow the Club's own pet word—it subsumes every other issue on appeal, including the questions of breach of contract, disparate treatment, Appellants' defenses, liability, and attorney's fees.

I. The prospect of being trapped in a perpetual contract is indeed dramatic.

The Club scoffs at Appellants' first argument as exaggerated and melodramatic. Perhaps the Club's cold, corporate heart cannot fathom the very real human distress borne by the members it has selected to persecute, who have watched and felt powerless as the Club unilaterally stripped them of their rights, imposed upon them unbargained-for obligations, and grimly pursued them for hundreds of thousands of dollars in dues that will accumulate until the end of time. Nor did those members anticipate that a relatively straightforward collections lawsuit over a social club membership would fester into a looming appellate blessing upon a perpetual contract.

The Club is wrong to characterize Appellants' arguments in this regard as new and unpreserved, and the Club is wrong to accuse Appellants of having failed to raise defenses of illegality and unenforceability. To the contrary, the Appellants brought—as affirmative defenses and counterclaims—causes of action against the Club for: breach of contract, violation of the Nonprofit Corporation Act, failure to allow members to approve fundamental changes, misrepresentation, and disparate treatment, *inter alia*. (R. pp. 37-44, 82-88).[2] Appellants have been arguing on appeal that summary judgment was improper because questions of fact exist that should have precluded summary judgment, including on their defenses and counterclaims. Either a jury should be given the

[2] As in Appellants' initial brief, citations to the Record on Appeal in this brief are to the *Quinn* Record on Appeal. The same documents are in the Records on Appeal in *Martin* and *Frey*. Appellants would be glad to provide parallel citations to the Records in *Martin* and *Frey*, if the Court so wishes.

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opportunity to determine whether the Club's documents and practices are illegal, or this Court should do so outright; that has been the essence of Appellants' issues on appeal from the moment they filed their initial briefs.

II. Disparate Treatment Claim

The Club's Return argues only that this issue was not preserved for appeal. Appellants properly pled disparate treatment under the Nonprofit Corporation Act as a defense, and properly preserved it for review. (*See, e.g.*, R. pp. 86–87; *Appellants' Petition For Rehearing*, filed Jan. 31, 2020, pp. 4–5 n.5 (identifying this issue pled and argued at least twelve times, including (i) as an affirmative defense, (ii) in motions, and (iii) in the appeal briefs); *see also* R. pp. 110, 135, 211)).

The Club's Return makes no arguments on the actual merits of this issue as it applies to these Appellants' specific situations. This Court ruled correctly on this issue in *Dennis* (Op. No. 5696 at p. 5), and the same ruling properly should be entered in favor of Appellants here.

III. Governing Documents

A. Resignation vs. Expulsion

The Club argues that this is a resignation case only and does not involve expulsion. This sidesteps the inconvenient fact that – for years – the Club and Appellants have been fighting about whether or not Appellants were, or should have been, expelled under the governing documents. As stated in Appellants' initial appeal brief, "This is the exit

method that applies to Mark Quinn." *Brief of Appellant*, filed Aug. 27, 2015, p. 5;[3] *see also id.* at 6 ("Under these terms and circumstances, Mark Quinn was expelled in or about May of 2010, if not earlier."). While Appellants salute the sheer *chutzpa* it takes for the Club now to argue that this is only a resignation case, Appellants would respectfully point to the following pages in the Record on Appeal that show otherwise: 5, 6, 8, 35-36, 38-39, 49, 50, 52-53, 80-81, 83-84, 110, 130, 132-133, 206, 208, 222-224, 230-231, 234, 236, 237, 244-245, 247-248, 254, 325-327, 330-337, 345-346, 348, 354-355, 389-390, 392, 424-427, 433, 438-439, 441-444, 469-470, 475-476, 478, 488, 490-491, 509, 536-538, 540-541, 545-548, 625, 629, 674, 677-678, 680, 897-900, 902-903, 926-928, 941, 943- 946, 959, 1038, 1042, 1049, 1104, 1105-1107, 1112, 1116-1117, 1119, 1158, 1162-1166, 1169, 1195, 1203, 1206-1207, 1211-1215, 1223, 1225-1226,[4] 1229-1231, 1234, 1235, 1564. This case is, and always has been, very much about expulsion of Appellants.

Perhaps sensing that its argument is not flawless, the Club next argues that, regardless, expulsion is the same as resignation or termination, and that it is not mandatory under any circumstances. This is contradicted by (1) the Supreme Court, (2) the governing documents, and (3) the documentary evidence.

First, in the Supreme Court's *Dennis* Opinion, both the majority and dissent were clear that expulsion was different from resignation, with different procedures and consequences. The majority and dissent each appear to believe that expulsion ends a

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[3] The same argument was made in the briefs of Martin and Frey, on the same pages.

[4] "It is a little bit like being expelled from school but still having to pay tuition [for years and decades to come]. We think that that is a misreading of the statute. We also respectfully assert we should be at least be allowed a trial on those issues." (R. pp. 1225-1226).

person's obligations to the Club, although the majority ruled that the expulsion process was not invoked with regard to the Dennises and therefore was not relevant under the Dennises' particular facts.[5]

Second, the governing documents are clear that expulsion is different from resignation—each exit path is addressed in different parts of the governing documents, with different procedures and consequences. Under the governing documents, "expulsion" severs a member's relationship with the Club, and it ends a person's obligations to the Club. The bylaws 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. 1303 (B-11, § 8(b)); *see also* R. p. 1449 (2008 Plan, § 3.4(b), identifying "expulsion" as a way in which a "person shall cease to be an Equity Member.")).[6]

Third, the documentary evidence is clear that when a member is expelled, their membership ends forever, along with future obligations. Expelled members are required to surrender their membership certificates. (*See, e.g.*, R. pp. 509, 1562, 1563, 1564). The Club's Resale List shows that such memberships belong to the Club (the Club's "Membership Pool"), not to the former member. (R. p. 1548, 1549; *see also* R. p. 899 line

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[5] The Supreme Court majority discussed that that expulsion—unlike resignation—would arise only after a specific process involving suspension and then expulsion, which the majority held did not take place with regard to Mr. and Mrs. Dennis. The dissent explicitly discussed how expulsion would end a member's liability for future dues. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 204, 213, 821 S.E.2d 667, 673, 677 (2018).

[6] *See, e.g., Appellants' Petition for Rehearing*, filed Jan. 31, 2020, at pp. 7–9; *see also Brief of Appellant*, filed August 27, 2015, at pp. 3–6, 13–18, 29–32; *Reply Brief of Appellant*, filed Aug. 27, 2015, at pp. 1, 6–8.

25 - p. 900 line 14). Moreover, "[a]ny Member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club Facilities under any circumstances." (R. p. 321). The documents show that expulsion ends a person's future membership obligations in the same way that it ends their membership rights, forever.

Finally, the Club makes an unpreserved argument that expulsion is treated the same as resignation under S.C. Code § 33-31-621. The Supreme Court did not rule on § 33-31-621 in *Dennis*, and the opinion has no applicability to a different section of the statute with drastically different terms. For example, § 33-31-621 requires that expulsion procedures be "fair and reasonable" and "carried out in good faith" and "tak[e] into consideration all of the relevant facts and circumstances." Section 33-31-621 also specifies that an expelled member "*may* be liable to the corporation" for certain obligations, which is different from the verbiage of § 33-21-620. (emphasis added). The Club's telling failure to address, or even acknowledge, these important points of statutory interpretation speaks volumes, and this new argument should be discarded.

B. Amendment of Governing Documents

In this portion of its Return, the Club trots out its familiar refrain, first claiming that the Supreme Court decided this issue and, next, harping on issue preservation. This Court should not sing along. The terms of the contract itself, as well as statutory limitations, require that the Club obtain the approval of its members before making substantive changes—affecting the rights and obligations of its members—to the governing documents. Evidence in the Record shows that the Club failed to do so.

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The Supreme Court did not decide the question of whether the Club's unilateral, secret modifications to the material rights of its members were proper. This question was not before that Court, and the words that the Club quotes are nothing more than dictum taken from what the opinion describes as "a general discussion of the membership arrangement and the membership documents that govern that arrangement." *Dennis*, 425 S.C. at 198, 821 S.E.2d at 670. This "general discussion" by the Court is not a ruling on a substantive issue with the weight of precedence. That "general discussion" certainly should not control in these appeals, since the *Dennis* Court was careful to confine its holding to the record before it in that case, which was a markedly different record than that of these Appellants.

A question of fact exists as to whether the Club's unilateral, material modifications to its governing documents were improper. This is so because the governing documents themselves prevent substantive amendment affecting the rights and obligations of members without a vote of the members.[7] That argument alone—which the Club does not address in its Return—is sufficient to compel remand for a jury determination of whether the Club followed the amendment procedures contained within its own contract. If it failed to do so, as the evidence shows, then those material modifications are invalid.

Next, the Club appears shocked—shocked!—to have learned[8] in *Appellants' Petition for Rehearing* that the Nonprofit Corporation Act might pertain to its attempted

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[7] "[A]ny such amendment or modification [of the Rules] shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. p. 510).

[8] *Casablanca* (Warner Bros., 1942) (Captain Renault: "I'm shocked, shocked to find that gambling is going on in here!").

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unilateral amendment of its governing documents. But this is no surprise ambush. The Appellants have been arguing for at least six years that the Club's actions and practices violate the Act, and that the Club secretly amended its documents to affect the rights of members without a vote of the members. This not a new issue, as the Club attempts to characterize it. Appellants have simply cited the Definitions section of a statute that has always controlled the actions of the Club, ever since it elected to organize itself as a nonprofit, mutual benefit corporation. (*See, e.g.*, R. pp. 105, 106, 111, 136, 176-177, 212, 303, 334, 1225-1226, 1233, 1344, 1389, 1484, 1494 (discussing, *inter alia*, the Club's requirement to comply with the Nonprofit Corporation Act)).

The Club is not prejudiced by an argument that its governing documents and its board's actions must comply with the Act. Presumably, its governing documents were drafted in an attempt to comply with the Act – which is precisely why, by the documents' own terms, the board's ability to modify the Rules "**is subject to and controlled by** the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. p. 510 (emphasis added)). The Club, in organizing itself under the Act, was of course aware that the Act's definition of "bylaws" included the Club's Rules.[9] It was in order to comply with the Act that the Plan was drafted to require that:

> ***Any*** amendment or modification which **materially and adversely affects the rights of the equity members must be approved** by a majority of the votes held by the equity members so affected.

[9] "'Bylaws' means the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated." S.C. Code § 33-31-140, Definitions.

(R. p. 1272) (emphasis added). The Club and its documents are servants to the Act, and not its master. Where the Act requires that changes in "bylaws" be approved by affected members, it is implicit that the governing documents are drafted in compliance with that requirement.

The Club is wrong that the Nonprofit Corporation Act unreservedly allows amendment to the bylaws without a vote of the members. (*Return to Appellants' Petition for Rehearing*, p. 7). The very section of the Act that appears as a block quote in the Club's *Return* goes on to put the following limits on the board's purported freedom:

> (c) A notice of a meeting for members at which bylaws are to be adopted, amended, or repealed shall state that the purpose, or one of the purposes, of the meeting is to consider the adoption, amendment, or repeal of bylaws and contain or be accompanied by a copy or summary of the proposal.
>
> (d) Unless otherwise provided in the articles, an amendment to the bylaws which relates solely to the dues required for membership and which establishes or changes an amount for, or method of computation of, dues, must be approved by the members.

S.C. Code § 33-31-1021. The evidence in the Record shows that Appellants did not receive the required notice, and nor did they approve any change in the method of computation of dues, including but not limited to the documents' provisions relating to suspension and expulsion (which limited a member's obligation to pay dues to four months following suspension), nor to liability (which contemplated that dues would accrue against a membership until it was reissued).

The issue before this Court on appeal is whether the circuit court improperly disregarded evidence that the Club had modified its governing documents without notice to or a vote of the members. There is evidence in the Record of the Club's practice

of making unilateral, secret, material changes to provisions affecting the rights and obligations of its members, without approval of the members, as required by the Act and the contract itself. This Court should therefore remand for a jury to consider, as a question of fact, whether the Club violated notice and vote requirements, rendering its amendments void.

The Appellants have been arguing since the inception of this case that the Club's practices violate the Act. This is not a new issue; it is existing law in support of a previously-raised issue that the trial court decided incorrectly.

IV. Damages/Attorney's Fees

A. Damages

The Club contends that the Appellants' argument on set-off was not preserved, and that it was raised for the first time in the Petition for Rehearing. Any attentive reader over the last five or more years would surely have noticed that the Appellants have been arguing since their opposition to the Club's motion for summary judgment that they are entitled to a have any amount deemed to be owed to the Club offset by their membership contribution.[10] For the moment setting aside, for the sake of argument, the evidence that the Club unauthorizedly modified the governing documents to affect the computation of

[10] *See, e.g.*, R. pp. 232-233, 236-237 ("As to damages, taking the [Appellant's] allegations as true, the [Appellant] overpaid on dues and fees and is seeking return of the overpayment. In addition, the [Appellant] is owed for the amount of equity he still holds in the membership or for which he was never paid when he should have been rightly expelled."); *Brief of Appellant* at pp. 13, 17–20, p. 20 n.9 ("Alternatively, the Order incorrectly failed to allow Mark Quinn a credit of $26,000 for his equity contribution, toward the judgment amount [because the] documents specify that unpaid dues are to be 'deducted from' a member's equity in the Club."), p. 41; *Reply Brief of Appellant* at pp. 8–9, pp. 15–16; *Supplemental Brief of Appellant* at p. 10.

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its members' dues and liability, the contractual language entitling Appellants to have their judgment reduced by the amount of their membership contributions is unambiguous and should be construed by this Court to allow such a set-off.

B. Attorney's Fees

The Club's Return makes no new points on this issue, and fails to address the law and arguments made in Appellants' *Petition* (*see, e.g.*, pp. 21–23). In the trial court, Appellants submitted briefing on this issue "as instructed by the [Trial] Court," and the trial court ruled on the issue, thus preserving it for appeal. (*See, e.g.*, R. pp. 265, 1245–1246).

The Return's one-sentence argument on the substance of this issue does not refute the arguments or law in the *Brief of Appellants*, filed Aug. 27, 2015, at pp. 35–39. *See also Reply Brief of Appellants*, filed Aug. 27, 2015, at p. 4. If, as the Club argues, the governing documents should be strictly interpreted, those documents should be strictly interpreted against the Club as well.

V. Counterclaims

A. Violation of the Nonprofit Corporation Act constitutes breach of contract.

At this point in its brief, the Club appears to be just flinging words onto the page willy-nilly. It seems to argue, utterly without basis, that Judge Mullen's dismissal of Appellants' counterclaim for disparate treatment under the Nonprofit Corporation Act bleeds over to preclude their breach of contract counterclaim. First, to be clear, Judge Mullen's order did *not* dismiss Appellants' *defenses* under the Nonprofit Corporation

Act.[11] Further, it did not dismiss Appellants' counterclaims for breach of contract nor for misrepresentation.

Nothing in Judge Mullen's order prohibits Appellants from arguing that the Club's improper amendment without membership approval, in violation of the terms of the governing documents, was a breach of contract. Nothing in Judge Mullen's order prohibits Appellants from arguing that, because the Club was organized pursuant to the Nonprofit Corporation Act, its governing documents must comply (and remain complaint) with the Act's requirements. Nothing in Judge Mullen's order prohibits Appellants from arguing that uniform treatment of members was an implicit term of the contract, which impliedly incorporates the requirements and protections of the Nonprofit Corporation Act by virtue of the Club's organization thereunder. And nothing in Judge Mullen's order precludes Appellants from arguing that any violation of the Act by the Club constitutes a breach of contract.

Because evidence exists sufficient to raise a question of fact as to whether the Club breached its contract with Appellants, the case should be remanded to the trial court for a jury to try the facts.

B. Negligent Misrepresentation

Eschewing reasoned argument altogether, the final section of the Club's *Return* (p. 21) propounds simply that Appellants' argument "clearly cannot serve as a basis for reversing summary judgment" as to negligent misrepresentation. As discussed in

[11] The Order found that Appellants could not bring certain counterclaims against the Club because the court held those claims must necessarily be asserted as a derivative action.

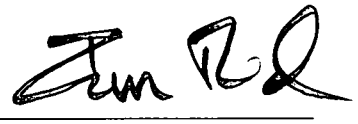
Appellants' *Petition* (pp. 24–25) and the case law cited therein, Appellants raised at least a scintilla of evidence as to the falsity of the Club's statements regarding concession, termination, suspension, and expulsion, which evidence should have defeated summary judgment on the misrepresentation counterclaim.

CONCLUSION

For the reasons set forth above, as well as in their *Petition for Rehearing*, Appellants respectfully submit that this Court should withdraw its Opinion No. 2019-UP-393 and remand the Appellants' cases for trial by jury.

Respectfully submitted,

FORD WALLACE THOMSON LLC



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Neil D. Thomson, Bar No. 71209
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Attorneys for Appellants

February 21, 2020

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001
Lower Court Case Nos. 2012-CP-07-03209, 2012-CP-07-03216, 2012-CP-07-03218

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants

Of whom
Gregory L. Martin, Michael J. Frey, and Mark K. Quinn
are the Appellants

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CERTIFICATE OF SERVICE

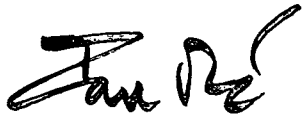
I certify that I have served the *Appellants' Reply in Support of Petition for Rehearing* on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on February 20, 2020, addressed to their attorneys of record:

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FORD WALLACE THOMSON LLC

ATTORNEYS AT LAW

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SC Court of Appeals

February 21, 2020

VIA FEDERAL EXPRESS; OVERNIGHT DELIVERY AND FAX

The Honorable Jenny Abbot Kitchings
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *The Callawassie Island Members Club Inc. vs. Gregory L. Martin and Rebecca L. Martin, The Calllawassie Island Members Club Inc. vs. Michael J. Frey and Grace I. Frey, The Callawassie Island Members Club Inc. vs. Mark K. Quinn and Sherry B. Quinn*
SC Court of Appeals Case No.: 2015-000001

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of the Appellants' Reply in Support of Petition for Rehearing and Certificate of Service in the above-referenced matters.

Thank you in advance for your assistance with this matter. Should you have any questions or concerns, please do not hesitate to contact my office.

With kind regards, I am,

Very truly yours,

Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman

ISF/ja
Enc. - as stated
cc: All Counsel of Record

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

Of Whom Gregory L. Martin is the Appellant.

Appellate Case No. 2015-000001

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Unpublished Opinion No. 2018-UP-178
Submitted September 1, 2017 – Filed May 2, 2018

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Ian S. Ford and Neil Davis Thomson, both of Ford Wallace Thomson LLC, of Charleston, for Appellant.

M. Dawes Cooke, Jr., John William Fletcher, and Bradley B. Banias, all of Barnwell Whaley Patterson & Helms, LLC, of Charleston; Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort; and James Andrew Yoho, of Carlock Copeland & Stair, LLP, of Charleston, for Respondent.

PER CURIAM: Gregory L. Martin appeals the circuit court's order granting summary judgment to The Callawassie Island Members Club, Inc. (CIMC). He argues the circuit court erred in (1) failing to apply the "scintilla of evidence" standard to CIMC's motion for summary judgment, (2) disregarding the voluminous evidence he presented in opposing CIMC's motion for summary judgment, (3) awarding damages under incorrect contract provisions and under incorrect interpretations of the applicable documents, (4) granting summary judgment in favor of CIMC on his counterclaims when he submitted evidence raising numerous issues of material fact, and (5) granting summary judgment prematurely because he did not have a full and fair opportunity to complete discovery. We affirm in part, reverse in part, and remand.[1]

Disregarding Evidence

Martin argues the circuit court disregarded genuine issues of material fact and, therefore, erred in granting summary judgment in favor of CIMC. We have addressed Martin's specific arguments below.

i. Contract

Martin first contends CIMC failed to prove a contract existed because he applied for membership in a different organization, the Callawassie Island Club, Inc. (CIC). We hold a question of fact does not exist as to whether Martin was a member of CIMC. The evidence in the record supports the circuit court's finding that Martin's membership in CIC transferred to CIMC upon the sale of the club. The 1994 Plan for the Offering of Memberships (Plan) expressly contemplated the transfer of CIC's assets to the members, which occurred in 2001 when CIMC assumed control. Martin also continued paying dues and receiving the benefits of membership well after CIMC took control of the club.

ii. Governing Documents

Martin contends the circuit court disregarded (1) the differences among resigned, terminated, and expelled members; (2) the abundant evidence that he had been expelled by CIMC, which included testimony from CIMC's representatives and other club members regarding the expulsion process and documents showing

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

CIMC had previously expelled other members; (3) evidence that the governing documents had been improperly changed by CIMC to prohibit people from exiting the club; and (4) the abundant evidence that he had no obligation beyond his equity interest in his club membership.

a. Resignation

Martin contends there are genuine disputes as to (1) which governing documents are controlling and (2) the interpretation and application of the governing documents as they relate to his obligation to pay dues.

This court recently considered the same issues in *The Callawassie Island Members Club, Inc. v. Dennis*. 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016), cert. granted (S.C. Sup. Ct. Order dated September 8, 2017). There, this court noted the 1994 general club rules (GCRs) provided that a member could terminate membership in the club by delivering written notice of termination to the club's secretary but would remain liable for any *unpaid* club account, membership dues, and charges. *Id.* at 616, 790 S.E.2d at 438. However, this court found this language different from that in other documents. *Id.* at 616–17, 790 S.E.2d at 438. This court stated,

> [U]nlike the 1994 GCRs, the 1994 CIC Plan and Bylaws provide resigned members are obligated to continue to pay dues *until their memberships are reissued*. Further ambiguity is found . . . in the 2009 GCRs, which provide that members who have terminated their club memberships remain liable for *unpaid* dues until their membership is sold. The term "unpaid" is not defined in the documents. It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation.

Id. Based on this ambiguous language in the governing documents regarding "the issue of whether Appellants were obligated to pay dues post-resignation," this court reversed the grant of summary judgment to CIMC. *Id.* at 617, 790 S.E.2d at 438.

The same governing documents at issue in *Dennis* were used in this case. Like in *Dennis*, the 1994 Bylaws, the 1994 Plan, and subsequent revisions to the Plan consistently stated that resigned members had to continue paying dues until their

memberships were reissued. However, the 1994 and 2001 GCRs provided that a person who terminated his or her membership in the club would remain liable for any *unpaid* club account, membership dues and charges. The 2007 and 2009 GCRs added in that the member would remain liable for these "unpaid" charges "until the membership was sold."

When all of the governing documents are reviewed, an ambiguity exists regarding the obligation of a resigning member to continue paying dues post-resignation. Some of the documents state a member is responsible for paying dues until the membership is reissued, while others state the member is only responsible for "unpaid" dues, and the meaning of "unpaid" is not clear from the documents. *See id.* at 617, 790 S.E.2d at 438 ("The term 'unpaid' is not defined in the documents. It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation.").

Although Martin's brief essentially focuses on his belief that he was expelled from the club, there is some evidence that he attempted to resign his membership. In his answer, he not only sought a finding that he was expelled from the club but also contended that his resignation should be deemed effective. Additionally, in its answer to interrogatories filed by Martin, CIMC stated it had in its possession a purported resignation from Martin. *See Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof). In light of this evidence and the ambiguity of the provisions governing the obligation of resigned members to continue paying dues, summary judgment was improper. *See HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007) ("[When] a contract is unclear, or is ambiguous and capable of more than one construction, the parties' intentions are matters of fact to be submitted to a jury."); *see also Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991) ("As a general rule, written contracts are to be construed by the [c]ourt[,] but [when] a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury.").

b. Expulsion

Martin also contends that his liability for unpaid dues ended after four months of delinquency by the mandatory process of expulsion.

The *Dennis* court also addressed this issue and focused on the mandatory expulsion language of the 2001 GCRs and the testimony of the membership coordinator for CIC and CIMC, who stated she understood the expulsion provision to mean that after four months of delinquency, a member would lose his or her membership. 417 S.C. at 617, 790 S.E.2d at 439. This court stated,

> We acknowledge that section 13.3.1 provides club members *may* be suspended; however, in light of the subsequent mandatory expulsion language and the conflicting evidence presented as to the club's actual suspension and expulsion practices, we agree with Appellants that the language of the GCRs presented an ambiguity as to whether Appellants were entitled to expulsion and thus exposed to a maximum liability of four months' of unpaid dues (plus any accrued expenses). [When] there is some ambiguity in the governing documents as to whether expelled members are still liable for dues accruing after expulsion, summary judgment is inappropriate.

Id. at 617–18, 790 S.E.2d at 439.

Like in *Dennis*, the record contains the testimony of the membership coordinator, as well as the following provision from the 2001 GCRs:

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

(Emphases added). There is evidence in the record that Martin had been suspended by CIMC before the initiation of CIMC's action against him. CIMC's General Manager stated in an affidavit that CIMC had "been forced, owing to non-payment, to suspend" the membership rights and privileges of Martin. However, the above provision from the 2001 GCRs was amended in 2007 and the mandatory expulsion language was removed. It states as follows:

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

(Emphases added). Pursuant to this revision, CIMC would not have been obligated to expel Martin despite his suspension. However, Martin contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club. He points to the following provision, which prohibits modification of the governing documents unless a majority of the members vote in favor of it:

> 2007 and 2012 Plan:
>
> > The Board of Directors may, in its sole discretion, amend or modify this Plan from time to time, so long as such amendments or modifications do not materially and adversely affect the rights of the Equity Members. Any amendment or modification which materially and adversely affects the rights of the Equity Members must be approved by a majority of the votes held by the Equity Members so affected.

Martin stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to Martin, there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of Martin's suspension from the club. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof). Thus, summary judgment to CIMC was improper. *See Dennis*, 417 S.C. at 618, 790 S.E.2d at 439 ("[When] there is some ambiguity in the governing documents as to whether expelled members are still liable for dues accruing after expulsion, summary judgment is inappropriate."); *see also Cafe Assocs., Ltd.*, 305 S.C. at 9, 406 S.E.2d at 164 ("As a general rule, written contracts are to be construed by the [c]ourt[,] but [when] a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury.").

iii. Nonprofit Corporation Act

According to Martin, permitting CIMC to continue to levy dues, fees, assessments, and other charges against him is a violation of the South Carolina Nonprofit Corporation Act of 1994 (the Act) because it eliminates a person's right to resign from a nonprofit organization; it also conflicts with the governing documents, which do not state a member is responsible for dues and other charges after termination or expulsion. Martin argues CIMC "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."

We find the provision at issue from the Act, section 33-31-620 of the South Carolina Code (2006), does not require resigned members to continue paying dues that accrue after they resign. *See* § 33-31-620 (stating "[a] member may resign at any time" and "[t]he resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation"); *see also Dennis*, 417 S.C. at 618, 790 S.E.2d at 439 ("Section 33-31-620 obligates resigned members to pay any dues incurred *before* resignation. This section does not require resigned members to continue to pay any dues that accrue *after* resignation. To do so, we believe, would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate [his or her] membership obligations."); *id.* at 619, 790 S.E.2d at 439 ("[S]ection 33-31-620 protects club members from such continuing liability after resignation.").

Counterclaims

i. Breach of Contract

Martin argues there was sufficient evidence to support his breach of contract counterclaim, including that he established CIMC improperly amended material provisions of the governing documents to prevent members from leaving the club. Because of the interrelated nature between Martin's breach of contract counterclaim and CIMC's breach of contract claim and, as stated above, the fact that relevant provisions of the governing documents are ambiguous, we reverse the circuit court's grant of summary judgment to CIMC. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof).

ii. Negligent Misrepresentation

Martin stated in his brief that he is not maintaining "that the prior entity, [CIC], by and through its governing documents, conveyed these false representations." Instead, Martin argues "[t]he false representations occurred after the Club took over in 2001" and consisted of CIMC providing "methods for certain members to exit the Club without owing more than their equity contribution." This evidence is insufficient to support Martin's negligent misrepresentation counterclaim because allowing certain members to leave the club is not a *false* representation and it was not made to Martin. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) ("To establish liability for negligent misrepresentation, the plaintiff must show "(1) the defendant made a *false* representation *to the plaintiff* . . . ." (emphases added)). Therefore, the circuit court did not err in granting summary judgment to CIMC on this counterclaim. *See* Rule 56(c), SCRCP (stating summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law").

Attorney's Fees

Because of our reversal of the grant of summary judgment to CIMC, we also reverse the award of attorney's fees to CIMC. *See Camburn v. Smith*, 355 S.C. 574, 581, 586 S.E.2d 565, 568 (2003) ("An award of attorney's fees will be reversed [when] the substantive results achieved by counsel are reversed on appeal.").

Remaining Issues

Based upon our reversal of the grant of summary judgment, the court need not address Martin's remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when the resolution of prior issue is dispositive).[2]

[2] CIMC also raises several additional sustaining grounds, which we decline to address. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420 n.9, 526 S.E.2d 716, 723 n.9 (2000) ("The appellate court may or may not wish to address such [additional sustaining] grounds when it reverses the lower court's decision.").

Conclusion

We affirm the circuit court's grant of summary judgment to CIMC on Martin's negligent misrepresentation counterclaim. We reverse the circuit court's grant of summary judgment to CIMC on its claims against Martin and the accompanying award of damages, the grant of summary judgment to CIMC on Martin's breach of contract claim, and the award of attorney's fees. Finally, we remand to the circuit court for trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, C.J., and HUFF and HILL, JJ., concur.

The South Carolina Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

Of Whom Gregory L. Martin is the Appellant.

Appellate Case No. 2015-000001

ORDER

After careful consideration, we grant Respondents' and Appellant's petitions for rehearing. Additionally, the parties may serve and file any supplemental brief in light of the holding in *The Callawassie Island Members Club, Inc. v. Dennis*, Op. No. 27835 (S.C. Sup. Ct. filed Nov. 14, 2018) (Shearouse Adv. Sh. No. 45 at 9). Any supplemental brief must be filed within thirty days of the date of this order.

James E. Lockemy C.J.

Thomas C. Young J.

D. Garrison J.

Columbia, South Carolina

FILED
November 30, 2018

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Jerri Ann Roseneau
Chief Administrative Judge for the Fourteenth Judicial Circuit

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-00001
Lower Court Case No. 2012-CP-07-03218

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

v.

Gregory L. Martin and Rebecca L. Martin ..... Defendants,

Of whom Gregory L. Martin is ..... Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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Eagles, "I Can't Tell You Why"
The Long Run (Asylum Records 1979) 1

- Appendix 2180 -

Respondent is fond of pointing out that "hard cases make bad law." In adopting this as its refrain, the Club strays far afield from the Eagles theme that this Court has previously sanctioned. This Court should not be tempted to "make it harder than it has to be."[1] This is a simple appeal as to a trial court's inappropriate grant of summary judgment. All Appellant Greg Martin wants is a fair trial.

ARGUMENT

This Court has granted the petitions for rehearing, filed by both Appellant and Respondent, and it has requested supplemental briefing in light of the South Carolina Supreme Court's opinion in *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018) ("*Dennis* Opinion").

For the reasons set forth below, this Court should recognize that the Supreme Court's decision in *Dennis* has no saving influence over many distinct and independent grounds for reversal of the Circuit Court's order on appeal in this case.

Further, based on the *Dennis* Court's holding that certain parts of the governing documents at issue are unambiguous, Appellant hereby petitions this Court for a specific ruling that would limit the amount of damages recoverable by the Club in this lawsuit, to an amount not greater than that of Appellant's membership contribution.

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[1] Eagles, "I Can't Tell You Why" *The Long Run* (Asylum Records 1979) (But, actually, we *can* tell you why.)

Finally, because it overlooked evidence in the Record as to the issue, this Court should reverse its previous decision as to the Appellant's counterclaim for negligent misrepresentation.

I. The Supreme Court's decision in *Dennis* was limited to the particular issues before the Court on certiorari.

When evaluating the *Dennis* Opinion's impact on the merits of Appellant's appeal, this Court should be aware of the constraints of the Opinion, which is necessarily restricted to the questions that were before the Supreme Court on certiorari. "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions that they are not asked." *Kennedy v. Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322 (2001), *quoting State v. Austin*, 306 SC 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991).

The Club asked the Supreme Court to answer only two questions as to this Court's decision on appeal in *Dennis*:

1. Did the Court of Appeals err in its *sua sponte* revision and judicial repeal of Code of Laws of South Carolina (1976), as amended, Section 33-31-620, ignoring uncontroverted key facts in the record and disregarding the language of subsection (b) of the statute?

2. Did the Court of Appeals err in concluding that the Dennises presented evidence of ambiguity, where the parties' written contract clearly stated that members of Petitioner, The Callawassie Island Members Club, Inc. (referred to herein as "CIMC" and "the Club") must fulfill the financial obligations of membership in CIMC until the reissuance of their membership?"

(*Petitioner The Callawassie Island Members Club, Inc.'s Brief on Appeal*, at p. 1, Statement of Issues on Appeal.)[2] In answering the Club's questions, the Supreme Court was starkly divided, with two justices robustly dissenting. The majority opinion emphasized that:

> In response to the "logical end" argument [in the dissent], we point out that—as in all cases before this Court—we decide only the issues before us in *this* case. The "logical end" of our analysis goes no further than required by the four corners of the governing documents in this case when applied to the facts of this case.

425 S.C. at 202, 821 S.E.2d at 672 (italics in original, underlining added). With respect to the issues before it on certiorari, the Supreme Court made the following specific holdings:

1. Payment after resignation: "[Section 5.11 of the 2008 Plan] unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued." [3]

2. Parol evidence: "First, because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning."[4]

3. Nonprofit Corporation Act: "The dues, fees, and other charges the Dennises owe fall into the 'commitments made' category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises resigned—both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges 'until his or her equity membership is reissued by the Club.' When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. Therefore, we find the requirement that members continue to pay dues, fees, and

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[2] The Club also questioned this Court's quotation of lyrics from the Eagles' *Hotel California*. The Supreme Court declined to directly address the merits of that particular issue, instead "applaud[ing] the reference." 425 S.C. at 204 n.4, 821 S.E.2d at 673. Thus, we can infer that the Eagles theme prevails.

[3] 425 S.C. at 200, 821 S.E.2d at 670.

[4] *Id.* at 203, 821 S.E.2d at 672.

other charges after resignation until their membership is reissued is not prohibited by section 33-31-620."[5]

The majority opinion observes that the Dennises never were suspended by the Club, and therefore they could not have been expelled. *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 ("This provision makes it clear that mandatory expulsion arises only after the board has suspended a member, which is discretionary with the board. Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered.")

The strong dissent is written in support of this Court's ruling, and it contends that numerous material issues of fact should have precluded summary judgment on the question of resignation. Among other things, the dissent states that:

> Lastly, the majority's holding which forecloses the ability to resign has the potential to lead to an absurd result. Instead of attempting to resign, members have more incentive to simply become "bad neighbors" and behave in such a way as to encourage the Club to suspend them, because suspension places them in a better financial situation than resignation. **Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so "shall be expelled from the Club," ending their liability for future dues.**

Id. at 213, 821 S.E.2d at 677 (emphasis added).

Given the precise, finite issues presented to, and decided by, the Supreme Court in *Dennis*—as well as the different facts and evidence within the Records on Appeal—many of the issues that **this** Court identified in the opening paragraph of its opinion in **this** case remain pending and unaffected by the *Dennis* Opinion:

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[5] *Id.* at 206, 821 S.E.2d at 673.

> [Appellant] argues the circuit court erred in (1) failing to apply the "scintilla of evidence" standard to CIMC's motion for summary judgment, (2) disregarding the voluminous evidence he presented in opposing CIMC's motion for summary judgment, (3) awarding damages under incorrect contract provisions and under incorrect interpretations of the applicable documents, (4) granting summary judgment in favor of CIMC on his counterclaims when he submitted evidence raising numerous issues of material fact, and (5) granting summary judgment prematurely because he did not have a full and fair opportunity to complete discovery.

(Unpublished Op. No. 2018-UP-178 at 2). As set forth, below, this Court should reverse the Circuit Court's errors and remand this case for trial.

II. This Court should disregard the new arguments in the Club's *Petition for Rehearing*.

After this Court filed its Opinion on May 2, 2018, the Club retained new counsel, who filed a notice of appearance on May 11, 2018. On May 17, 2018, new counsel filed the Club's *Petition for Rehearing and Incorporated Memorandum in Support*, which contains new arguments not previously made by the Club, which should be stricken or disregarded.

Chief Justice Jean H. Toal has explained that, on appeal, "the prevailing party abandons any additional sustaining grounds it might have argued by failing to raise them in the party's appellate brief." Jean H. Toal et al., *Appellate Practice in South Carolina* 192 (3rd ed. 2016); *see also id.* at 432 ("Note where a party fails to argue an issue in the brief, it is not preserved for appellate review.") Chief Justice Toal cited to *I'On, L.L.C. v. Town of Mt. Pleasant*, where the Supreme Court held:

> Of course, a **respondent** may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—**by failing to raise it in the appellate brief**. *Maxey v. R.L. Bryan Co.*, 295 S.C. 334, 336 n. 2, 368 S.E.2d 466, 467 n. 2 (Ct. App. 1988); *May v. Hopkinson*, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct. App. 1986); *see also* Rule 208(b)(1)(B), SCACR ("[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal").

338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (emphasis added).

As Appellant pointed out in his *Reply Brief*, the Club, in its *Final Brief of Respondent*, entirely failed to address the Appellant's arguments regarding the Club's improper amending of the governing documents. (*See, e.g.*, App. Reply at p. 2: "The Club's brief does not address, or barely addresses, numerous points argued in [Appellant's] initial brief. Those points appear to be conceded, and include: . . . II.A(6) The trial court erred in disregarding evidence that the governing documents had been improperly changed by the Club.").

Despite its previous abandonment of the issue, the Club dedicates entire pages of its *Petition for Rehearing* to brand-new grounds that address—for the first time—Appellant's arguments about the Club's improper amending of the governing documents. (*See* Club *Petition for Rehearing*, at pp. 8–9). The Club's addition—at the rehearing stage—of new grounds for sustaining the trial court's decision is inappropriate, and this Court should consider the question of whether the documents were improperly amended to have been conceded by the Club.

III. This Court should remand the case for trial on the question of whether the Club improperly amended the governing documents.

The *Dennis* Opinion has no bearing on this Court's prior holding that a genuine issue of material fact exists as to whether the governing documents were improperly amended, particularly because the question was not before the Supreme Court on certiorari. This Court held:

> [Appellant] contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club . . . [Appellant] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Appellant], there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of [Appellant's] suspension from the club.

(Unpublished Op. No. 2018-UP-178 at 6) (citing *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof)).

This Court's holding is well-supported. As set forth in Appellant's brief, the governing documents do not permit the Club to unilaterally—and without notice or a vote—change the basic rights of membership (such as changing "shall be expelled" to "may be expelled"). The documents themselves prevent any alteration by the Club that "materially and adversely affects the rights of the Equity Members," unless such modification is "approved by a majority of the votes held by the Equity Members so affected." (R. at 1369) (Section 10.1). Evidence in the record shows that the Club made fundamental changes to the expulsion provisions of the governing documents without a

board vote, without a vote of members, and without notifying or allowing Appellant to vote on such changes (App. Br. pp. 24-25). As this Court already has held, there is a genuine issue of material fact as to whether or not key provisions in the governing documents were changed correctly, and the factual consequences of those changes.

As discussed in *supra* Part II, the Club's *Petition for Rehearing* contains new arguments on this point, which should be stricken or ignored. In addition, those new points are based on the Club's contention—apparently made in all seriousness—that the Club's admitted changes to the governing documents "plainly did not adversely affect the rights of members of the Club," and therefore did not require member approval. (Club *Pet. for Reh'g* at p. 9). As the dozens of pending Club cases show (four on appeal in this Court, two pending before the United States District Court, and literally dozens pending before the state trial court) the Club's unilateral and secret changes to the governing documents had fundamental effects on the rights of members. Those adverse effects are the direct result of the Club's attempt to end—by secretly amending its documents—the mandatory expulsion of members, and the Club's attempt to eliminate—by secretly amending its documents—the mandatory cap on members' liability to four months dues (*inter alia*). *See, e.g.*, R. p. 506 (resale list showing numerous expelled or conceded memberships); *see also* App. Br. II.A(6) ("Changes to the governing documents affecting a member's financial obligations must be approved by the persons so affected. (R. p. 1369)".)[6]

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[6] Another of the Club's new arguments is that it could amend the Club **Rules** without approval. (Club *Pet. for Reh'g* at p. 9). This is simply incorrect. As Appellant showed in his final brief (at p. 25), the Club Rules are for day-to-day issues relating to the

This Court's prior ruling on this issue remains valid, and there exist no grounds in the *Dennis* Opinion for its reversal. This Court should remand the case for trial on the issue of whether the governing documents were improperly amended by the Club.

IV. Appellant's liability must be strictly limited to his membership contribution.

While the measure of damages was not precisely before the Supreme Court on certiorari, its decision in *Dennis* has remarkable implications for the question of what damages are ultimately recoverable by the Club in the legion of lawsuits that it has filed against its members. Put simply, if the Club benefits from "unambiguous" terms in the governing documents, it must be bound by them, too.

The *Dennis* Opinion itself contains an underlying dialogue between the majority and the dissent, in which the justices discuss the potential repercussions of their decision on the liability of the many ill-fated members of the Callawassie Island Members Club. Justice Hearn, writing for the dissent, expresses concern that the Court's decision might lead to the absurd—yet very real—result of perpetual, inescapable liability on the part of members, whose largely fictional "resignation" from the Club regrettably offers them no relief from the payment of dues, even when they are beyond the grave. *Dennis*, 425 S.C. at 212 n.6–7, 821 S.E.2d at 677 n.6–7.

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use of the Club facilities (dress code, etc.). The Club Rules are not permitted to be unilaterally, and secretly, changed to make memberships inalienable and perpetual. Such fundamental changes to membership rights are required to be approved by the members so affected.

The majority directly addresses and mollifies the dissent's concern, explicitly limiting its holding by emphatically stating "We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts." *Id.* at 202, 821 S.E.2d at 672 (emphasis in original).

It is for this Court, then, to make the decision on damages—and perpetual liability—that the Supreme Court majority did not. Appellant seeks a ruling from this Court that it was error for the Circuit Court to award damages to the Club in the amount of $41,930.24, because, properly, the Club's recovery must be limited to (and offset by) the amount of the Appellant's membership contribution. Such a holding by this Court would be supported by the Club's governing documents, as well as by the Supreme Court's decision. The interpretation of an unambiguous contract is a question of law, and this Court may construe the membership documents at issue in this case *de novo*, without deference to the trial court's findings. *See Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013). By their own express terms, the Club's governing documents confine a member's ultimate liability to the Club to the loss of a return on his or her membership contribution.

The governing documents make the following statements, which clearly limit a member's expectations as to the amount of his liability to the Club:

> - An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club. **These dues will accrue against and be deducted from the amount to be paid to the resigned member upon reissuance of his or her resigned membership.**
>
> R. p. 1260 (emphasis added) (1994 Plan).

- An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees, and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club. **Any unpaid dues, fees, and other Charges . . . will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.**

  R. p. 1448–49 (2008 Plan) (emphasis added).

- Any equity member may resign from the Club by giving written notice to the Secretary. **Dues, fees and charges shall accrue against a resigned equity membership** until the resigned equity membership is reissued by the Club.

  R. p. 1299 (1994 Bylaws) (emphasis added).

- The Club shall have a lien **against each membership** for any unpaid dues, fees, and other Charges . . . .

  R. p. 1450 (2008 Plan) (emphasis added).

- Article XI, Delinquencies, "The Club shall have a **lien against each membership** for any unpaid assessments, fees, annual dues, or other charges . . . .

  R. p. 1482 (2009 By-Laws) (emphasis added).

These unambiguous provisions are unmistakable in their effect: dues, fees, and charges accrue against a resigned equity **membership**—and not against the member personally. In fact, the clear language of the documents evidences an intent by the Club to seek recourse for unpaid dues against the **value of the membership**. Ultimately, the Club may reclaim the **membership** through foreclosure, and recoup its lost dues from the membership contribution when it is reissued. (R. p. 1482 ("Delinquencies")). It is clear that, in the end, a member only may be liable up to the amount of his or her already-paid equity contribution ($31,000 for Appellant here).

Indeed, the *Dennis* Court nodded toward such a determination. Justice Hearn, writing for the dissent, construed that "unpaid dues and fees accrue against membership only, rather than on an ongoing basis against the member personally;" therefore, she conveyed her concern about "taking the majority's view to its logical end" to "create unlimited liability where none previously existed." 425 S.C. at 210, 821 S.E.2d at 676. The majority's reply to the dissent's concern is telling: "In response to the 'logical end' argument . . . the summary judgment we affirm is for less than four years of unpaid dues. We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts." *Id.* at 202, 821 S.E.2d at 671-672 (emphasis in original).

Pursuant to the express terms of the Club's governing documents, the trial court erred in ordering damages in excess of the Appellant's equity contribution, and in not providing for a setoff for his equity contribution. This Court is free to construe the force and effect of unambiguous contracts, and to hold that the plain language of the governing documents operates to restrict any recovery by the Club to an amount not greater than Appellant's already-paid equity contribution of $31,000. *Dennis* at 203, 821 S.E.2d at 672 (citing *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.")); *see also Bennett*, 405 S.C. at 4, 747 S.E.2d at 427.

As set forth above, and in the Appellant's previous briefs to this Court, the governing documents expressly do ***not*** support perpetual liability. As a matter of law, they limit liability to a finite amount. Appellant respectfully requests that this Court hold

that—on remand to the Circuit Court for trial—the maximum damages the Club may claim must be confined to the amount of the member's equity contribution (here, the $31,000 already paid).

V. This Court should reverse the Circuit Court's erroneous grant of summary judgment on numerous other issues not reached by the *Dennis* Opinion.

In its Order of May 2, 2018, after finding, as grounds for reversal of the Circuit Court, that the governing documents are ambiguous and the Nonprofit Corporation Act prevents the Club from prohibiting resignation (*inter alia*), this Court held: "[b]ased on our reversal of the grant of summary judgment, **the court need not address [Appellant's] remaining issues on appeal**." (Unpublished Op. No. 2018-UP-178 at p. 8) (emphasis added). Importantly, those remaining issues on appeal each constitute independent grounds for the reversal of the Circuit Court's grant of summary judgment, and they stand undisturbed in the wake of the *Dennis* Opinion. Therefore, Appellant respectfully requests that, even if this Court finds that *Dennis* mandates the reversal of portions of its previous opinion, it does not control as to the questions, previously briefed,[7] and identified below.

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[7] Appellant expressly incorporates herein by reference the *Brief of Appellant* and *Reply Brief of Appellant*, both of which were filed with the Court of Appeals on August 27, 2015.

[I. The trial court's Order should be reversed because it applied the wrong legal standard.] [8]

This issue is discussed on pages 9–11 of the *Brief of Appellant*, and at page 3 of the *Reply Brief of Appellant*. Summarized, the trial court failed to apply the "mere scintilla" standard required by South Carolina law. The Club neglected to address this issue in its brief, other than in an incorrect issue preservation argument. (*see* Reply p. 3). Not only did the Club apparently concede this issue, the question was not reached or decided in the *Dennis* Opinion. Thus, it is grounds for reversal of the trial court's grant of summary judgment.

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

This issue is discussed on pages 11-27 of the *Brief of Appellant*, and at pages 2–8 of the *Reply Brief of Appellant*. It contains several sub-parts, most of which were not reached by the *Dennis* Opinion. The overarching argument is that Appellant presented a tremendous amount of evidence to the trial court on numerous defenses and issues, certainly more than a scintilla, and therefore summary judgment was improper.

[II.A. Appellant presented more than a mere scintilla of evidence challenging the Club's interpretation of the alleged agreement, and whether the alleged agreement exists.]

These issues are discussed on pages 11–27 of the *Brief of Appellant*, and at pages 2 and 5–8 of the *Reply Brief of Appellant*. Summarized, Appellant argues, *inter alia*, that (1) the trial court order fails to establish the terms of the alleged agreement (App. Br. pp. 12–

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[8] The following issues below are numbered in [brackets] to correspond with their numbering in the Appellant's Brief.

13), (2) the trial court erred by disregarding the abundant evidence that Appellant had been expelled from the Club and had no further obligation (*id.* at 13–14), and (3) the trial court erred by disregarding abundant evidence that Appellant had no obligation beyond his equity interest in his purported Club membership (*id.* at 19–20; *see also supra* Part III). These issues were not reached in the *Dennis* Opinion, and each constitutes grounds for reversal of the trial court.

While the *Dennis* Opinion does appear to obviate those portions of the argument in Part II.A(4) (*id.* at 21–23) relating to the terms "unpaid" and "termination" under the governing documents,[9] the South Carolina Supreme Court explicitly did not reach arguments relating to expulsion, because it did not find evidence in the particular record before it that the Dennises had been suspended. *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 ("Here no suspension ever occurred; the Dennises resigned."). As discussed above, the majority in the *Dennis* Opinion held that "The 'logical end' of our analysis goes no further than required by the four corners of the governing documents in *this* case when applied to the facts of *this* case." *Id.* at 202, 821 S.E.2d at 672 (emphasis added). The dissent emphasized that "Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so 'shall be expelled from the Club,' ending their liability for future dues. . . ." *Id.* at 213, 821 S.E.2d at 677.

[9] *Dennis* also negated arguments in II.A(4) relating to the Nonprofit Corporation Act's provision on resignation (App. Br. p. 22).

Appellant's argument against summary judgment as to the question of expulsion must prevail because there is Brobdingnagian evidence in ***this*** record—certainly more than a scintilla—that Appellant was expelled. As discussed in the *Brief of Appellant*, it is undisputed that Appellant had been suspended, thereby triggering the expulsion requirement. That conclusion is supported by, *inter alia*, (1) Club documents such as the suspended members list, (2) the testimony of other members such as Ronnie and Jeanette Dennis and Dick Mercier, and (3) the testimony of Club board members Harmon Switzer, Karen Norwood, and Jim Carling. (App. Br. pp. 15–18). As this Court stated in its ruling:

> There is evidence in the record that [Appellant] had been suspended by CIMC before the initiation of CIMC's action against him. CIMC's General Manager stated in an affidavit that CIMC had "been forced, owing to non-payment, to suspend" the membership rights and privileges of [Appellant].

(Unpublished Op. No. 2018-UP-178 at p. 5). Moreover, even the majority in *Dennis* acknowledged that mandatory expulsion exists under the wording of the documents before it:

> This provision makes it clear that **mandatory expulsion arises** only after the board has suspended a member, which is discretionary with the board.

425 S.C. at 204, 821 S.E.2d at 673 (emphasis added). In other words, the majority appears to acknowledge that mandatory expulsion occurs under the documents, but it did not believe that the particular facts of *Dennis* invoked that particular provision.

Closing the deal on expulsion is the fact that the Club's *Brief of Respondent* fails to address Appellant's expulsion argument and *Brief of Appellant* Part II.A(2)[10], and the issue

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[10] Part II.A(2) in the *Brief of Appellant's* argues that "The trial court erred by disregarding the abundant evidence that [Appellant] had been expelled from the Club and had no further obligation."

accordingly is conceded (*see* App. Reply p. 2). These issues were not reached in the *Dennis* Opinion, and each constitutes grounds for reversal of the trial court.

[II.B. Appellant presented more than a mere scintilla of evidence in support of his defenses, which would defeat the Club's claims.]

The *Dennis* Opinion also did not reach Appellant's arguments in Part II.B (pp. 25–27) regarding the evidence Appellant presented in support of his defenses, each of which also precludes summary judgment. However, arguments relating to certain statements of Club membership director Ellen Padgett about the contract terms likely have been obviated by the Supreme Court's ruling on parol evidence, to the extent that Padgett's statements pertained to the termination and resignation provisions discussed in the *Dennis* Opinion (but not as to expulsion provisions, which were not reached, as discussed above).

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

Appellant's numerous arguments as to the Circuit Court's improper award of damages are set forth in pages 19–20, and again on pages 25–40, of Appellant's brief, and they were not reached by the *Dennis* Opinion. Appellant contends (among other arguments) that it was error for the Circuit Court to award damages to the Club in the amount of $41,930.24, because—properly—the Club's recovery must be limited to the amount of Appellant's membership contribution. Based on the arguments contained in the *Brief of Appellant* and *Reply of Appellant*, as well as the *Dennis* Opinion, Appellant seeks from this Court a specific ruling on this issue, as set forth above.

[IV. The trial court erred when it granted summary judgment in favor of the Club on Appellant's counterclaims.]

As set forth *infra*, this Court should reverse its previous decision as to the Appellant's counterclaim against the Club for negligent misrepresentation, because of evidence that it overlooked in the Record.

Further, this Court has already held that it was improper for the Circuit Court to grant summary judgment as to the Appellant's counterclaim for breach of contract, including his allegation that the Club improperly amended the governing documents. This holding stands unaffected by the *Dennis* Opinion and the case should be remanded for trial on the issue.

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

Appellant's argument as to the trial court's erroneous failure to allow him a full and fair opportunity to complete discovery may be found in his brief at pages 43-44. These arguments remain untouched by the Supreme Court's decision in *Dennis* and constitute additional grounds for reversal of the summary judgment order.

VI. This Court overlooked evidence in the Record that the Club made false statements to the Appellant, which made summary judgment improper.

This Court previously ruled that the Circuit Court did not err in granting summary judgment to the Club on Appellant's negligent misrepresentation counterclaim. This Court has since granted Appellant's *Petition for Rehearing* on this issue, and the following further supports why a summary judgment dismissal of Appellant's counterclaim is not appropriate.

In its prior ruling, this Court found that "allowing certain members to leave the club is not a *false* representation, and it was not made to [Appellant]." Unpublished Op. 2018-UP-178, at 8 (Ct. App. May 2, 2018) (emphasis in original). In so holding, the Court misapprehended evidence in the Record that demonstrates that: (1) the Club had a practice of **publicly posting** a suspended member list; (2) the Club allowed some suspended members, but not others, to exit their memberships via expulsion; and (3) the provisions within the Club's governing documents, which delineate the procedure for mandatory expulsion following suspension, are false as they pertain to Appellant.

The Record contains more than a scintilla of evidence of the Club's false statements, expressly made to the Appellant, concerning expulsion. Importantly, the Club's false statements were received and relied upon by the Appellant:

A. False statements made by the Club.

The false statements are contained within the four corners of the Club's governing documents applicable to the Appellant, and directed to the Appellant:

> 13.3.1 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 had 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 member**.

(R. pp. 1354, 1355; emphasis added).[11] By failing to expel the Appellant, and by continuing to charge him after he surrendered his membership, the Club rendered its above-statements false.

B. False statements were received and relied upon by Appellant.

Appellant received and relied upon these false statements to his detriment:

> 3. The Membership Purchase Agreement I signed in February 2001 does NOT indicate that I was agreeing to amendments or changes to the Plan For the Offering of Memberships dated April 1, 1994 referenced in that document and that any other amendments to that document would have to be in compliance with the provisions contained in that Plan.
>
> 4. That the Plan for Offering of Membership and Club Rules did NOT obligate members to continue to pay dues, fees and assessments and other charges after 4 months of delinquency (at which point they were required to be expelled) and in no case was the liability ever greater than the value of the equity in the membership.

(R. p. 422, Aff. of Gregory Martin).

C. The South Carolina Supreme Court's majority opinion in *Dennis* supports Appellant's right to maintain a negligent misrepresentation counterclaim.

The *Dennis* Opinion lends credence to the proposition that the Club Rule governing mandatory expulsion is false, if that rule is not applied by the Club. The *Dennis* Opinion refers to the "mandatory expulsion" provision that the Rules contain, and it

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[11] *See also Brief of Appellant*, pp. 41-43, for its reference to additional evidence in the Record of false statements made to Appellant by the Club.

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notes that it "arises only after the board has suspended a member, which is discretionary with the board. Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered." *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673.

The facts of the Appellant's case are different from those in *Dennis*, and the mandatory expulsion period should have been triggered. In the subject case, this Court has already recognized that Appellant had been suspended. Unpublished Op. 2018-UP-178, at p. 5 ("There is evidence in the record that Martin had been suspended by CIMC before the initiation of CIMC's action against him.") Therefore, even the *Dennis* majority would acknowledge that the Rules' requirement of expulsion should have been triggered in Appellant's case. Thus, it is appropriate for Appellant to maintain a negligent misrepresentation counterclaim upon remand at trial, given his reliance on the Club's statements on expulsion, and the four-month cap on liability.

Appellant has demonstrated evidence establishing that the Club (1) made false representations, and that (2) those representations were made to him. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003). Therefore, Appellant respectfully requests this Court to reverse its prior ruling, based on evidence overlooked in the Record, and allow Appellant to assert both negligent misrepresentation and breach of contract counterclaims before a fact-finder.

CONCLUSION

South Carolina law recognizes that summary judgment is a drastic remedy. Thus, if there is even a scintilla of evidence that tips the scale in favor of the opposing party, it is error for a trial court to grant a motion for summary judgment. Moreover, on summary judgment, any question as to contract *or* fact must be construed against the Club. If this is a "hard case," it is because the documents and facts at issue are a mess of the Club's own making.

Appellant respectfully requests that this Court reverse the Circuit Court's erroneous grant of summary judgment and remand this case for trial before a fact-finder. Further, Appellant asks that this Court would reverse its previous decision and allow the Appellant to proceed at trial with his counterclaim for negligent misrepresentation.

Finally, Appellant requests a ruling from this Court that the Club would be bound by the provisions within its own governing documents, which limit its recourse against its members to its ability to retain their membership contribution.

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January 29, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2015-00001

RECEIVED
JAN 30 2019
SC Court of Appeals

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

v.

Gregory L. Martin and Rebecca L. Martin ..... Defendants.

Of whom Gregory L. Martin is ..... Appellant.

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

This case is before this Court on appeal from the entry of summary judgment in favor of Plaintiff-Respondent Callawassie Island Members Club, Inc. ("CIMC"), which is a member-owned amenities club on Callawassie Island, Beaufort County, South Carolina. CIMC filed this lawsuit to enforce its contractual rights. CIMC seeks to recover dues and other amounts due from the Defendants Gregory L. Martin and Rebecca L. Martin, who are equity members of CIMC. (R. 21-31). CIMC claims that, under the governing documents, the Martins agreed to and are required to continue to meet their financial obligations until CIMC reissues their membership to a new member. Reissuance can occur either by transfer in connection with the sale of the Martins' property on Callawassie Island or sale via the membership resale list.

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

Several controlling documents, which have been amended and revised over the years, have governed membership in the Club. Those documents include, in

descending order of primacy, CIMC's By-Laws, Plan for Offering of Memberships, and General Club Rules.

The Martins have asserted counterclaims and argued, for various reasons, that they are not obligated to remain members of CIMC and can abandon their financial responsibilities to their fellow members whenever they want. In their Second Amended Answer and Counterclaims, the Martins asserted counterclaims for breach of contract and negligent misrepresentation. (R. 78-90).

The trial court correctly granted CIMC summary judgment as to Appellant Gregory L. Martin because the unambiguous documents provide that CIMC is entitled to the relief demanded. The trial court denied summary judgment as to Defendant Rebecca L. Martin, pending the completion of further discovery. (R. 11). Gregory Martin filed an appeal to this Court.

On May 2, 2018, this Court issued an unpublished opinion affirming in part and reversing in part the trial court's entry of summary judgment in favor of CIMC, holding that:

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

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

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

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

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

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

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

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

Both parties filed petitions for rehearing. While those petitions were pending, the South Carolina Supreme Court issued a published opinion in the related case of *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). Thereafter, on November 30, 2018, this Court granted both sides' petitions for rehearing and authorized the filing of supplemental briefs in light of the Supreme Court's decision in *Dennis*.

ARGUMENTS

I. The Supreme Court's opinion in the *Dennis* case establishes that the contractual requirement that Club members continue to pay dues, fees, and other charges until their membership is reissued is valid and enforceable under the Nonprofit Corporation Act.

In its opinion filed May 2, 2018, this Court interpreted the South Carolina Nonprofit Corporation Act of 1994 and concluded that S.C. Code Ann. § 33-31-620 of the Act "does not require resigned members to continue paying dues that accrue after they resign." (Slip Op. at 7). For this holding, this Court relied exclusively on its prior analysis in *The Callawassie Island Members Club, Inc. v. Dennis,* 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016).

However, the Supreme Court subsequently reversed that portion of this Court's prior *Dennis* decision. Specifically, the Supreme Court held:

> The court of appeals' reasoning ignores subsection 33-31-620(b), which provides, "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(b) (2006). Subsection 33-31-620(b) contemplates two categories of debt for which a resigned member continues to be responsible after resignation: (1) "obligations incurred ... before resignation" and (2) "commitments made before resignation." S.C. Code Ann. § 33-31-620(b). The dues, fees, and other charges the Dennises owe fall into the "commitments made" category. The 1994 Plan -- which was in effect when the Dennises joined -- and the 2008 Plan -- which was in effect when the Dennises resigned --

> both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges "until his or her equity membership is reissued by the Club." When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. *Therefore, we find the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620.*

The Callawassie Island Members Club, Inc. v. Dennis, 425 S.C. 193, 821 S.E.2d 667, 673 (2018). (Emphasis added).

In applying the Supreme Court's *Dennis* decision to the case at bar, it is beyond dispute that the Appellant Martin, like the Dennises, made a commitment to pay dues, fees, and other charges until the reissuance of his membership. Moreover, this Court must construe S.C. Code Ann. § 33-31-620 as upholding the requirement that Martin continue to pay dues, fees, and other charges after his resignation (or his unilateral attempt to force an expulsion by non-payment). Consequently, the trial court's ruling that Martin owes dues, fees, and other charges incurred prior to reissuance of his membership should be affirmed.

II. The Supreme Court's opinion in the *Dennis* case supports this Court's prior ruling that the Appellant was a member of CIMC.

In its decision in *Dennis*, the Supreme Court recognized that "[t]here is no question the Dennises are contractually bound to the Members Club." *Dennis*, 821

S.E.2d at 670, n.2. The Supreme Court explained:

> The Dennises argued to the court of appeals there was no evidence their Island Club membership transferred to the Members Club. The court of appeals rejected this argument, stating, "We hold a question of fact does not exist as to whether Appellants were members of [the Members Club]." 417 S.C. at 615, 790 S.E.2d at 438. We agree.

Id.

The same is true in the present case. This Court has previously ruled that "a question of fact does not exist as to whether Martin was a member of CIMC" because "[t]he evidence in the record supports the circuit court's finding that Martin's membership in CIC transferred to CIMC upon the sale of the club." (Slip Op. at 2). Likewise, this Court noted that "Martin also continued paying dues and receiving the benefits of membership well after CIMC took control of the club." (Slip Op. at 2). That ruling is fully supported by, and consistent with, the Supreme Court's decision in *Dennis* and should be upheld on rehearing.[1]

III. The Supreme Court's opinion in the *Dennis* case requires the reversal of this Court's prior rulings that there exist genuine issues of material fact in dispute that preclude the summary judgment entered in CIMC's favor.

In *Dennis*, the Supreme Court began its analysis "with a general discussion of

[1] This ruling was not challenged by Martin in his petition for rehearing.

the membership arrangement and the membership documents that govern that arrangement." *Dennis*, 821 S.E.2d at 670. The Court recognized that three documents -- the Bylaws, the Plan, and the Rules -- "govern the membership" and that "[t]he three documents reference each other and are intended to operate together." *Id.* The Supreme Court determined that "[w]hen the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules." *Id.* The Supreme Court also found "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments." *Id.* By footnote, the Supreme Court recognized the following:

> The 1994 Bylaws provide the "Bylaws may be altered, amended, or repealed." The 1994 Plan provides the "Plan may be amended in accordance with the Bylaws." Similarly, the 1994 Bylaws provide the board of the Island Club have [sic] the authority to "[a]dopt, alter, amend, or repeal the Rules governing use of the Club."

Id., n.1.

The same is true in the present case. Martin has alleged that he resigned or otherwise tried to force his expulsion from CIMC by non-payment in late 2011 or at least by June 2012.[2] At that time, like in *Dennis*, the membership documents in

[2] In his Amended Answer and Counterclaims, Martin sought "a finding that the Defendants obligations to the Club terminated at the time of their resignation in November 2011." (R. 60). Later, in the Second Amended Answer and Counterclaims, Martin pled alternatively that he was expelled from membership "since approximately June 2012 or earlier." (R. 81). The record

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effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules. Consequently, consistent with the Supreme Court's decision in *Dennis*, there is no genuine issue of material fact in dispute as to which version of the governing documents controls the relationship between Martin and CIMC in the 2011-2012 time frame.

Likewise, consistent with the Supreme Court's decision in *Dennis*, there is no genuine issue of material fact in dispute regarding the authority for the CIMC Board to amend the General Club Rules without a vote of the full membership. This issue has arisen only in the context of Martin's "mandatory expulsion" argument. Martin relies on language in the 2001 Rules stating: "Any member whose account is not settled within the four (4) months period following suspension *shall* be expelled from the Club." (R. 1354). (Emphasis added). However, in 2007, the Rules were properly amended, and the "mandatory expulsion" language was removed. The 2007 Rules state: "Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club." (R. 1435). (Emphasis added). The 2009 Rules continued to use the same "may be expelled" language. (R. 1471). Citing that same language, the Supreme Court in *Dennis* explained that "the 2009 Rules, which were in effect when the Dennises resigned,

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also shows that Martin stopped paying his dues, fees, assessments and charges in late 2011. (R. 30).

do not make expulsion mandatory under any condition." *Dennis*, 821 S.E.2d at 673.[3] Those same 2009 Rules, as applied to Martin, show that expulsion was likewise not mandatory in the 2011-2012 time frame.

In its May 2, 2018 opinion, this Court recognized that pursuant to the revision adopted in the 2007 Rules and retained in the 2009 Rules, "CIMC would not have been obligated to expel Martin despite his suspension." (Slip Op. at 6). But this Court further wrote: "However, Martin contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club." (Slip Op. at 6). This Court cited to a provision in the 2007 Plan stating:

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

(Slip Op. at 6). Then, relying on Martin's affidavit that no such vote of the membership was ever held, this Court found that "there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of Martin's suspension from the club." (Slip Op. at 6). This Court's error, however, was in

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[3] The Supreme Court also found "there is no ambiguity as to expulsion from the Members Club." *Dennis*, 821 S.E.2d at 673.

citing to the amendment provision for the Plan for Offering of Memberships rather than the amendment provision for the General Club Rules.[4] As the Supreme Court explains in *Dennis*, the Bylaws provide that the Board of Directors has the authority to "[a]dopt, alter, amend or repeal the General Club Rules governing use of the Club and all its facilities by members." (R. 1478). *See*, *Dennis*, 821 S.E.2d at 670, n.1. Thus, an amendment of the Rules *does not require a vote of the full membership.* Martin, in fact, does not cite to any evidence suggesting that the General Club Rules were not properly amended in 2007 or 2009. Moreover, he cites to no contractual document that required a vote of the members to approve any changes to the General Club Rules.

As a result, contrary to what this Court previously determined, there is no material issue of fact in dispute. The 2009 Rules govern Martin's resignation or attempt to force his expulsion from CIMC during the 2011-2012 time frame, and those Rules do not include the "mandatory expulsion" provision. This is precisely what the Supreme Court ruled in *Dennis*, and it is equally applicable and binding in this case.

In sum, there is absolutely no evidence that CIMC Board expelled Martin

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[4] The 2007 and 2009 versions of the General Club Rules provide that "[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. 1425, ¶ 1.3 (2007 version); R. at 1496, ¶ 1.3 (2009 version); *accord* R. at 1310 (1994 version); R. 1324, ¶ 1.3 (2001 version)).

from the Club. Even if "suspended" from the Club for non-payment, Martin did not have the right to automatically "expel" himself by simply remaining delinquent for four additional months. Therefore, regardless of whether Martin submitted his resignation or attempted to force his own expulsion by non-payment, Martin remains obligated to pay his dues, fees, and other charges until such time as his membership is reissued. That trial court ruling is fully consistent with the Supreme Court's decision in *Dennis* and should be affirmed.

IV. The Supreme Court's opinion in the *Dennis* case requires a ruling in the case at bar that the CIMC governing documents are unambiguous and are not subject to interpretation using parol evidence.

In its opinion in *Dennis*, the Supreme Court rejected all arguments that the governing documents -- the 2008 Plan, the 2009 Bylaws, and the 2009 Rules -- are ambiguous in any respect. First and foremost, the Supreme Court cited to Section 5.11 of the 2008 Plan, entitled "Payment of Dues and Other Charges by Resigning Members," which states: "An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club." (R. 1448-1449). The Supreme Court concluded that "[t]his language unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation

until their membership is reissued." *Dennis*, 821 S.E.2d at 670. The Supreme Court recognized that "[t]here are no provisions in the 2009 Bylaws or 2009 Rules that contradict this." *Id.*

The Supreme Court then analyzed and reversed the rulings of this Court in *Dennis* finding certain ambiguities in the contract language. First, the Supreme Court rejected this Court's reliance on differences in language between the 1994 Bylaws and 1994 Plan as "not sufficient to create an ambiguity" and as "irrelevant." *Dennis*, 821 S.E.2d at 671. Moreover, the Supreme Court explained that "even if we were to treat the 'termination' provision and the 'resignation' provision as governing the same event, there is no ambiguity." *Id.* The Court, indeed, focused on the 2009 Rules which state: "'Any member may terminate membership in the Club. ... Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold.'" *Id.*

The Supreme Court also rejected this Court's determination that the term "unpaid" in the 2009 Rules was undefined and thus ambiguous. The Supreme Court wrote:

> Finally, the term "unpaid" in the 2009 Rules is not ambiguous, despite the fact it is not defined. The court of appeals explained its interpretation of this provision by stating, "It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after

> resignation." We find there is nothing unclear. "Unpaid" means any payment the Dennises are obligated to make according to the terms of the membership documents that has not been made. We have already discussed that the membership documents include obligations to pay before and after the date of resignation. The Dennises admit they have not made the payments. According to the plain language of the membership documents, the Dennises' unpaid dues, fees, and other charges are "unpaid."

Id. (Citation omitted).

These are important points for rehearing in the present case. In its May 2, 2018 opinion, this Court found the same ambiguities in the contract documents as identified in its *Dennis* opinion. This Court recognized that "[t]he same governing documents at issue in *Dennis* were used in this case" and then cited to the exact same ambiguities discussed in *Dennis*, thereby concluding that "an ambiguity exists regarding the obligation of a resigning member to continue paying dues post-resignation." (Slip Op. at 3-4). The Supreme Court, however, rejected that analysis in its *Dennis* opinion, and thus, on rehearing, this Court is bound to conclude that the same documents are not ambiguous, consistent with the Supreme Court's analysis of that very issue.

Moreover, the Supreme Court in *Dennis* rejected any reliance on extrinsic evidence to argue that the governing documents are ambiguous. The Supreme Court explained "because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to

vary their otherwise clear meaning." *Dennis*, 821 S.E.2d at 672. The Supreme Court thus applied the parol evidence rule to bar consideration of testimony that contradicts or varies the terms of the membership documents, including testimony of what the members were allegedly told by Ellen Padgett, a former membership coordinator, about the expulsion process. In its May 2, 2018 opinion, this Court relied on the very same parol evidence to preclude summary judgment. On rehearing, that evidence must now be rejected consistent with the Supreme Court's decision in *Dennis*.

V. The summary judgment on the Appellant's breach of contract counterclaim should be affirmed.

In its May 2, 2018 opinion, this Court also reversed summary judgment entered on Martin's breach of contract counterclaim. This Court reasoned as follows: "Because of the interrelated nature between Martin's breach of contract counterclaim and CIMC's breach of contract claim and, as stated above, the fact that relevant portions of the governing documents are ambiguous, we reverse the circuit court's grant of summary judgment to CIMC." (Slip Op. at 7). This ruling should be reversed on rehearing. As discussed above, the Supreme Court in *Dennis* determined that the governing documents are not ambiguous and further explained that CIMC members, such as the Dennises and Martin, remain obligated for dues,

fees, and other charges until reissuance of their memberships. Thus, the summary judgment on Martin's breach of contract counterclaim should be affirmed.[5]

VI. The trial court's award of attorney's fees and costs to CIMC should be affirmed.

In its May 2, 2018 opinion, this Court also reversed the grant of attorney's fees to CIMC because the summary judgment on the merits was reversed in part and remanded. On rehearing, CIMC requests that the trial court's award of attorney's fees and costs be reinstated and affirmed. If the summary judgment on the merits is affirmed, the award of attorney's fees and costs should be affirmed as well.

CIMC relies on prior briefing on this issue. In sum, the analysis by the trial court should be affirmed. The governing documents are properly construed to include the recovery of "all costs and expenses" to CIMC, including reasonable attorney's fees, if a legal action is commenced by CIMC "to collect any amount owed" or "to enforce any liability of a member to the Club." (R. 1471). Furthermore, Martin's argument that the governing documents do not provide for

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[5] The Court's analysis of the negligent misrepresentation claim in its May 2, 2018 opinion is correct and should be affirmed on rehearing. In his petition for rehearing on this issue, Martin argues that the expulsion language as contained in Section 13.3.1 of the 2001 Rules constitutes a representation that "members must be expelled after nonpayment." *See*, Martin's Petition for Rehearing, p. 3. However, as discussed above and as determined by the Supreme Court in *Dennis*, that expulsion provision was amended in the 2007 and 2009 Rules to be discretionary rather than mandatory. As a result, Martin has not shown that any false representation was made by the 2001 Rules. Instead, that representation was no longer in effect in the 2011-2012 time frame because the Rules had been amended in the interim.

CIMC to recover attorney's fees was an issue raised for the first time in his Rule 59(e) motion, which was untimely. The trial court, in fact, recognized that "CIMC's authority to collect its attorney's fees … was raised for the first time at the hearing for reconsideration." (R. 9). It is, however, well settled that "a party cannot for the first time raise an issue by way of a Rule 59(e) motion that could have been raised at trial." *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995). Here, the issue was not even raised in the Rule 59(e) motion but rather for the first time at the hearing on the Rule 59(e) motion, which is obviously not timely. (R. 333-334).

CONCLUSION

For the foregoing reasons, the Respondent Callawassie Island Members Club, Inc. respectfully requests this Court to affirm the trial court's grant of summary judgment to CIMC, including the award of attorney's fees and costs.

Respectfully submitted,

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January 30, 2019

868862

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J. Ernest Kinard, Jr., Judge

Case No. 2012-CP-07-03218
SC Court of Appeals No. 2015-000001

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SC Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin, Appellant.

APPELLANT'S PETITION FOR REHEARING

Appellant Gregory L. Martin respectfully submits this Petition for Rehearing related only to this Court's ruling on Appellant's negligent misrepresentation counterclaim. For the reasons set forth below, Appellant hereby petitions the Court for rehearing of that portion of its Opinion Number 2018-UP-178, filed on May 2, 2018, which affirmed in part and reversed in part the entry of summary judgment for the Club. Appellant seeks to preserve his right to assert a negligent misrepresentation counterclaim in the event that the South Carolina Supreme Court or the trial court rules that Appellant may not end his membership without further obligation to the Club.

INTRODUCTION & BACKGROUND

This action involves a social club on Callawassie Island: Respondent The Callawassie Island Members Club, Inc. (the "Club"). Appellant recognizes that this Court is familiar with the background and circumstances, and Appellant refers to and incorporates Appellant's previous briefs, which discuss the facts and circumstances giving rise to these appeals.

ARGUMENT

Appellant only seeks rehearing of the portion of this Court's opinion relating to Appellant's negligent misrepresentation counterclaim. In that section of its opinion, the Court held that the trial court did not err in granting summary judgment to the Club on Appellants' negligent misrepresentation counterclaim. The Court's reasoning was that "[The] evidence is insufficient to support [Appellant's] negligent misrepresentation counterclaim because allowing certain members to leave the club is not a *false* representation and it was not made to [Appellant]." (Slip Op. at p. 8)

Appellant respectfully submits that the record contains misrepresentations by the Club directly to Appellant, which would be sufficient to support Appellant's counterclaim for negligent misrepresentation. Those misrepresentations include the documents themselves provided by the Club to Appellant, which stated that the member could choose to terminate his membership, and that a member shall be expelled after several months non-payment. For example, the Club's documents stated to Appellant:

> 14.2.1 Any **member** may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for the Offering of Club Memberships. Notwithstanding termination, the member shall remain liable for any **unpaid** club account,

> membership dues and charges (including any food and beverage minimums).

(R. at 1355 (emphasis added).) As this Court has held, the term "unpaid" is ambiguous. (Slip Op. at p. 4) The provision therefore must be interpreted in favor of Appellant for purposes of the summary judgment motion filed by the Club, and when interpreting documents drafted by the Club.

Similarly, the Club represented that members must be expelled after non-payment:

> 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. 1354–55; emphasis added)

Appellant's understanding that he could end his membership without further obligation was reasonable based on: (1) the representations made by the Club to Appellant within the four corners of the Club's documents, including those cited above; and (2) the actions of the Club allowing members to end their membership. For example, the resale list provided to members (including Appellant) indicates that dozens of

members were expelled or conceded their memberships. (R. at 1552–53). Both types of representations were made to the Appellant himself.

If the South Carolina Supreme Court (or the trial court on remand) rule that Appellant may **not** end his membership without further obligation, the representations of the Club set forth above are false. In such instance, at least a mere scintilla of evidence exists supporting Appellant's negligent misrepresentation counterclaim, and Appellant should be permitted to present his negligent misrepresentation counterclaim at a trial.

CONCLUSION

For these reasons, Appellant requests that the Court grant his Petition for Rehearing and vacate the portion of the Court's Opinion affirming summary judgment on Appellant's negligent misrepresentation counterclaim.

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By: 

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Attorneys for Appellant Gregory L. Martin

May 29, 2018

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
MAY 30 2018
SC Court of Appeals

J. Ernest Kinard, Jr., Judge

Appellate Case No. 2015-000001

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing, on all parties of record, by depositing a copy of it in the United States Mail, postage prepaid, on May 29, 2018, addressed to the attorney of record:

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May 29, 2018

FORD WALLACE THOMSON LLC

ATTORNEYS AT LAW

May 29, 2018

VIA FEDERAL EXPRESS; OVERNIGHT DELIVERY
The Honorable Jenny Abbot Kitchings
SC Court of Appeals
Attention: Elizabeth
1220 Senate Street
Columbia, SC 29201

RECEIVED
MAY 30 2018
SC Court of Appeals

Re: *The Callawassie Island Members Club Inc. vs. Gregory L. Martin*
Beaufort County Case No.: 2012-CP-07-03218
SC Court of Appeals Case No.: 2015-000001

The Callawassie Island Members Club Inc. vs. Michael J. Frey
Beaufort County Case No.: 2012-CP-07-03209
SC Court of Appeals Case No.: 2015-000002

The Callawassie Island Members Club Inc. vs. Mark K. Quinn
Beaufort County Case No.: 2012-CP-07-03216
SC Court of Appeals Case No.: 2015-000003

Dear Elizabeth:

Enclosed for filing please find the original and seven copies of the Appellant's Petition for Rehearing along with a Proof of Service and $25.00 check representing the requisite filing fee in each of the above-referenced matters.

I would appreciate your filing the same and returning a filed copy to me with the enclosed postage pre-paid Federal Express package provided for your convenience.

Thank you in advance for your assistance with this matter. Should you have any questions or concerns, please do not hesitate to contact my office.

With kind regards, I am,

Very truly yours,

Neil D. Thomson
Ian S. Ford

ISF/smb
Enc. – as stated

cc: All Counsel of Record

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UNITED STATES US

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2015-00001

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

v.

Gregory L. Martin and Rebecca L. Martin ..... Defendants.

Of whom Gregory L. Martin is .....Appellant.

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

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SC Court of Appeals

AND NOW COMES Respondent The Callawassie Island Members Club, Inc. ("CIMC" or "the Club") and files the following Petition for Rehearing. For the reasons that follow, CIMC hereby petitions the Court for rehearing of its Opinion Number 2018-UP-178, filed on May 2, 2018, which affirmed in part and reversed in part the entry of summary judgment for CIMC.

INTRODUCTION

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

BACKGROUND

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

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

In a nutshell, CIMC filed the action seeking to recover dues and other amounts due from Defendants Gregory L. Martin and Rebecca L. Martin ("Defendants"), who are equity members of CIMC. (R. at 21-31). CIMC claims that, under the governing documents, Defendants agreed to and are required to continue to meet their financial obligations until CIMC reissues their membership to a new member. Reissuance can occur either by transfer in connection with the sale of Defendants' property on Callawassie Island or sale via the membership resale list. The Club has operated in that fashion for more than 22 years.

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

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

Defendants, however, have asserted counterclaims and argued, for various reasons, that they are not obligated to remain members of CIMC and can abandon their financial responsibilities to their fellow members whenever they want. In Defendants' Amended Answer and Counterclaims, they asserted counterclaims for: (1) breach of contract; (2) statutory violations; and (3) negligent misrepresentation. (R. at 47-62).

The trial court correctly granted CIMC summary judgment as to Appellant Gregory L. Martin ("Appellant") because the unambiguous documents provide that CIMC is entitled to the relief demanded. The trial court denied summary judgment as to Defendant Rebecca L. Martin, pending the completion of further discovery. (R. at 11). Appellant filed an appeal to this Court.

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

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

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

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

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

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

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

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

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

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

ARGUMENTS

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

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

When Defendants purchased their membership in the Club, they acknowledged receipt of the Plan for the Offering of Memberships in the Callawassie Island Club Dated April 1, 1994 (and all exhibits thereto)[2] ("1994 Plan") and "agree[d] to be bound by all of their respective terms and conditions." (R. at 28). The 1994 Plan provides that:

> [a]n equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership *is reissued by the Club.*

(R. at 1260 (emphasis added)). Similarly, the 1994 Callawassie Island Club ("CIC") By-Laws, an exhibit to the 1994 Plan, provide that "[d]ues, fees and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club." (R. at 1299, ¶ 9(a)). These provisions state in plain and unambiguous language that a member of the Club is required to continue paying dues and other charges to the Club until their membership is "reissued." There is nothing contradictory or unclear about those provisions. They unambiguously provide that a resigning member is obligated to continue meeting his financial commitment until his or her membership is reissued. Additionally, this language is contained in future versions of the contractual documents governing Appellant's membership in the Club:

- Under the 2001 Membership Plan, a resigned member "will be obligated to continue to pay all Charges to the Club until his or her equity membership is reissued by the Club." (R. at 1365, ¶ 2.4.9).

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[2] The Exhibits to the Plan include the By-Laws of The Callawassie Island Club, Inc. (CIMC's predecessor) ("1994 CIC By-Laws") and the General Club Rules ("1994 General Rules"). (R. at 1251).

- Under the 2008 Membership Plan, a resigned member "will be obligated to continue to pay to the Club all dues, fees and other Charges associated with his/her membership until his/her Equity Membership is reissued by the Club." (R. at 1448-49, ¶ 5.11).

- Under the 2012 Membership Plan, a resigned member "will be obligated to continue to pay to the Club all dues, fees and other Charges associated with his/her membership until his/her Equity Membership is reissued by the Club." (R. at 1526, ¶ 5.11(a)).

However, the Court — relying in part on its prior opinion in *Dennis* — found an ambiguity from the language of a provision of the 1994 General Rules: "[a]ny member may terminate membership in the Club by delivering to the Club's Secretary written notice of termination in accordance with the By-Laws. Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums)." (R. at 1314). Other later versions of the General Club Rules included similar language, including the 2009 version: "Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold." (R. at 1472, ¶ 14.2.1; *accord* R. at 1436, ¶ 14.2.1 (2007 General Club Rules); R. at 1508, ¶ 14.2.1 (2009 version)).

The *Dennis* Court determined that this provision was potentially ambiguous because: "The term 'unpaid' is not defined in the documents. It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation." *See Dennis*, 790 S.E.2d at 438. However, as discussed herein, even if the term "unpaid" as used in that section only "refers to unpaid dues owed at the time of resignation," this does not conflict with the Membership Plan provision about continuing obligations because it addresses a different subject, a resigning member's liability for unpaid dues owed at the time of resignation. It does not state or imply that a resigning member is released from his commitment to pay dues in the future.[3]

---

[3] In addition, in construing the documents, the Court failed to take into account the hierarchy of the documents. By way of example, the General Club Rules provide that they "shall be subject to and controlled by the applicable provisions of the By-Laws." In essence, this Court

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

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

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

> A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation. 17A Am. Jur. 2d Contracts § 338, at 345 (1991). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Id.*

See Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "'Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity.'" *Stribling v. Stribling*, 369 S.C. 400, 404, 632 S.E.2d 291, 293 (Ct. App. 2006) (*quoting Gamble, Givens Moody v. Moise*, 288 S.C. 210, 215, 341 S.E.2d 147, 150 (Ct. App.

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has erred in reading the General Club Rules in a vacuum, separate and apart from "the applicable provisions of the By-Laws," in order to find an ambiguity that quite simply does not exist. Thus, this Court failed to read the term "unpaid" in conjunction with the explicit language in the By-Laws, which states as follows: "Any equity member may resign from the Club by giving written notice to the Secretary. *Dues, fees and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club.*" (Emphasis added).

1986)). "In making this determination [of whether an ambiguity exists], the court must examine the entire contract and not merely whether certain phrases taken in isolation could be interpreted in more than one way." *See Gaffney v. Gaffney*, 401 S.C. 216, 222, 736 S.E.2d 683, 687 (Ct. App. 2012) (citation omitted). "'A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract." *See Williams v. Government Employees Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705 (2014) (citations omitted).

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

> In finding the arbitration agreement ambiguous, the circuit court held:
>
> > The first paragraph of the agreement references "WMAS, its officers, directors, agents, registered representatives and/or employee." ... The [] paragraph [immediately following] states, in pertinent part: I (we) understand that: (1) ARBITRATION IS FINAL AND BINDING ON THE PARTIES (i.e., YOU AND WMAS).... This Court finds that this second paragraph is set forth with greater emphasis than the first and is inconsistent with the preceding paragraph as to who is to be controlled by the arbitration agreement.
> >
> > We find there is no inconsistency or ambiguity between the clauses. Even acknowledging a difference, the most logical explanation is that the language of the first paragraph actually creates the agreement to arbitrate, and the second paragraph merely summarizes that agreement.

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

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

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

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

(R. at 1354, ¶ 13.3.1). This language was subsequently changed in 2007 to make expulsion discretionary even as to suspended members: "Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club." (R. at 1435, ¶ 13.3.1). Even though this new language was in effect at the time Appellant stopped paying on his membership, the Court held that there is an ambiguity or issue for trial as to whether CIMC was required to expel him from the Club within four months after being suspended. That ruling is in error.

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

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

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

(R. at 1369, ¶ 10.1 (2001 Membership Plan); R. at 1452, ¶ 11.1 (2008 Membership Plan); *accord* R. at 1268 (1994 version)). Under this provision, the Court further cited Appellant's Affidavit testimony that "I have never voted to change the requirement that a member must be expelled after

4 months of suspension and have never been made aware of any vote to do so, nor have I voted to restrict my right to transfer my property or membership." (R. at 443, ¶ 8).

However, unlike the provision that the Court relies upon, the expulsion provisions are not contained in any Membership Plan. Rather, these provisions are contained in General Club Rules, which the Board of Directors can amend at any time. The 2007 and 2009 versions of the General Club Rules provide that "[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. 1425, ¶ 1.3 (2007 version); R. at 1496, ¶ 1.3 (2009 version); *accord* R. at 1310 (1994 version); R. 1324, ¶ 1.3 (2001 version)). Appellant does not cite to any evidence suggesting that the General Club Rules were not properly amended under this provision. He cites to no contractual document that required a vote of the members to approve changes to the General Club Rules.

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

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

Under the December 1, 2001 General Club Rules, CIMC's Board of Directors may suspend a member whose account is delinquent for 60 days. (R., at 1331, ¶ 13.3.1). Under those rules, a member who was suspended and whose account was not thereafter settled within four months

"shall be expelled from the Club." (R., at 1331, ¶ 13.3.1). There is no evidence that Appellant was expelled under the 2001 General Club Rules, since Defendants stopped paying their dues, fees, assessments and charges in 2011. (R. at 30).

Similarly, under the 2007 amendments to the CIMC General Club Rules, a member whose account is delinquent for 60 days "may be suspended" by the Club's Board of Directors. (R. at 1435, ¶ 13.3.1). However, under the 2007 version of the CIMC General Club Rules (unlike the 2001 version), a member who is suspended and whose account is not settled within four months "*may* be expelled from the Club." (R. at 1435, ¶ 13.3.1). In other words, this revision made clear that the decision to expel a member for nonpayment (after failing to settle his account four months after suspension), even after suspension, was *permissive, not mandatory*; as always, the decision to suspend in the first instance is discretionary. Subsequent versions of CIMC's Rules are consistent up to the present date. (R. at 1507, ¶ 13.3.1). All of the post-2001 General Club Rule provisions — which would have been in effect at the time Appellant stopped paying — make expulsion discretionary. To the contrary, even if Appellant was "suspended" from the Club, he did not have the right to automatically "expel" himself by simply remaining delinquent for four more months.

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

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

> Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club property under any circumstances. An expelled member shall be so notified by registered mail and shall have the obligation to surrender his or her Membership Certificate for reissuance by the Club to a new member in accordance with the provisions of Article X, Section 9 of these By-Laws.

(R. at 1303, Art. XIV.5). CIMC's 2001 and subsequent General Club Rules reiterate that, upon the expulsion of a member, such member must "surrender his or her membership certificate for reissuance by the Club to a new member." (R. at 1332, ¶ 14.1.5; R. at 1436, ¶ 14.1.5; R. at 1472, ¶ 14.1.5).

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

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

(R. at 1448-49, ¶ 5.11; *accord* R. at 1260; R. at 1365, ¶ 2.4.9; R. at 1526, ¶ 5.11(a)).

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

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

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

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

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

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

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

("Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made. It does not depend on the subjective, after the fact meaning one party assigns to it.")).

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

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

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

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

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

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

> No person has been authorized to give any information or make any representation not contained in this Membership Plan and, if given or made, such information or representation must not be relied upon as having been authorized by the Partnership or the Club.

(R. at 1249; *accord* R. at 1361, ¶ 1.8; R. at 1453, ¶ 12.3; R., at 1533, ¶ 12.3). In this regard, Defendants expressly agreed that they did not (and could not) rely on any alleged representations

by Ms. Padgett (or anyone else for that matter). South Carolina law will enforce the parties' agreement that prior representations are not to be relied upon to add to the representations contained in the agreement. *See Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument."); *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 127-28, 713 S.E.2d 799, 805 (Ct. App. 2011) ("A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement.").[4]

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

C. The Court Misconstrued the South Carolina Nonprofit Corporation Act

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

> Section 33-31-620 obligates resigned members to pay any dues incurred before resignation. This section does not require resigned members to continue to pay any dues that accrue after resignation. To do so, we believe, would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations. . . .

---

[4] In addition, it is well established that extrinsic evidence is not admissible to create an ambiguity or to show the intent of the parties. *Kirven v. Bartell*, 266 S.C. 385, 223 S.E.2d 597, 599 (1976) ("extrinsic evidence is to be admitted to resolve ambiguities, not create them"); *Bellamy v. Bellamy*, 292 S.C. 107, 111, 355 S.E.2d 1, 3 (Ct. App. 1987) ("[e]xtrinsic evidence is admissible to resolve ambiguities, not to create them where none exists"). The Court respectfully erred in considering the testimony of Ellen Padgett, which is extrinsic evidence used to find an ambiguity existed.

> Appellants state in their brief it is undisputed that CIMC membership is no longer available to non-Callawassie property holders. With only 85 lots remaining for development and every fourth purchase coming off the resale list, it is possible only 21 names will ever come off the list. Appellants are 72nd on the resale list. Therefore, it appears unlikely Appellants will ever be able to sell their membership. We find section 33-31-620 protects club members from such continuing liability after resignation.

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

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

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

---

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

membership to the purchaser of his or her property. (R. at 1258; R. at 1364, ¶ 2.4.1; R. at 1446, ¶ 5.2; R. at 1447-48, ¶ 5.8; R. at 1522, ¶ 5.2; R. at 1525, ¶ 5.8). Appellant has not presented any evidence that Defendants could not sell their property and have their membership reissued to the purchaser.

As discussed above, such reissuance of the membership would relieve the member of ongoing membership obligations. In other words, Appellant could end his membership obligations by selling his property and having the purchaser obtain his reissued membership. Appellant offers no evidence that this would not be a viable way to end his membership commitment. If Defendants sell their property and complete the required paperwork, Appellant can end his membership and any further obligations. This process assures continuity of membership and furthers the Callawassie community's ethos – expressly embodied in the 2001 covenant amendments (R. at 1373-1422) – that Club membership goes hand in hand with property ownership.

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

---

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

[7] Under the various governing documents, Defendants were advised that their purchase of a membership in the Club was solely for recreational purposes and was not intended to provide any economic benefit to them or serve as an investment. (R. at 1250; R. at 1361, ¶ 1.9; R. at 1453, ¶ 12.4; R. at 1533, ¶ 12.4).

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

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

The essence of most homeowners' associations is that those who own property within the association, and thus enjoy its amenities and other benefits, must belong to the association and pay dues for as long as they own their property. Yet, under this Court's decision such requirement is void because this Court seemingly believes that Club members must be allowed to resign and permitted to avoid their financial obligations at any time. Community associations cannot survive this way. One trial court resolved this dilemma by cogently recognizing that mandatory membership does not violate the Act, because the member "may resign from the HOA at any time by selling his . . . property." *See Jarmuth v. International Club Homeowners Ass'n, Inc.*, 2013 WL 6832934, at *4 (S.C. Com. Pl. Horry March 11, 2013). Likewise, Appellant and his spouse can

resign from the Club any time and may end their financial obligation by selling their property and transferring their membership to their buyer, who governing covenants require to become an equity member. They have presented no evidence that CIMC has done anything to prevent them from selling their property. This Court should find that this arrangement satisfies the Act's requirement that members be allowed to resign.

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

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

> (a) A member may resign at any time.
>
> (b) The resignation of a member *does not relieve the member* from any obligations the member may have to the corporation as a result of *obligations incurred or commitments made before resignation.*

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

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

> The Court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993).
>
> Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d

280, 283 (2000). "*A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.*" *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citation omitted).

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The Court's opinion reflects that it perceives the CIMC governing documents as unfairly oppressive and largely inharmonious. This perception is mistaken. The documents, though sometimes using different words to deal with similar subjects, leave no doubt as to what the Club's founders meant and what every member, including Appellant, agreed to. CIMC is a first-class club, offering amenities that no member could ever afford alone. CIMC, like other amenity-based clubs and community associations, is a remarkable product of collective will. It has no revenue source except for the dues and fees paid by its limited pool of members. It depends for its very existence upon every members' commitment to pay his share of the cost of running the Club until his membership passes to a new member. The membership agreement between CIMC and Appellant leaves no doubt about this. It is not ambiguous, unfair, or illegal; for the sake of every other member, the Court should enforce it according to its clear terms.

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

Respectfully submitted,

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May 17, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent, does hereby certify that service of **Respondent's Petition for Rehearing and Incorporated Memorandum in Support Thereof** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 17th day of May 2018:

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Hand Delivered
The Honorable Jenny Abbott Kitchings
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1220 Senate Street
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RE: The Callawassie Island Members Club, Inc. v. Gregory L. Martin and Rebecca L. Martin
Appellate Case Number: 2015-000001
Civil Action Number: 2012-CP-07-3218
Our File Number: 79.20032

Dear Ms. Kitchings:

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

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

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

RECEIVED
MAY 17 2018
SC Court of Appeals

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Enclosures

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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. 2015-000001

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

v.

Gregory L. Martin and Rebecca L. Martin .....Defendants,

Of Whom Gregory L. Martin is the 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?

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STATEMENT OF THE CASE

On September 13, 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 Gregory L. Martin and Rebecca L. Martin (the "Martins"). On November 21, 2012, the Martins 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 21, 2012, the Martins 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 July 30, 2013, the Club filed a Motion to Dismiss, alleging that the Martins' 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 Martins 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 Martins' 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 Martins 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 Martins 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 Gregory L. Martin, but denying the claims as to Rebecca Martin.

On July 7, 2014, the Martins filed a Motion to Reconsider Order Granting Summary Judgment Against Gregory L. Martin. 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 Martins 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 Gregory L. Martin.

The Martins 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" or "CIMC") is a private social club on Callawassie Island. When Gregory and Rebecca Martin (the "Martins") purchased property on Callawassie Island in 2001, Appellant Gregory Martin submitted an application for membership in a different organization, the Callawassie Island Club, Inc. ("CIC"), an entity owned by the original island developer (R. p. 27) There is, however, no evidence in the record that the Martins signed a membership purchase agreement with the Club, only an application with CIC.

Equally as important, the Martins were told—and the Club documents at the time stated—that Gregory Martin 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.

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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. 1364-65) (R. pp. 217-219) (R. pp. 336-37)

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. pp. 1331-32) (R. pp. 217-219) (R. pp. 336-37)

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

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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. 1331-32) (R. pp. 217-219) (R. pp. 336-37) This is the exit method that applies to Gregory Martin.

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. p. 1533) (R. pp. 1566-67) (R. p. 465, line 19-p. 466, line 24) (R. p. 472, lines 10-11) (R. 474, lines 6-18) (R. p. 486, lines 2-17) (R. pp. 506-07) (R. p. 608, line 9-p. 611, line 18) (R. p. 621, lines 1-14) (R. p. 659, line 7-p. 660, line 12) (R. p. 663, lines 16-20) (R. p. 676, line. 16-p. 677, line 8) (R. p. 686, lines 8-9) (R. p. 713, lines 3-13) (R. p. 872, lines 5-18) (R. p. 898, lines 2-17) (R. p. 922, lines 9-25) (R. p. 941, lines 22-24) (R. p. 1100, lines 1-13) (R. p. 1102, lines 308) 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

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contribution ($31,000 for Gregory Martin), 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, Gregory Martin was expelled in or about April 2012, 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. 14)

In its lawsuit, the Club overreaches and now claims that Gregory Martin continues to owe dues, fees, assessments, and other charges since his expulsion three 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 Gregory Martin no longer has the right to resign or terminate his membership. The Club further alleges that Gregory Martin, despite having been expelled from the Club and losing his $31,000 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. 1331-1332) (R. pp. 1259-60) (R. pp. 422-43) (R. pp. 329-330) (R. pp. 237-38)

(R. p. 240) The Martins 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. 203) 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. 1140, lines 24-25) (R. p. 1141, lines 1-8) (R. p. 1038, lines 21-24) (R. p. 1163, lines 17-23) (R. p. 1165, line 23) In opposition, the Martins submitted voluminous documents and deposition transcripts showing areas of known ambiguity as well as supporting their individual defenses and counterclaims. (R. p. 720, lines 4-5 & lines 17-19) (R. p. 955, lines 17-19) (R. p. 1533) (R. pp. 1566-67) (R. p. 465, line 19-p. 466, line 24) (R. p. 472, lines 10-11) (R. p. 474, lines 6-18) (R. p. 486, lines 2-17) (R. pp. 506-07) (R. p. 608, line 9-p. 611, line 18) (R. p. 621, lines 1-14) (R. p. 659, line 7-p. 660, line 12) (R. p. 663, lines 16-20) (R. p. 676, line. 16-p. 677, line 8) (R. p. 686, lines 8-9) (R. p. 713, lines 3-13) (R. p. 872, lines 5-18) (R. p. 898, lines 2-17) (R. p. 922, lines 9-25) (R. p. 941, lines 22-24) (R. p. 1100, lines 1-13) (R. p. 1102, lines 308) Gregory Martin submits this appeal seeking a reversal of the order granting summary judgment, so that he may have a trial on the claims and counterclaims.

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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).

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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 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 Gregory Martin. On each of those points, the Martins 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:

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[1] The Club's Complaint alleges an "alternative" cause of action of quantum meruit. (R. p. 24) The trial court's Order appears to grant summary judgment on the breach of contract action, rendering the "alternative" cause of 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 Martins "benefitted" from or used their Club purported membership; the only evidence the Club provided was that the Club continued to send bills to the Martins.

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> 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. 12, 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 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 Martins 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. 1240, line 10-p. 1241, line 14) (R. p. 1204, lines 15-17)

Having made that assumption, the Order then effectively shifted the burden of proof onto the Martins. This is demonstrated, for example, by the Order's statement that Gregory Martin "cannot establish the essential elements

for a negligent misrepresentation claim . . . ." (R. pp. 14-15) The trial court incorrectly treats the liability case as only a debt collection problem and appears to rely upon a trial standard—that the Martins 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 Martins presented more than a mere scintilla of evidence establishing genuine issues of material fact.

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

The Martins 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

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agreement between the parties is unambiguous" was erroneous.[2] (R. p. 16) 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 Martins, 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 Martins because (i) the documents are dated after the Gregory Martin had been expelled, and (ii) the quoted excerpts refer to different tracks of

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[2] In the alternative, even if the alleged contract was unambiguous, Gregory Martin is still entitled to a trial on disputed issues of fact, such as (i) whether and when Gregory Martin 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 Gregory Martin; and (iii) whether Gregory Martin owes money to the Club, or how much is owed. (*See supra*) (R. p. 1533) (R. pp. 1566-67) (R. p. 465, line 19-p. 466, line 24) (R. p. 472, lines 10-11) (R. p. 474, lines 6-18) (R. p. 486, lines 2-17) (R. pp. 506-07) (R. p. 608, line 9-p. 611, line 18) (R. p. 621, lines 1-14) (R. p. 659, line 7-p. 660, line 12) (R. p. 663, lines 16-20) (R. p. 676, line. 16-p. 677, line 8) (R. p. 686, lines 8-9) (R. p. 713, lines 3-13) (R. p. 872, lines 5-18) (R. p. 898, lines 2-17) (R. p. 922, lines 9-25) (R. p. 941, lines 22-24) (R. p. 1100, lines 1-13) (R. p. 1102, lines 308) (R. p. 1140, lines 24-25) (R. p. 1141, lines 1-8) (R. p. 1038, lines 21-24) (R. p. 1163, lines 17-23) (R. p. 1165, line 23)

[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.").

exiting the Club—to "resignation" or "termination" of members, rather than "expulsion" of members. (R. p. 13)

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 Martins, when the evidence shows that Gregory Martin was expelled by 2012 and the Martins were sued in 2012. (R. pp. 13-14) The Order itself indicates that the trial court considered governing documents after 1994 to be irrelevant to its ruling. (R. p. 12) 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. 16)

(2) The trial court erred by disregarding the abundant evidence that the Martins 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 Martins' arguments is that they (or, more specifically, Gregory Martin as the only "member") were "expelled" from membership after four months of non-payment of dues (so, in early 2012), and their charges up to

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that expulsion date would be deducted from their $31,000 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. 1354-55) 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. 1364-65) (R. pp. 1354-55) And "termination" from the Club was

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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. 499, lines 24-25) (R. p. 500, lines 16-18) (R. p. 556, lines 17-18 (trans. p. 135)) (R. p. 723, lines 16-17) (R. p. 747, lines 3-22) (R. p. 871, lines 9-14) (R. p. 912, lines 3-6) (R. p. 1149, lines 14-18)

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another exit option entirely.[5] (R. p. 1355) (R. pp. 225-26) (R. pp. 328-29) The trial court's Order, however, relies only on sections from the governing documents (many of which post-date the Martins' 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 Martins relied and submitted evidence.[6]

The Martins' 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. 954, line 8-p. 955, line 19) (R. pp. 221-226) (R. p. 335-336) She testified that § 13.3.1 of the Club Rules is reasonably

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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. pp. 1355) 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. 1355) 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.

6 The sixth quote in the Order does refer to "expulsion," but that document is dated January 1, 2014, long after the Martins 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. 543 (trans. p. 84, lines 3-5) (R. p. 1044, lines 7-11) (R. 1066, p. 23-p. 1067, line 3)

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understood by her to mean that after four months of delinquency the member would lose their membership.[7] (R. p. 954, line 8-p. 955, line 19) (R. p. 895, line 25-p. 896, 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. 686, lines 8-9) (R. p. 712, line 22-p. 713, line 7) Dick Mercier (another member) also testified that he was told he could end his membership at any time. (R. p. 220) (R. p. 608, line 20-p. 609, 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. 472, lines 10-11) (R. p. 536 (trans. p. 56, line 24-p.57, line) (R. p. 1038 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.

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[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. 816, lines 6-24) (R. p. 830, line 11-p. 832, line 21) (R. p. 844, lines 17-25) (R. p. 916, 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).

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(R. p. 474, 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. 474, 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. 543, lines 15-19 (trans. p. 84)) 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. 543 (trans. p. 84, lines 3-5) (R. p. 1044, lines 7-11) (R. 1066, p. 23-p.1067, 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. 1552-53, 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. 1566-67, expulsion letters from Club)

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. 1299) Gregory Martin's affidavit states that his

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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. p. 422) As remedy, the Club would get to keep the person's equity contribution ($31,000 for Gregory Martin), 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. 12) The Order incorrectly holds that there is "no room for contrary interpretation."[8] (R. p. 13) The Order failed to address, or even mention, the ample evidence—testimony, documents, affidavit—submitted by the Martins showing the Club's failure to abide by its own required expulsion process. Taking all inferences in the light most favorable to Gregory Martin, there is more than a "mere scintilla" of evidence supporting his arguments. And there are

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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. 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.

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issues of fact as to whether Gregory Martin 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 Martins had no obligation beyond their equity interest in their purported Club membership.

The Martins argued to the trial court that, based on the Club's governing documents, any liability they might have is limited to Gregory Martin's equity investment of $31,000 in the Club. Without a legal basis, the Order disregarded this requirement and instead incorrectly awarded the Club $41,930.24 in damages. (R. p. 18)

Gregory Martin 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. pp. 422-23) 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. 1260) 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. 1303) 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. 1296) This is consistent with the "Transfer Upon Death" provision, which indicates that a deceased member's estate's financial responsibility accrues

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against the deceased member's membership contribution, and is limited to that person's membership contribution (rather than against the estate itself). (R. p. 1260) 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. 1261)

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. 1331)

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 Gregory Martin should be permitted to have a trial on these issues.[9]

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[9] Alternatively, the Order incorrectly failed to allow Gregory Martin a credit of $31,000 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. 1365)

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

The Order incorrectly issues a judgment of $41,930.24 against Gregory Martin, and indicates that the Club may continue to levy "dues, fees, assessments, and other charges" going forward. (R. p. 18) This is legally incorrect under 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. 1311, emphasis added) (R. p. 1332) 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 Gregory Martin for years to come. This is particularly true for expelled members (such as Gregory Martin) 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. 1332) 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.

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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 Gregory Martin, 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 Gregory Martin 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

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"resign" either. (R. p. 488, lines 12-15) (R. p. 525, lines 12-13 (trans. p. 11) 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, 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 Gregory Martin and the Club.

The Club failed to meet its burden of proving that a contract existed between Gregory Martin and the Club. The only signed document submitted to the trial court was an "Application for Membership" in which Gregory Martin applied for membership in a different organization, the Callawassie Island Club, Inc. (R. p. 27) The Club has not submitted a signed agreement evidencing a contract between Gregory Martin and the Club. Nor has the Club submitted a signed agreement whereby Gregory Martin agreed to continue to pay dues and fees until his purported Club membership was reissued.

Additionally, the "Application for Membership" with CIC that forms the basis of the Club's claim states that it is not binding until CIC signs it: "This Application for Membership shall not be binding on the Club until the acceptance below is signed." (R. p. 29) No such signed Application was submitted to the trial court, and no such signed Application has been produced. By its own terms, the alleged Application is not binding.

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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. Gregory Martin's sworn affidavit states that he only signed an application to the Callawassie Island Club (not with the Club), and that he did not agree to amendments or changes to the documents cited in that application. (R. pp. 422-23) At the least, a genuine issue of material fact exists as to whether a binding contract exists between Gregory Martin 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 Martins raised a genuine issue of material fact as to whether the Club improperly changed its governing documents to attempt to prohibit people such as Gregory Martin from exiting the Club. (R. p. 227) (R. p. 543, lines 3-5 (trans. p. 84)) (R. p. 1044, lines 7-11) (R. 1066, p. 23-p. 1067, line 3) The Club governing documents do

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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. 1368) Changes to the governing documents affecting a member's financial obligations must be approved by the persons so affected. (R. p. 1369)

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, Gregory Martin'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. 422-23) 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. 543 (trans. p. 84, lines 3-5) (R. p. 1044, lines 7-11) (R. 1066, p. 23-p.1067, line 3) The trial court's Order incorrectly disregarded that Gregory Martin's presented more than a "mere scintilla" of evidence on this point.

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

The Martins presented more than a mere scintilla of evidence supporting their defenses, including waiver, laches, payment, and misrepresentation. (R. pp.

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42-61) 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. p. 1533) (R. pp. 1566-67) (R. p. 465, line 19-p. 466, line 24) (R. p. 472, lines 10-11) (R. 474, lines 6-18) (R. p. 486, lines 2-17) (R. pp. 506-07) (R. p. 608, line 9-p. 611, line 18) (R. p. 621, lines 1-14) (R. p. 659, line 7-p. 660, line 12) (R. p. 663, lines 16-20) (R. p. 676, line. 16-p. 677, line 8) (R. p. 686, lines 8-9) (R. p. 713, lines 3-13) (R. p. 872, lines 5-18) (R. p. 898, lines 2-17) (R. p. 922, lines 9-25) (R. p. 941, lines 22-24) (R. p. 1100, lines 1-13) (R. p. 1102, lines 308) This was Gregory Martin's understanding, based both on the Club's practices and on the Club's documents. (R. pp. 422-23) 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 Martins. (*See id.*) (R. p. 898, lines 1-18) (R. p. 914, lines 13-19) (R. p. 922, line 9-p. 923, line 1) (R. p. 955, 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 Gregory

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Martin'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 $41,930.24 to the Club, which is comprised of dues, assessments, interest, and fees through May 9, 2014. (R. p. 18) The trial court's damages award is based on an erroneous legal conclusion that Gregory Martin 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 Gregory Martin 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 Martin'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)).

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In fact, there is ample evidence—certainly more than a scintilla—supporting Martin'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 Martin as a "resigned" member, and thus invoked the wrong measure of damages.

The trial court's conclusion is erroneous because it wrongly assumes that Gregory Martin 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 2012). 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. 1369)

However, the record is void of any evidence that before 2012 Gregory Martin "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 Gregory Martin was placed on a waiting list to sell his Club membership, pursuant to the resignation provision.

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For a damages analysis, this is a non-payment of dues case. A delinquency case.[10] Due to their own financial constraints, the Martins 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. 1354-55)

The Martins have provided ample evidence in the record affirming that Gregory Martin'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":

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

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	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
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,**

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

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		approved member

(*See supra*) (R. pp. 1364-65) (R. pp. 1331-32) (R. pp. 1361-74) (R. pp. 1325-1360)

"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).

Gregory Martin stopped making his dues payments on or about November of 2011. (R. p. 30) Under the applicable Club Rules, Martin was deemed expelled by roughly April of 2012, if not earlier.[13] (R. p. 1354) (*See supra*)

The trial court's Order errs in not acknowledging the above-referenced distinctions between "resignation" and "expulsion"; instead it incorrectly addressed Martin's classification of expulsion as "irrelevant." (R. pp. 12-15) 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

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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."

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and other charges continues until the membership is re-issued to a new member." (R. p. 12) For purposes of this argument on damages, there is ample evidence to indicate that Gregory Martin 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. 1354) 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. (*Id.*) In a light most favorable to Gregory Martin, under the express terms of the governing documents, the suspended, then-expelled Gregory Martin's damages should be capped at forfeiture of his $31,000 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 Gregory Martin, because they were purportedly enacted and effective a few years after his expulsion from the Club. (R. pp. 13-14)

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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. 13) 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 Gregory Martin'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. 13) 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. 3 (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 Gregory Martin.

On the contrary, the applicable expulsion provisions consistently found in the Club Rules from the Club's formation in 2001 up through Gregory Martin's expulsion in 2012, provide ample room for a contrary interpretation from the trial court order. As referenced above, in a light most favorable to them, the Martins' 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 Gregory Martin'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?

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, Gregory

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[14] The Martins 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.

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Martin, as an expelled member, lost rights to a refund on his equity contribution ($31,000 levied by mandatory lien against his membership).

C. The trial court erred by awarding damages that exceed the value of the equity contribution ($31,000), regardless of the mode by which Gregory Martin 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. 12) 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. 1365) 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

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defaulting resigned member. This reference dovetails with the Bylaws' language, previously referenced, binding the equity membership, not the member.

D. 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 Gregory Martin. "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

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> 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. 289, 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 Martins' case.

---

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 . . . ." (R. p. 287) It does not include attorneys' fees.

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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 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. 303, 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

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> 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. 318, 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 Martins 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. 14) 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

- Appendix 2301 -

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 Martins and others. [16]

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

In their Amended Answer and Counterclaim, the Martins 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. 83-87)

The Club has asserted an action against the Martins for alleged unpaid dues, fees, and charges. The Martins 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 Martins 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.

---

[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. p. 18)

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A. The trial court erred by dismissing the Martins' 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 who had "conceded" their membership obligations as a means of exiting from the Club; further, they maintained a roster of certain expelled members. (R. pp. 1552-53)

These overt actions and representations made by the Club, in turn, induced the Martins 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 Martins undertook their initial obligations. (R. p. 14-15) However, the Martins 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

---

[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. 1533) (R. pp. 1566-67) (R. p. 465, line 19-p. 466, line 24) (R. p. 472, lines 10-11) (R. p. 474, lines 6-18) (R. p. 486, lines 2-17) (R. pp. 506-07) (R. p. 608, line 9-p. 611, line 18) (R. p. 621, lines 1-14) (R. p. 659, line 7-p. 660, line 12) (R. p. 663, lines 16-20) (R. p. 676, line. 16-p. 677, line 8) (R. p. 686, lines 8-9) (R. p. 713, lines 3-13) (R. p. 872, lines 5-18) (R. p. 898, lines 2-17) (R. p. 922, lines 9-25) (R. p. 941, lines 22-24) (R. p. 1100, lines 1-13) (R. p. 1102, lines 308) (R. p. 1140, lines 24-25) (R. p. 1141, lines 1-8) (R. p. 1038, lines 21-24) (R. p. 1163, lines 17-23) (R. p. 1165, line 23) (*See supra*).

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Martins 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. 422-23) The Martins 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. 1552-53) (R. pp. 1566-67) Therefore, the Club's representations aligned with the Martins' understanding since joining of their limitations on financial risk upon exiting.

However, subsequent to the Martins' exit, the Club demanded reimbursement for future payment obligations—which was a contradicting position, action, and interpretation relative to prior representations made to the Martins and their fellow active members. (*Id.*) (R. pp. 422-23).[18]

To their ultimate detriment, the Martins 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

---

[18] Additionally, the Martins 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. 83-84)

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ongoing dues payments (as accounted for in its $41,930.24 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 Martins 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 Martins, the Club attached an executed affidavit from its general manager, Jeff Spencer. In the affidavit, Spencer purported to testify as to what documents the Martins had agreed to, as well as what type of notice the Martins received of the alleged deficiency. (R. p. 398) The affidavit was executed on March 3, 2014; the Motion for Summary Judgment was filed on March 7, 2014. The Martins filed a Memorandum in Opposition to Summary Judgment on May 19, 2014, indicating their intent and need to depose Jeff Spencer. (R. p. 214) The Martins 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 Martins' attorney protested that he had not been allowed to depose Spencer and had not received full discovery responses. (R. pp.

237-38) Importantly, the month before, on April 15, 2014, the Martins 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. p. 19) (R. p. 1572)

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 Martins.**

The furtherance and completion of discovery is essential to the Martins' defense of the Club's claims, and in support of the Martins' 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 Martins); 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 Gregory Martin who was forced out of the Club by compelled expulsion in 2012.

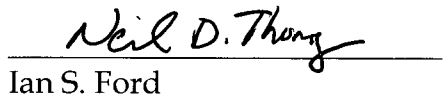
For the reasons set forth above, it is likely that further discovery will uncover additional relevant evidence, and does not amount to a "fishing expedition," as intimated by the trial court's Order.

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CONCLUSION

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

Respectfully submitted,



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- Appendix 2307 -

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

RECEIVED
AUG 27 2015
SC Court of Appeals

Appellate Case No. 2015-000001

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin, Appellant.

CERTIFICATE OF COUNSEL

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

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The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin, Appellant.

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I, Neil D. Thomson, attorney for the Appellant, Gregory L. Martin, do hereby certify that I have this 26th day of August, 2015 served counsel of record with the Brief of Appellant and the Reply Brief of Appellant by mailing said copies by United States Mail, first class postage pre-paid, to said counsel at the following addresses:

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BEAUFORT COUNTY
FOURTEENTH JUDICIAL CIRCUIT

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v.

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PROOF OF SERVICE

I, Neil D. Thomson, attorney for the Appellant, Gregory L. Martin, do hereby certify that I have this 26th day of August, 2015 served the South Carolina Court of Appeals with fifteen copies of the Record On Appeal, Brief of Appellant and Reply Brief of Appellant by mailing said copies by Federal Express, postage pre-paid, to said court at the following address:

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In The Court of Appeals

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Court of Common Pleas
14th Judicial Circuit

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001

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v.

Gregory L. Martin and Rebecca L. Martin,
of Whom Gregory L. Martin is the Appellant, Appellant.

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STATEMENT OF ISSUES ON APPEAL

1. DID MARTIN PROPERLY PRESERVE HIS ISSUES AND ARGUMENTS FOR APPELLATE REVIEW?

2. FACED WITH A CLEAR AND UNAMBIGUOUS CONTRACT, WAS THE TRIAL COURT CORRECT IN CONCLUDING, AS A MATTER OF LAW, THAT (A) MARTIN UNDERTOOK THE OBLIGATION TO REMAIN A MEMBER UNTIL HIS MEMBERSHIP REISSUED; (B) SUCH OBLIGATION REMAINED CONSTANT THROUGHOUT HIS MEMBERSHIP; AND (C) SUCH OBLIGATION DID NOT VIOLATE S.C. CODE ANN. §33-31-610 ET SEQ.?

3. WAS THE TRIAL COURT CORRECT TO DISMISS MARTIN'S COUNTERCLAIMS WHEN, AS A MATTER OF LAW, THEY COULD NOT MEET THE ESSENTIAL ELEMENTS AND WERE DEVOID OF ANY EVIDENTIARY SUPPORT?

4. HAVING DETERMINED THAT AN UNAMBIGUOUS CONTRACTUAL AGREEMENT EXISTED, WAS THE TRIAL COURT CORRECT IN FINDING THAT ANY FURTHER DISCOVERY OF EXTRINSIC EVIDENCE WAS UNNECESSARY?

STATEMENT OF THE CASE

On September 13, 2012, The Callawassie Island Club, Inc. ("CIMC") brought a breach of contract action against Gregory L. Martin and Rebecca L. Martin (the "Martins"), for the collection of delinquent dues, fees and assessments.[1] (R. pp. 21-31). The action alleged that the Martins, as club members, had an ongoing obligation to pay dues until such time as their membership was reissued to a new member. The Martins answered alleging that their resignation or expulsion relieved them of any further liability for dues, even though their membership had not transferred to a new member. (R. p. 37;p.

[1]For purposes of this Brief, the monetary damages sought by CIMC, which include dues, fees, assessments, costs and attorneys' fees, are hereinafter referred to as "dues" unless more specificity is required by the context.

54). Additionally, the Martins brought numerous counterclaims of which only two remain, negligent misrepresentation and breach of contract.

CIMC moved for summary judgment arguing that the Martins' obligation to pay dues until their membership reissued to a new member was clear and that the various defenses and counterclaims were either barred or unsupported by any evidence. Specifically, CIMC argued it did not own the club, and in fact was not even in existence, at the time the Martins purchased and therefore was not capable of making any misrepresentation upon which the Martins could have relied. CIMC filed a Memorandum in Support of Motion for Summary Judgment, with supporting Affidavits on March 7, 2014,[2] and the Martins responded with a Memorandum in Opposition, filed the morning of the hearing on May 19, 2014. CIMC's motion for summary judgment as to Defendant, Gregory L. Martin ("Martin") was granted by Order dated June 24, 2014 ("Initial Order"). Summary judgment as to Martin's wife was denied, pending the completion of additional discovery, with leave to refile. (R. p. 11).

The Martins filed a Motion for Reconsideration pursuant to Rule 59, SCRCP, on July 7, 2014 (the "Rule 59 Motion"), to which CIMC filed a Memorandum in Opposition on October 28, 2014. Prior to oral argument on November 3, 2014, the Martins retained new counsel. At the hearing, the Martin's present counsel argued for the first time and over the objection of CIMC, that the trial court's award of attorneys' fees was unauthorized by the governing documents. The trial court directed the parties to submit

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[2]CIMC filed Affidavits of Jeff Spencer and Ehrick K. Haight, Jr., which were updated by Supplemental Affidavits filed May 19, 2014.

alternative proposed orders on the issue. (R. p. 1241, lines 15-21). The Martins, however, submitted a Supplemental Brief in Opposition to Plaintiff's Summary Judgment. On December 16, 2014, the trial court denied the Martins' Motion for Reconsideration and affirmed summary judgment against Gregory L. Martin, which he now appeals (the "Final Order").

FACTS

The Martins purchased real property on Callawassie Island in early 2001. (R. p. 2;p. 32;p. 47). At the time of their purchase, they also acquired a membership in what was then the Callawassie Island Club, Inc., which owned and operated the majority of the recreational amenities, including the golf course, tennis facilities, swimming pools, clubhouses, and dining facilities. (R. pp. 21-29). At that time, the Callawassie Island Club, Inc. was controlled by Callawassie Island Company, L.P. (the "Developer"). (R. p. 201;p. 420). As indicated in the Application for Membership executed by the Martins, membership in the Callawassie Island Club was governed by the 1994 Plan for the Offering of Memberships, the corporate By-Laws attached thereto, and the General Club Rules (the "1994 Governing Documents"). (R. pp. 21-29). Central to this case is the obligation set forth in the 1994 Governing Documents, which requires:

> An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club **until his or her equity membership is reissued** *(emphasis added)* by the Club. (R. p. 1261).*(Plan for the Offering of Memberships, April 1, 1994, Rev. July, 1994; "Payment of Dues by Resigned Equity Member", Page 9, in force at the time Martin acquired Membership).*
>
> *See also:*
>
> 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** *(emphasis added)* by the Club. (R. p. 1299).*(By-Laws, Callawassie Island Club, 9(a), pg. B-11, in force at the time Martin acquired Membership).*
>
> *And:*
>
> Any member may terminate membership in the Club by delivering to the Secretary written notice of termination in accordance with the By-Laws. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) (R. p. 1311).*(Callawassie Island Club General Club Rules "Suspension and Termination of Membership, page C-3, in force at the time Martin acquired Membership).*

As is common in residential communities in the area, the development plan further contemplated the transfer of the recreational amenities to a member owned and managed organization following the Developer's control period. (R. p. 1247). To effectuate that intent, CIMC was created and registered as a §501(c)(7) not for profit organization under the Internal Revenue Code. (R. p. 21;p. 201;p. 419). Following the Martins' purchase, the Callawassie Island Club's assets were transferred to CIMC and it commenced the maintenance and operation of the club amenities under a new Plan for the Offering of Memberships dated August 8, 2001 (the "2001 Plan"), which included the By-Laws and General Club Rules (collectively, and as amended, the "CIMC Governing Documents"). (R. p. 201;pp. 419-420). The Martins, as existing members, were entitled to continue their membership in the newly formed club pursuant to Section 2.2.2, which provided that "[e]ach existing equity member as of the date of this Plan will be entitled to continue his or her equity membership under this Plan without having to pay any additional or new membership contribution to the Club." (R. p. 1362). Consistent with the 1994 Governing Documents, the CIMC Governing Documents contained similar language mandating that members continue to pay dues until their memberships reissued to a new member. (R. p.

1332;p. 1365). It is absolutely uncontroverted in the record that the Martins elected to continue their membership following CIMC's acquisition of the assets for many years, enjoying the benefits and privileges of membership up until their purported resignation or expulsion in 2012. (R. p. 23;pp. 30-31;p. 33;p. 50;pp. 398-412).

In the wake of radically declining real estate prices precipitated by the latest recession however, a few members, including the Martins, sought to terminate their ongoing obligations to CIMC without honoring their obligations. They simply resigned without selling or otherwise transferring their membership to a new member and ceased payment. There are two ways in which a membership may be re-issued. The first is to place the membership on a re-sale list and wait for it to be sold in turn. Alternatively, a member may sell his or her property with the attendant membership. (R. p. 1258). A membership may be placed on the re-sale list voluntarily at the request of a resigning member, or involuntarily through termination which forces surrender of the membership certificate. (R. p. 1311). These methods of re-issuance remained constant throughout Martins' membership. (R. p. 1332;p. 1436;p. 1472).

Prior to the recession, CIMC had "very few delinquencies" as those who could no longer afford their membership found it relatively easy to sell their property. (R. p. 429, line 25-p.430, line 5). Rather than sell his property in this difficult market, Martin simply elected to default in his financial obligations to CIMC and this action was commenced for the collection of the unpaid account.

ARGUMENT

I. SEVERAL OF MARTIN'S ISSUES AND ARGUMENTS WERE NOT PROPERLY RAISED TO AND RULED ON BY THE TRIAL JUDGE.

- Appendix 2320 -

Martin makes several arguments that were raised for the first time during the motion for reconsideration and in his Brief, including but not limited to those outlined below.

A. ISSUE I: IMPROPER LEGAL STANDARD.

Martin takes issue with the legal standard recited in the initial Order, contending Judge Kinard's Order fails to mention the "mere scintilla" standard used in a summary judgment context. (App. Initial Brief p. 9). While Martin briefly mentioned this concern in his Motion for Reconsideration[3], he now employs entirely new arguments in his Brief.

Martin contends the failure to include the "mere scintilla" language in the Order "appears to be driven in part by the trial court judge's background in drafting restrictive covenants for property owner subdivisions . . . and current status as the president of a country club." (App. Initial Brief pp. 9-10). Martin's argument seeks to cast a cloud of doubt over Judge Kinard's ability to impartially adjudicate this matter. However, at no time during the proceedings of this matter did Martin question Judge Kinard's fitness to hear the case nor did he request Judge Kinard's recusal. Accordingly, his argument and belated questioning of Judge Kinard's fitness is unpreserved for appellate review. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 643 (2011) (stating it is axiomatic that an issue cannot be raised for the first time on appeal) (Citations omitted).

Martin further asserts other shortcomings, including failure to include official "findings of fact" and "conclusions of law;" improperly shifting the burden of proof to the non-moving party; and treating the matter as "only a debt collection problem." (App. Initial Brief pp. 9-10). Martin has raised these arguments for the first time in his Brief.

[3] (R. pp. 327-328).

See Id. Accordingly, they are not preserved for appellate review and should not be considered by this Court. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) (stating an appellate court will not consider issued on appeal which have not been preserved for appellate review) (Citations omitted).

B. ISSUE III(B) WAIVER ARGUMENT.

Martin challenges Judge Kinard's reliance upon and citation to the 2014 General Club Rules governing expulsion. (App. Initial Brief pp. 32-34). In doing so, Martin contends CIMC's act of amending its Club Rules in 2014, to reflect that an expelled member will remain "liable for all Charges until Membership is re-issued," operates as a waiver of CIMC's argument and an admission that the un-amended version of that provision was open to differing interpretations.[4] (App. Initial Brief pp. 33-34). This argument was not presented to Judge Kinard, either through oral argument, written memoranda, or in his Rule 59 Motion. *See Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court). Accordingly, the argument is unpreserved and should not be considered by this Court.

C. ISSUE III(E) ATTORNEYS' FEES.

Martin takes issue with Judge Kinard's award of attorneys' fees to CIMC, claiming CIMC failed to cite statutory or contractual authority for recovering its attorneys' fees. (App. Initial Brief p. 33-38). Martin then attempts to dissect CIMC's governing documents, reading them in light of his argument, to impugn Judge Kinard's award.

[4] It is important to note that Judge Kinard's reference to the 2014 Club Rules was merely illustrative of the Club's consistent policy that all members are responsible for the payment of dues, fees, and assessments until such time as the membership is reissued.

(App. Initial Brief pp. 33-38). Martin levies further attacks on Judge Kinard's Orders by asserting he relied on generalized statements in CIMC's documents and disregarded specific provisions and improperly revised documents. (App. Initial Brief pp. 33-38).

At the hearing of CIMC's Motion for Summary Judgment, both in oral argument and in his supporting memorandum of law, Martin contended awarding attorneys' fees was improper because the affidavit accompanying the request for attorneys' fees was untimely. (R. p. 1199, lines 17-19;p. 1211, lines 20-25). Martin also questioned the reasonableness of the amount claimed. (R. pp. 237-238). Martin never challenged CIMC's contractual authority to request attorneys' fees. The only argument presented to Judge Kinard prior to his initial ruling was the challenge to the timeliness and reasonableness of the affidavit of attorneys' fees.

Admittedly, over CIMC's objection, Martin raised arguments about the source of authority for attorneys' fees to Judge Kinard during the hearing on the motion for reconsideration. (R. p. 1220, line 24-p.1221, line 21;p. 1233, lines 6-10). However, a party may not raise a new issue previously not raised to the court in a Rule 59 motion. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment). Accordingly, because Martin has not challenged the award of attorneys' fees based on these arguments raised to Judge Kinard prior to issuance of the Initial Order, Martin has waived his challenge of the attorney fee issue. *See First Union Nat'l Bank v. S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (stating a failure to challenge a ruling is an abandonment of the issue and an unchallenged ruling, right or wrong, is the law of the case).

D. ISSUE IV(B) MARTIN'S NEGLIGENT MISREPRESENTATION CLAIM

Martin contends Judge Kinard erred in dismissing Martin's negligent misrepresentation claim because CIMC's act of providing methods for certain members to leave the club without owing more than their equity contribution "aligned with Appellant's understanding . . ." (App. Initial Brief pp. 38-40). This specific argument in favor of Martin's negligent misrepresentation claim was never presented to Judge Kinard for consideration and is not preserved for appellate review. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court).

II. CIMC DEMONSTRATED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BY CONCLUSIVELY ESTABLISHING (A) MARTIN WAS A MEMBER, (HAVING PAID DUES FOR THE USE OF CIMC'S AMENITIES); (B) THAT THE GOVERNING DOCUMENTS (FROM THE TIME MARTIN ACQUIRED HIS MEMBERSHIP FORWARD) OBLIGATED HIM TO REMAIN IN GOOD STANDING UNTIL HIS MEMBERSHIP REISSUED; AND (C) THAT MARTIN HAD NOT MADE PAYMENT IN ACCORDANCE WITH THE AGREEMENT.

A. MEMBERSHIP IN CIMC IS A CONTRACTUAL OBLIGATION

The required elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). All of these elements are conclusively established by the record in this case.

When Martin acquired his membership in CIMC's predecessor, the Callawassie Island Club, Inc., the terms and provisions governing membership were memorialized in the 1994 Governing Documents. (R. pp. 21-29). Martin signed an Application for Membership in the Callawassie Island Club (the "Application"). (R. pp. 21-22; pp. 27-

29;p. 32;p. 47). In so doing, he expressly agreed to be bound by the 1994 Plan, "as same may be amended from time to time." (R. p. 28). Martin's application for and subsequent purchase of a membership is not in dispute. Nor is there any controversy over the fact that CIMC provided, and Martin enjoyed, the benefits of membership; or that Martin paid dues, fees and assessments for nearly a decade. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997). In this case, we have ample evidence of all three.

As for consideration, our courts have held it may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998). A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. *Shayne of Miami, Inc. v. Greybow, Inc.*, 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957). Clearly, the provision of benefits and services in exchange for the observance of the duties and obligations of membership qualifies as adequate consideration.

There being no question that Martin was offered membership subject to the 1994 Governing Documents, accepted membership in accordance with the 1994 Governing Documents, and was accorded the rights and privileges of membership pursuant thereto; the trial court rightly concluded that a contract existed. "By applying for a membership and purchasing same, Defendant became contractually bound by the 1994 Plan for the Offering of Memberships and the Exhibits thereto, which included the By-Laws and the General Club Rules. . . ." (R. p. 12).

The 1994 Plan specifically contemplated the transfer of the Callawassie Island Club's assets to the membership, which occurred in late 2001, when CIMC assumed control. (R. p. 419;p. 1247). Following CIMC's acquisition of the club assets, Martin continued his membership as allowed under the CIMC Governing Documents. Section 2.2.2 of the 2001 Plan states in part: "Each equity member as of the date of this Plan will be entitled to continue his or her equity membership under this Plan without having to pay an additional or new membership contribution to the Club." It is clear in the record that Martin availed himself of the benefits of membership in CIMC from the time of its acquisition until he ceased payment of his dues. (R. pp. 30-31; pp. 398-412).

The trial court found: (a) that a contract exists, (b) that CIMC has the right to enforce it, (c) that Martin continued to use the club amenities, and (d) paid dues to CIMC. Because these findings are wholly supported by the record and not reasonably subject to any other inference, they should not be disturbed on appeal. (R. p. 14).

B. OBLIGATION TO PAY DUES UNTIL MEMBERSHIP REISSUED.

Having satisfied itself that a contract did exist under the 1994 Governing Documents, as amended, the Trial court next addressed its interpretation. At all times during Martin's membership, the applicable governing documents mandated that members remain obligated for dues, fees and assessments until such time as the membership was reissued.[5] The following excerpts leave no room for contrary interpretation:

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[5]At the time Martin acquired membership, the governing documents included The Plan for Offering Memberships dated April 1, 1994, Rev. July, 1994, and the By-Laws and General Club Rules issued by CIC. A full copy of the 1994 Plan, 2001 Plan, 2007 Plan and 2008 Plan, together with the 1994 General Club Rules and By-Laws, along with all later versions, amended

Relevant Plan Excerpts:

> An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club **until his or her equity membership is reissued** *(emphasis added)* by the Club. (R. p. 1260).*(Plan for the Offering of Memberships, April 1, 1994, Rev. July, 1994; "Payment of Dues by Resigned Equity Member", Page 9, in force at the time Martin acquired Membership).*

> An Equity Member who is on the waiting list to sell his/her Membership will be obligated to continue to pay to the Club all Charges associated with his/her Membership **until his/her Equity Membership is reissued by the Club** *(emphasis added)*. (R. pp. 1448-1449).*(Plan for the Offering of Membership, Amended as of February 1, 2008, 5.11 "Payment of Dues and Charges By Resigned Members", in force at the time of Martin attempted resignation).*

Relevant Excerpt from By-Laws:

> 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** *(emphasis added)* by the Club. (R. p. 1299).*(By-Laws, Callawassie Island Club, Article X, Sec. 9(a), pg. B-11, in force at the time Martin acquired Membership).*

The By-Laws impose identical obligations (for ongoing payment of dues, fees, charges, until the membership is reissued) upon expelled members.

> Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to the 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 in accordance with the provisions of Article X, Section 9 of these By-Laws** *(emphasis added).* (R. p. 1303).*(By-Laws, Callawassie Island Club, Article XIV, Sec. 5, pg. B-15, in force at the time Martin acquired Membership).*

> The Club shall have a lien against each membership for any unpaid assessments, fees, annual dues or other charges . . .[and] **may also**

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and adopted by CIMC during the Martin' membership, were provided to the trial court (R. p. 1186, lines 21-22), the relevant excerpts of which are set forth herein above.

(emphasis added), at its option, sue to recover a money judgment for unpaid annual dues or other charges . . ." (R. p. 1492).*(By-Laws, Callawassie Island Members Club, March, 2009, Article XI, pg. 8, in force at the time Martin attempted resignation - showing Club is not limited to recovery against equity only).*

Relevant Excerpts from the General Club Rules:

Any member may terminate membership in the Club by delivering to the Secretary written notice of termination in accordance with the By-Laws. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) (R. p. 1311).*(Callawassie Island Club General Club Rules "Suspension and Termination of Membership, page C-3, in force at the time Martin acquired Membership).*

Any member may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for the Offering of Club Memberships. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) **until the membership is sold** *(emphasis added).* (R. p. 1472).*(The Callawassie Island Members Club, Inc. General Club Rules as of February 23, 2009, Sec. 14.2.1, in force at the time Martin attempted resignation).*

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. p. 1472).*(The Callawassie Island Members Club, Inc. General Club Rules as of February 23, 2009, Sec. 14.1.5, in force at the time Martin attempted resignation).*

Notwithstanding any termination or suspension of membership, the member **shall remain liable for any unpaid club account or membership dues, fees, charges and assessments**... (R. p. 1472).*(The Callawassie Island Members Club, Inc. General Club Rules as of February 23, 2009, Sec. 14.2.3, in force at the time Martin attempted resignation).*

There is no triable issue of fact for a jury to consider when the language of the applicable contract is clear and unambiguous. "When a contract or agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning

and the intent of the parties as found within the agreement." *ESA Services, LLC v. S.C. Dept. of* Revenue, 392 S.C. 11, 20, 707 S.E.2d 431, 436 (2011). "it is a question of law for the court whether the language of a contract is ambiguous." *Id., see also: Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). The trial court, after carefully reading the documents as a whole and giving the language its plain meaning, concluded Martin had a clear and unambiguous obligation to pay ongoing dues until his membership reissued. (R. pp. 8-9;p. 13). In so doing, the trial court correctly applied the cardinal rule of contract interpretation by ascertaining and giving legal effect to the parties' intentions as determined by the contract language. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009).

The trial court was thoroughly briefed regarding Martin's contention that expulsion somehow absolved him from any further liability and the matter was extensively argued at each hearing. While he readily admits that a "resigning" member has a duty to continue paying dues in his Brief to this Court, Martin asked the trial court to disregard the plain meaning of the above excerpted provisions and adopt the notion that there are "multiple exit tracks" depending on whether a member voluntarily resigns, has his membership terminated by the Board, or is expelled by operation of the agreement. He suggests that by defaulting and forcing his own expulsion, a member can simply dispense with his obligations or otherwise cap his damages at his equity contribution. In support of his contention, Martin refers to the following provision:

> Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to the Club Facilities under any circumstances. Any expelled member…shall have the obligation to surrender his or her membership certificate **for reissuance** *(emphasis added)* by the Club to a new member… (R. p. 1299;p. 1303;p. 1332;p.

1436;p. 1472).*(1994 By-Laws, p. B-15, incorrectly cited as p. B-11 in Appellant's Brief; an identical provision also appears in the 2001, 2007 and 2009 General Club Rules at Section 14.1.5).*

Martin then, in a leap of logic wholly unsupported by the evidence, and contrary to the specific provisions of the contract documents, concludes that expulsion prematurely terminates the obligation to pay dues until the membership reissues. Such a contention is not only counter to the clear intent of the parties, but is also specifically contradicted by the clear provisions of the By-Laws. As confirmed by the provisions of Articles X and XIV of the club By-Laws, there are not multiple "exit tracks." Article XIV, Section 5 of the 1994 By-Laws, entitled "Expulsion," specifically refers back to Article X, Section 9, both of which are cited hereinabove, and both of which impose identical obligations upon resigning or expelled members. Section 9(a) states: "[d]ues, fees and charges shall accrue against a resigned equity membership until . . . reissued by the Club." It is clear that the manifest intent is to force the surrender and "reissuance" of the membership, and that "reissuance" alone is the method by which a member may conclude his or her financial responsibilities. Martin does not, and cannot, cite to any provision, in any version of the governing documents that waives this obligation. Thus, regardless of whether the termination is effected by resignation or expulsion, the resigning and/or expelled member remains liable, under the explicit provisions of the club documents, for payment of dues, fees and charges until the membership is reissued.

Nor can Martin cite to any provision in the governing documents which limits his damages to the value of his equity membership. While several provisions do authorize the Club to accrue dues against the equity, there is absolutely no language which indicates a lien against the equity is CIMC's sole remedy. In fact, the 1994 Governing Documents

clearly authorize a suit for damages, stating, it "**may also** *(emphasis added)*, at its option, sue to recover a money judgment for unpaid annual dues or other charges . . ." (R. p. 1492). Indeed, to read the governing documents as Martin suggests would completely invalidate the numerous provisions cited above.

Rather than contradict the clear and unambiguous intent and application of these provisions, the testimony tendered by Martin in support of his interpretations serves to underscore its plain meaning. Former Board member James Carling testified that the Club would continue to try and collect from individuals who simply tried to walk away from their obligations. (R. p. 476, lines 17-25). Former Board member Karen Norwood testified that expulsion meant a permanent loss of privilege (as opposed to a termination of obligations). (R. p. 543, lines 15-23). What she **did not** say is that expulsion terminated a members' obligation to pay dues until the membership re-issued. Longstanding Board member, Philip C. Kilian corroborated Ms. Norwood's testimony, stating "the underlying club documents require that membership in good standing be maintained by even a member who was expelled or suspended." (R. p. 439, lines 4-6). Even Martin's own witness clarified that surrender of a membership merely placed it with the Club for resale. (R. p. 608, lines 23-25).

Despite Martin's concerted efforts to torture the plain meaning of the governing documents; reading various sections in isolation; and introducing extrinsic evidence to impute terms that are nowhere present in the documents themselves, a contract must be read as a whole document so that ambiguity is not created by a single sentence or clause. *McGill, at 185, 574.* Whether or not the governing documents are ambiguous is a question of law for the court and does not present any genuine issue of material fact. *Id.*

The trial court acknowledged the standard set forth in *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, in the face of such clear and unequivocal language, the trial court had a duty to enforce the agreement as written. "(W)hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Holmes v. East Cooper Community Hosp., Inc.,* 408 S.C. 138, 758 S.E.2d 483 (2014), citing *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct.App.1997) (citation omitted). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). "It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine." *Priest v. Brown,* 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). Accordingly, summary judgment was appropriate.

C. FAILURE TO PAY.

CIMC conclusively established the existence of a contract and proved Martin's breach thereof and damages in the form of its verified Complaint and Affidavits. (R. pp. 21-31;pp. 398-412). Martin introduced absolutely no evidence challenging the correctness of these charges, other than to assert that through resignation, expulsion or termination he should be absolved of further liability. Rule 56(e), SCRCP provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

III. THE REQUIREMENT TO PAY DUES UNTIL REISSUANCE DOES NOT VIOLATE THE SOUTH CAROLINA NON-PROFIT CORPORATION ACT. AS IS THE CASE WITH NEARLY ALL PROPERTY OWNER ASSOCIATIONS, MARTIN NEED ONLY SELL HIS PROPERTY AND MEMBERSHIP TO ANOTHER PARTY TO RELIEVE HIMSELF OF FURTHER OBLIGATION AND THE FACT THAT HE CHOSE NOT TO DOES NOT RENDER THE REQUIREMENT UNLAWFUL.

Martin cites S.C. Code Ann. §33-31-620, of the South Carolina Nonprofit Corporation Act (the "Act"), for the proposition that assigning liability for continuing obligations post-resignation is statutorily prohibited. Martin's argument conveniently ignores subpart (b) to that section, which specifically obligates a resigning member to meet any obligations incurred or commitments made before the resignation. Likewise §33-31-621 reinforces the notion that members who are terminated or expelled remain liable for obligations or commitments made while members. The official comment to both sections makes the legislative intent patently clear. Members are to be held accountable for previously agreed upon continuing obligations, even beyond resignation.

In determining that these statutes permitted CIMC to charge dues until the membership reissued, the trial court correctly ascertained and effectuated the intent of the legislature. The court gave the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E. 2d 877, 881 (2011). "In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. When a

statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Anderson v. S.C. Election Com'n*, 397 S.C. 551, 556-557, 725 S.E.2d 704, 706-707 (2012), *citations omitted.*

The Official Comments to §33-31-620 recognize that a "member in joining the organization may promise to use its facilities or services for a specific period of time." In this case, the specific period of time is "until their membership is reissued." The trial court recognized such requirements are quite common, particularly in Beaufort County, where nearly all developments utilize non-profit corporations to collect dues for the maintenance of common areas and recreational amenities within their community. (R. p. 1204, lines 4-19). It is illogical to assert that S.C. Code Ann. §33-31-620, absolves homeowners from liability for dues incurred prior to sale under the rational that members of a not-for-profit corporation have a "right to resign at any time". However, that is the conclusion to be drawn from Martin's tortured reading of the statute.

The fact that Martin may have found it economically inconvenient to sell his property at 35 Sugar Mill Drive, does not excuse his financial responsibilities. Nowhere in any of the governing documents is Martin guaranteed a profitable return on his investment. The 1994 Plan specifically advised that the memberships were for recreational purposes and not to be relied upon as an investment. (R. p. 1249). No matter how disadvantageous the requirement may prove in today's economic climate, the fact remains that allowing a member to unilaterally resign without selling or transferring his membership to a new, dues paying, member, would have devastating consequences to all of the other members on Callawassie Island who rely upon, and who have contributed to, a

steady source of funding to maintain their amenities. It is clear from the statutory language and comments that such an application is consistent with the stated purposes and intent of the Act.

IV. MARTIN'S REMAINING AFFIRMATIVE DEFENSES AND COUNTERCLAIMS DID NOT SURVIVE SUMMARY JUDGMENT AS THEY LACKED THE NECESSARY ELEMENTS AND/OR WERE UNSUPPORTED BY ANY EVIDENCE.

A. COUNTERCLAIMS

Only two of the various counterclaims initially asserted by Martin were before the Trial court, the remainder having been dismissed by prior order. The first, that CIMC breached its contract by not expelling him for non-payment; and the second, that CIMC made negligent misrepresentations upon which he relied to his detriment. The Trial court determined that regardless of a member's expulsion, suspension, termination or resignation, the 1994 Governing Documents and all subsequent amendments thereto, plainly required a member to pay dues until his or her membership re-issued. (R. p. 12). As the construction of a clear and unambiguous contract is the province of the trial court and not a jury, summary judgment was appropriate on this issue as previously discussed.

Summary judgment in favor of CIMC is also appropriate as to Martin's only other remaining counterclaim. CIMC could not have made a representation upon which Martin relied when purchasing his membership. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (stating summary judgment is appropriate when the non-moving party fails to establish an element of its case). The elements of a cause of action for negligent misrepresentation are: 1) a false representation made by CIMC to the Members; 2) a pecuniary interest by CIMC in making the statement; 3) a duty of care

owed by CIMC to see that truthful information was communicated to the Members; 4) a breach of the duty owed by CIMC by failing to exercise due care; 5) justifiable reliance on the representation; and 6) pecuniary loss as a direct and proximate result of reliance on the representation. *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). A false representation must be false at the time it was made. *GSM Dealer Services, Inc. v. Chrysler Corp.*, 32 F.3d 139 (4th Cir. 1994).

At the time the Martins acquired their membership, the club was owned and operated by the Callawassie Island Club, which was controlled by the Developer. (R. p. 201;p. 419). CIMC did not come into existence until November 16, 1999, and did not acquire and manage the assets of the club until June 29, 2001. Therefore, the representations allegedly relied upon by Martin at the time of his purchase cannot be ascribed to CIMC. (R. p. 419).

The 1994 Plan admonished members to "carefully read all the attached documents" and "consider seeking professional advice to evaluate these documents." (R. p. 1248). The Plan further advised that "no person has been authorized to give any information or make any representation not contained in this Membership Plan, and if given or made, such information or representation must not be relied upon as having been authorized…". Additionally, Martin's own witness, Sandra Aulton, affirmed that to the extent any representations were made by the Developer, they were never incorporated into the written documents. (R. p. 700, lines 7-15). Even when examined in the light most favorable to Martin, it is clear he cannot establish the necessary elements. There was no representation by CIMC, no justifiable reliance and therefore no damage, no breach of duty by CIMC, and no pecuniary interest realized on the part of CIMC.

Once Martin acquired his membership, he was contractually bound by the governing documents. None of the deposition testimony in the record suggests that anyone ever told Martin that if he stopped paying, he would simply be expelled without further obligation. What he was told, and what is not at odds with any of the governing documents, is that he could terminate his membership. As amply illustrated herein, membership can be terminated, either at the request of the member or involuntarily, but in either event, the member remains liable until his membership is re-issued. Even if Martin had received contrary advise (which CIMC denies) the 1994 Plan and the CIMC Governing Documents, specifically Section 1.8 of the 2001 Plan, Section 12.3 of the 2007 and 2008 Plans, plainly state: "No person has been authorized to give any information or make any representation not contained in this Membership Plan and, if given or made, such information or representation must not be relied upon as having been authorized..."

V. FOLLOWING EXTENSIVE DOCUMENTARY PRODUCTION, DEPOSITIONS AND INTERROGATORIES, THE TRIAL COURT CORRECTLY CONCLUDED THAT THE CONTRACT WAS CLEAR AND UNAMBIGUOUS, MAKING FURTHER DISCOVERY OF EXTRINSIC EVIDENCE IMMATERIAL.

CIMC's Motion for Summary Judgment was brought after two years of litigation, and a full and fair opportunity for thorough and complete discovery. A detailed member history report was attached to the verified Complaint (R. pp. 30-31), and further updated via the affidavits of Jeff Spencer, CIMC's general manager. (R. pp. 398-412). Martin was given every opportunity to depose Mr. Spencer and failed to do so. He cannot now cry "foul" and allege that he was not afforded adequate discovery. (R. p. 1213, lines 2-5). Further, the Trial court recognized that any parol evidence sought by Martin would not be

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admissible in light of his determination that the contract was unambiguous. (R. pp. 15-17).

VI. THE AWARD OF SUMMARY JUDGMENT SHOULD BE AFFIRMED AS A MATTER OF PUBLIC POLICY AND FOR ADDITIONAL SUSTAINING GROUNDS

The old adage, "it takes a village to raise a child" could readily be adapted to the concept of sustaining a resort golf community. Without the continuing participation of its members, the cost to keep up Callawassie's twenty-seven (27) hole course, club house, restaurant, pools, tennis courts, pavilions, and dock would be unsustainable. That is why as early as 1994, the Plan for the Offering of Memberships provided that a member would be required to continue to pay dues until his or her membership reissued. (R. p. 1260;p. 1303;p. 1311). That is why the membership formed CIMC and continued that obligation in 2001, when they took over the management of the assets from the Developer. (R. p. 1365). And that is why the residents of Callawassie Island voted overwhelmingly to require anyone purchasing property on Callawassie Island after 2001, to purchase a membership in CIMC. (R. p. 22;p. 126;p. 217). Callawassie's development model, like so many other communities across the state, relies upon the financial contributions of the residents to maintain the amenities, which clearly provide a material benefit to the real property interests of the landowners.

The Court should consider, in weighing the issues, that failing to uphold the clear and unambiguous obligations challenged here may usher in a flood of other similar challenges, and not just within Callawassie Island. This is true particularly if the Court were to read the Act as Martin suggests. Although Callawassie Island has chosen to have its resort amenities owned and managed by a non-profit club rather than a non-profit

homeowner's association[6], for all intents and purposes, the application of the statute is the same. If Martin may "resign at any time" without regard to his commitment to continue paying dues until his membership reissues, every homeowner in every deed restricted community could likewise declare himself "resigned" and cease to pay dues without further liability.

As for additional sustaining grounds, CIMC calls this Court's attention to those defenses set forth in its Reply. CIMC asserts that to the extent any representations were made (which CIMC denies) they were either merged into the 1994 Governing Documents, as amended, or were parol evidence outside the terms of the agreement. CIMC further asserts that to the extent Martin claims some right under earlier versions of the various governing documents that were later abrogated by an allegedly unauthorized change, CIMC asks this Court, under Rule 220(c), SCACR, to sustain the trial court's decision on the ground that the statute of limitation for challenging actions has run.

Similarly, Martin is barred by the doctrine of laches, estopped or has otherwise waived, his right to challenge any actions on the part of CIMC in exercising its business judgment. The 1994 Governing Documents admonished applicants to "carefully read all of the attached documents" and further to "consider seeking profession advice to evaluate these documents". (R. p. 1248). Additionally, the 1994 Governing Documents stated in bold, capitalized print, that "MEMBERSHIPS SHOULD NOT BE VIEWED OR ACQUIRED AS AN INVESTMENT AND NO PERSON PURCHASING A MEMBERSHIP SHOULD EXPECT TO DERIVE ANY ECONOMIC PROFITS FROM

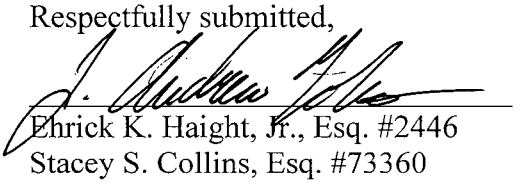
[6] Other common property, such as the roadways and certain landscaping, are owned and managed by The Callawassie Island Property Owners Association.

MEMBERSHIP IN THE CLUB." (R. p. 1249). Based on the foregoing, Martin assumed the risk of incurring ongoing obligations, despite economic hardship or declining property values.

CONCLUSION

In the face of clear and unequivocal contractual obligations, which specifically requires Martin to pay dues until his membership reissued, summary judgment in favor of CIMC is appropriate. Martin's negligent misrepresentation claim failed because he did not and indeed cannot, attribute any of the alleged misrepresentations to CIMC. Further, Martin has produced absolutely no evidence to support that CIMC breached its contract with him. Based on CIMC's showing that no issue of material fact existed as to Martin's obligations or the amounts owed, the trial court's award of summary judgment should be upheld.

Respectfully submitted,



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August 25, 2015.

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED
AUG 28 2015
SC Court of Appeals

2012-CP-07-03218

The Callawassie Island Members Club, Inc., Respondent,

vs.

Gregory L. Martin and Rebecca L. Martin
of Whom Gregory L. Martin is the Appellant, Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I, the undersigned, as counsel for the Respondent, The Callawassie Island Members Club, Inc., certify that the within Final Brief of the Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 28 2015
SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
14th Judicial Circuit

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin,
of Whom Gregory L. Martin is the Appellant, Appellant.

PROOF OF SERVICE

I certify that I served the Final Brief of Respondent on Gregory L. Martin by depositing a copy of it in the United States Mail, postage prepaid, on this 26th day of August, 2015, addressed to his attorneys of record, Ian Ford and Neil Thomson, Ford Wallace Thomson, LLC 715 King Street Charleston, SC 29403.

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Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001

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v.

Gregory L. Martin and Rebecca L. Martin .....Defendants,

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ARGUMENT

In its brief, Respondent The Callawassie Island Members Club, Inc. (the "Club" or "CIMC") doubles down on its arguments that the language of the Club's documents is "clear and unambiguous" and that not even a "mere scintilla" of evidence exists to support Appellant Gregory Martin's case. The Club's brief itself demonstrates that this is incorrect.

First, the ambiguities in Club's documents are proven by the acrobatics needed to try to explain those documents. The Club contends that "resignation" means "expulsion" means "termination—even though those terms are used separately, in different parts of the documents, to mean different things. To try to conflate the terms, the Club cross-references disparate sections, but only in certain, cherry-picked instances. And the Club's explanation does not address numerous important sections of the documents regarding "termination" and "expulsion." This is not a "clear and unambiguous" situation.

Second, the Club's brief ignores the extensive evidence submitted by Martin in opposition to summary judgment—a tacit admission that at least a "mere scintilla" of evidence is present. Similarly, numerous legal arguments made in Martin's brief are not addressed.

The South Carolina Nonprofit Corporation Act articulates the policy that "[a] member may resign at any time." The Club's position, and the trial court's Order, are directly contrary to that policy—under their interpretation, a member may not leave the Club until onerous, nearly-impossible conditions are met. If

the Club is permitted to enforce that extreme position, it should be required to convey that requirement *clearly, consistently* in its governing documents and other representations. The Club should not be permitted to enforce such an extreme position under the convoluted terms, and blatant misrepresentations, at issue here. Or, at the least, Martin should be allowed a trial on his many credible arguments and considerable evidence. In sum, this is not a summary judgment case.

I. The Club does not address many legal points argued in Martin's opening brief.

The Club's brief does not address, or barely addresses, numerous points argued in Martin's initial brief. Those points appear to be conceded, and include:

> II.A(2): The trial court erred by disregarding the abundant evidence that the Martins had been expelled from the Club and had no further obligation.
>
> II.A(3): The trial court erred by disregarding abundant evidence that the Martins had no obligation beyond their equity interest in their purported Club membership.
>
> II.A(4): The trial court erred by ruling that Gregory Martin has an on-going liability.
>
> II.A(6): The trial court erred in disregarding evidence that the governing documents had been improperly changed by the Club.
>
> III.A: The trial court erred by classifying Martin as a resigned member, and thus invoked the wrong measure of damages.

II. The issues were preserved for appeal.

"Generally, an issue must be raised to and ruled upon by the circuit court to be preserved. . . . Once the issue has been properly raised by a Rule 59(e)

motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." *Pye v. Estate of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 510 (2006) (internal citations and quotations omitted).

A. Issue I: Improper Legal Standard

Martin preserved the issue of the trial court's failure to apply the proper "mere scintilla" legal standard, including in his Rule 59 motion. (R. pp. 327-28, Mot. Reconsider 7/7/2014 at pp. 1-2: "This Motion is made on the grounds that the Court fails to apply the proper standard . . . ."; "The Court's order in this case fails to analyze the Plaintiff's motion in this case pursuant to this ["mere scintilla"] standard . . . .") (R. pp. 1218, line 9-p.1221, line 3) The other points—the lack of explicit findings of fact or conclusions of law, etc.—are examples of how, instead of applying the "mere scintilla" standard, the trial court's Order instead assumed that the Club had met all the elements of proof and then improperly shifted the burden to Martin.

Aside from this issue preservation argument, the Club provides no defense on "Issue I," the failure of the trial court to apply the "mere scintilla" standard.

B. Issue III(B): 2014 Club Rules

Martin argues that the trial court erred in relying on the 2014 Club Plan because, *inter alia*, those rules contained different language than was in effect when Martin was a member. This issue was preserved in, *inter alia*, Martin's

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Rule 59 motion, which specifically argued that the trial court's reliance on the 2014 Club Rules was wrong because those Rules went into effect years after Martin left the Club, and after the lawsuit was filed. (R. pp. 329-30) The ancillary point—that the Club's "clarification" in 2014 of its Rules indicates that its previous versions were ambiguous—is an illustration of how the previous Rules were ambiguous. That is, if the previous Rules were as "clear and unambiguous" as the Club now claims, the Club would not have needed to "clarify" them in 2014.

Aside from this issue preservation argument, the Club provides no rebuttal to this argument.

C. Issue III(E): Attorney fees

The trial court ordered briefing on the issue of attorney fees, which was provided and timely entered into the record. (R. p. 262 (Supplemental Brief 11/13/2014: Martin "submit[s] this supplemental brief . . . as instructed by the Court during the hearing on November 3, 2014") (R. pp. 237-38) (R. pp. 333-34) (R. p. 1211, line 18-p.1212, line 13) An issue may be preserved by a Rule 59 motion, or at the instruction of the trial judge. *See Pye*, 369 S.C. at 566, 633 S.E.2d at 510.

Aside from this issue preservation argument, the Club provides no rebuttal to this argument regarding attorney fees.

D. Issue IV(A): Statute of limitations and waiver

Martin argued to the trial court the defenses of statute of limitations and

waiver, and preserved arguments regarding S.C. Code § 33-31-620 *et seq.* (R. p. 231) (R. p. 88) (R. pp. 83-84) (R. pp. 52-61) (R. p. 1192, lines 15-18) (R. p. 1230, line 14-p. 1231, line 3) (R. p. 1230, line 14-p.1231, line 3) (R. p. 1239, lines 5-21) (R. p. 127)

Aside from this issue preservation argument, the Club provides no rebuttal to this argument on statute of limitations and waiver.

E. Issue IV(B): Negligent misrepresentation counterclaim

Martin argued to the trial court his negligent misrepresentation counterclaim, and preserved that issue. (R. pp. 220-228) (R. pp. 232-233) (R. pp. 334-335) (R. pp. 339-342) (R. pp. 1194, line 15-p.1197, line 19)

III. The Club's brief does not establish the terms of the alleged agreement.

In his initial brief, Martin argues (at point II.A(1)) that the trial court's Order does not establish to terms of the alleged agreement. The Club's brief, at points II.A-B, attempts to rebut the Order's error through a contractual summation. The Club's summary is not found in the trial court's Order, and the Club's *post hoc* speculation of the trial court's reasoning contradicts the language in the Order.

The Club's brief also conflates the separate exit paths from the Club—resignation, termination, and expulsion. Like the Order, the Club's brief uses those terms interchangeably, and does not address Martin's argument, in his opening brief, that each term has a separate meaning under the Club

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documents.[1]

Leaving the trial court's Order entirely, the Club's brief bases its entire argument on a single cross-reference in the 1994 By-laws. In sum, the Club argues that an "expulsion" is the same as a "resignation" because one of the "expulsion" clauses states that the Club may reissue the expelled member's certificate. However, the "reissuance" clause refers only to the fact that an expelled member must return his or her certificate to the Club. The Club then gives the developer the option to buy the membership (under Article X § 14), or the Club reissues the certificate and keeps the equity. (R. p. 1301 (§ X.12)) (R. pp. 1299-1300 (§ X.9)). That is, the expelled member does not get to keep his or her membership or sell it to another person—the membership must be returned to the Club. This is consistent with, for example, later Club documents which state that an expelled member must "surrender his or her membership certificate for reissuance by the Club to a new member," without the specification of a specific article governing the reissuance. (R. p. 1355 (Rules 8/8/01 § 14.1.6)) The point is that, upon expulsion, the Club gets the membership and accompanying certificate, and the ex-member is ejected. This is consistent with the common definition of "expel": "To force to leave; deprive of membership." A synonym is

---

[1] The Club's brief also misconstrues Martin's argument. The brief states that Martin contends that a member can "simply dispense" with his obligations by termination or expulsion. To the contrary, the terminating or expelled member forfeits significant equity contribution ($31,000 for Martin) when he or she takes those exit paths.

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"eject." Am. Heritage College Dictionary p. 482 (3rd ed. 1997).[2]

The Club's interpretation is serpentine, and does not make sense. It would mean that (1) "expulsion" is essentially the same as "resignation," (2) even though the expelled person will not be admitted to the Club Facilities "under any circumstances," (3) but the expelled members still have all the financial duties and responsibilities of membership, and (4) the Club gets to own the expelled member's membership and still assess him or her with dues, fees, charges, and other assessments for *years* to come—as long as the Club so choses. This interpretation also ignores the "termination" option of exit from the Club, which contains no such cross-reference to the "resignation provision." (R. p. 1311)

Indeed, if this were the "clear and unambiguous intent and application of these provisions" as the Club now contends, there would be no need for the Order, and the Club's brief, to cite numerous later versions of the various documents to try to justify the interpretation. And it still involves questions of fact, such as which exit path (termination, or resignation/expulsion) applies to Martin or other defendants, when the exit path was invoked, and what damages apply, if any.

The Club's brief (at pages 16-17) cites to testimony of various witnesses about their interpretations of the exit requirements. This in many instances conflicts with their, and others', testimony regarding their subjective

---

[2] Black's Law Dictionary defines "expulsion" as "A putting or driving out. Ejectment; banishment; a cutting off from the privileges of an institution or society permanently. . . ." Black's Law Dictionary p. 582 (6th ed. 1990).

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understandings of the exit paths. (R. p. 1533) (R. pp. 1566-67) (R. p. 465, line 19-p. 466, line 24) (R. p. 472, lines 10-11) (R. 474, lines 6-18) (R. p. 486, lines 2-17) (R. pp. 506-07) (R. p. 608, line 9-p. 611, line 18) (R. p. 621, lines 1-14) (R. p. 659, line 7-p. 660, line 12) (R. p. 663, lines 16-20) (R. p. 676, line. 16-p. 677, line 8) (R. p. 686, lines 8-9) (R. p. 713, lines 3-13) (R. p. 872, lines 5-18) (R. p. 898, lines 2-17) (R. p. 922, lines 9-25) (R. p. 941, lines 22-24) (R. p. 1100, lines 1-13) (R. p. 1102, lines 308) It also conflicts with the affidavit of Martin—who was never deposed. (R. p. 422) Even the Club board members and representatives are not able to interpret the Club documents consistently or clearly. And the Club's citation to witness testimony is a telling reversion to parol evidence, in an attempt to justify a convoluted interpretation of ambiguous documents that the Club drafted.

IV. The Club concedes that the documents provide that dues accrue against equity.

The Club's brief concedes that "several provisions do authorize the Club to accrue dues against the equity" of a member. Resp. br. at 16. This is consistent with the affidavit of Martin, which states that his liability for dues and fees was restricted to the amount of equity he had in the Club. (R. p. 423 ¶ 6)

The Club's brief goes on to argue that the Club "may also" sue for a money judgment. This argument is based on a single clause ("may also") in the 2009 Club By-laws, a version of the documents that the Club and trial court seem to have previously indicated do not apply to Martin. This interpretation conflicts with numerous provisions in the documents that hold that a departing member's liability is restricted to the amount of equity he or she holds in the Club, and

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conflicts with the clear testimony of Martin. (R. p. 1260-61) (R. p. 1299) (R. p. 1296) (R. p. 1331) (R. pp. 422-23) In the face of these conflicting provisions in ambiguous documents, and contrary evidence, summary judgment on this issue was inappropriate.

V. The South Carolina Nonprofit Corporation Act supports Martin's position.

The S.C. Nonprofit Corporation Act states that "[a] member may resign at any time." It goes on to state that a member is not relieved from obligations incurred or commitments made before resignation. S.C. Code § 33-31-620 (2015). The Legislature's intent is clear: if an organization avails itself of the benefits of the Nonprofit Corporation Act, the organization must allow people to leave. That is, to *really leave*, rather than "resign" but still have *all* the obligations and burdens of membership.

The Club's position, and the trial court's interpretation, effectively nullify this Legislative requirement. The Club's position reinterprets the Legislature's language to mean "a member may resign at any time . . . unless the Club says they cannot." This interpretation opens the door to allow nonprofit corporations throughout South Carolina to nullify this, and other, statutory language by inserting contrary provisions in their governing documents.

This is particularly true in this situation, where the Club's position is so extreme. The Club's argument, and the trial court's Order, indicates that the Club can expel a member, bar him or her from the Club facilities, and still require him or her to be financially obligated for all dues, charges, fees, and assessments for

years to come. This is exactly what the Club has done to Martin, and many others.

The Club attempts to sooth its interpretation by claiming that a member simply needs to sell their property. But that sale must be to a person of whom the Club approves, and that approval can be withheld at the Club's whim.[3] (R. p. 1364 (Club Plan 8/8/2001 at p. 4 § 2.4.1, 2.4.2: A member may transfer his or her membership only to the Club. The Club only need take back a membership "if an individual, *who is acceptable to the Club*, is willing to purchase the membership" (emphasis added)). This is not a "specific period of time," as claimed by the Club's brief under the comments to § 33-31-620. It is instead an open-ended obligation, made perpetual by the Club.

A more reasonable interpretation is that, upon expulsion (or termination), a member is responsible for "unpaid" dues and charges. That is the language of the Club documents, which means that upon exit a member must pay (for example) any unpaid bar, restaurant, and other charges already incurred, or past-due dues and assessments. (R. p. 1311) (R. p. 1355) This is consistent with the Nonprofit Corporation Statute's statement that members remain obligated for obligations and commitments made before resignation .

The Club's brief makes sweeping statements to the effect that "others do this" and that any other interpretation will have "devastating consequences" on

[3] Even the Club does not attempt to argue that the Club's "resale list" is a viable option. The Club's "resale list" is widely recognized as a fiction.

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the Club.[4] There is no evidence in the record to support these doomsday predictions. If the Club feels so strongly about this, it has the option to forego its nonprofit status for a different corporate form that permits such practices.

VI. Martin's Counterclaims overcome summary judgment, as the underlying elements for each claim are a question of fact for the jury to consider.

A. The trial court's dismissal of the breach of contract counterclaim was unsupported and misguided.

The Club's brief references that, because the trial court made no legal distinction among resignation, termination, or expulsion as it relates to the ongoing financial obligation, then Martin's breach of contract counterclaim fails as a matter of law. However, in reliance on the position that it does not matter how Martin exited the Club, the trial court cites to several excerpts from the various governing documents. In a glaring error, the trial court's Order cites to the 2014 Club Rules governing expulsion, which was not in effect at the time Martin exited the Club. (R. p. 13)

Coupling the error contained in the defective trial court Order, along with Martin's affidavit affirming the appropriate governing documents being silent as to the ongoing financial obligation after expulsion, there is a clear question of fact remaining on the breach of contract counterclaim. (R. pp. 422-23)

---

[4] The Club does not address the fact that Callawassie has a separate property owners association, which has responsibility for the common areas, roadways, paths, gatehouse, etc. The Club is a private social club for golfers and tennis players.

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B. Martin meets the elements required for his negligent misrepresentation counterclaim.

Martin has provided ample evidence, certainly more than a mere scintilla, that the Club made false representations to its members. Martin does not deny that there was a predecessor entity, Callawassie Island Club (CIC), which was in existence at the time he joined as a member. However, when the Club took over in 2001, it was the false representations made by the Club that damaged Martin. After 2001 and during Martin's membership, the Club maintained a roster of certain members who had "conceded" their membership obligations as a means of exiting from the Club. (R. pp. 1552-53) These acts and representations made by the Club perpetuated Martin's well-founded understanding that there was an exit strategy available which did not carry financial obligations in perpetuity beyond his equity and which were contingent on a re-issuance to a new member. Martin justifiably relied on his ability to exit by expulsion (or termination), albeit in forfeiture of his equity. (R. pp. 422-43)

However, for the Club to take an apparent contrary position and then sue based on enforcement of an ongoing financial obligation after expulsion is a misrepresentation of its prior acts. It is erroneous for the trial court to dismiss this counterclaim on the premise that Martin is not entitled to rely on the false representation simply because the Club was not the entity which first signed them on as members.

On the contrary, Martin continued to rely on his well-founded understanding, now called a mistaken belief, once the Club took ownership.

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During Martin's years as a member, the Club never delivered or published any governing document defining the position and (re)interpretation that it now takes: namely, that an expelled member shall remain liable for ongoing payments until its property is sold and membership re-issued to a new approved member. (R. pp. 422-43) This explains the defective trial court Order citing to the 2014 Club Rule (not binding on Martin) enacted long after Martin's expulsion by virtue of his non-payment and forfeiture of equity. (R. p. 13)

Moreover, in support of the dismissal of the negligent misrepresentation counterclaim, the Club's brief cites to *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). Martin has set forth evidence to meet each of the elements enumerated under this cause of action. Furthermore, the Club's reliance on this case (and all relevant South Carolina case law on negligent misrepresentation) amounts to a hoisting with its own petard: Determining "whether or not there has been a misrepresentation is an ultimate issue of fact for the jury." *Id.* at 482, 494 S.E.2d at 852 (citing *State Farm Mut. Auto. Ins. Co. v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 263 S.C. 391, 210 S.E.2d 613 (1974).

VII. Martin's right to full and fair discovery was denied upon the issuance of the Order Granting Summary Judgment.

Martin craves reference to his initial brief, which set forth the trial court's procedural bungling of key discovery matters. App. Initial Brief at Part V) Martin's counsel argued the need and right to depose the Club's general manager, Jeff Spencer. (R. pp. 238-239) (R. pp. 1212, line 3-p. 1213, line 6) Moreover, the trial court granted Martin's Motion to Compel Discovery on June

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17, 2014, just ten days before the Order Granting Summary Judgment on June 27, 2014. (R. pp. 19-20) (App. Initial Brief at Part V) The Summary Judgment Order had been entered and filed prior to Mr. Spencer having been deposed, and before the court-ordered discovery was produced. (*Id.*)

Martin has set forth several grounds demonstrating that his contract with the Club was ambiguous, or at a minimum, the Club's interpretation of same was not consistent with the relevant terms. If the Club's provisions concerning obligations upon expulsion were unambiguous, why did it continue to amend those provisions, and try to retroactively apply the amended versions after Martin had exited the Club? Martin is entitled to cross-examine the Club's key personnel to understand the Club's inconsistent and disparate treatment to its members, and how that comports with its claims against him.

VIII. Public policy demands that the Club shall not be entitled to charge Martin, and similarly situated members, for ongoing payments after mandatory expulsion/ejectment from its facilities and amenities.

It is certainly fair to charge current members for ongoing dues. And it is consistent with public policy to allow members who wish to resign from their membership to draw down their equity to pay for their ongoing dues, while they maintain their use and benefit of the club facilities and amenities. And, in such a scenario, the resigning members would receive 80% of their equity back once their membership was reissued to a new member. All of this is consistent with public policy, and all of this was Martin's understanding of the oral and written rules presented to him by the Club. (R. p. 422)

It is also fair to honor the representations made to members upon their joining the Club (and beyond), wherein certain assurances were made that the maximum financial risk/"loss" would be their respective equity deposit, in the event of an exit from the Club. When a member makes it clear to the Club that he or she no longer wishes to use the Club facilities and amenities, and that he or she is no longer able to meet the ongoing financial requirements to be an existing member, then public policy dictate the person shall be removed from the Club. Not without penalty—Greg Martin's membership cost $31,000, his ownership interest in the Club. Upon being expelled in 2012, Greg Martin forfeited that ownership interest in full. At the time of his expulsion, there was no governing document maintained by the Club requiring that he continue to make ongoing dues payments after expulsion. Rather, at the time of his exit from the Club, expulsion was deemed a mandatory action taken by the Club, pursuant to its governing documents. From a social club's financial health perspective, public policy dictates that the $31,000 forfeiture covers the "lost dues" from the expelled member during the downtime in which the club seeks a replacement member.

Public policy adheres to the old adage: "You get what you pay for." The Club's unfair position in billing and suing its expelled members is: "You pay for what you don't get."

Finally, the South Carolina Nonprofit Corporation Act sets forth the Legislative policy that members are allowed to resign from nonprofit corporations. If the Club is allowed to (re)interpret its documents to force people

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to continue paying in perpetuity, those terms should have been set forth *clearly and consistently*. (R. pp. 337-338) The convoluted provisions of the Club's documents, and misrepresentations, do not meet this standard, and at least raise questions of fact as to what was agreed to, by whom, and what if any damages exist from the alleged breach.

IX. The record is devoid of any additional sustaining grounds to support judgment in favor of the Club.

In making its unsupported contention there are additional sustaining grounds to affirm the trial court's decision, the Club's brief references the 1994 governing documents. In rebutting arguments of laches, waiver and estoppel, Martin is consistent with the 1994 governing documents. The 1994 Bylaws and 1994 Club Rules support Martin's understanding that his maximum financial liability was forfeiture of his equity. Paragraph 9(a) of the Bylaws governing resignation sets forth in accrual of ongoing dues, fees, and charges against the resigned equity membership (not against the member). R. p. 1299 (1994 Club Bylaws, Art. X, Para. 9(a) at B-11). Similarly, the termination provision in the 1994 Club Rules sets forth a terminated member's liability for "unpaid" club account, dues and charges. (R. p. 1311)

When coupled with the representations made (both when he joined the predecessor entity, when the Club was formed, and beyond) that he could ultimately exit the Club and at most forfeit his equity, the 1994 governing documents support Martin's reasonable understanding.

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It is the subsequent unilateral amendments to the governing documents after 2001 by the Club, and its revisionist interpretation of what the Club now deems has "always been" regarding ongoing financial obligations, which Martin takes issue with, and thus, renders the Club in violation of the business judgment rule.

The unilateral amendments to the governing documents, along with the Club's inconsistent interpretations thereto, were not discovered by Martin until after he was sued. Therefore, any statute of limitations argument now espoused by the Club to negate Martin's defenses and counterclaims fails.

To date, Greg Martin has never been deposed by the Club. His affidavit is unrefuted, and explains his understanding that the 1994 governing documents capped member's liability to the amount of equity that the membership had in the Club. This is consistent with the express language in those documents. The Club has failed to counter Martin's sworn testimony in that regard, and it is a question of fact as to whether the Club's subsequent amendments/interpretations were proper or enforceable to impose further financial obligations against this former member.

CONCLUSION

For these reasons, this Court should reverse the trial court's Order granting summary judgment against Gregory L. Martin and granting summary judgment in favor of the Club on the Martins' counterclaims.

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

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

J. Ernest Kinard, Jr., Judge

Appellate Case No. 2015-000001

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin, Appellant.

PROOF OF SERVICE

I, Neil D. Thomson, attorney for the Appellant, Gregory L. Martin, do hereby certify that I have this 26th day of August, 2015 served counsel of record with the Brief of Appellant and the Reply Brief of Appellant by mailing said copies by United States Mail, first class postage pre-paid, to said counsel at the following addresses:

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
BEAUFORT COUNTY
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J. Ernest Kinard, Jr., Judge

Appellate Case No. 2015-000001

RECEIVED
AUG 27 2015
SC Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin, Appellant.

PROOF OF SERVICE

I, Neil D. Thomson, attorney for the Appellant, Gregory L. Martin, do hereby certify that I have this 26th day of August, 2015 served the South Carolina Court of Appeals with fifteen copies of the Record On Appeal, Brief of Appellant and Reply Brief of Appellant by mailing said copies by Federal Express, postage pre-paid, to said court at the following address:

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

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

Of whom Michael J. Frey is the Appellant.

Appellate Case No. 2015-000002

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Unpublished Opinion No. 2018-UP-179
Submitted September 1, 2017 – Filed May 2, 2018

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Ian S. Ford and Neil Davis Thomson, both of Ford Wallace Thomson LLC, of Charleston, for Appellant.

M. Dawes Cooke, Jr., John William Fletcher, and Bradley B. Banias, all of Barnwell Whaley Patterson & Helms, LLC, of Charleston; Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort; and James Andrew Yoho, of Carlock Copeland & Stair, LLP, of Charleston, for Respondent.

PER CURIAM: Michael J. Frey appeals the circuit court's order granting summary judgment to The Callawassie Island Members Club, Inc. (CIMC). He argues the circuit court erred in (1) failing to apply the "scintilla of evidence" standard to CIMC's motion for summary judgment, (2) disregarding the voluminous evidence he presented in opposing CIMC's motion for summary judgment, (3) awarding damages under incorrect contract provisions and under incorrect interpretations of the applicable documents, (4) granting summary judgment in favor of CIMC on his counterclaims when he submitted evidence raising numerous issues of material fact, and (5) granting summary judgment prematurely because he did not have a full and fair opportunity to complete discovery. We affirm in part, reverse in part, and remand.[1]

Disregarding Evidence

Frey argues the circuit court disregarded genuine issues of material fact and, therefore, erred in granting summary judgment in favor of CIMC. We have addressed Frey's specific arguments below.

i. Contract

Frey first contends CIMC failed to prove a contract existed because he applied for membership in a different organization, the Callawassie Island Club, Inc. (CIC). We hold a question of fact does not exist as to whether Frey was a member of CIMC. The evidence in the record supports the circuit court's finding that Frey's membership in CIC transferred to CIMC upon the sale of the club. The 1994 Plan for the Offering of Memberships (Plan) expressly contemplated the transfer of CIC's assets to the members, which occurred in 2001 when CIMC assumed control. Frey also continued paying dues and receiving the benefits of membership well after CIMC took control of the club.

ii. Governing Documents

Frey contends the circuit court disregarded (1) the differences among resigned, terminated, and expelled members; (2) the abundant evidence that he had been expelled by CIMC, which included testimony from CIMC's representatives and other club members regarding the expulsion process and documents showing

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

CIMC had previously expelled other members; (3) evidence that the governing documents had been improperly changed by CIMC to prohibit people from exiting the club; and (4) the abundant evidence that he had no obligation beyond his equity interest in his club membership.

a. Resignation

Frey contends there are genuine disputes as to (1) which governing documents are controlling and (2) the interpretation and application of the governing documents as they relate to his obligation to pay dues.

This court recently considered the same issues in *The Callawassie Island Members Club, Inc. v. Dennis*. 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016), cert. granted (S.C. Sup. Ct. Order dated September 8, 2017). There, this court noted the 1994 general club rules (GCRs) provided that a member could terminate membership in the club by delivering written notice of termination to the club's secretary but would remain liable for any *unpaid* club account, membership dues, and charges. *Id.* at 616, 790 S.E.2d at 438. However, this court found this language different from that in other documents. *Id.* at 616–17, 790 S.E.2d at 438. This court stated,

> [U]nlike the 1994 GCRs, the 1994 CIC Plan and Bylaws provide resigned members are obligated to continue to pay dues *until their memberships are reissued*. Further ambiguity is found . . . in the 2009 GCRs, which provide that members who have terminated their club memberships remain liable for *unpaid* dues until their membership is sold. The term "unpaid" is not defined in the documents. It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation.

Id. Based on this ambiguous language in the governing documents regarding "the issue of whether Appellants were obligated to pay dues post-resignation," this court reversed the grant of summary judgment to CIMC. *Id.* at 617, 790 S.E.2d at 438.

The same governing documents at issue in *Dennis* were used in this case. Like in *Dennis*, the 1994 Bylaws, the 1994 Plan, and subsequent revisions to the Plan consistently stated that resigned members had to continue paying dues until their

memberships were reissued. However, the 1994 and 2001 GCRs provided that a person who terminated his or her membership in the club would remain liable for any *unpaid* club account, membership dues and charges. The 2007 and 2009 GCRs added in that the member would remain liable for these "unpaid" charges "until the membership was sold."

When all of the governing documents are reviewed, an ambiguity exists regarding the obligation of a resigning member to continue paying dues post-resignation. Some of the documents state a member is responsible for paying dues until the membership is reissued, while others state the member is only responsible for "unpaid" dues, and the meaning of "unpaid" is not clear from the documents. *See id.* at 617, 790 S.E.2d at 438 ("The term 'unpaid' is not defined in the documents. It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation.").

Although Frey's brief essentially focuses on his belief that he was expelled from the club, there is some evidence that he attempted to resign his membership. In his answer, he not only sought a finding that he was expelled from the club but also contended that his resignation should be deemed effective. Additionally, in its answer to interrogatories filed by Frey, CIMC stated it had in its possession a purported resignation from Frey. *See Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof). In light of this evidence and the ambiguity of the provisions governing the obligation of resigned members to continue paying dues, summary judgment was improper. *See HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007) ("[When] a contract is unclear, or is ambiguous and capable of more than one construction, the parties' intentions are matters of fact to be submitted to a jury."); *see also Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991) ("As a general rule, written contracts are to be construed by the [c]ourt[,] but [when] a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury.").

b. Expulsion

Frey also contends that his liability for unpaid dues ended after four months of delinquency by the mandatory process of expulsion.

The *Dennis* court also addressed this issue and focused on the mandatory expulsion language of the 2001 GCRs and the testimony of the membership coordinator for CIC and CIMC, who stated she understood the expulsion provision to mean that after four months of delinquency, a member would lose his or her membership. 417 S.C. at 617, 790 S.E.2d at 439. This court stated,

> We acknowledge that section 13.3.1 provides club members *may* be suspended; however, in light of the subsequent mandatory expulsion language and the conflicting evidence presented as to the club's actual suspension and expulsion practices, we agree with Appellants that the language of the GCRs presented an ambiguity as to whether Appellants were entitled to expulsion and thus exposed to a maximum liability of four months' of unpaid dues (plus any accrued expenses). [When] there is some ambiguity in the governing documents as to whether expelled members are still liable for dues accruing after expulsion, summary judgment is inappropriate.

Id. at 617–18, 790 S.E.2d at 439.

Like in *Dennis*, the record contains the testimony of the membership coordinator, as well as the following provision from the 2001 GCRs:

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

(Emphases added). There is evidence in the record that Frey had been suspended by CIMC before the initiation of CIMC's action against him. The record contains a November 2011 list of suspended members that included Frey. Also, CIMC's General Manager stated in an affidavit that CIMC had "been forced, owing to non-payment, to suspend" the membership rights and privileges of Frey. However, the above provision from the 2001 GCRs was amended in 2007 and the mandatory expulsion language was removed. It states as follows:

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

(Emphases added). Pursuant to this revision, CIMC would not have been obligated to expel Frey despite his suspension. However, Frey contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club. He points to the following provision, which prohibits modification of the governing documents unless a majority of the members vote in favor of it:

> 2007 and 2012 Plan:
>
> > The Board of Directors may, in its sole discretion, amend or modify this Plan from time to time, so long as such amendments or modifications do not materially and adversely affect the rights of the Equity Members. Any amendment or modification which materially and adversely affects the rights of the Equity Members must be approved by a majority of the votes held by the Equity Members so affected.

Frey stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to Frey, there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of Frey's suspension from the club. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof). Thus, summary judgment to CIMC was improper. *See Dennis*, 417 S.C. at 618, 790 S.E.2d at 439 ("[When] there is some ambiguity in the governing documents as to whether expelled members are still liable for dues accruing after expulsion, summary judgment is inappropriate."); *see also Cafe Assocs., Ltd.*, 305 S.C. at 9, 406 S.E.2d at 164 ("As a general rule, written contracts are to be construed by the [c]ourt[,] but [when] a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury.").

iii. Nonprofit Corporation Act

According to Frey, permitting CIMC to continue to levy dues, fees, assessments, and other charges against him is a violation of the South Carolina Nonprofit Corporation Act of 1994 (the Act) because it eliminates a person's right to resign from a nonprofit organization; it also conflicts with the governing documents, which do not state a member is responsible for dues and other charges after termination or expulsion. Frey argues CIMC "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."

We find the provision at issue from the Act, section 33-31-620 of the South Carolina Code (2006), does not require resigned members to continue paying dues that accrue after they resign. *See* § 33-31-620 (stating "[a] member may resign at any time" and "[t]he resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation"); *see also Dennis*, 417 S.C. at 618, 790 S.E.2d at 439 ("Section 33-31-620 obligates resigned members to pay any dues incurred *before* resignation. This section does not require resigned members to continue to pay any dues that accrue *after* resignation. To do so, we believe, would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate [his or her] membership obligations."); *id.* at 619, 790 S.E.2d at 439 ("[S]ection 33-31-620 protects club members from such continuing liability after resignation.").

Counterclaims

i. Breach of Contract

Frey argues there was sufficient evidence to support his breach of contract counterclaim, including that he established CIMC improperly amended material provisions of the governing documents to prevent members from leaving the club. Because of the interrelated nature between Frey's breach of contract counterclaim and CIMC's breach of contract claim and, as stated above, the fact that relevant provisions of the governing documents are ambiguous, we reverse the circuit court's grant of summary judgment to CIMC. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof).

ii. Negligent Misrepresentation

Frey stated in his brief that he is not maintaining "that the prior entity, [CIC], by and through its governing documents, conveyed these false representations." Instead, Frey argues "[t]he false representations occurred after the Club took over in 2001" and consisted of CIMC providing "methods for certain members to exit the Club without owing more than their equity contribution." This evidence is insufficient to support Frey's negligent misrepresentation counterclaim because allowing certain members to leave the club is not a *false* representation and it was not made to Frey. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) ("To establish liability for negligent misrepresentation, the plaintiff must show "(1) the defendant made a *false* representation *to the plaintiff* . . . ." (emphases added)). Therefore, the circuit court did not err in granting summary judgment to CIMC on this counterclaim. *See* Rule 56(c), SCRCP (stating summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law").

iii. Section 33-31-621(d)

Frey argues the circuit court erred in dismissing his statutory violation claim because CIMC brought its breach of contract action after the one-year statute of limitations of section 33-31-621(d) of the South Carolina Code (2006), which states, "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."

The circuit court did not address this issue in its order granting summary judgment to CIMC and Frey did not raise it in his motion to reconsider. Therefore, it is unpreserved. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

Attorney's Fees

Because of our reversal of the grant of summary judgment to CIMC, we also reverse the award of attorney's fees to CIMC. *See Camburn v. Smith*, 355 S.C. 574, 581, 586 S.E.2d 565, 568 (2003) ("An award of attorney's fees will be

reversed [when] the substantive results achieved by counsel are reversed on appeal.").

Remaining Issues

Based upon our reversal of the grant of summary judgment, the court need not address Frey's remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when the resolution of prior issue is dispositive).[2]

Conclusion

We affirm the circuit court's grant of summary judgment to CIMC on Frey's negligent misrepresentation counterclaim. We reverse the circuit court's grant of summary judgment to CIMC on its claims against Frey and the accompanying award of damages, the grant of summary judgment to CIMC on Frey's breach of contract claim, and the award of attorney's fees. Finally, we remand to the circuit court for trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, C.J., and HUFF and HILL, JJ., concur.

[2] CIMC also raises several additional sustaining grounds, which we decline to address. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420 n.9, 526 S.E.2d 716, 723 n.9 (2000) ("The appellate court may or may not wish to address such [additional sustaining] grounds when it reverses the lower court's decision.").

The South Carolina Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

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

Of whom Michael J. Frey is the Appellant.

Appellate Case No. 2015-000002

ORDER

After careful consideration, we grant Respondents' and Appellant's petitions for rehearing. Additionally, the parties may serve and file any supplemental brief in light of the holding in *The Callawassie Island Members Club, Inc. v. Dennis*, Op. No. 27835 (S.C. Sup. Ct. filed Nov. 14, 2018) (Shearouse Adv. Sh. No. 45 at 9). Any supplemental brief must be filed within thirty days of the date of this order.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

FILED

November 30, 2018

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-00002
Lower Court Case No. 2012-CP-07-03209

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

v.

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

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

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Respondent is fond of pointing out that "hard cases make bad law." In adopting this as its refrain, the Club strays far afield from the Eagles theme that this Court has previously sanctioned. This Court should not be tempted to "make it harder than it has to be."[1] This is a simple appeal as to a trial court's inappropriate grant of summary judgment. All Appellant Michael Frey wants is a fair trial.

ARGUMENT

This Court has granted the petitions for rehearing, filed by both Appellant and Respondent, and it has requested supplemental briefing in light of the South Carolina Supreme Court's opinion in *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018) ("*Dennis* Opinion").

For the reasons set forth below, this Court should recognize that the Supreme Court's decision in *Dennis* has no saving influence over many distinct and independent grounds for reversal of the Circuit Court's order on appeal in this case.

Further, based on the *Dennis* Court's holding that certain parts of the governing documents at issue are unambiguous, Appellant hereby petitions this Court for a specific ruling that would limit the amount of damages recoverable by the Club in this lawsuit, to an amount not greater than that of Appellant's membership contribution.

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[1] Eagles, "I Can't Tell You Why" *The Long Run* (Asylum Records 1979) (But, actually, we *can* tell you why.)

Finally, because it overlooked evidence in the Record as to the issue, this Court should reverse its previous decision as to the Appellant's counterclaim for negligent misrepresentation.

I. The Supreme Court's decision in *Dennis* was limited to the particular issues before the Court on certiorari.

When evaluating the *Dennis* Opinion's impact on the merits of Appellant's appeal, this Court should be aware of the constraints of the Opinion, which is necessarily restricted to the questions that were before the Supreme Court on certiorari. "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions that they are not asked." *Kennedy v. Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322 (2001), *quoting State v. Austin*, 306 SC 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991).

The Club asked the Supreme Court to answer only two questions as to this Court's decision on appeal in *Dennis*:

1. Did the Court of Appeals err in its *sua sponte* revision and judicial repeal of Code of Laws of South Carolina (1976), as amended, Section 33-31-620, ignoring uncontroverted key facts in the record and disregarding the language of subsection (b) of the statute?

2. Did the Court of Appeals err in concluding that the Dennises presented evidence of ambiguity, where the parties' written contract clearly stated that members of Petitioner, The Callawassie Island Members Club, Inc. (referred to herein as "CIMC" and "the Club") must fulfill the financial obligations of membership in CIMC until the reissuance of their membership?"

(*Petitioner The Callawassie Island Members Club, Inc.'s Brief on Appeal*, at p. 1, Statement of Issues on Appeal.)[2] In answering the Club's questions, the Supreme Court was starkly divided, with two justices robustly dissenting. The majority opinion emphasized that:

> In response to the "logical end" argument [in the dissent], we point out that—as in all cases before this Court—we decide only the issues before us in *this* case. The "logical end" of our analysis goes no further than required by the four corners of the governing documents in this case when applied to the facts of this case.

425 S.C. at 202, 821 S.E.2d at 672 (italics in original, underlining added). With respect to the issues before it on certiorari, the Supreme Court made the following specific holdings:

1. Payment after resignation: "[Section 5.11 of the 2008 Plan] unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued." [3]

2. Parol evidence: "First, because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning."[4]

3. Nonprofit Corporation Act: "The dues, fees, and other charges the Dennises owe fall into the 'commitments made' category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises resigned—both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges 'until his or her equity membership is reissued by the Club.' When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. Therefore, we find the requirement that members continue to pay dues, fees, and

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[2] The Club also questioned this Court's quotation of lyrics from the Eagles' *Hotel California*. The Supreme Court declined to directly address the merits of that particular issue, instead "applaud[ing] the reference." 425 S.C. at 204 n.4, 821 S.E.2d at 673. Thus, we can infer that the Eagles theme prevails.

[3] 425 S.C. at 200, 821 S.E.2d at 670.

[4] *Id.* at 203, 821 S.E.2d at 672.

other charges after resignation until their membership is reissued is not prohibited by section 33-31-620."[5]

The majority opinion observes that the Dennises never were suspended by the Club, and therefore they could not have been expelled. *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 ("This provision makes it clear that mandatory expulsion arises only after the board has suspended a member, which is discretionary with the board. Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered.")

The strong dissent is written in support of this Court's ruling, and it contends that numerous material issues of fact should have precluded summary judgment on the question of resignation. Among other things, the dissent states that:

> Lastly, the majority's holding which forecloses the ability to resign has the potential to lead to an absurd result. Instead of attempting to resign, members have more incentive to simply become "bad neighbors" and behave in such a way as to encourage the Club to suspend them, because suspension places them in a better financial situation than resignation. **Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so "shall be expelled from the Club," ending their liability for future dues.**

Id. at 213, 821 S.E.2d at 677 (emphasis added).

Given the precise, finite issues presented to, and decided by, the Supreme Court in *Dennis*—as well as the different facts and evidence within the Records on Appeal—many of the issues that **this** Court identified in the opening paragraph of its opinion in **this** case remain pending and unaffected by the *Dennis* Opinion:

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[5] *Id.* at 206, 821 S.E.2d at 673.

> [Appellant] argues the circuit court erred in (1) failing to apply the "scintilla of evidence" standard to CIMC's motion for summary judgment, (2) disregarding the voluminous evidence he presented in opposing CIMC's motion for summary judgment, (3) awarding damages under incorrect contract provisions and under incorrect interpretations of the applicable documents, (4) granting summary judgment in favor of CIMC on his counterclaims when he submitted evidence raising numerous issues of material fact, and (5) granting summary judgment prematurely because he did not have a full and fair opportunity to complete discovery.

(Unpublished Op. No. 2018-UP-179 at 2). As set forth, below, this Court should reverse the Circuit Court's errors and remand this case for trial.

II. This Court should disregard the new arguments in the Club's *Petition for Rehearing*.

After this Court filed its Opinion on May 2, 2018, the Club retained new counsel, who filed a notice of appearance on May 11, 2018. On May 17, 2018, new counsel filed the Club's *Petition for Rehearing and Incorporated Memorandum in Support*, which contains new arguments not previously made by the Club, which should be stricken or disregarded.

Chief Justice Jean H. Toal has explained that, on appeal, "the prevailing party abandons any additional sustaining grounds it might have argued by failing to raise them in the party's appellate brief." Jean H. Toal et al., *Appellate Practice in South Carolina* 192 (3rd ed. 2016); *see also id.* at 432 ("Note where a party fails to argue an issue in the brief, it is not preserved for appellate review.") Chief Justice Toal cited to *I'On, L.L.C. v. Town of Mt. Pleasant*, where the Supreme Court held:

> Of course, a **respondent** may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—**by failing to raise it in the appellate brief**. *Maxey v. R.L. Bryan Co.*, 295 S.C. 334, 336 n. 2, 368 S.E.2d 466, 467 n. 2 (Ct. App. 1988); *May v. Hopkinson*, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct. App. 1986); *see also* Rule 208(b)(1)(B), SCACR ("[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal").

338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (emphasis added).

As Appellant pointed out in his *Reply Brief*, the Club, in its *Final Brief of Respondent*, entirely failed to address the Appellant's arguments regarding the Club's improper amending of the governing documents. (*See, e.g.*, App. Reply at p. 2: "The Club's brief does not address, or barely addresses, numerous points argued in [Appellant's] initial brief. Those points appear to be conceded, and include: . . . II.A(6) The trial court erred in disregarding evidence that the governing documents had been improperly changed by the Club.").

Despite its previous abandonment of the issue, the Club dedicates entire pages of its *Petition for Rehearing* to brand-new grounds that address—for the first time—Appellant's arguments about the Club's improper amending of the governing documents. (*See* Club *Petition for Rehearing*, at pp. 8–9). The Club's addition—at the rehearing stage—of new grounds for sustaining the trial court's decision is inappropriate, and this Court should consider the question of whether the documents were improperly amended to have been conceded by the Club.

III. This Court should remand the case for trial on the question of whether the Club improperly amended the governing documents.

The *Dennis* Opinion has no bearing on this Court's prior holding that a genuine issue of material fact exists as to whether the governing documents were improperly amended, particularly because the question was not before the Supreme Court on certiorari. This Court held:

> [Appellant] contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club . . . [Appellant] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Appellant], there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of [Appellant's] suspension from the club.

(Unpublished Op. No. 2018-UP-179 at 6) (citing *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof)).

This Court's holding is well-supported. As set forth in Appellant's brief, the governing documents do not permit the Club to unilaterally—and without notice or a vote—change the basic rights of membership (such as changing "shall be expelled" to "may be expelled"). The documents themselves prevent any alteration by the Club that "materially and adversely affects the rights of the equity members," unless such modification is "approved by a majority of the votes held by the equity members so affected." (R. at 1374) (Section 10.1). Evidence in the record shows that the Club made fundamental changes to the expulsion provisions of the governing documents without a

board vote, without a vote of members, and without notifying or allowing Appellant to vote on such changes (App. Br. pp. 24-25). As this Court already has held, there is a genuine issue of material fact as to whether or not key provisions in the governing documents were changed correctly, and the factual consequences of those changes.

As discussed in *supra* Part II, the Club's *Petition for Rehearing* contains new arguments on this point, which should be stricken or ignored. In addition, those new points are based on the Club's contention—apparently made in all seriousness—that the Club's admitted changes to the governing documents "plainly did not adversely affect the rights of members of the Club," and therefore did not require member approval. (Club *Pet. for Reh'g* at p. 9). As the dozens of pending Club cases show (four on appeal in this Court, two pending before the United States District Court, and literally dozens pending before the state trial court) the Club's unilateral and secret changes to the governing documents had fundamental effects on the rights of members. Those adverse effects are the direct result of the Club's attempt to end—by secretly amending its documents—the mandatory expulsion of members, and the Club's attempt to eliminate—by secretly amending its documents—the mandatory cap on members' liability to four months dues (*inter alia*). *See, e.g.*, R. p. 528 (resale list showing numerous expelled or conceded memberships); *see also* App. Br. II.A(6) ("Changes to the governing documents affecting a member's financial obligations must be approved by the persons so affected. (R. p. 1374)".)[6]

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[6] Another of the Club's new arguments is that it could amend the Club **Rules** without approval. (Club *Pet. for Reh'g* at p. 9). This is simply incorrect. As Appellant showed in his final brief (at p. 25), the Club Rules are for day-to-day issues relating to the

This Court's prior ruling on this issue remains valid, and there exist no grounds in the *Dennis* Opinion for its reversal. This Court should remand the case for trial on the issue of whether the governing documents were improperly amended by the Club.

IV. Appellant's liability must be strictly limited to his membership contribution.

While the measure of damages was not precisely before the Supreme Court on certiorari, its decision in *Dennis* has remarkable implications for the question of what damages are ultimately recoverable by the Club in the legion of lawsuits that it has filed against its members. Put simply, if the Club benefits from "unambiguous" terms in the governing documents, it must be bound by them, too.

The *Dennis* Opinion itself contains an underlying dialogue between the majority and the dissent, in which the justices discuss the potential repercussions of their decision on the liability of the many ill-fated members of the Callawassie Island Members Club. Justice Hearn, writing for the dissent, expresses concern that the Court's decision might lead to the absurd—yet very real—result of perpetual, inescapable liability on the part of members, whose largely fictional "resignation" from the Club regrettably offers them no relief from the payment of dues, even when they are beyond the grave. *Dennis*, 425 S.C. at 212 n.6–7, 821 S.E.2d at 677 n.6–7.

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use of the Club facilities (dress code, etc.). The Club Rules are not permitted to be unilaterally, and secretly, changed to make memberships inalienable and perpetual. Such fundamental changes to membership rights are required to be approved by the members so affected.

The majority directly addresses and mollifies the dissent's concern, explicitly limiting its holding by emphatically stating "We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts." *Id.* at 202, 821 S.E.2d at 672 (emphasis in original).

It is for this Court, then, to make the decision on damages—and perpetual liability—that the Supreme Court majority did not. Appellant seeks a ruling from this Court that it was error for the Circuit Court to award damages to the Club in the amount of $67,876.46, because, properly, the Club's recovery must be limited to (and offset by) the amount of the Appellant's membership contribution. Such a holding by this Court would be supported by the Club's governing documents, as well as by the Supreme Court's decision. The interpretation of an unambiguous contract is a question of law, and this Court may construe the membership documents at issue in this case *de novo*, without deference to the trial court's findings. *See Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013). By their own express terms, the Club's governing documents confine a member's ultimate liability to the Club to the loss of a return on his or her membership contribution.

The governing documents make the following statements, which clearly limit a member's expectations as to the amount of his liability to the Club:

> - An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club. **These dues will accrue against and be deducted from the amount to be paid to the resigned member upon reissuance of his or her resigned membership.**
>
> R. p. 1280 (emphasis added) (1994 Plan).

- An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees, and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club. **Any unpaid dues, fees, and other Charges . . . will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.**

  R. p. 1453-54 (2008 Plan) (emphasis added).

- Any equity member may resign from the Club by giving written notice to the Secretary. **Dues, fees and charges shall accrue against a resigned equity membership** until the resigned equity membership is reissued by the Club.

  R. p. 1319 (1994 Bylaws) (emphasis added).

- The Club shall have a lien **against each membership** for any unpaid dues, fees, and other Charges . . . .

  R. p. 1455 (2008 Plan) (emphasis added).

- Article XI, Delinquencies, "The Club shall have a **lien against each membership** for any unpaid assessments, fees, annual dues, or other charges . . . .

  R. p. 1487 (2009 By-Laws) (emphasis added).

These unambiguous provisions are unmistakable in their effect: dues, fees, and charges accrue against a resigned equity **membership**—and not against the member personally. In fact, the clear language of the documents evidences an intent by the Club to seek recourse for unpaid dues against the **value of the membership**. Ultimately, the Club may reclaim the **membership** through foreclosure, and recoup its lost dues from the membership contribution when it is reissued. (R. p. 1487 ("Delinquencies")). It is clear that, in the end, a member only may be liable up to the amount of his or her already-paid equity contribution ($22,000 for Appellant here).

Indeed, the *Dennis* Court nodded toward such a determination. Justice Hearn, writing for the dissent, construed that "unpaid dues and fees accrue against membership only, rather than on an ongoing basis against the member personally;" therefore, she conveyed her concern about "taking the majority's view to its logical end" to "create unlimited liability where none previously existed." 425 S.C. at 210, 821 S.E.2d at 676. The majority's reply to the dissent's concern is telling: "In response to the 'logical end' argument . . . the summary judgment we affirm is for less than four years of unpaid dues. We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts." *Id.* at 202, 821 S.E.2d at 671-672 (emphasis in original).

Pursuant to the express terms of the Club's governing documents, the trial court erred in ordering damages in excess of the Appellant's equity contribution, and in not providing for a setoff for his equity contribution. This Court is free to construe the force and effect of unambiguous contracts, and to hold that the plain language of the governing documents operates to restrict any recovery by the Club to an amount not greater than Appellant's already-paid equity contribution of $22,000. *Dennis* at 203, 821 S.E.2d at 672 (citing *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.")); *see also Bennett*, 405 S.C. at 4, 747 S.E.2d at 427.

As set forth above, and in the Appellant's previous briefs to this Court, the governing documents expressly do ***not*** support perpetual liability. As a matter of law, they limit liability to a finite amount. Appellant respectfully requests that this Court hold

that—on remand to the Circuit Court for trial—the maximum damages the Club may claim must be confined to the amount of the member's equity contribution (here, the $22,000 already paid).

V. This Court should reverse the Circuit Court's erroneous grant of summary judgment on numerous other issues not reached by the *Dennis* Opinion.

In its Order of May 2, 2018, after finding, as grounds for reversal of the Circuit Court, that the governing documents are ambiguous and the Nonprofit Corporation Act prevents the Club from prohibiting resignation (*inter alia*), this Court held: "[b]ased on our reversal of the grant of summary judgment, **the court need not address [Appellant's] remaining issues on appeal**." (Unpublished Op. No. 2018-UP-179 at p. 9) (emphasis added). Importantly, those remaining issues on appeal each constitute independent grounds for the reversal of the Circuit Court's grant of summary judgment, and they stand undisturbed in the wake of the *Dennis* Opinion. Therefore, Appellant respectfully requests that, even if this Court finds that *Dennis* mandates the reversal of portions of its previous opinion, it does not control as to the questions, previously briefed,[7] and identified below.

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[7] Appellant expressly incorporates herein by reference the *Brief of Appellant* and *Reply Brief of Appellant*, both of which were filed with the Court of Appeals on August 27, 2015.

[I. The trial court's Order should be reversed because it applied the wrong legal standard.][8]

This issue is discussed on pages 9-11 of the *Brief of Appellant*, and at page 3 of the *Reply Brief of Appellant*. Summarized, the trial court failed to apply the "mere scintilla" standard required by South Carolina law. The Club neglected to address this issue in its brief, other than in an incorrect issue preservation argument. (*see* Reply p. 3). Not only did the Club apparently concede this issue, the question was not reached or decided in the *Dennis* Opinion. Thus, it is grounds for reversal of the trial court's grant of summary judgment.

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

This issue is discussed on pages 11-26 of the *Brief of Appellant*, and at pages 2-8 of the *Reply Brief of Appellant*. It contains several sub-parts, most of which were not reached by the *Dennis* Opinion. The overarching argument is that Appellant presented a tremendous amount of evidence to the trial court on numerous defenses and issues, certainly more than a scintilla, and therefore summary judgment was improper.

[II.A. Appellant presented more than a mere scintilla of evidence challenging the Club's interpretation of the alleged agreement, and whether the alleged agreement exists.]

These issues are discussed on pages 11-25 of the *Brief of Appellant*, and at pages 2 and 5-8 of the *Reply Brief of Appellant*. Summarized, Appellant argues, *inter alia*, that (1) the trial court order fails to establish the terms of the alleged agreement (App. Br. pp. 12-

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[8] The following issues below are numbered in [brackets] to correspond with their numbering in the Appellant's Brief.

13), (2) the trial court erred by disregarding the abundant evidence that Appellant had been expelled from the Club and had no further obligation (*id.* at 13-18), and (3) the trial court erred by disregarding abundant evidence that Appellant had no obligation beyond his equity interest in his purported Club membership (*id.* at 18-20; *see also supra* Part III). These issues were not reached in the *Dennis* Opinion, and each constitutes grounds for reversal of the trial court.

While the *Dennis* Opinion does appear to obviate those portions of the argument in Part II.A(4) (*id.* at 21-22) relating to the terms "unpaid" and "termination" under the governing documents,[9] the South Carolina Supreme Court explicitly did not reach arguments relating to expulsion, because it did not find evidence in the particular record before it that the Dennises had been suspended. *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 ("Here no suspension ever occurred; the Dennises resigned."). As discussed above, the majority in the *Dennis* Opinion held that "The 'logical end' of our analysis goes no further than required by the four corners of the governing documents in *this* case when applied to the facts of *this* case." *Id.* at 202, 821 S.E.2d at 672 (emphasis added). The dissent emphasized that "Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so 'shall be expelled from the Club,' ending their liability for future dues. . . ." *Id.* at 213, 821 S.E.2d at 677.

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[9] *Dennis* also negated arguments in II.A(4) relating to the Nonprofit Corporation Act's provision on resignation (App. Br. p. 22).

Appellant's argument against summary judgment as to the question of expulsion must prevail because there is Brobdingnagian evidence in ***this*** record—certainly more than a scintilla—that Appellant was expelled. As discussed in the *Brief of Appellant*, it is undisputed that Appellant had been suspended, thereby triggering the expulsion requirement. That conclusion is supported by, *inter alia*, (1) Club documents such as the suspended members list, (2) the testimony of other members such as Ronnie and Jeanette Dennis and Dick Mercier, and (3) the testimony of Club board members Harmon Switzer, Karen Norwood, and Jim Carling. (App. Br. pp. 15-18). As this Court stated in its ruling:

> There is evidence in the record that [Appellant] had been suspended by CIMC before the initiation of CIMC's action against him. CIMC's General Manager stated in an affidavit that CIMC had "been forced, owing to non-payment, to suspend" the membership rights and privileges of [Appellant].

(Unpublished Op. No. 2018-UP-179 at p. 5). Moreover, even the majority in *Dennis* acknowledged that mandatory expulsion exists under the wording of the documents before it:

> This provision makes it clear that **mandatory expulsion arises** only after the board has suspended a member, which is discretionary with the board.

425 S.C. at 204, 821 S.E.2d at 673 (emphasis added). In other words, the majority appears to acknowledge that mandatory expulsion occurs under the documents, but it did not believe that the particular facts of *Dennis* invoked that particular provision.

Closing the deal on expulsion is the fact that the Club's *Brief of Respondent* fails to address Appellant's expulsion argument and *Brief of Appellant* Part II.A(2)[10], and the issue

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10 Part II.A(2) in the *Brief of Appellant's* argues that "The trial court erred by disregarding the abundant evidence that [Appellant] had been expelled from the Club and had no further obligation."

accordingly is conceded (*see* App. Reply p. 2). These issues were not reached in the *Dennis* Opinion, and each constitutes grounds for reversal of the trial court.

[II.B. Appellant presented more than a mere scintilla of evidence in support of his defenses, which would defeat the Club's claims.]

The *Dennis* Opinion also did not reach Appellant's arguments in Part II.B (pp. 25-26) regarding the evidence Appellant presented in support of his defenses, each of which also precludes summary judgment. However, arguments relating to certain statements of Club membership director Ellen Padgett about the contract terms likely have been obviated by the Supreme Court's ruling on parol evidence, to the extent that Padgett's statements pertained to the termination and resignation provisions discussed in the *Dennis* Opinion (but not as to expulsion provisions, which were not reached, as discussed above).

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

Appellant's numerous arguments as to the Circuit Court's improper award of damages are set forth in pages 18-20, and again on pages 26-40, of Appellant's brief, and they were not reached by the *Dennis* Opinion. Appellant contends (among other arguments) that it was error for the Circuit Court to award damages to the Club in the amount of $67,876.46 because—properly—the Club's recovery must be limited to the amount of Appellant's membership contribution. Based on the arguments contained in the *Brief of Appellant* and *Reply of Appellant*, as well as the *Dennis* Opinion, Appellant seeks from this Court a specific ruling on this issue, as set forth above.

[IV. The trial court erred when it granted summary judgment in favor of the Club on Appellant's counterclaims.]

As set forth *infra*, this Court should reverse its previous decision as to the Appellant's counterclaim against the Club for negligent misrepresentation, because of evidence that it overlooked in the Record.

Further, this Court has already held that it was improper for the Circuit Court to grant summary judgment as to the Appellant's counterclaim for breach of contract, including his allegation that the Club improperly amended the governing documents. This holding stands unaffected by the *Dennis* Opinion and the case should be remanded for trial on the issue.

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

Appellant's argument as to the trial court's erroneous failure to allow him a full and fair opportunity to complete discovery may be found in his brief at pages 44-46. These arguments remain untouched by the Supreme Court's decision in *Dennis* and constitute additional grounds for reversal of the summary judgment order.

VI. This Court overlooked evidence in the Record that the Club made false statements to the Appellant, which made summary judgment improper.

This Court previously ruled that the Circuit Court did not err in granting summary judgment to the Club on Appellant's negligent misrepresentation counterclaim. This Court has since granted Appellant's *Petition for Rehearing* on this issue, and the following

further supports why a summary judgment dismissal of Appellant's counterclaim is not appropriate.

In its prior ruling, this Court found that "allowing certain members to leave the club is not a *false* representation, and it was not made to [Appellant]." Unpublished Op. 2018-UP-179, at 8 (Ct. App. May 2, 2018) (emphasis in original). In so holding, the Court misapprehended evidence in the Record that demonstrates that: (1) the Club had a practice of **publicly posting** a suspended member list; (2) the Club allowed some suspended members, but not others, to exit their memberships via expulsion; and (3) the provisions within the Club's governing documents, which delineate the procedure for mandatory expulsion following suspension, are false as they pertain to Appellant.

The Record contains more than a scintilla of evidence of the Club's false statements, expressly made to the Appellant, concerning expulsion. Importantly, the Club's false statements were received and relied upon by the Appellant:

A. False statements made by the Club.

The false statements are contained within the four corners of the Club's governing documents applicable to the Appellant, and directed to the Appellant:

> 13.3.1 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 had 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 member.**

(R. pp. 1350, 1351; emphasis added).[11] By failing to expel the Appellant, and by continuing to charge him after he surrendered his membership, the Club rendered its above-statements false.

B. False statements were received and relied upon by Appellant.

Appellant received and relied upon these false statements to his detriment:

> 3. The Membership Purchase Agreement I signed in September 1995 does NOT indicate that I was agreeing to amendments or changes to the Plan For the Offering of Memberships dated April 1, 1994 referenced in that document.
>
> 4. That the Plan for Offering of Membership and Club Rules did NOT obligate members to continue to pay dues, fees and assessments and other charges after 4 months of delinquency (at which point they were required to be expelled) and in no case was the liability ever greater than the value of the equity in the membership.

(R. p. 442, Aff. of Michael Frey).

C. The South Carolina Supreme Court's majority opinion in *Dennis* supports Appellant's right to maintain a negligent misrepresentation counterclaim.

The *Dennis* Opinion lends credence to the proposition that the Club Rule governing mandatory expulsion is false, if that rule is not applied by the Club. The *Dennis* Opinion refers to the "mandatory expulsion" provision that the Rules contain, and it notes that it "arises only after the board has suspended a member, which is discretionary with the board. Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered." *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673.

---

[11] *See also Brief of Appellant*, pp. 42-44, for its reference to additional evidence in the Record of false statements made to Appellant by the Club.

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The facts of the Appellant's case are different from those in *Dennis*, and the mandatory expulsion period should have been triggered. In the subject case, this Court has already recognized that Appellant had been suspended. Unpublished Op. 2018-UP-179, at p. 5 ("There is evidence in the record that Frey had been suspended by CIMC before the initiation of CIMC's action against him."). Therefore, even the *Dennis* majority would acknowledge that the Rules' requirement of expulsion should have been triggered in Appellant's case. Thus, it is appropriate for Appellant to maintain a negligent misrepresentation counterclaim upon remand at trial, given his reliance on the Club's statements on expulsion, and the four-month cap on liability.

Appellant has demonstrated evidence establishing that the Club (1) made false representations, and that (2) those representations were made to him. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003). Therefore, Appellant respectfully requests this Court to reverse its prior ruling, based on evidence overlooked in the Record, and allow Appellant to assert both negligent misrepresentation and breach of contract counterclaims before a fact-finder.

CONCLUSION

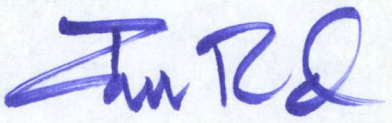
South Carolina law recognizes that summary judgment is a drastic remedy. Thus, if there is even a scintilla of evidence that tips the scale in favor of the opposing party, it is error for a trial court to grant a motion for summary judgment. Moreover, on summary judgment, any question as to contract *or* fact must be construed against the Club. If this

is a "hard case," it is because the documents and facts at issue are a mess of the Club's own making.

Appellant respectfully requests that this Court reverse the Circuit Court's erroneous grant of summary judgment and remand this case for trial before a fact-finder. Further, Appellant asks that this Court would reverse its previous decision and allow the Appellant to proceed at trial with his counterclaim for negligent misrepresentation.

Finally, Appellant requests a ruling from this Court that the Club would be bound by the provisions within its own governing documents, which limit its recourse against its members to its ability to retain their membership contribution.

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January 29, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2015-00002

RECEIVED
JAN 30 2019
SC Court of Appeals

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

v.

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

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

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

This case is before this Court on appeal from the entry of summary judgment in favor of Plaintiff-Respondent Callawassie Island Members Club, Inc. ("CIMC"), which is a member-owned amenities club on Callawassie Island, Beaufort County, South Carolina. CIMC filed this lawsuit to enforce its contractual rights. CIMC seeks to recover dues and other amounts due from the Defendants Michael J. Frey and Grace I. Frey, who are equity members of CIMC. (R. 25-46). CIMC claims that, under the governing documents, the Freys agreed to and are required to continue to meet their financial obligations until CIMC reissues their membership to a new member. Reissuance can occur either by transfer in connection with the sale of the Freys' property on Callawassie Island or sale via the membership resale list.

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

Several controlling documents, which have been amended and revised over the years, have governed membership in the Club. Those documents include, in

descending order of primacy, CIMC's By-Laws, Plan for Offering of Memberships, and General Club Rules.

The Freys have asserted counterclaims and argued, for various reasons, that they are not obligated to remain members of CIMC and can abandon their financial responsibilities to their fellow members whenever they want. In their Second Amended Answer and Counterclaims, the Freys asserted counterclaims for breach of contract and negligent misrepresentation. (R. 94-106).

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

On May 2, 2018, this Court issued an unpublished opinion affirming in part and reversing in part the trial court's entry of summary judgment in favor of CIMC, holding that:

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

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

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

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

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

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

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

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

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

Both parties filed petitions for rehearing. While those petitions were pending, the South Carolina Supreme Court issued a published opinion in the related case of *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). Thereafter, on November 30, 2018, this Court granted both sides' petitions

for rehearing and authorized the filing of supplemental briefs in light of the Supreme Court's decision in *Dennis*.

ARGUMENTS

I. The Supreme Court's opinion in the *Dennis* case establishes that the contractual requirement that Club members continue to pay dues, fees, and other charges until their membership is reissued is valid and enforceable under the Nonprofit Corporation Act.

In its opinion filed May 2, 2018, this Court interpreted the South Carolina Nonprofit Corporation Act of 1994 and concluded that S.C. Code Ann. § 33-31-620 of the Act "does not require resigned members to continue paying dues that accrue after they resign." (Slip Op. at 7). For this holding, this Court relied exclusively on its prior analysis in *The Callawassie Island Members Club, Inc. v. Dennis,* 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016).

However, the Supreme Court subsequently reversed that portion of this Court's prior *Dennis* decision. Specifically, the Supreme Court held:

> The court of appeals' reasoning ignores subsection 33-31-620(b), which provides, "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(b) (2006). Subsection 33-31-620(b) contemplates two categories of debt for which a resigned member continues to be responsible after resignation: (1) "obligations incurred ...

> before resignation" and (2) "commitments made before resignation." S.C. Code Ann. § 33-31-620(b). The dues, fees, and other charges the Dennises owe fall into the "commitments made" category. The 1994 Plan -- which was in effect when the Dennises joined -- and the 2008 Plan -- which was in effect when the Dennises resigned -- both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges "until his or her equity membership is reissued by the Club." When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. *Therefore, we find the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620.*

The Callawassie Island Members Club, Inc. v. Dennis, 425 S.C. 193, 821 S.E.2d 667, 673 (2018). (Emphasis added).

In applying the Supreme Court's *Dennis* decision to the case at bar, it is beyond dispute that the Appellant Frey, like the Dennises, made a commitment to pay dues, fees, and other charges until the reissuance of his membership. Moreover, this Court must construe S.C. Code Ann. § 33-31-620 as upholding the requirement that Frey continue to pay dues, fees, and other charges after his resignation (or his unilateral attempt to force an expulsion by non-payment). Consequently, the trial court's ruling that Frey owes dues, fees, and other charges incurred prior to reissuance of his membership should be affirmed.

II. The Supreme Court's opinion in the *Dennis* case supports this Court's prior ruling that the Appellant was a member of CIMC.

In its decision in *Dennis*, the Supreme Court recognized that "[t]here is no question the Dennises are contractually bound to the Members Club." *Dennis*, 821 S.E.2d at 670, n.2. The Supreme Court explained:

> The Dennises argued to the court of appeals there was no evidence their Island Club membership transferred to the Members Club. The court of appeals rejected this argument, stating, "We hold a question of fact does not exist as to whether Appellants were members of [the Members Club]." 417 S.C. at 615, 790 S.E.2d at 438. We agree.

Id.

The same is true in the present case. This Court has previously ruled that "a question of fact does not exist as to whether Frey was a member of CIMC" because "[t]he evidence in the record supports the circuit court's finding that Frey's membership in CIC transferred to CIMC upon the sale of the club." (Slip Op. at 2). Likewise, this Court noted that "Frey also continued paying dues and receiving the benefits of membership well after CIMC took control of the club." (Slip Op. at 2). That ruling is fully supported by, and consistent with, the Supreme Court's decision in *Dennis* and should be upheld on rehearing.[1]

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[1] This ruling was not challenged by Frey in his petition for rehearing.

III. The Supreme Court's opinion in the *Dennis* case requires the reversal of this Court's prior rulings that there exist genuine issues of material fact in dispute that preclude the summary judgment entered in CIMC's favor.

In *Dennis*, the Supreme Court began its analysis "with a general discussion of the membership arrangement and the membership documents that govern that arrangement." *Dennis*, 821 S.E.2d at 670. The Court recognized that three documents -- the Bylaws, the Plan, and the Rules -- "govern the membership" and that "[t]he three documents reference each other and are intended to operate together." *Id.* The Supreme Court determined that "[w]hen the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules." *Id.* The Supreme Court also found "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments." *Id.* By footnote, the Supreme Court recognized the following:

> The 1994 Bylaws provide the "Bylaws may be altered, amended, or repealed." The 1994 Plan provides the "Plan may be amended in accordance with the Bylaws." Similarly, the 1994 Bylaws provide the board of the Island Club have [sic] the authority to "[a]dopt, alter, amend, or repeal the Rules governing use of the Club."

Id., n.1.

The same is true in the present case. Frey has alleged that he resigned or otherwise tried to force his expulsion from CIMC by non-payment in late 2009 or at

least by May 2010.[2] At that time, like in *Dennis*, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules. Consequently, consistent with the Supreme Court's decision in *Dennis*, there is no genuine issue of material fact in dispute as to which version of the governing documents controls the relationship between Frey and CIMC in the 2009-2010 time frame.

Likewise, consistent with the Supreme Court's decision in *Dennis*, there is no genuine issue of material fact in dispute regarding the authority for the CIMC Board to amend the General Club Rules without a vote of the full membership. This issue has arisen only in the context of Frey's "mandatory expulsion" argument. Frey relies on language in the 2001 Rules stating: "Any member whose account is not settled within the four (4) months period following suspension *shall* be expelled from the Club." (R. 1350). (Emphasis added). However, in 2007, the Rules were properly amended, and the "mandatory expulsion" language was removed. The 2007 Rules state: "Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club." (R. 1440). (Emphasis added). The 2009 Rules continued to use the same "may be expelled" language. (R. 1476). Citing that same language, the Supreme Court in *Dennis* explained that "the

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[2] In his Second Amended Answer and Counterclaims, Frey pled that he "ceased paying dues and fees in October 2009." (R. 96). Frey further alleged that his "membership was terminated as of January 2010 (4 months after delinquency) or in the alternative was resigned as of May 2010." (R. 101).

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2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition." *Dennis*, 821 S.E.2d at 673.[3] Those same 2009 Rules, as applied to Frey, show that expulsion was likewise not mandatory in the 2009-2010 time frame.

In its May 2, 2018 opinion, this Court recognized that pursuant to the revision adopted in the 2007 Rules and retained in the 2009 Rules, "CIMC would not have been obligated to expel Frey despite his suspension." (Slip Op. at 6). But this Court further wrote: "However, Frey contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club." (Slip Op. at 6). This Court cited to a provision in the 2007 Plan stating:

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

(Slip Op. at 6). Then, relying on Frey's affidavit that no such vote of the membership was ever held, this Court found that "there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of Frey's suspension

---

[3] The Supreme Court also found "there is no ambiguity as to expulsion from the Members Club." *Dennis*, 821 S.E.2d at 673.

from the club." (Slip Op. at 6). This Court's error, however, was in citing to the amendment provision for the Plan for Offering of Memberships rather than the amendment provision for the General Club Rules.[4] As the Supreme Court explains in *Dennis*, the Bylaws provide that the Board of Directors has the authority to "[a]dopt, alter, amend or repeal the General Club Rules governing use of the Club and all its facilities by members." (R. 1483). *See*, *Dennis*, 821 S.E.2d at 670, n.1. Thus, an amendment of the Rules *does not require a vote of the full membership.* Frey, in fact, does not cite to any evidence suggesting that the General Club Rules were not properly amended in 2007 or 2009. Moreover, he cites to no contractual document that required a vote of the members to approve any changes to the General Club Rules.

As a result, contrary to what this Court previously determined, there is no material issue of fact in dispute. The 2009 Rules govern Frey's resignation or attempt to force his expulsion from CIMC during the 2009-2010 time frame, and those Rules do not include the "mandatory expulsion" provision. This is precisely what the Supreme Court ruled in *Dennis*, and it is equally applicable and binding in this case.

---

[4] The 2007 and 2009 versions of the General Club Rules provide that "[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. 1430, ¶ 1.3 (2007 version); R. at 1465, ¶ 1.3 (2009 version); *accord* R. at 1330 (1994 version); R. 1343, ¶ 1.3 (2001 version)).

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In sum, there is absolutely no evidence that CIMC Board expelled Frey from the Club. Even if "suspended" from the Club for non-payment, Frey did not have the right to automatically "expel" himself by simply remaining delinquent for four additional months. Therefore, regardless of whether Frey submitted his resignation or attempted to force his own expulsion by non-payment, Frey remains obligated to pay his dues, fees, and other charges until such time as his membership is reissued. That trial court ruling is fully consistent with the Supreme Court's decision in *Dennis* and should be affirmed.

IV. The Supreme Court's opinion in the *Dennis* case requires a ruling in the case at bar that the CIMC governing documents are unambiguous and are not subject to interpretation using parol evidence.

In its opinion in *Dennis*, the Supreme Court rejected all arguments that the governing documents -- the 2008 Plan, the 2009 Bylaws, and the 2009 Rules -- are ambiguous in any respect. First and foremost, the Supreme Court cited to Section 5.11 of the 2008 Plan, entitled "Payment of Dues and Other Charges by Resigning Members," which states: "An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club." (R. 1453-1454). The Supreme Court concluded that "[t]his language unambiguously provides the Dennises are obligated

to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued." *Dennis*, 821 S.E.2d at 670. The Supreme Court recognized that "[t]here are no provisions in the 2009 Bylaws or 2009 Rules that contradict this." *Id.*

The Supreme Court then analyzed and reversed the rulings of this Court in *Dennis* finding certain ambiguities in the contract language. First, the Supreme Court rejected this Court's reliance on differences in language between the 1994 Bylaws and 1994 Plan as "not sufficient to create an ambiguity" and as "irrelevant." *Dennis*, 821 S.E.2d at 671. Moreover, the Supreme Court explained that "even if we were to treat the 'termination' provision and the 'resignation' provision as governing the same event, there is no ambiguity." *Id.* The Court, indeed, focused on the 2009 Rules which state: "'Any member may terminate membership in the Club. ... Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold.'" *Id.*

The Supreme Court also rejected this Court's determination that the term "unpaid" in the 2009 Rules was undefined and thus ambiguous. The Supreme Court wrote:

> Finally, the term "unpaid" in the 2009 Rules is not ambiguous, despite the fact it is not defined. The court of appeals explained its interpretation of this provision by stating, "It is unclear whether the language relating to

> unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation." We find there is nothing unclear. "Unpaid" means any payment the Dennises are obligated to make according to the terms of the membership documents that has not been made. We have already discussed that the membership documents include obligations to pay before and after the date of resignation. The Dennises admit they have not made the payments. According to the plain language of the membership documents, the Dennises' unpaid dues, fees, and other charges are "unpaid."

Id. (Citation omitted).

These are important points for rehearing in the present case. In its May 2, 2018 opinion, this Court found the same ambiguities in the contract documents as identified in its *Dennis* opinion. This Court recognized that "[t]he same governing documents at issue in *Dennis* were used in this case" and then cited to the exact same ambiguities discussed in *Dennis*, thereby concluding that "an ambiguity exists regarding the obligation of a resigning member to continue paying dues post-resignation." (Slip Op. at 3-4). The Supreme Court, however, rejected that analysis in its *Dennis* opinion, and thus, on rehearing, this Court is bound to conclude that the same documents are not ambiguous, consistent with the Supreme Court's analysis of that very issue.

Moreover, the Supreme Court in *Dennis* rejected any reliance on extrinsic evidence to argue that the governing documents are ambiguous. The Supreme Court explained "because we find the terms of the membership documents are

unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning." *Dennis*, 821 S.E.2d at 672. The Supreme Court thus applied the parol evidence rule to bar consideration of testimony that contradicts or varies the terms of the membership documents, including testimony of what the members were allegedly told by Ellen Padgett, a former membership coordinator, about the expulsion process. In its May 2, 2018 opinion, this Court relied on the very same parol evidence to preclude summary judgment. On rehearing, that evidence must now be rejected consistent with the Supreme Court's decision in *Dennis*.

V. The summary judgment on the Appellant's breach of contract counterclaim should be affirmed.

In its May 2, 2018 opinion, this Court also reversed summary judgment entered on Frey's breach of contract counterclaim. This Court reasoned as follows: "Because of the interrelated nature between Frey's breach of contract counterclaim and CIMC's breach of contract claim and, as stated above, the fact that relevant portions of the governing documents are ambiguous, we reverse the circuit court's grant of summary judgment to CIMC." (Slip Op. at 7). This ruling should be reversed on rehearing. As discussed above, the Supreme Court in *Dennis* determined that the governing documents are not ambiguous and further explained that CIMC

members, such as the Dennises and Frey, remain obligated for dues, fees, and other charges until reissuance of their memberships. Thus, the summary judgment on Frey's breach of contract counterclaim should be affirmed.[5]

VI. The trial court's award of attorney's fees and costs to CIMC should be affirmed.

In its May 2, 2018 opinion, this Court also reversed the grant of attorney's fees to CIMC because the summary judgment on the merits was reversed in part and remanded. On rehearing, CIMC requests that the trial court's award of attorney's fees and costs be reinstated and affirmed. If the summary judgment on the merits is affirmed, the award of attorney's fees and costs should be affirmed as well.

CIMC relies on prior briefing on this issue. In sum, the analysis by the trial court should be affirmed. The governing documents are properly construed to include the recovery of "all costs and expenses" to CIMC, including reasonable attorney's fees, if a legal action is commenced by CIMC "to collect any amount owed" or "to enforce any liability of a member to the Club." (R. 1476).

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[5] The Court's analysis of the negligent misrepresentation claim in its May 2, 2018 opinion is correct and should be affirmed on rehearing. In his petition for rehearing on this issue, Frey argues that the expulsion language as contained in Section 13.3.1 of the 2001 Rules constitutes a representation that "members must be expelled after nonpayment." *See*, Frey's Petition for Rehearing, p. 3. However, as discussed above and as determined by the Supreme Court in *Dennis*, that expulsion provision was amended in the 2007 and 2009 Rules to be discretionary rather than mandatory. As a result, Frey has not shown that any false representation was made by the 2001 Rules. Instead, that representation was no longer in effect in the 2009-2010 time frame because the Rules had been amended in the interim.

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Furthermore, Frey's argument that the governing documents do not provide for CIMC to recover attorney's fees was an issue raised for the first time in his Rule 59(e) motion, which was untimely. The trial court, in fact, recognized that "CIMC's authority to collect its attorney's fees … was raised for the first time at the hearing for reconsideration." (R. 15). It is, however, well settled that "a party cannot for the first time raise an issue by way of a Rule 59(e) motion that could have been raised at trial." *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995). Here, the issue was not even raised in the Rule 59(e) motion but rather for the first time at the hearing on the Rule 59(e) motion, which is obviously not timely. (R. 352-353).

CONCLUSION

For the foregoing reasons, the Respondent Callawassie Island Members Club, Inc. respectfully requests this Court to affirm the trial court's grant of summary judgment to CIMC, including the award of attorney's fees and costs.

Respectfully submitted,

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January 30, 2019

- Appendix 2425 -

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
MAY 30 2018
SC Court of Appeals

J. Ernest Kinard, Jr., Judge

Case No. 2012-CP-07-03209
SC Court of Appeals No. 2015-000002

The Callawassie Island Members Club, Inc., Respondent,

v.

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

APPELLANT'S PETITION FOR REHEARING

Appellant Michael J. Frey respectfully submits this Petition for Rehearing related only to this Court's ruling on Appellant's negligent misrepresentation counterclaim. For the reasons set forth below, Appellant hereby petitions the Court for rehearing of that portion of its Opinion Number 2018-UP-179, filed on May 2, 2018, which affirmed in part and reversed in part the entry of summary judgment for the Club. Appellant seeks to preserve his right to assert a negligent misrepresentation counterclaim in the event that the South Carolina Supreme Court or the trial court rules that Appellant may not end his membership without further obligation to the Club.

INTRODUCTION & BACKGROUND

This action involves a social club on Callawassie Island: Respondent The Callawassie Island Members Club, Inc. (the "Club"). Appellant recognizes that this Court is familiar with the background and circumstances, and Appellant refers to and incorporates Appellant's previous briefs, which discuss the facts and circumstances giving rise to these appeals.

ARGUMENT

Appellant only seeks rehearing of the portion of this Court's opinion relating to Appellant's negligent misrepresentation counterclaim. In that section of its opinion, the Court held that the trial court did not err in granting summary judgment to the Club on Appellants' negligent misrepresentation counterclaim. The Court's reasoning was that "[The] evidence is insufficient to support [Appellant's] negligent misrepresentation counterclaim because allowing certain members to leave the club is not a *false* representation and it was not made to [Appellant]." (Slip Op. at p. 8)

Appellant respectfully submits that the record contains misrepresentations by the Club directly to Appellant, which would be sufficient to support Appellant's counterclaim for negligent misrepresentation. Those misrepresentations include the documents themselves provided by Club to Appellant, which stated that the member could choose to terminate his membership, and that a member shall be expelled after several months non-payment. For example, the Club's documents stated to Appellant:

> 14.2.1 Any **member** may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for the Offering of Club Memberships. Notwithstanding termination, the member shall remain liable for any **unpaid** club account,

> membership dues and charges (including any food and beverage minimums).

(R. at 1351 (emphasis added).) As this Court has held, the term "unpaid" is ambiguous. (Slip Op. at p. 4) The provision therefore must be interpreted in favor of Appellant for purposes of the summary judgment motion filed by the Club, and when interpreting documents drafted by the Club.

Similarly, the Club represented that members must be expelled after non-payment:

> 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. 1350–51; emphasis added)

Appellant's understanding that he could end his membership without further obligation was reasonable based on: (1) the representations made by the Club to Appellant within the four corners of the Club's documents, including those cited above; and (2) the actions of the Club allowing members to end their membership. For example, the resale list provided to members (including Appellant) indicates that dozens of

members were expelled or conceded their memberships. (R. at 1557-58). Both types of representations were made to the Appellant himself.

If the South Carolina Supreme Court (or the trial court on remand) rule that Appellant may **not** end his membership without further obligation, the representations of the Club set forth above are false. In such instance, at least a mere scintilla of evidence exists supporting Appellant's negligent misrepresentation counterclaim, and Appellant should be permitted to present his negligent misrepresentation counterclaim at a trial.

CONCLUSION

For these reasons, Appellant requests that the Court grant his Petition for Rehearing and vacate the portion of the Court's Opinion affirming summary judgment on Appellant's negligent misrepresentation counterclaim.

FORD WALLACE THOMSON LLC

By: _____

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Attorneys for Appellant Michael Frey

May 29, 2018

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 and Grace I. Frey Defendants,
Of Whom Michael J. Frey is the Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing, on all parties of record, by depositing a copy of it in the United States Mail, postage prepaid, on May 29, 2018, addressed to the attorney of record:

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RECEIVED
MAY 30 2018
SC Court of Appeals

FORD WALLACE THOMSON LLC



Ian S. Ford
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May 29, 2018

FORD WALLACE THOMSON LLC

ATTORNEYS AT LAW

May 29, 2018

VIA FEDERAL EXPRESS; OVERNIGHT DELIVERY
The Honorable Jenny Abbot Kitchings
SC Court of Appeals
Attention: Elizabeth
1220 Senate Street
Columbia, SC 29201

RECEIVED
MAY 30 2018
SC Court of Appeals

Re: *The Callawassie Island Members Club Inc. vs. Gregory L. Martin*
Beaufort County Case No.: 2012-CP-07-03218
SC Court of Appeals Case No.: 2015-000001

The Callawassie Island Members Club Inc. vs. Michael J. Frey
Beaufort County Case No.: 2012-CP-07-03209
SC Court of Appeals Case No.: 2015-000002

The Callawassie Island Members Club Inc. vs. Mark K. Quinn
Beaufort County Case No.: 2012-CP-07-03216
SC Court of Appeals Case No.: 2015-000003

Dear Elizabeth:

Enclosed for filing please find the original and seven copies of the Appellant's Petition for Rehearing along with a Proof of Service and $25.00 check representing the requisite filing fee in each of the above-referenced matters.

I would appreciate your filing the same and returning a filed copy to me with the enclosed postage pre-paid Federal Express package provided for your convenience.

Thank you in advance for your assistance with this matter. Should you have any questions or concerns, please do not hesitate to contact my office.

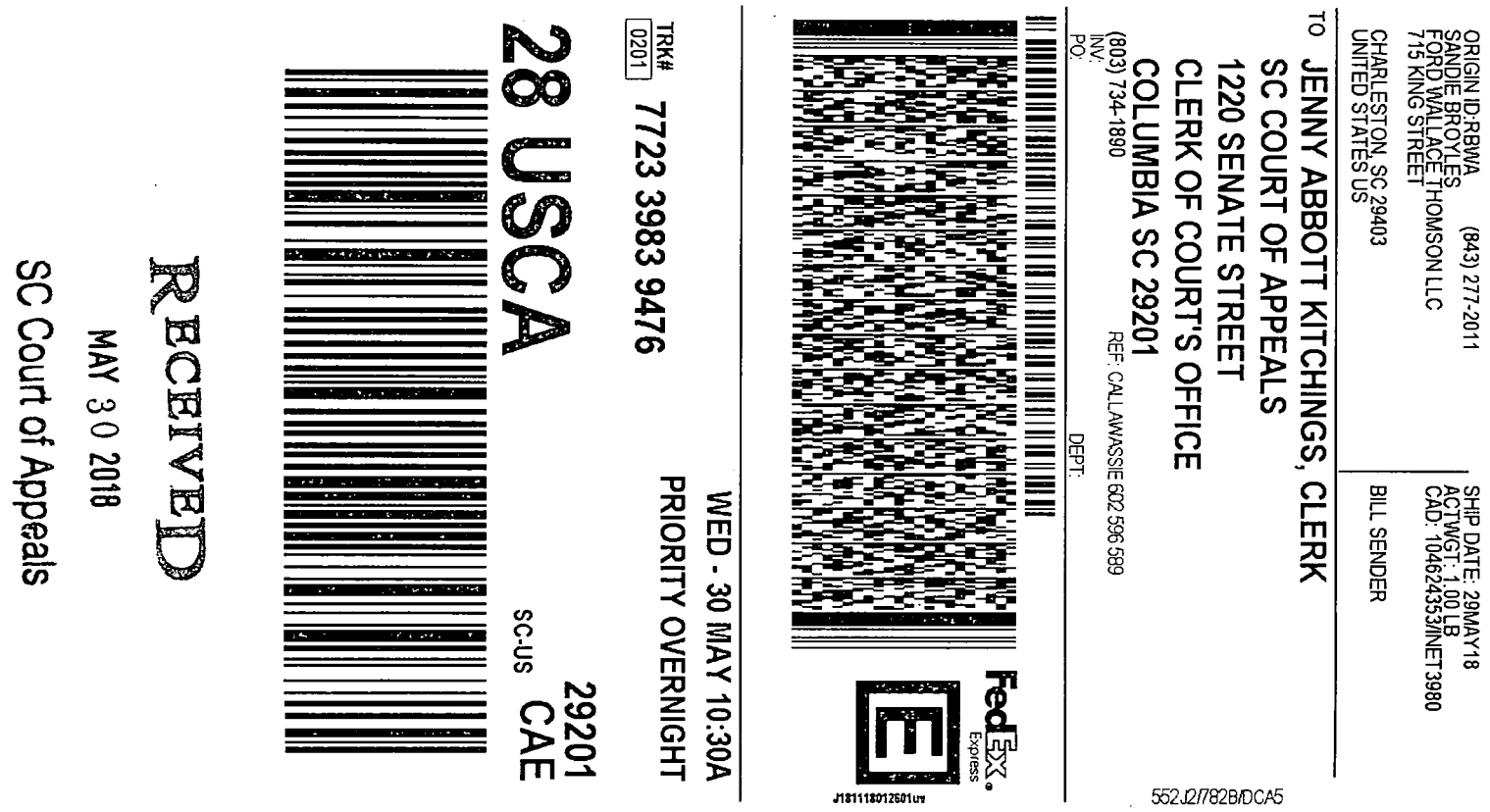
With kind regards, I am,

Very truly yours,

Neil D. Thomson
Ian S. Ford

ISF/smb
Enc. – as stated

cc: All Counsel of Record



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2015-00002

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

v.

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

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

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

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RECEIVED
MAY 17 2018
SC Court of Appeals

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

INTRODUCTION

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

BACKGROUND

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENTS

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

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

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

> [a]n equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership *is reissued by the Club*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[3] In addition, in construing the documents, the Court failed to take into account the hierarchy of the documents. By way of example, the General Club Rules provide that they "shall be subject to and controlled by the applicable provisions of the By-Laws." In essence, this Court has erred in reading the General Club Rules in a vacuum, separate and apart from "the applicable provisions of the By-Laws," in order to find an ambiguity that quite simply does not exist. Thus, this Court failed to read the term "unpaid" in conjunction with the explicit language in the By-Laws, which states as follows: "Any equity member may resign from the Club by giving written notice to the Secretary. *Dues, fees and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club.*" (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club property under any circumstances. An expelled member shall be so notified by registered mail and shall have the obligation to surrender his or her Membership Certificate for reissuance by the Club to a new member in accordance with the provisions of Article X, Section 9 of these By-Laws.

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

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

> An Equity Member who is on the waiting list to sell his/her membership will be *obligated to continue to pay to the Club all dues. fees and other*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> No person has been authorized to give any information or make any representation not contained in this Membership Plan and, if given or made, such information or representation must not be relied upon as having been authorized by the Partnership or the Club.

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

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

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

C. The Court Misconstrued the South Carolina Nonprofit Corporation Act

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

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

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[4] In addition, it is well established that extrinsic evidence is not admissible to create an ambiguity or to show the intent of the parties. *Kirven v. Bartell*, 266 S.C. 385, 223 S.E.2d 597, 599 (1976) ("extrinsic evidence is to be admitted to resolve ambiguities, not create them"); *Bellamy v. Bellamy*, 292 S.C. 107, 111, 355 S.E.2d 1, 3 (Ct. App. 1987) ("[e]xtrinsic evidence is admissible to resolve ambiguities, not to create them where none exists"). The Court respectfully erred in considering the testimony of Ellen Padgett, which is extrinsic evidence used to find an ambiguity existed.

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

> (a) A member may resign at any time.
>
> (b) The resignation of a member *does not relieve the member* from any obligations the member may have to the corporation as a result of *obligations incurred or commitments made before resignation.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Respectfully submitted,

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May 17, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent, does hereby certify that service of **Respondent's Petition for Rehearing and Incorporated Memorandum in Support Thereof** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 17th day of May 2018:

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May 17, 2018

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

Dear Ms. Kitchings:

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

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

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

RECEIVED
MAY 17 2018
SC Court of Appeals

AFL/jmb
Enclosures

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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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AUG 27 2015
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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.

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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?

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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

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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).

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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

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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,"

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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

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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

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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.

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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,

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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.

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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.").

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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

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> 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**.
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> 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.

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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).

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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

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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:

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> 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.

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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).

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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).

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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

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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

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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,

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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).

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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)

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(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

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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.

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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.

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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.

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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).

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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."

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(*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

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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.

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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.

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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).

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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

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> 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.

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> 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

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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).

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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

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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).

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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

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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).

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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

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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.

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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

RECEIVED
AUG 27 2015
SC Court of Appeals

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.

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STATEMENT OF ISSUES ON APPEAL

1. DID FREY PROPERLY PRESERVE HIS ISSUES AND ARGUMENTS FOR APPELLATE REVIEW?

2. FACED WITH A CLEAR AND UNAMBIGUOUS CONTRACT, WAS THE TRIAL COURT CORRECT IN CONCLUDING, AS A MATTER OF LAW, THAT (A) FREY UNDERTOOK THE OBLIGATION TO REMAIN A MEMBER UNTIL HIS MEMBERSHIP REISSUED; (B) SUCH OBLIGATION REMAINED CONSTANT THROUGHOUT HIS MEMBERSHIP; AND (C) SUCH OBLIGATION DID NOT VIOLATE S.C. CODE ANN. §33-31-610 ET SEQ.?

3. WAS THE TRIAL COURT CORRECT TO DISMISS FREY'S COUNTERCLAIMS WHEN, AS A MATTER OF LAW, THEY COULD NOT MEET THE ESSENTIAL ELEMENTS AND WERE DEVOID OF ANY EVIDENTIARY SUPPORT?

4. HAVING DETERMINED THAT AN UNAMBIGUOUS CONTRACTUAL AGREEMENT EXISTED, WAS THE TRIAL COURT CORRECT IN FINDING THAT ANY FURTHER DISCOVERY OF EXTRINSIC EVIDENCE WAS UNNECESSARY?

STATEMENT OF THE CASE

On September 11, 2012, The Callawassie Island Club, Inc. ("CIMC") brought a breach of contract action against Michael J. Frey and Grace I. Frey (the "Freys"), for the collection of delinquent dues, fees and assessments.[1] (R. pp. 25-46). The action alleged that the Freys, as club members, had an ongoing obligation to pay dues until such time as their membership was reissued to a new member. The Freys answered alleging that their resignation relieved them of any further liability for dues, even though their membership had not transferred to a new member. (R. pp. 52-53;p. 67;p. 69;p. 99;p. 101).

[1]For purposes of this Brief, the monetary damages sought by CIMC, which include dues, fees, assessments, costs and attorneys' fees, are hereinafter referred to as "dues" unless more specificity is required by the context.

Additionally, the Freys brought numerous counterclaims of which only two remain, negligent misrepresentation and breach of contract.

CIMC moved for summary judgment arguing the Freys' obligation to pay dues until their membership reissued to a new member was clear and the various defenses and counterclaims were either barred or unsupported by any evidence. Specifically, CIMC argued it did not own the club, and in fact, was not even in existence at the time the Freys purchased and therefore was not capable of making any misrepresentation upon which the Freys could have relied. CIMC filed a Memorandum in Support of Motion for Summary Judgment, with supporting Affidavits on March 7, 2014,[2] and the Freys responded with a Memorandum in Opposition, filed the morning of the hearing on May 19, 2014. CIMC's motion for summary judgment as to Defendant, Michael J. Frey ("Frey") was granted by Order dated June 24, 2014 ("Initial Order"). Summary judgment as to Frey's wife was denied, pending the completion of additional discovery, with leave to refile. (R. p. 4).

The Freys filed a Motion for Reconsideration pursuant to Rule 59, SCRCP, on July 7, 2014 (the "Rule 59 Motion"), to which CIMC filed a Memorandum in Opposition on October 28, 2014. Prior to oral argument on November 3, 2014, the Freys retained new counsel. At the hearing, the Freys' present counsel argued for the first time and over the objection of CIMC, that the trial court's award of attorneys' fees was unauthorized by the governing documents. The trial court directed the parties to submit alternative

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[2] CIMC filed Affidavits of Jeff Spencer and Ehrick K. Haight, Jr., which were updated by Supplemental Affidavits filed May 19, 2014.

proposed orders on the issue. (R. p.1263, lines 15-21). The Freys, however, submitted a Supplemental Brief in Opposition to Plaintiff's Summary Judgment. On December 16, 2014, the trial court denied the Freys' Motion for Reconsideration and affirmed summary judgment against Gregory L. Frey, which he now appeals (the "Final Order").

FACTS

On or about September 29, 1995, the Freys applied for and purchased a membership in what was then the Callawassie Island Club, Inc., which owned and operated the majority of the recreational amenities, including the golf course, tennis facilities, swimming pools, clubhouses, and dining facilities. (R. pp. 25-26;p. 47;p. 62;p. 94). At that time, the Callawassie Island Club, Inc. was controlled by Callawassie Island Company, L.P. (the "Developer"). (R. p. 222;p. 440). As indicated in The Callawassie Island Club Membership Purchase Agreement executed by the Freys, membership in the Callawassie Island Club was governed by the 1994 Plan for the Offering of Memberships, the corporate By-Laws attached thereto, and the General Club Rules (the "1994 Governing Documents"). (R. pp. 25-46). Central to this case is the obligation set forth in the 1994 Governing Documents, which requires:

> An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club **until his or her equity membership is reissued** *(emphasis added)* by the Club. (R. p. 9).*(Plan for the Offering of Memberships, April 1, 1994, Rev. July, 1994; "Payment of Dues by Resigned Equity Member", Page 9, in force at the time Frey acquired Membership).*
>
> *See also:*
>
> 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**

(emphasis added) by the Club. (R. p. 1319).*(By-Laws, Callawassie Island Club, 9(a), pg. B-11, in force at the time Frey acquired Membership).*

And:

Any member may terminate membership in the Club by delivering to the Secretary written notice of termination in accordance with the By-Laws. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) (R. p. 1331).*(Callawassie Island Club General Club Rules "Suspension and Termination of Membership, page C-3, in force at the time Frey acquired Membership).*

As is common in residential communities in the area, the development plan further contemplated the transfer of the recreational amenities to a member owned and managed organization following the Developer's control period. (R. p. 1268). To effectuate that intent, CIMC was created and registered as a §501(c)(7) not for profit organization under the Internal Revenue Code. (R. p. 25;p. 222;p. 440). Following the Freys' purchase, the Callawassie Island Club's assets were transferred to CIMC and it commenced the maintenance and operation of the club amenities under a new Plan for the Offering of Memberships dated August 8, 2001 (the "2001 Plan"), which included the By-Laws and General Club Rules (collectively, and as amended, the "CIMC Governing Documents"). (R. p. 222;pp. 439-440). The Freys, as existing members, were entitled to continue their membership in the newly formed club pursuant to Section 2.2.2, which provided that "[e]ach existing equity member as of the date of this Plan will be entitled to continue his or her equity membership under this Plan without having to pay any additional or new membership contribution to the Club." (R. p. 1367). Consistent with the 1994 Governing Documents, the CIMC Governing Documents contained similar language mandating that members continue to pay dues until their memberships reissued

to a new member. (R. p. 1351;p. 1370). It is absolutely uncontroverted in the record that the Freys elected to continue their membership following CIMC's acquisition of the assets for many years, enjoying the benefits and privileges of membership up until their purported resignation or expulsion in 2010. (R. pp. 25-46;pp. 48-50;pp. 63-65;pp. 95-97;pp. 414-432).

In the wake of radically declining real estate prices precipitated by the latest recession however, a few members, including the Freys, sought to terminate their ongoing obligations to CIMC without honoring their obligations. They simply resigned without selling or otherwise transferring their membership to a new member and ceased payment. There are two ways in which a membership may be re-issued. The first is to place the membership on a re-sale list and wait for it to be sold in turn. Alternatively, a member may sell his or her property with the attendant membership. (R. p. 1278). A membership may be placed on the re-sale list voluntarily at the request of a resigning member, or involuntarily through termination which forces surrender of the membership certificate. (R. p. 1331). These methods of re-issuance remained constant throughout the Freys' membership. (R. p. 1351;p. 1441;p. 1477).

Prior to the recession, CIMC had "very few delinquencies" as those who could no longer afford their membership found it relatively easy to sell their property. (R. p. 451, line 25-p. 452, line5). Rather than sell his property in this difficult market, Frey defaulted in his financial obligations to CIMC and this action was commenced for the collection of the unpaid account.

ARGUMENT

I. FREY FAILED TO PRESERVE SEVERAL ISSUES FOR APPELLATE REVIEW.

Frey makes several arguments that were raised for the first time during the motion for reconsideration and in his Brief, including but not limited to those outlined below.

A. ISSUE I: IMPROPER LEGAL STANDARD.

Frey takes issue with the legal standard recited in the Initial Order, contending Judge Kinard's Order fails to mention the "mere scintilla" standard used in a summary judgment context. (App. Initial Brief p. 9). While Frey briefly mentioned this concern in his Motion for Reconsideration[3], he employs entirely new arguments in his Brief.

Frey contends the failure to include the "mere scintilla" language in the Order "appears to be driven in part by the trial court judge's background in drafting restrictive covenants for property owner subdivisions . . . and current status as the president of a country club." (App. Initial Brief pp. 9-10). Frey's argument seeks to cast a cloud of doubt over Judge Kinard's ability to impartially adjudicate this matter. However, at no time during the proceedings of this matter did Frey question Judge Kinard's fitness to hear the case nor did he request Judge Kinard's recusal. Accordingly, his argument and belated questioning of Judge Kinard's fitness is unpreserved for appellate review. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 643 (2011) (stating it is axiomatic that an issue cannot be raised for the first time on appeal) (Citations omitted).

Frey further asserts other shortcomings, including failure to include official "findings of fact" and "conclusions of law;" improperly shifting the burden of proof to

[3] (R. pp. 346-347).

the non-moving party; and treating the matter as "only a debt collection problem." (App. Initial Brief pp. 9-10). Frey has raised these arguments for the first time in his Brief. *See Id.* Accordingly, they are not preserved for appellate review and should not be considered by this Court. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) (stating an appellate court will not consider issued on appeal which have not been preserved for appellate review) (Citations omitted).

B. ISSUE III(B) WAIVER ARGUMENT.

Frey challenges Judge Kinard's reliance upon and citation to the 2014 General Club Rules governing expulsion. (App. Initial Brief pp. 30-32). In doing so, Frey contends CIMC's act of amending its Club Rules in 2014, to reflect that an expelled member will remain "liable for all Charges until Membership is re-issued," operates as a waiver of CIMC's argument and an admission that the un-amended version of that provision was open to differing interpretations.[4] (App. Initial Brief pp. 30-32). This argument was not presented to Judge Kinard, either through oral argument, written memoranda, or in his Rule 59 Motion. *See Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court). Accordingly, the argument is unpreserved and should not be considered by this Court.

C. ISSUE III(E) ATTORNEYS' FEES.

Frey takes issue with Judge Kinard's award of attorneys' fees to CIMC, claiming CIMC failed to cite statutory or contractual authority for recovering its attorneys' fees.

[4] It is important to note that Judge Kinard's reference to the 2014 Club Rules was merely illustrative of the Club's consistent policy that all members are responsible for the payment of dues, fees, and assessments until such time as the membership is reissued.

(App. Initial Brief pp.34-38). Frey then attempts to dissect CIMC's governing documents, reading them in light of his argument, to impugn Judge Kinard's award. (App. Initial Brief pp. 34-38). Frey levies further attacks on Judge Kinard's Orders by asserting he relied on generalized statements in CIMC's documents and disregarded specific provisions and improperly revised documents. (App. Initial Brief pp. 34-38).

At the hearing of CIMC's Motion for Summary Judgment, both in oral argument and in his supporting memorandum of law, Frey contended awarding attorneys' fees was improper because the affidavit accompanying the request for attorneys' fees was untimely. (R. p. 259;p. 1221, lines 17-19;p. 1224, lines 20-25). Frey never challenged CIMC's contractual authority to request attorneys' fees. The only argument presented to Judge Kinard prior to his initial ruling was the challenge to the timeliness and reasonableness of the affidavit of attorneys' fees submitted by counsel for CIMC.

Admittedly, over CIMC's objection, Frey raised arguments about the source of authority for attorneys' fees to Judge Kinard during the hearing on the motion for reconsideration. (R. p. 1242, line 24-p. 1243, line 21;p. 1255, lines 6-10). However, a party may not raise a new issue previously not raised to the court in a Rule 59 motion. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment). Accordingly, because Frey has not challenged the award of attorneys' fees based on these arguments raised to Judge Kinard prior to issuance of the initial Order, Frey has waived his challenge of the attorney fee issue. *See First Union Nat'l Bank v. S.C. v. Soden*, 333 S.C. 554, 566, 511

S.E.2d 372, 378 (Ct. App. 1998) (stating a failure to challenge a ruling is an abandonment of the issue and an unchallenged ruling, right or wrong, is the law of the case).

D. ISSUE IV(A) STATUTORY VIOLATION CLAIM

Frey asserts Judge Kinard erred by dismissing his statutory violation claim under S.C. Code Ann. §33-31-621, because CIMC is time barred from challenging Frey's mandatory expulsion. (App. Initial Brief pp. 38-40). Frey asserts CIMC's collection action against him amounts to a challenge of his expulsion from the Club. (App. Initial Brief pp. 39-40). Frey cites section 33-31-621 for the proposition that a challenge to an expulsion must be commenced within one year of that expulsion. (App. Initial Brief pp. 39-40). As a threshold matter, section 33-31-621 clearly applies in the context of an expelled member challenging an expulsion. However, the Court need not reach this argument as it is not preserved for appellate review.

In his second amended answer and counterclaim, Frey pled a cause of action claiming a violation of sections 33-31-620, 621. In pleading this cause of action, Frey did not assert any argument regarding the statute of limitations, but noted the statute of limitations as separate affirmative defense. (R. pp. 99-100;p. 104). During the briefing and arguments at the summary judgment stage, Frey never argued CIMC's debt collection amounted to a time-barred challenge to Frey's purported expulsion. Furthermore, Judge Kinard did not specifically rule on this argument and Frey did not raise it in his motion for reconsideration. Accordingly, this issue was not properly presented to Judge Kinard for consideration, was not ruled on by Judge Kinard, or raised in Frey's Motion for Reconsideration. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they

are raised to and ruled on by the lower court). Accordingly, the arguments presented in Frey's Issue IV(A) are not preserved for appellate review and should not be considered by this Court.

E. ISSUE IV(B) FREY'S NEGLIGENT MISREPRESENTATION CLAIM

Frey contends Judge Kinard erred in dismissing Frey's negligent misrepresentation claim because CIMC's act of providing methods for certain members to leave the club without owing more than their equity contribution "aligned with Appellant's understanding . . ." (App. Initial Brief pp. 40-42). This specific argument in favor of Frey's negligent misrepresentation claim was never presented to Judge Kinard for consideration and is not preserved for appellate review. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court).

II. CIMC DEMONSTRATED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BY CONCLUSIVELY ESTABLISHING (A) FREY WAS A MEMBER, (HAVING PAID DUES FOR THE USE OF CIMC'S AMENITIES); (B) THAT THE GOVERNING DOCUMENTS (FROM THE TIME FREY ACQUIRED HIS MEMBERSHIP FORWARD) OBLIGATED HIM TO REMAIN IN GOOD STANDING UNTIL HIS MEMBERSHIP REISSUED; AND (C) THAT FREY HAD NOT MADE PAYMENT IN ACCORDANCE WITH THE AGREEMENT.

A. MEMBERSHIP IN CIMC IS A CONTRACTUAL OBLIGATION

The required elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). All of these elements are conclusively established by the record in this case.

When Frey acquired his membership in CIMC's predecessor, the Callawassie Island Club, Inc., the terms and provisions governing membership were memorialized in the 1994 Governing Documents. (R. pp. 25-46). Frey signed The Callawassie Island Club Membership Application ("Application") and also its Purchase Agreement (the "Agreement"). (R. pp. 25-46;p. 47;p. 62;p. 94). In so doing, he expressly agreed to be bound by the 1994 Plan (R. pp. 25-36). Frey's purchase of a membership is not in dispute. Nor is there any controversy over the fact that CIMC provided, and Frey enjoyed, the benefits of membership; or that Frey paid dues, fees and assessments for well over a decade. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997). In this case, we have ample evidence of all three.

As for consideration, our courts have held it may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998). A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. *Shayne of Miami, Inc. v. Greybow, Inc.*, 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957). Clearly, the provision of benefits and services in exchange for the observance of the duties and obligations of membership qualifies as adequate consideration.

There being no question that Frey was offered membership subject to the 1994 Governing Documents, accepted membership in accordance with the 1994 Governing Documents, and was accorded the rights and privileges of membership pursuant thereto;

the trial court rightly concluded that a contract existed. "By applying for a membership and purchasing same, Defendant became contractually bound by the 1994 Plan for the Offering of Memberships and the Exhibits thereto, which included the By-Laws and the General Club Rules . . . ." (R. p. 5).

The 1994 Plan specifically contemplated the transfer of the Callawassie Island Club's assets to the membership, which occurred in late 2001, when CIMC assumed control. (R. p. 1268;p. 439). Following CIMC's acquisition of the club assets, Frey continued his membership as allowed under the CIMC Governing Documents. Section 2.2.2 of the 2001 Plan states in part: "Each equity member as of the date of this Plan will be entitled to continue his or her equity membership under this Plan without having to pay an additional or new membership contribution to the Club." It is clear in the record that Frey availed himself of the benefits of membership in CIMC from the time of its acquisition until he ceased payment of his dues. (R. pp. 25-36;pp. 414-432).

The trial court found: (a) that a contract exists, (b) that CIMC has the right to enforce it, (c) that Frey continued to use the club amenities, and (d) paid dues to CIMC. Because these findings are wholly supported by the record and not reasonably subject to any other inference, they should not be disturbed on appeal. (R. p. 7).

B. OBLIGATION TO PAY DUES UNTIL MEMBERSHIP REISSUED.

Having satisfied itself that a contract did exist under the 1994 Governing Documents, as amended, the Trial court next addressed its interpretation. At all times during Frey's membership, the applicable governing documents mandated that members

remain obligated for dues, fees and assessments until such time as the membership was reissued.[5] The following excerpts leave no room for contrary interpretation:

> Relevant Plan Excerpts:
>
> An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club **until his or her equity membership is reissued** *(emphasis added)* by the Club. (R. p. 1280).*(Plan for the Offering of Memberships, April 1, 1994, Rev. July, 1994; "Payment of Dues by Resigned Equity Member", Page 9, in force at the time Frey acquired Membership).*
>
> An Equity Member who is on the waiting list to sell his/her Membership will be obligated to continue to pay to the Club all Charges associated with his/her Membership **until his/her Equity Membership is reissued by the Club** *(emphasis added)*. (R. pp. 1453-1454).*(Plan for the Offering of Membership, Amended as of February 1, 2008, 5.11 "Payment of Dues and Charges By Resigned Members", in force at the time of Frey attempted resignation).*
>
> Relevant Excerpt from By-Laws:
>
> 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** *(emphasis added)* by the Club. (R. p. 1319).*(By-Laws, Callawassie Island Club, Article X, Sec. 9(a), pg. B-11, in force at the time Frey acquired Membership).*

The By-Laws impose identical obligations (for ongoing payment of dues, fees, charges, until the membership is reissued) upon expelled members.

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[5] At the time Frey acquired membership, the governing documents included The Plan for Offering Memberships dated April 1, 1994, Rev. July, 1994, and the By-Laws and General Club Rules issued by CIC. A full copy of the 1994 Plan, 2001 Plan, 2007 Plan and 2008 Plan, together with the 1994 General Club Rules and By-Laws, along with all later versions, amended and adopted by CIMC during the Frey' membership, were provided to the trial court (R. p. 1208, lines 21-22), the relevant excerpts of which are set forth herein above.

Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to the 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 in accordance with the provisions of Article X, Section 9 of these By-Laws** *(emphasis added).* (R. p. 1323).*(By-Laws, Callawassie Island Club, Article XIV, Sec. 5, pg. B-15, in force at the time Frey acquired Membership).*

The Club shall have a lien against each membership for any unpaid assessments, fees, annual dues or other charges . . .[and] **may also** *(emphasis added)*, at its option, sue to recover a money judgment for unpaid annual dues or other charges . . ." (R. p. 1487).*(By-Laws, Callawassie Island Members Club, March, 2009, Article XI, pg. 8, in force at the time Frey attempted resignation - showing Club is not limited to recovery against equity only).*

Relevant Excerpts from the General Club Rules:

Any member may terminate membership in the Club by delivering to the Secretary written notice of termination in accordance with the By-Laws. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) (R. p. 1331).*(Callawassie Island Club General Club Rules "Suspension and Termination of Membership, page C-3, in force at the time Frey acquired Membership).*

Any member may terminate membership in the Club by delivering to the Membership Director written notice of termination in accordance with the Plan for the Offering of Club Memberships. **Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges** (including food and beverage minimums) **until the membership is sold** *(emphasis added).* (R. p. 1477).*(The Callawassie Island Members Club, Inc. General Club Rules as of February 23, 2009, Sec. 14.2.1, in force at the time Frey attempted resignation).*

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. p. 1477).*(The Callawassie Island Members Club, Inc. General Club Rules as of February 23, 2009, Sec. 14.1.5, in force at the time Frey attempted resignation).*

> **Notwithstanding any termination** or suspension of membership, the member **shall remain liable for any unpaid club account or membership dues, fees, charges and assessments**...(R. p. 1477).*(The Callawassie Island Members Club, Inc. General Club Rules as of February 23, 2009, Sec. 14.2.3, in force at the time Frey attempted resignation).*

There is no triable issue of fact for a jury to consider when the language of the applicable contract is clear and unambiguous. "When a contract or agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *ESA Services, LLC v. S.C. Dept. of* Revenue, 392 S.C. 11, 20, 707 S.E.2d 431, 436 (2011). "[I]t is a question of law for the court whether the language of a contract is ambiguous." *Id., see also: Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). The trial court, after carefully reading the documents as a whole and giving the language its plain meaning, concluded Frey had a clear and unambiguous obligation to pay ongoing dues until his membership reissued. (R. p. 6;p. 14). In so doing, the trial court correctly applied the cardinal rule of contract interpretation by ascertaining and giving legal effect to the parties' intentions as determined by the contract language. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009).

The Trial court was thoroughly briefed regarding Frey's contention that expulsion somehow absolved him from any further liability and the matter was extensively argued at each hearing. While he readily admits that a "resigning" member has a duty to continue paying dues in his Brief to this Court, Frey asked the Trial court to disregard the plain meaning of the above excerpted provisions and adopt the notion that there are "multiple exit tracks" depending on whether a member voluntarily resigns, has his membership terminated by the Board, or is expelled by operation of the agreement. Frey suggests that

by defaulting and forcing his own expulsion, a member can simply dispense with his obligations or otherwise cap his damages at his equity contribution. In support of his contention, Frey refers to the following provision:

> Any member of the Club who has been expelled shall not again be eligible for membership nor admitted to the Club Facilities under any circumstances. Any expelled member...shall have the obligation to surrender his or her membership certificate **for reissuance** *(emphasis added)* by the Club to a new member...(R. p. 1319;p. 1323;p. 1351;p. 1441;p. 1513).*(1994 By-Laws, p. B-15, incorrectly cited as p. B-11 in Appellant's Brief; an identical provision also appears in the 2001, 2007 and 2009 General Club Rules at Section 14.1.5).*

Frey then, in a leap of logic wholly unsupported by the evidence, and contrary to the specific provisions of the contract documents, concludes that expulsion prematurely terminates the obligation to pay dues until the membership reissues. Such a contention is not only counter to the clear intent of the parties, but is also specifically contradicted by the clear provisions of the By-Laws. As confirmed by the provisions of Articles X and XIV of the club By-Laws, there are not multiple "exit tracks." Article XIV, Section 5 of the 1994 By-Laws, entitled "Expulsion," specifically refers back to Article X, Section 9, both of which are cited hereinabove, and both of which impose identical obligations upon resigning or expelled members. Section 9(a) states: "[d]ues, fees and charges shall accrue against a resigned equity membership until . . . reissued by the Club." It is clear that the manifest intent is to force the surrender and "reissuance" of the membership, and that "reissuance" alone is the method by which a member may conclude his or her financial responsibilities. Frey does not, and cannot, cite to any provision, in any version of the governing documents that waives this obligation. Thus, regardless of whether the termination is effected by resignation or expulsion, the resigning and/or expelled member

remains liable, under the explicit provisions of the club documents, for payment of dues, fees and charges until the membership is reissued.

Nor can Frey cite to any provision in the governing documents which limits his damages to the value of his equity membership. While several provisions do authorize the Club to accrue dues against the equity, there is absolutely no language which indicates a lien against the equity is CIMC's sole remedy. In fact, the 1994 Governing Documents clearly authorize a suit for damages, stating, it "**may also** *(emphasis added)*, at its option, sue to recover a money judgment for unpaid annual dues or other charges . . ." (R. p. 1497). Indeed, to read the governing documents as Frey suggests would completely invalidate the numerous provisions cited above.

Rather than contradict the clear and unambiguous intent and application of these provisions, the testimony tendered by Frey in support of his interpretations serves to underscore its plain meaning. Former Board member James Carling testified that the Club would continue to try and collect from individuals who simply tried to walk away from their obligations. (R. p. 32, lines 17-25). Former Board member Karen Norwood testified that expulsion meant a permanent loss of privilege (as opposed to a termination of obligations). (R. p. 565, lines 15-23). What she **did not** say is that expulsion terminated a members' obligation to pay dues until the membership re-issued. Longstanding Board member, Philip C. Kilian corroborated Ms. Norwood's testimony, stating "the underlying club documents require that membership in good standing be maintained by even a member who was expelled or suspended." (R. p. 461, lines 4-6). Even Frey's own witness clarified that surrender of a membership merely placed it with the Club for resale. (R. p. 630, lines 23-25).

Despite Frey's concerted efforts to torture the plain meaning of the governing documents; reading various sections in isolation; and introducing extrinsic evidence to impute terms that are nowhere present in the documents themselves, a contract must be read as a whole document so that ambiguity is not created by a single sentence or clause. *McGill, at 185, 574.* Whether or not the governing documents are ambiguous is a question of law for the court and does not present any genuine issue of material fact. *Id.*

The trial court was well aware of the standard of review and acknowledged the standard set forth in *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, in the face of such clear and unequivocal language, the trial court had a duty to enforce the agreement as written. "(W)hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014), citing *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct.App.1997) (citation omitted). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). "It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine." *Priest v. Brown,* 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). Accordingly, summary judgment was appropriate.

C. FAILURE TO PAY.

CIMC conclusively established the existence of a contract and proved Frey's breach thereof and damages in the form of its verified Complaint and Affidavits. (R. pp. 25-46;pp. 414-432). Frey introduced absolutely no evidence challenging the correctness of

these charges, other than to assert that through resignation, expulsion or termination he should be absolved of further liability. Rule 56(e), SCRCP provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

III. THE REQUIREMENT TO PAY DUES UNTIL REISSUANCE DOES NOT VIOLATE THE SOUTH CAROLINA NON-PROFIT CORPORATION ACT. AS IS THE CASE WITH NEARLY ALL PROPERTY OWNER ASSOCIATIONS, FREY NEED ONLY SELL HIS PROPERTY AND MEMBERSHIP TO ANOTHER PARTY TO RELIEVE HIMSELF OF FURTHER OBLIGATION AND THE FACT THAT HE CHOSE NOT TO DOES NOT RENDER THE REQUIREMENT UNLAWFUL.

Frey cites S.C. Code Ann. §33-31-620, of the South Carolina Nonprofit Corporation Act (the "Act"), for the proposition that assigning liability for continuing obligations post-resignation is statutorily prohibited. Frey's argument conveniently ignores subpart (b) to that section, which specifically obligates a resigning member to meet any obligations incurred or commitments made before the resignation. Likewise §33-31-621 reinforces the notion that members who are terminated or expelled remain liable for obligations or commitments made while members. The official comment to both sections makes the legislative intent patently clear. Members are to be held accountable for previously agreed upon continuing obligations, even beyond resignation.

In determining that these statutes permitted CIMC to charge dues until the membership reissued, the trial court correctly ascertained and effectuated the intent of the

legislature. The court gave the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E. 2d 877, 881 (2011). "In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Anderson v. S.C. Election Com'n*, 397 S.C. 551, 556-557, 725 S.E.2d 704, 706-707 (2012), *citations omitted.*

The Official Comments to §33-31-620 recognize that a "member in joining the organization may promise to use its facilities or services for a specific period of time." In this case, the specific period of time is "until their membership is reissued." The trial court recognized such requirements are quite common, particularly in Beaufort County, where nearly all developments utilize non-profit corporations to collect dues for the maintenance of common areas and recreational amenities within their community. (R. p. 1226, lines 4-19). It is illogical to assert that S.C. Code Ann. §33-31-620, absolves homeowners from liability for dues incurred prior to sale under the rational that members of a not-for-profit corporation have a "right to resign at any time". However, that is the conclusion to be drawn from Frey's tortured reading of the statute.

The fact that Frey may have found it economically inconvenient to sell his property at 24 Island Creek Drive, does not excuse his financial responsibilities. Nowhere

in any of the governing documents is Frey guaranteed a profitable return on his investment. The 1994 Plan specifically advised that the memberships were for recreational purposes and not to be relied upon as an investment. (R. p. 1270). No matter how disadvantageous the requirement may prove in today's economic climate, the fact remains that allowing a member to unilaterally resign without selling or transferring his membership to a new, dues paying, member, would have devastating consequences to all of the other members on Callawassie Island who rely upon, and who have contributed to, a steady source of funding to maintain their amenities. It is clear from the statutory language and comments that such an application is consistent with the stated purposes and intent of the Act.

IV. FREY'S REMAINING AFFIRMATIVE DEFENSES AND COUNTERCLAIMS DID NOT SURVIVE SUMMARY JUDGMENT AS THEY LACKED THE NECESSARY ELEMENTS AND/OR WERE UNSUPPORTED BY ANY EVIDENCE.

A. COUNTERCLAIMS

Only two of the various counterclaims initially asserted by Frey were before the Trial court, the remainder having been dismissed by prior order. The first, that CIMC breached its contract by not expelling him for non-payment; and the second, that CIMC made negligent misrepresentations upon which he relied to his detriment. The Trial court determined that regardless of a member's expulsion, suspension, termination or resignation, the 1994 Governing Documents and all subsequent amendments thereto, plainly required a member to pay dues until his or her membership re-issued. (R. p. 5). As the construction of a clear and unambiguous contract is the province of the trial court and not a jury, summary judgment was appropriate on this issue as previously discussed.

Summary judgment in favor of CIMC is also appropriate as to Frey's only other remaining counterclaim. CIMC could not have made a representation upon which Frey relied when purchasing his membership. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (stating summary judgment is appropriate when the non-moving party fails to establish an element of its case). The elements of a cause of action for negligent misrepresentation are: 1) a false representation made by CIMC to the Members; 2) a pecuniary interest by CIMC in making the statement; 3) a duty of care owed by CIMC to see that truthful information was communicated to the Members; 4) a breach of the duty owed by CIMC by failing to exercise due care; 5) justifiable reliance on the representation; and 6) pecuniary loss as a direct and proximate result of reliance on the representation. *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). A false representation must be false at the time it was made. *GSM Dealer Services, Inc. v. Chrysler Corp.*, 32 F.3d 139 (4th Cir. 1994).

At the time the Freys acquired their membership, the club was owned and operated by the Callawassie Island Club, which was controlled by the Developer. (R. p. 222;p. 440). CIMC did not come into existence until November 16, 1999, and did not acquire and manage the assets of the club until June 29, 2001. Therefore, the representations allegedly relied upon by Frey at the time of his purchase cannot be ascribed to CIMC. (R. p. 439).

The 1994 Plan admonished members to "carefully read all the attached documents" and "consider seeking professional advice to evaluate these documents." (R. p. 1269). Additionally, Frey's own witness, Sandra Aulton, affirmed that to the extent any representations were made by the Developer, they were never incorporated into the written documents. (R. p. 722, lines 7-15). Even when examined in the light most favorable to

Frey, it is clear he cannot establish the necessary elements. There was no representation by CIMC, no justifiable reliance and therefore no damage, no breach of duty by CIMC, and no pecuniary interest realized on the part of CIMC.

Once Frey acquired his membership, he was contractually bound by the governing documents. None of the deposition testimony in the record suggests that anyone ever told Frey that if he stopped paying, he would simply be expelled without further obligation. What he was told, and what is not at odds with any of the governing documents, is that he could terminate his membership. As amply illustrated herein, membership can be terminated, either at the request of the member or involuntarily, but in either event, the member remains liable until his membership is re-issued. Even if Frey had received contrary advise (which CIMC denies) the 1994 Plan and the CIMC Governing Documents, specifically Section 1.8 of the 2001 Plan, Section 12.3 of the 2007 and 2008 Plans, plainly state: "No person has been authorized to give any information or make any representation not contained in this Membership Plan and, if given or made, such information or representation must not be relied upon as having been authorized..."

V. FOLLOWING EXTENSIVE DOCUMENTARY PRODUCTION, DEPOSITIONS AND INTERROGATORIES, THE TRIAL COURT CORRECTLY CONCLUDED THAT THE CONTRACT WAS CLEAR AND UNAMBIGUOUS, MAKING FURTHER DISCOVERY OF EXTRINSIC EVIDENCE IMMATERIAL.

CIMC'S Motion for Summary Judgment was brought after two years of litigation and a full and fair opportunity for thorough and complete discovery. A detailed member history report was attached to the verified Complaint (R. pp. 25-46), and further updated via the affidavits of Jeff Spencer, CIMC's general manager. (R. pp. 414-432). Frey was given every opportunity to depose Mr. Spencer and failed to do so. He cannot now cry

"foul" and allege he was not afforded adequate discovery. (R. p. 1235, lines 2-5). Further, the Trial court recognized that any parol evidence sought by Frey would not be admissible in light of his determination that the contract was unambiguous. (R. pp. 8-10).

VI. THE AWARD OF SUMMARY JUDGMENT SHOULD BE AFFIRMED AS A MATTER OF PUBLIC POLICY AND FOR ADDITIONAL SUSTAINING GROUNDS.

The old adage, "it takes a village to raise a child" could readily be adapted to the concept of sustaining a resort golf community. Without the continuing participation of its members, the cost to keep up Callawassie's twenty-seven (27) hole course, club house, restaurant, pools, tennis courts, pavilions, and dock would be unsustainable. That is why as early as 1994, the Plan for the Offering of Memberships provided that a member would be required to continue to pay dues until his or her membership reissued. (R. p. 1280;p. 1323;p. 1331). That is why the membership formed CIMC and continued that obligation in 2001, when they took over the management of the assets from the Developer. (R. p. 1351;p. 1370). And that is why the residents of Callawassie Island voted overwhelmingly to require anyone purchasing property on Callawassie Island after 2001, to purchase a membership in CIMC. (R. p. 26;p. 143;p. 238). Callawassie's development model, like so many other communities across the state, relies upon the financial contributions of the residents to maintain the amenities, which clearly provide a material benefit to the real property interests of the landowners.

The Court should consider, in weighing the issues, that failing to uphold the clear and unambiguous obligations challenged here may usher in a flood of other similar challenges, and not just within Callawassie Island. This is true particularly if the Court were to read the Act as Frey suggests. Although Callawassie Island has chosen to have its

resort amenities owned and managed by a non-profit club rather than a non-profit homeowner's association[6], for all intents and purposes, the application of the statute is the same. If Frey may "resign at any time" without regard to his commitment to continue paying dues until his membership reissues, every homeowner in every deed restricted community could likewise declare himself "resigned" and cease to pay dues without further liability.

As for additional sustaining grounds, CIMC calls this Court's attention to those defenses set forth in its Reply. CIMC asserts that to the extent any representations were made (which CIMC denies) they were either merged into the 1994 Governing Documents, as amended, or were parol evidence outside the terms of the agreement. CIMC further asserts that to the extent Frey claims some right under earlier versions of the various governing documents that were later abrogated by an alleged unauthorized change, CIMC asks this Court, under Rule 220(c), SCACR, to sustain the trial court's decision on the ground that the statute of limitation for challenging actions has run.

Similarly, Frey is barred by the doctrine of laches, estopped or has otherwise waived, his right to challenge any actions on the part of CIMC in exercising its business judgment. The 1994 Governing Documents admonished applicants to "carefully read all of the attached documents" and further to "consider seeking profession advice to evaluate these documents". (R. p. 1269). Additionally, the 1994 Governing Documents stated in bold, capitalized print, that "MEMBERSHIPS SHOULD NOT BE VIEWED OR ACQUIRED AS AN INVESTMENT AND NO PERSON PURCHASING A

[6] Other common property, such as the roadways and certain landscaping, are owned and managed by The Callawassie Island Property Owners Association.

MEMBERSHIP SHOULD EXPECT TO DERIVE ANY ECONOMIC PROFITS FROM MEMBERSHIP IN THE CLUB." (R. p. 1270). Based on the foregoing, Frey assumed the risk of incurring ongoing obligations, despite economic hardship or declining property values.

CONCLUSION

In the face of clear and unequivocal contractual obligations, which specifically require Frey to pay dues until his membership reissued, summary judgment in favor of CIMC is appropriate. Frey's negligent misrepresentation claim failed because he did not and indeed cannot, attribute any of the alleged misrepresentations to CIMC. Further, Frey has produced absolutely no evidence to support that CIMC breached its contract with him. Based on CIMC's showing that no issue of material fact existed as to Frey's obligations or the amounts owed, the trial court's award of summary judgment should be upheld.

Respectfully submitted,

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August 25, 2015.

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

2012-CP-07-03209

The Callawassie Island Members Club, Inc., Respondent,

vs.

Michael J. Frey and Grace I. Frey,
of Whom Michael J. Frey is the Appellant, Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I, the undersigned, as counsel for the Respondent, The Callawassie Island Members Club, Inc., certify that the within Final Brief of the Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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August 25, 2015

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC 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.

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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?

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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

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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).

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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

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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,"

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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

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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

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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.

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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,

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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.

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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.").

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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

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> 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.

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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).

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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

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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:

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> 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.

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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).

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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).

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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

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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

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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,

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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).

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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)

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(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

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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.

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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.

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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).

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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."

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(*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

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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.

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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.

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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).

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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

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> 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.

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> 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

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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).

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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

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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).

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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

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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).

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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

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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,

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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BEAUFORT COUNTY
FOURTEENTH JUDICIAL CIRCUIT

J. Ernest Kinard, Jr., Judge

Appellate Case No. 2015-000002

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SC Court of Appeals

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.

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