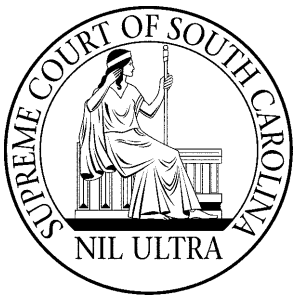

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
November 14, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

27802 - The State v. Stephanie I. Greene	Granted until 11/23/2018
2018-000487 - George Cleveland, III v. State	Granted until 11/23/2018

PETITIONS FOR REHEARING

27835 - The Callawassie Island v. Ronnie Dennis	Denied 11/14/2018
27841 - Allen Patterson v. Herb Witter	Granted 11/14/2018
2018-MO-029 - Hector Fragosa v. Kade Construction	Denied 11/8/2018

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2018-UP-421-SCDSS v, Stevens Daniel Gilstrap
(Filed November 5, 2018)

2018-UP-422-State v. Raymond L. Roberson

2018-UP-423-Wells Fargo Bank, N.A. v. William R. Hudspeth

2018-UP-424-Jarrod A.R. Villareal v. Maria M. M. Caspillan

2018-UP-425-Jarrod A.R. Villareal v. Maria M.M. Caspillan (2)

2018-UP-426-Andra Jamison v. S.C. Dep't of Corrections

PETITIONS FOR REHEARING

5588-Brad Walbeck v. The I'On Company	Pending
5590-State v. Michael L. Mealor	Pending
5596-James B. Williams v. Merle S. Tamsberg	Pending
5598-Emily S. Brown v. Grady C. Odom	Pending
5600-Stoneledge v. IMK Development (Marick/Thoennes)	Pending
5601-Stoneledge v. IMK Development (Bostic Brothers)	Pending
5602-John McIntyre v. Securities Commissioner of South Carolina	Pending
5603-State v. David A. White	Pending

2018-UP-178-Callawassie Island Members Club v. Gregory Martin	Pending
2018-UP-179-Callawassie Island Members Club v. Michael Frey	Pending
2018-UP-180-Callawassie Island Members Club v. Mark Quinn	Pending
2018-UP-327-State v. Joe Ross Worley	Pending
2018-UP-338-John Rakowsky v. Law Office of Adrian Falgione	Pending
2018-UP-340-Madel Rivero v. Sheriff Steve Loftis	Pending
2018-UP-343-State v. Benjamin C. Hernandez	Pending
2018-UP-365-In re Estate of Norman Robert Knight, Jr.	Pending
2018-UP-368-Laurent Britton v. Charleston County	Pending
2018-UP-389-Gloria Terry v. Robert Terry, Sr.	Pending
2018-UP-391-State v. Corey A. Brown	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5554-State v. Antwan J. Jett	Pending
5556-BLH by parents v. SCDSS	Pending
5557-Skywaves v. Branch Banking	Denied 11/09/18
5559-Commissioners v. City of Fountain Inn	Pending
5561-Innovative Waster v. Crest Energy	Pending
5563-Angel Gary v. Lowcountry Medical	Pending
5564-J. Scott Kunst v. David Loree	Pending
5566-Tyrone York v. Longlands Plantation	Pending
5567-Karl Jobst v. Bryan Jobst (Brittany Martin)	Pending

5568-Amisub of South Carolina, Inc. v. SCDHEC	Pending
5571-William Crenshaw v. Erskine College	Pending
5572-State v. Steven Otts	Pending
5573-Skydive Myrtle Beach v. Horry County	Pending
5574-State v. Jeffrey D. Andrews	Pending
5579-State v. Nathaniel Wright	Pending
5581-Nathan Bluestein v. Town of Sullivan's Island	Pending
5586-State v. Sha'quille Washington	Pending
5592-State v. Aaron S. Young, Jr.	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2018-UP-011-Charles Hobbs v. Fairway Oaks	Pending
2018-UP-078-David Wilson v. John Gandis	Pending
2018-UP-080-Kay Paschal v. Leon Lott	Pending
2018-UP-081-State v. Billy Phillips	Pending
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending
2018-UP-087-David Rose v. SCDOT	Pending
2018-UP-099-Shaul Levy v. Carolinian, LLC	Pending
2018-UP-111-State v. Mark Lorenzo Blake, Jr.	Pending
2018-UP-147-State v. Courtney Ray Mitchell	Denied 11/09/18
2018-UP-169-State v. Marquez Glenn	Pending
2018-UP-183-S.C. Community Bank v. Carolina Procurement	Pending
2018-UP-185-Peggy D. Conits v. Spiro E. Conits	Pending

2018-UP-187-State v. Rodney R. Green	Pending
2018-UP-191-Cokers Commons v. Park Investors	Pending
2018-UP-193-Mark Ostendorff v. School Dt. of Pickens Cty.	Denied 11/09/18
2018-UP-201-Knightsbridge Property Owners v. Paul Nadeau	Pending
2018-UP-211-Hamilton Duncan v. Roy Drasites	Pending
2018-UP-214-State v. Tavarious Settles	Pending
2018-UP-216-Nicholas Geer v. SCDPPPS	Pending
2018-UP-221-Rebecca Delaney v. CasePro, Inc.	Pending
2018-UP-231-Cheryl DiMarco v. Brian A. DiMarco	Pending
2018-UP-237-Harold F. Jones v. State Farm Mutual	Pending
2018-UP-242-Linda Estrada v. Andrew Marshall	Pending
2018-UP-250-Morningstar v. York County	Pending
2018-UP-260-Kenneth Shufelt v. Janet Shufelt	Pending
2018-UP-268-Holly Lawrence v. Jennifer Brown	Pending
2018-UP-269-Carleton Cantrell v. Aiken County	Pending
2018-UP-273-State v. Maurice A. Odom	Pending
2018-UP-275-Ronald Jarmuth v. The International Club	Pending
2018-UP-280-Scott Ledford v. Department of Public Safety	Pending
2018-UP-281-Philip Ethier v. Fairfield Memorial	Pending
2018-UP-287-S.C. Farm Bureau v. Michael Harrelson	Pending
2018-UP-318-Theresa Catalano v. Jack Catalano	Pending

2018-UP-333-Roosevelt Simmons v. Mase and Company	Pending
2018-UP-335-State v. Samuel E. Alexander, Jr.	Pending
2018-UP-339-State v. James Crews	Pending
2018-UP-349-Verma Tedder v. Darlington County	Pending
2018-UP-352-Decidora Lazaro v. Burriss Electrical	Pending

The Supreme Court of South Carolina

The Callawassie Island Members Club, Inc., Petitioner,

v.

Ronnie D. Dennis and Jeanette Dennis, Respondents.

Appellate Case No. 2016-002187

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been overlooked or disregarded. The petition for rehearing is denied. However, we did overlook the procedural fact that the court of appeals found it unnecessary to address all issues raised before it, so we substitute the attached revised opinion remanding this case to the court of appeals to address the other issues. In all other respects, the opinion is unchanged.

The petition for rehearing is denied.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

We would grant the petition for rehearing.

s/ Donald W. Beatty C.J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

November 14, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Callawassie Island Members Club, Inc., Petitioner,

v.

Ronnie D. Dennis and Jeanette Dennis, Respondents.

Appellate Case No. 2016-002187

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27835
Heard May 1, 2018 – Re-Filed November 14, 2018

REVERSED

Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia; M. Dawes Cooke Jr. and John W. Fletcher, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston; and Stephen P. Hughes, of Howell, Gibson & Hughes, PA, of Beaufort, all for Petitioner.

Ian S. Ford and Neil D. Thomson, both of Ford Wallace Thomson, LLC, of Charleston, for Respondent.

JUSTICE FEW: The circuit court granted summary judgment to The Callawassie Island Members Club on the basis that its membership documents clearly and unambiguously require members to continue paying their dues until their

membership is reissued, even after their resignation. The court of appeals reversed. We reverse the court of appeals and reinstate the summary judgment for all unpaid dues, fees, and other charges. Because Respondents raised other issues to the court of appeals that have not yet been addressed, we remand to the court of appeals for further proceedings consistent with this opinion.

I. Facts and Procedural History

In 1999, Ronnie and Jeanette Dennis purchased property on Callawassie Island. At that time, the Dennises joined a private club known as the Callawassie Island Club, and paid $31,000 to become "equity members." In their application, the Dennises agreed their membership would be governed by the "Plan for the Offering of Memberships in The Callawassie Island Club," which the developer of Callawassie Island created in 1994. The 1994 Plan included exhibits labeled as Bylaws and Rules. The 1994 Plan stated, "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." Similarly, the 1994 Bylaws stated, "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."

The 1994 Plan contemplated that the members would eventually take over the assets and operation of the Island Club. In 2001, the members of the Island Club formed The Callawassie Island Members Club, Inc. for this purpose. The Members Club assumed ownership and operations of all Island Club amenities, including a golf course and driving range, tennis courts, a swimming pool, and a clubhouse. The members of the Island Club—including the Dennises—received a membership certificate to the Members Club and continued to enjoy the benefits of membership. The Members Club established its own Bylaws, Plan, and Rules in 2001, each of which was amended several times over the years.

In 2010, the Dennises decided they no longer wanted to be in the Members Club, so they submitted a "letter of resignation" and stopped making all payments. Those payments included $634 per month for the membership, "special assessments" that totaled $100 per month, and yearly food and beverage minimums of $1,000. In 2011, the Members Club filed a breach of contract action against the Dennises, alleging the unambiguous terms of the membership documents required the Dennises to continue to pay their membership dues, fees, and other charges until

their membership is reissued. The Dennises denied any liability, alleging they were told by a Members Club manager that their maximum liability would be only four months of dues, because after four months of not paying, they would be expelled. The Dennises also alleged the membership arrangement violates the South Carolina Nonprofit Corporation Act. *See* S.C. Code Ann. §§ 33-31-101 to -1708 (2006 & Supp. 2017).

The Members Club filed a motion for summary judgment. The circuit court held a hearing and issued an order granting summary judgment. The court found the membership documents unambiguously require a resigned member to continue to pay dues, fees, and other charges until the membership is reissued. The court rejected the Dennises' arguments relating to the Nonprofit Corporation Act.

The Dennises appealed, and the court of appeals reversed on both issues. *The Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016). The court of appeals found there was "some ambiguity in the governing documents as to whether club members are liable for dues accruing after resignation." 417 S.C. at 616, 790 S.E.2d at 438. In addition, the court of appeals found the provisions of the documents that require the Dennises to continue to pay their membership dues after resignation violate section 33-31-620 of the Nonprofit Corporation Act. 417 S.C. at 618-19, 790 S.E.2d at 439. The court of appeals found it unnecessary to address the other issues raised on appeal, 417 S.C. at 619 n.5, 790 S.E.2d at 440 n.5, and remanded to the circuit court for trial, 417 S.C. at 619, 790 S.E.2d at 440. The Members Club filed a petition for a writ of certiorari, which we granted.

II. Discussion

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The questions before us in this appeal are questions of law. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) ("It is a question of law for the court whether the language of a contract is ambiguous."); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law . . . ."). We review questions of law de novo. 378 S.C. at 110, 662 S.E.2d at 41. Because the ambiguity of contracts and statutes are questions of law, we do not view the evidence

in any particular light. Rather, we read the contract or statute to determine if its meaning is clear and unambiguous. *See Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302 ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.").

A. The Membership Arrangement

We begin our analysis of this case with a general discussion of the membership arrangement and the membership documents that govern that arrangement. Three documents governed the Dennises' membership in the Island Club and the Members Club—the Bylaws, the Plan, and the Rules. The three documents reference each other and are intended to operate together. When the Dennises first joined the Island Club, the 1994 versions of those documents applied. However, these documents were amended several times over the years, as permitted by the Bylaws, the Plan, and the Rules.[1] The first amendments occurred when the club assets were transferred from the Island Club to the Members Club in 2001, at which point the Members Club enacted its own Plan, Bylaws, and Rules.[2] All three documents were further amended several times during the 2000s. There 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. When the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules.[3]

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[1] 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 the authority to "[a]dopt, alter, amend, or repeal the Rules governing use of the Club."

[2] There is no question the Dennises are contractually bound to the Members Club. 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.

[3] The dissent incorrectly states the Club's position as to which version of the governing documents control the relationship. Rather than taking a position as to

B. Ambiguity of the Membership Documents

The Dennises argue these documents are ambiguous as to whether they are obligated to continue to pay membership dues, fees, and other charges after resignation, and therefore the circuit court erred in granting summary judgment. We disagree.

Section 5.11 of the 2008 Plan, entitled "Payment of Dues and Other Charges by Resigning Members," 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*. Any unpaid dues, fees and other charges plus interest accrued under the then prevailing terms of the Rules will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.

This 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. There are no provisions in the 2009 Bylaws or 2009 Rules that contradict this. Also, although not dispositive of the issue, this language is nearly identical to

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which documents control, the Club has argued from the beginning it is entitled to summary judgment under any version of the documents. At the summary judgment hearing, the Club stated, "The documents have been clear since 1994 that you are obligated to continue to pay until it's reissued." The Club made the same point in the hearing on the Dennises' motion to reconsider the summary judgment. In its brief to the court of appeals, the Club stated, "At all times during the Dennises' membership, the applicable governing documents mandated that members remain obligated for dues, fees and assessments until such time as their membership was reissued." Finally, in its brief to this Court, the Club stated, "From 1994 through the present date, all of the governing documents . . . have plainly stated that members remain obligated to fulfill the commitments of membership in the Club until the reissuance of their membership."

the provisions in the 1994 Plan and Bylaws that relate to continued payment after resignation.

In finding there was ambiguity in the membership documents, the court of appeals focused on the fact the language in the 1994 Rules governing "termination" was different than the language in the 1994 Bylaws and 1994 Plan governing "resignation." 417 S.C. at 616, 790 S.E.2d at 438. In particular, the court of appeals referenced the 1994 Rules that 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 food and beverage minimums)." *Id.* In other words, the 1994 Rules do not contain any "until reissued" provision regarding termination, while the 1994 Bylaws and Plan do contain that language regarding resignation. The court of appeals found further ambiguity based on the fact the 2009 Rules "termination" provision did not define the term "unpaid." 417 S.C. at 617, 790 S.E.2d at 438.

The court of appeals was incorrect for several reasons. First, any difference between the language of a "termination" provision and a "resignation" provision is not sufficient to create an ambiguity. The documents provide that termination and resignation are two separate events. Ronnie Dennis unequivocally testified he resigned by submitting a "letter of resignation." Thus, the language in the "termination" provisions of the 1994 and 2009 Rules is irrelevant.

Second, even if we were to treat the "termination" provision and the "resignation" provision as governing the same event, there is no ambiguity. The 1994 Rules state, "All rules and regulations contained herein shall be subject to and controlled by the applicable provisions of the By-Laws." The 1994 Rules, therefore, are subject to the 1994 Bylaws, which unambiguously state that "dues, fees, and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club." In addition, the 2009 Rules, which were in place when the Dennises resigned, 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."

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." 417 S.C. at 617, 790 S.E.2d at 438. 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."

The plain language of the applicable provisions of the membership documents expresses the intent with which these provisions were written. *See* 11 *Williston on Contracts* § 32:7 (4th ed. 2012) ("In construing a contract, a court seeks to ascertain the meaning of the contract at the time and place of its execution."). The provisions of the membership documents that require members to continue to pay their membership dues until their membership is reissued are necessary to ensure the Club will remain viable in the future. When the Dennises entered into this membership agreement, they accepted the obligation to continue to pay their membership dues even under difficult circumstances, such as a financial downturn, a health crisis, or a sudden disinterest in being members in the Club. In doing so, however, they also received the benefit of knowing that if other members experienced those circumstances, the other members would likewise be obligated to continue to make their payments. Without these provisions, members could default on their payments whenever it became convenient to do so, and the non-defaulting members would be forced to absorb the costs. Therefore, these provisions are not "unfair" or "unreasonable," but rather are the very feature of the membership documents that enables the Dennises and other members to sustain a viable Members' Club on Callawassie Island, which in turn increases the value of their membership and their property.

The dissent argues that "taking the majority's view to its logical end, this is an obligation that could extend beyond a member's lifetime," and we have rendered a "harsh result." In response to the "logical end" argument, 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. The Dennises resigned on November 1, 2010, and the summary judgment order was filed on June 10, 2014. Therefore, 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.

In suggesting we have rendered a "harsh result"—a factual analysis we should not conduct in this case because the governing documents are unambiguous—the dissent ignores several important facts. First, the Dennises' membership in the Club—and thus their obligation to pay membership dues, fees, and other charges—is tied to their ownership of a lot and house on Callawassie Island. If the Dennises truly wish to avoid paying membership dues, they may sell their house. In addition, Callawassie Island is a private resort community developed around the property owners' use of the amenities paid for by these dues. The Dennises purchased their exclusive home there in 1999 for $590,000. They have chosen not to sell, but are instead attempting to keep their home on this resort island without having to pay a property owner's share of the amenities.

When reading unambiguous contracts, we should not normally concern ourselves with the fairness of the result required by the terms of the contract. The Dennises have not asked the circuit court, the court of appeals, nor this Court to decide the case based on any alleged harshness of having to pay dues. Because the dissent has made it an issue, however, we note our decision by no means renders a harsh result. Rather, this is precisely the result to which these sophisticated purchasers of a resort home agreed when they decided to purchase the property and abide by the terms of the governing documents.

C. Parol Evidence

The Dennises urge us to consider information they allege was conveyed to them orally at the time they joined the Island Club. In particular, the Dennises claim Ellen Padgett—who served as the membership coordinator for the club when the Dennises joined—told them that if they chose to stop making their membership payments, they would be liable only for four months of payments before they would be expelled from the club. At oral argument, the Dennises also noted the testimony of Lindsey Cooler, a subsequent membership coordinator, who testified at a deposition that the Members Club does not allow members to resign.

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. *See 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."); *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990) ("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."); *see also* 11 *Williston on Contracts* § 33:1 (4th ed. 2012) (stating the parol evidence rule "prohibits the admission of evidence of prior or contemporaneous oral agreements, or prior written agreements, whose effect is to add to, vary, modify, or contradict the terms of a writing which the parties intend to be a final, complete, and exclusive statement of their agreement."). Thus, under the circumstances of this case, Padgett's statement about expulsion and Cooler's statement about resignation are irrelevant.

The discussion about expulsion does, however, draw us to the terms of the membership documents that deal with expulsion, and the court of appeals' interpretation of those terms. Relying on the 2001 Rules, the court of appeals 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)." 417 S.C. at 617-18, 790 S.E.2d at 439.

We believe the court of appeals erred in finding this provision created an ambiguity. First, the 2001 Rules were not in effect when the Dennises resigned in 2010. Even if those Rules did apply, however, the Rules state, "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." 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.

Second, the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition. The 2009 Rules state, "The Board of Directors may suspend a member . . . from some or all club privileges for a period up to one year." The 2009 Rules further provide, "The Board of Directors *may* . . . request the resignation of any member of the club for cause deemed sufficient to the Board. If the member does not resign at the request of the Board, the member *may*

be expelled by the Board." We find there is no ambiguity as to expulsion from the Members Club.

D. Nonprofit Corporation Act

The Dennises argue the provisions in the membership documents that require them to continue to pay dues, fees, and other charges after resignation violate the Nonprofit Corporation Act. They rely specifically on subsection 33-31-620(a) of the Nonprofit Corporation Act, which provides, "A member may resign at any time." S.C. Code Ann. § 33-31-620(a) (2006). The Dennises contend the membership documents prevent them from actually "resigning" because they require them to continue to pay dues, fees, and other charges even after they are no longer in the Members Club. The court of appeals agreed, and found "[s]ection 33-31-620 obligates resigned members to pay any dues incurred *before* resignation," but "does not require resigned members to continue to pay any dues that accrue *after* resignation." 417 S.C. at 618, 790 S.E.2d at 439. The court of appeals explained that requiring a member to continue to pay dues that accrue after resignation "would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations."[4] *Id.*

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

[4] Although we disagree with the court of appeals' legal reasoning here, we do applaud the reference to the Eagles' hit *Hotel California*. *See* 417 S.C. at 618, 790 S.E.2d at 439.

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.

III. Conclusion

The court of appeals' opinion is **REVERSED** and the circuit court's order granting summary judgment is reinstated. We remand to the court of appeals to address the remaining issues.

KITTREDGE and JAMES, JJ., concur. HEARN, J., dissenting in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN: I respectfully dissent, as I believe the court of appeals was correct that the governing documents are ambiguous and the Club's interpretation violates the South Carolina Nonprofit Corporation Act (the Act).

The majority ostensibly permits the Dennises to resign from the Club, yet holds them responsible for the same obligations as an active member, including ever-accumulating dues and fees, only allowing them to escape that obligation in the unlikely event their membership is reissued. This harsh result is one I do not believe the governing documents require, and certainly not as a matter of law.

I. Controlling Documents

The majority contends the Club's 2008 Plan, 2009 Bylaws, and 2009 Rules unambiguously require a resigning member to continue to pay—potentially for that member's lifetime and beyond—dues, fees, and food and beverage minimums unless their membership is reissued. The majority's categorical reliance on these documents is stunning because neither the trial judge nor the Club has identified them as the controlling documents. In fact, the Club alleges in its complaint that only the contracts signed by the Dennises, which reference the 1994 plan, and provisions pertaining to the property owners' association—a separate entity—form the basis of the parties' contract. Importantly, in its motion for summary judgment, the Club specifically pointed to the 2001 plan, general club rules, and bylaws, making only a vague reference to "all amendments thereto." Certainly, as the moving party, the Club is required to identify with particularity which documents comprise the alleged contract. In my view, if the Club cannot do this—and heretofore in this litigation it has not—it is not entitled to summary judgment.

Even throughout this appeal, the Club has been inconsistent in identifying which documents form the contract between the parties, and has instead relied on different versions of the plan, bylaws, and rules at various stages. For example, in its brief to the court of appeals, the Club suggested *all* of the numerous documents together form the contract, and argued they must be read as a whole. However, in its petition for rehearing to the court of appeals, the Club argued the 1994 plan, bylaws, and club rules unambiguously entitle it to judgment as a matter of law. Thereafter, in its brief to this Court, the Club never stated with specificity which documents entitle it to judgment as a matter of law, instead merely asserting, "Several controlling documents, which have been amended and revised over the years, govern

membership in the Club." While the Club does delineate the order of primacy as "the CIPOA covenants, CIMC's By-Laws, its Membership Plan, and its General Club Rules," it never set forth which version of each subset controls. Thus, I disagree with the majority's pronouncement that the 2008 Plan, 2009 Bylaws, and 2009 Rules control when the Club itself has never argued that.[5]

II. Ambiguities

In addition to believing that the Club has not carried its burden to demonstrate what documents form the contract between these parties, I agree with the court of appeals that the documents are ambiguous on their face. To begin, under Rule 14.2.1 of the 2001 Rules, the rules upon which the Club premised its motion for summary judgment,

> 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 members shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums).

According to the Club, this provision is subordinate to the bylaws and membership plan, so even if the term "unpaid" only referred to unpaid dues at the time of resignation, the Dennises are still required to pay future dues. However, conspicuously absent from this provision is any language indicating the dues and charges continue to accrue after resignation "until the membership is reissued." The

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[5] Needless to say, I disagree with the majority that I have incorrectly stated the Club's position as to the controlling documents, but this disagreement merely underscores our differing views as to what a party must show to justify a grant of summary judgment. The Club never specifically argued the 2008 Plan, 2009 Bylaws, and 2009 Rules control, as the majority has found. Even if I were to accept the premise that the Club argued *all* of the various documents support its position, I would still disagree with deciding this case as a matter of law because I discern at least one substantial difference in the documents, i.e., whether a resigned member is responsible for all unpaid dues and charges or whether that responsibility extends to future dues. Although I have pointed out other ambiguities in the documents, this is a substantial one which I believe should preclude summary judgment.

2009 Rules contained a similar termination provision, and added language that the member remains liable "until the membership is sold." As the court of appeals noted, the governing documents do not define the term "unpaid," and viewing the evidence in the light most favorable to the Dennises as we are required to do, the clause is ambiguous because it is unclear whether a resigned member is liable for unpaid dues outstanding at the time of resignation or for dues accruing before and after resignation. Moreover, Rule 14.2.1 states that upon termination, the member "shall *remain* liable" for unpaid club accounts and dues. The use of the words "remain" and "unpaid" support the Dennises' interpretation that the provision refers to charges and dues which have already been accrued—not future charges—for a member cannot *remain* liable for dues and charges which have not yet come into existence. In my view, the better interpretation is to impose liability on the member for previously-incurred dues and charges, rather than *future* dues and charges in perpetuity; however, at the least, the two contrary constructions illustrate the ambiguity in this agreement between the parties. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."); *Cafe Associates, 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 Court; but where 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.").

Moreover, the Dennises point to the understanding conveyed to them by Ellen Padgett, the membership director when they joined, who assured them the maximum liability for unpaid dues would be four months. Even though Ms. Padgett confirmed that understanding in her deposition testimony, the majority completely discounts this testimony, reasoning that parol evidence to vary this purportedly unambiguous contract is inadmissible. Because I disagree that the documents are unambiguous, I believe this evidence is relevant and further supports the denial of summary judgment. *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997) ("[W]here a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties.").

Finally, I believe it is worth noting that according to the 1994 Plan, in place when the Dennises purchased their membership, members possessed the right to resign and upon reissuance of their membership, were entitled to receive the greater of their membership contribution or eighty percent of the contribution paid by the

new purchaser. While the 1994 Plan provided that an equity member remained obligated to pay dues to the Club until his equity membership was reissued, the Plan then explained the dues "will accrue against and be deducted from the amount to be paid to the resigned member upon the reissuance" of his membership. In line with this, the 1994 Bylaws state, "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." These provisions unequivocally state that any liability for unpaid dues and fees accrues against membership equity only, rather than on an ongoing basis against the member personally. Thus at the time the Dennises joined the Club, the extent of their continuing financial obligation upon resignation was their $31,000 initial contribution. Accordingly, even if I were to agree with the majority's assertion that the 1994 documents were supplanted by later amendments, a subsequent change in the bylaws and rules cannot strip the Dennises of this substantive right contained in the documents at the time of purchase, and create unlimited personal liability where none previously existed. Indeed, taking the majority's view to its logical end, this is an obligation that could extend beyond a member's lifetime.[6] Even if I were to accept the majority's view that the documents justify rendering judgment as a matter of law, at some point courts are called upon to step in to alleviate a provision contrary to public policy. *See Ward v. W. Oil Co.*, 387 S.C. 268, 275 n.5, 692 S.E.2d 516, 520 n.5 (2010) (refusing to enforce an illegal contract because to do so "would violate statutory law and, in turn, public policy"); *Branham v. Miller Elec. Co.*, 237 S.C. 540, 545, 118 S.E.2d 167, 170 (1961) ("Freedom of contract is subordinate to public policy; agreements that are contrary to public policy are illegal.").

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[6] The 2008 Plan provides upon a member's death, the equity membership automatically transfers to the decedent's heirs, who then have 120 days to accept it. If the heirs decline to accept the membership, it is deemed resigned and will be reissued in the same manner as any other resigned membership, thereby exposing the estate to liability for future dues. Specifically,

> [T]he estate of the deceased member shall be responsible for payment of all dues, fees and other Charges associated with the deceased member's Equity Membership from the date of the member's death until such time as the deceased member's residential unit or lot on Callawassie Island is transferred to another owner and such owner acquires an Equity Membership.

III. Nonprofit Corporation Act

I also disagree with the majority's interpretation of the Nonprofit Corporation Act. In my opinion, the majority's holding effectively eliminates any meaningful right of resignation, which the Act guarantees. Specifically, the Act provides,

> (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 (2006). Black's Law Dictionary defines "resign" as:

> 1. To formally announce one's decision to leave a job or an organization <to resign from the army>.
>
> 2. To give up or give back (an office, trust, appointment, etc.) to those by whom it was given; to surrender <the officer resigned his commission>.
>
> 3. *To abandon the use or enjoyment of; to give up any claim to* <the monk resigned his inheritance>.

Resign, *Black's Law Dictionary* (10th ed. 2014) (emphasis added).

While the Club strenuously asserts the Dennises were permitted to resign, I find this purported resignation meaningless because the Club continued to assess monthly membership dues, fees, and other charges, potentially throughout the Dennises' lifetimes.[7] Moreover, the Club's argument that it is justified in continuing

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[7] The majority blithely suggests the Dennises should sell their house in order to put an end to their monthly payments to the Club. However, even if the Dennises wanted to sell their home, that may be easier said than done. A news article that is included in the record reveals the Club's membership scheme has significantly chilled potential buyers. *See* Kelly Meyerhofer, *Callawassie Club ruling: Court sides with members, cited Eagles song*, THE BEAUFORT GAZETTE (August 5, 2016), https://www.islandpacket.com/news/local/community/beaufort-news/article93992207.html. Indeed, according to the article, one member could not sell her property for over two years, despite listing it for $1. As of July 2016, eight

to impose dues because the Dennises are still entitled to use all of the Club's amenities runs completely counter to the very concept of resigning. An individual who resigns relinquishes a claim, or "abandon[s] the use or enjoyment" thereof. *Id.* By continuing to assess membership dues, fees, and other charges, the Club prevents the Dennises from "giving up…[or] surrend[erring]" their responsibilities, something I believe is contrary to the Act. *Id.* By accepting the interpretation of the ambiguous terms offered by the Club, the majority conflates the meaning of an active and a resigned member because there is essentially no difference: both remain responsible for all conditions of membership.

I further disagree with the majority that requiring the Dennises to pay for dues accruing after resignation is consistent with the Act. I acknowledge the Official Comments to section 33-31-620 explain that a resigning member cannot shed complete liability for "obligations incurred or commitments made" prior to resignation. However, I believe the majority errs in classifying future dues and charges as "commitments made" before resignation because at the time the Dennises joined the Club, the 1994 Plan and Rules allowed members to resign without holding them personally liable for future dues and charges in perpetuity. The result reached by the majority not only deprives them of a remedy which they possessed at the time they joined the Club, but also one clearly granted to them by the Act, which is arguably contrary to public policy and akin to enforcing an illegal contract. *Ward*, 387 S.C. at 279, 692 S.E.2d at 522 (holding a contract involving gambling devices was illegal and therefore unenforceable); *White v. J.M. Brown Amusement Co.,* 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) ("The general rule, well established in South Carolina, is that 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."). Moreover, at least one court has interpreted this provision in the Act to mean something different than a monetary obligation because the section also uses the phrase "obligations

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lots were listed at less than $10,000 each, belying the use of the majority's description of Callawassie Island property as "exclusive." The majority also takes issue with my description of the result in this case being harsh, and opines that we should look no farther than the result in *this* case. However, it is not uncommon for appellate courts to consider what a decision may mean to other litigants in the future, and in view of the numerous lawsuits filed by the Club against its members resulting in a "Callawassie-specific body of case law," as noted by Dennises' counsel, I stand by my description of the majority's result being harsh.

incurred." *See Kidd Island Bay Water Users Co-op. Ass'n, Inc. v. Miller*, 38 P.3d 609, 611 (Idaho 2001) (noting under the Idaho Nonprofit Corporation Act, "commitments made" prior to resignation clearly means something other than a monetary obligation and applies to specific commitments by a member to the corporation).

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. Surely a member who peaceably resigns should not be placed in a worse pecuniary situation than a member who is suspended for violating Club rules and policies.

Therefore, in viewing the evidence in the light most favorable to the Dennises, I believe material issues of fact remain, rendering summary judgment improper. Accordingly, I would affirm the court of appeals and would remand to the trial court for further proceedings.

BEATTY, C.J., concurs.

The Supreme Court of South Carolina

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2016-002343

ORDER

After careful consideration of Respondents' petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 14, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2016-002343

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27841
Heard May 24, 2018 – Re-Filed November 14, 2018

REVERSED AND REMANDED

James Edward Bradley and S. Jahue Moore, both of Moore Taylor Law Firm, PA, of West Columbia, for Petitioners.

William W. Wilkins and Burl F. Williams, both of Nexsen Pruet, LLC, of Greenville, James Lynn Werner and Lawrence M. Hershon, both of Parker Poe Adams & Bernstein, LLP, and Pope D. Johnson, of Johnson & Barnett, LLP, all of Columbia, for Respondents.

JUSTICE KITTREDGE: This case involves the South Carolina Home Builders Self Insurers Fund (Fund), which was created by the Home Builders Association of South Carolina, Inc. "for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act." The Fund at issue here was established in September 1995 by an "Agreement and Declaration of Trust" (Agreement) between the Home Builders Association of South Carolina, Inc. (Association) and the Fund's Board of Trustees (Board). The underlying dispute arose after the Board announced plans to wind down the Fund and use the Fund's remaining assets to finance a new mutual insurance company. Petitioners, who were members of the Fund, disagreed with that decision and challenged the Board's authority to use the Fund's assets in such a way. The trial court twice dismissed Petitioners' suit, first on the basis that it involved the internal affairs of a trust and therefore should have been filed in probate court, then in a subsequent proceeding, on the basis that the lawsuit was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1), SCRCP.

On appeal, the court of appeals affirmed the dismissal of Petitioners' complaint, finding the trial court properly concluded (1) the Fund was not a trust; (2) Petitioners' claims were derivative in nature; and (3) Petitioners' complaint was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). We issued a writ of certiorari to review the court of appeals' decision. We reverse and remand, for Petitioners have satisfied the pleading requirements of Rule 23(b)(1), irrespective of whether the Fund is properly characterized as a trust.

I.

All employers conducting business in South Carolina must secure the payment of compensation to their injured employees. S.C. Code Ann. § 42-5-10 (2015). This may be accomplished either by purchasing workers' compensation liability insurance or by qualifying as a "self-insured" employer. To become self-insured, an employer must demonstrate to the Workers' Compensation Commission (Commission) that it has the "financial ability to pay directly the compensation in the amount and manner and when due as provided" by the Act. S.C. Code Ann. § 42-5-20 (2015).

The Act also allows employers to create a self-insured workers' compensation liability fund or "pool." *Id*. § 42-5-20 ("The [C]omission may, under such rules and regulations as it may prescribe, permit two or more employers in businesses of a similar nature to enter into agreements to pool their liabilities under the Workers' Compensation Law for the purpose of qualifying as self-insurers."). For a self-insurance fund to be approved, an officer of the proposed organization must submit to the Commission various documents, financial statements, and notably, "[a]n indemnity agreement which jointly and severally binds each member of the fund, signed by each proposed member." S.C. Code Ann. Regs. 67-1501(E)(1)–(8) (2012).[1] A self-insured fund must be approved by the Commission before it may begin operation. *Id*. § 67-1502 (2012).

The Agreement identified its purpose as:

> meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; *to form an overall self-insurers fund* pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation

[1] This requirement of joint and several liability for fund membership is not unique to South Carolina. *See infra* note 8.

> coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry.

(emphasis added).

In addition to establishing the authority of Board members and extensive guidelines for the administration of the Fund, the Agreement further provided that amendments to the Agreement may be made by a majority of the Board, "However, this Agreement may not be amended so as to change its purpose as set forth [above] *or to permit the diversion or application of any of the funds of the* [*Fund*] *for any purpose other than those specified herein*." (emphasis added). The Agreement also provided that "In the event of termination, the remaining funds available in the [Fund], after providing for all outstanding obligations, shall be distributed, through a formula determined by the [Board], to the participating members."

In the fall of 2003, the Board began discussing the idea of winding down the Fund and using the remaining monies on hand to capitalize a mutual insurance company, presumably to be comprised of the members of the Fund. Over the next several years, the Board continued to explore this "conversion" with the Association, the Commission, and the Department of Insurance (DOI); the two biggest challenges were identified as accumulating the $5 million necessary for the mutual insurance company's starting capital reserve and upgrading the Fund's existing computer systems to enable compliance with DOI's regulatory requirements.

In furtherance of the plan to create a mutual insurance company, the Board authorized expenditures from the Fund to purchase a custom computer software program; purchase office space costing $1.6 million; include "operations of the insurance company" in the scope of its directors and officers insurance coverage; and to subscribe to a national workers' compensation insurance-rating and data-collection bureau.

In May 2011, the Board notified the Commission it planned to cease accepting new members into the Fund effective July 1, 2011, and planned to withdraw the Fund from the self-insured program effective January 1, 2012. The Board also sought and received "approval" from the Commission to use $5 million in Fund assets to capitalize the reserve fund for the mutual insurance company; however, this

"approval" included no evaluation of whether this use of Fund monies complied with the terms of the Agreement. Indeed, the director of the self-insurance division of the Commission wrote to the Fund's administrator:

> In response to your request[,] we have approved the release of $5 million in non-pledged assets of the SC Home Builders Self-Insurers Fund to be used solely to capitalize the SC Builders Insurance Group, Inc., in conjunction with the closure of the self-insured [F]und. It is understood that the [F]und will cease accepting new members effective July 1, 2011[,] and will become no longer self-insured for workers' compensation in South Carolina effective January 1, 2012. *The outstanding liabilities of the* [*F*]*und at the time of closure, January 1, 2012, will remain the responsibility of the self-insured* [*F*]*und and its membership under joint and several liability*. The [F]und is required to provide a final audited financial statement following closure and will continue to provide the Commission[']s Form 11, Fund Quarterly Financial Report, until further notice. The [F]und will also be required to comply with Self-Insurance Tax and Second Injury Fund Assessment requirements following the [F]und[']s closure.

(emphasis added).

Petitioners are members of the Fund who, in February 2012, filed suit against the Fund, the Board, and the individual members of the Board (collectively, Respondents). Petitioners alleged breach of fiduciary duty; breach of trust; breach of contract; and breach of contract accompanied by a fraudulent act. Petitioners alleged that the Board committed *ultra vires* acts in breach of its fiduciary duties by removing more than $5 million from the Fund to establish the mutual insurance company—monies which should have been returned to the Fund's members under the terms of the Agreement. Petitioners also alleged that in addition to not receiving their share of the $5 million paid-in surplus, they have suffered or will individually suffer additional tax consequences and additional liability exposure to cover the Fund's obligations. Petitioners alleged that all improper expenditures should be reimbursed to the Fund to reduce the amounts for which Fund members might ultimately be jointly and severally liable. Additionally, Petitioners sought an accounting and a declaration that Fund assets could not be used for the purpose of establishing a mutual insurance company.

Respondents moved to dismiss the complaint, asserting eight separate bases for dismissal, including (1) the circuit court's lack of subject matter jurisdiction because the complaint involved the internal affairs of a trust, which fell within the exclusive jurisdiction of the probate court;[2] and (2) that the action was derivative in nature and did not meet the pleading requirements of Rule 23(b)(1), SCRCP.[3] Respondents' motions sought protection from responding to Petitioners' discovery requests during the pendency of the motions; incorporated by reference an affidavit of the Fund's administrator, to which twelve separate exhibits were attached; and stated "the Court will be asked, pursuant to Rule 12(b)(6), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment."

On September 4, 2012, a hearing was held on Respondents' motions to dismiss, during which the circuit court indicated it was inclined to dismiss the complaint based on the probate court's exclusive jurisdiction of the internal affairs of trusts and requested proposed orders. On January 30, 2013, after the hearing but before the circuit court issued its written order, Petitioners sent a written demand letter to Respondents' counsel itemizing specific requests:

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[2] *See* S.C. Code Ann. § 62-7-201(a) (Supp. 2017) (providing "the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts").

[3] Rule 23(b)(1) provides:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains . . . . The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and . . . the reasons for his failure to obtain the action or for not making the effort.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the [F]und:

1. The $5,000,000 which was taken out of the [F]und as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Builders Self Insurers Fund.

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.

3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of the Trustees.

4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

The letter also stated:

> [We] believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. [We] believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

> If your clients' position is any different, please let [us] know so we can discuss this matter. If [we] do not hear from you regarding this, [we] will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Respondents did not immediately respond.

On March 5, 2013, the circuit court issued a written order of dismissal finding "[i]t is clear from the documents submitted to the Court that this dispute concerns a trust" and concluding the circuit court therefore lacked subject matter jurisdiction.

Nevertheless, the dismissal was without prejudice, allowing Plaintiffs to refile their complaint in Probate Court and subsequently remove the re-filed matter back to circuit court.[4]

Still having received no response to their January 30, 2013 letter, Petitioners refiled their lawsuit in probate court on April 9, 2013, alleging the same causes of action and including a new paragraph, which stated:

> 8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:
>
> a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
>
> b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with

[4] *See* S.C. Code Ann. § 62-1-302(d)(4) ("Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: . . . (4) matters involving the internal or external affairs of trusts . . . .").

> counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

The re-filed suit was removed to circuit court.

Respondents moved to dismiss this second complaint, alleging, among other things, that the lawsuit *did not involve a trust* but rather was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1) and therefore should be dismissed; Respondents submitted an affidavit in support of their motion.[5]

Ultimately, the circuit court dismissed Petitioners' complaint, finding the Fund was an unincorporated association, not a trust, and that the complaint was therefore subject to Rule 23(b)(1). The circuit court held that the complaint failed to comply with Rule 23(b)(1). Petitioners then filed a Rule 59(e) motion, arguing the pre-suit demand was properly made and that the trial court's order elevated form over substance. In their motion, Petitioners also sought to supplement or amend their pleadings if more detailed pleadings were required. The circuit court denied this motion.

On appeal, the court of appeals affirmed, finding the circuit court properly concluded (1) the Fund was an unincorporated association and not a trust; (2) Petitioners' claims were derivative in nature; and (3) Petitioners' complaint was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). This Court issued a writ of certiorari to review the court of appeals' decision.

II.

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). "In

[5] Respondents also alleged Petitioners lacked standing; that the contract claims failed because Petitioners were not parties to the Agreement; and that the complaint failed to meet the heightened pleading standard of Rule 9(b), SCRCP, as to the breach of contract accompanied by a fraudulent act claim.

considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id*. (citation omitted). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id*. at 395, 645 S.E.2d at 247–48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Id*. at 395, 645 S.E.2d at 248 (citation omitted).

In considering a motion for dismissal under Rule 12(b)(6), if "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 12(b), SCRCP; *see also, e.g*., *Brown v. James*, 389 S.C. 41, 47 n.5, 697 S.E.2d 604, 607 n.5 (Ct. App. 2010) (citations omitted) (finding that the trial court's consideration of matters beyond the pleadings converted the motion to dismiss into a motion for summary judgment). Because the parties submitted matters outside the pleadings that were not excluded by the court and certain factual findings in the circuit court's order exceeded the scope of the facts alleged in the complaint, we find this motion to dismiss was converted into a motion for summary judgment and we review it as such.

"[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[, then] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting *Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)).

A. Unincorporated Association or Trust

The court of appeals found that although the Agreement, by its terms, purported to create a trust, the Fund possessed many characteristics typically associated with business corporations, and thus, the Fund was properly considered an unincorporated association for the purposes of the pre-suit demand and pleading requirements of Rule 23. Petitioners argue the court of appeals erred in categorizing the Fund as anything other than precisely what it purports to be—a trust—and therefore, Petitioners argue the pre-suit demand and pleading requirements of Rule 23(b)(1) are inapplicable. Petitioners alternatively assert that in any event they satisfied the pleading requirements of Rule 23(b)(1). On this latter point, we agree with Petitioners. Nevertheless, we address the dispute over the proper characterization of the Agreement and its impact on the applicability of Rule 23(b)(1).

In construing a trust agreement, "a court must resort first to the language of the instrument, and if the language is perfectly plain and capable of legal construction, the language determines the form and effect of the instrument." *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App. 1985) (citing *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (1978)). "If the intention of the settlor appears on the face of the agreement, then the court will effectuate it, unless it is in conflict with principles of law." *Id*. (citing *Citizens & S. Nat'l Bank of S.C. v. Auman*, 259 S.C. 263, 191 S.E.2d 511 (1972)).

Despite this black-letter law, we acknowledge the truth in the court of appeals' observation that the Fund is, in many ways, dissimilar to a garden-variety trust. *Patterson*, 418 S.C. at 78–80, 791 S.E.2d at 301–02. Nevertheless, that dissimilarity is not dispositive. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462–66 (1980) (rejecting an argument that a business trust should be treated as an unincorporated association simply because it resembled a business association in several aspects, finding instead that the entity was an express trust, just as it purported to be, and that there was no basis for disregarding the trust's legal form). But many states permit (indeed, one state even requires[6]) workers' compensation

[6] *See* 77 Pa. Stat. and Cons. Stat. Ann. § 1036.2(b)(8) (West 2018) (allowing a group of employers to create a workers' compensation self-insured fund if the group "[e]xecutes a trust agreement under which each member agrees to jointly

self-insured funds to be organized as trusts.[7] Also, it is common in many other states for fund participants to be subject to joint and several liability.[8] The

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and severally assume and discharge the liabilities arising under this act").

[7] *See, e.g.*, Ariz. Rev. Stat. Ann. § 23-961.01(A) (2018) ("Two or more employers, each of whom are engaged in similar industries, may enter into contracts to establish a workers' compensation pool to provide for the payment and administration of workers' compensation claims . . . [b]y the execution of a trust agreement . . . ."); Ala. Admin. Code r. 480-5-3-.08(9) (2018) ("Each Fund shall have a set of Bylaws or shall enter into a trust agreement which shall govern the operation of the Fund."); 099-00-1 Ark. Code R. § 099.05(III)(A) (requiring a workers compensation self-insured group "to be administered under the direction of an elected board of trustees"); Ill. Admin. Code tit. 50, § 575.110 (2018) (defining the governing body of a workers' compensation self-insured fund as "any member of the pool's Board of Trustees, if the pool is a trust, or any member of the pool's Board of Directors, if the pool is any other type of entity"); 211 Mass. Code Regs. 67.06(2)(b)(2) (2018) (requiring self-insured group applicants to submit " a copy of the articles of association, trust agreement, or articles of organization"); Mich. Admin. Code r. 408.43d (2018) (requiring workers' compensation self-insured funds "to be administered under the direction of an elected board of trustees and to provide workers' compensation coverage for a group of private employers in the same industry or for public employers of the same type of unit"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(1)(A)(13) (2018) (defining a workers compensation self-insured trust as "[a] combination of persons, businesses, firms, or corporations bound together to secure, jointly and severally, workers' compensation liability by holding the individual interests of each subservient to a common authority for the common interests of all. This shall also include the written instrument that creates the trust."); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(a)(1) (2018) (requiring workers' compensation self-insured fund applicants to submit "[t]he articles of incorporation, trust agreement, or any other similar document from which the pool is formed").

[8] *See* Ga. Code Ann. § 34-9-151(9) (2018) (requiring workers' compensation self-insured fund agreements to include a provision "through which each member agrees to assume and discharge, jointly and severally, any and all liability under this article relating to or arising out of the operations of the fund"); Tex. Lab. Code Ann. § 407A.056(a) (requiring applicants for a certificate of approval to operate a

workers' compensation self-insured fund to submit an indemnity agreement that "jointly and severally bind[s] the group and each employer who is a member of the group to meet the workers' compensation obligations of each member"); Ala. Admin. Code r. 480-5-3-.08(6) (2018) ("All participants shall sign Participation Agreements providing for joint and several liability for claims against the Fund during the coverage periods of their participation."); 099-00-1 Ark. Code R. § 099.05(III)(A)(1)(a) (2018) (requiring all fund participants to execute "[a]n indemnity agreement jointly and severally binding the group and each member thereof to comply with the provisions of the Arkansas Workers' Compensation laws and Rules and Regulations of the Commission"); Cal. Code Regs. tit. 8, § 15479(a)–(b)(1) (2018) (requiring each member of a group self-insurer to execute an "agreement under which each member of a group self-insurer agrees to assume and discharge, jointly and severally, any compensation liability under Labor Code Section 3700-3705 of any and all other employers that are parties to the group self-insurer indemnity agreement"); Colo. Code Regs. § 702-2:2-2-2(7) (2018) (requiring pool agreements to "jointly and severally bind each member to pay claims and comply with all provisions of the workers' compensation laws of the State of Colorado"); Fla. Admin. Code Ann. r. 69O-190.068(1) (2018) ("Each self-insurers fund member shall enter into an indemnity agreement jointly and severally binding the self-insurers fund and each member thereof to comply with the provisions of the Florida Workers' Compensation Law"); La. Admin. Code tit. 37, § 1111(A) (2018) ("Each self-insurance fund member shall enter into an indemnity agreement jointly and severally binding the self-insurance fund and each member thereof to comply with the provisions of the applicable Louisiana Revised Statutes and rules, regulations, and directives of the Department of Insurance."); 02-031-250 Me. Code R. § III(B)(2)(d) (2018) (requiring members of workers' compensation group self-insured plans to submit an executed indemnity agreement); Md. Code Regs. 31.08.09.08(C)(13) (2018) (requiring a workers compensation self-insured fund to submit "[c]opies of executed agreements with each member assuming joint and several liability for obligations of the group in the event of insolvency of the Self-Insurers' Guaranty Fund"); 211 Mass. Code Regs. 67.06(2)(b)(17) (2018) (requiring that all members of a workers' compensation self-insured group are jointly and severally liable for all workers' compensation obligations); Mich. Admin. Code r. 408.43g(5)(j) (2018) (requiring workers' compensation group self-insured fund records to include "[i]ndividual membership applications containing signed indemnity agreements"); Minn. r. 2780.2800(3) (2018) (providing a workers' compensation self-insured group "shall not accept any

liability for a new member until a signed indemnity agreement in the form set forth in part 2780.9920 has been completed by that new member and filed with the commissioner"); 20-1 Miss. Code R. § 1.7(B)(2)(b)(8) (conditioning approval of a workers compensation self-insured fund upon the workers compensation commission's receipt of "[a]n indemnity agreement jointly and severally binding the group self-insurer and each member thereof to meet the workers' compensation obligations of each member"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(5)(A)(1) (2018) (requiring that workers' compensation self-insured trusts include in the trust agreement "an indemnity clause which jointly and severally binds the group and each member thereof for payment of benefits to employees of members of the group and all other liability pursuant to Chapter 287, RSMo"); Mont. Admin. R. 24.29.621(1)(c)(i) (2018) (requiring members of a workers compensation self-insured group to execute an "agreement to accept joint and several liability for all workers' compensation benefits and occupational disease obligations incurred by the employer group"); N.J. Admin. Code § 11:15-1.3(b)(5) (2018) (requiring workers' compensation self-insured groups to obtain "[a]n indemnity and trust agreement, in a form satisfactory to the Commissioner, jointly and severally binding the group and each member thereof to meet the workers' compensation obligations of each member, and establishing a trust for the benefit of persons qualifying to receive workers' compensation awards or payments from employers participating in the group"); N.Y. Comp. Codes R. & Regs. tit. 12, § 317.9(b)(7) (2018) (allowing a group self-insurer "to immediately levy an assessment upon the group members or take such other action as may be appropriate in order to make up the deficiency"); Okla. Admin. Code 810:25-11-15(a)(1) (2018) (requiring "[e]very member of a group self-insurance association shall execute an indemnity agreement . . . under which each member agrees to assume and discharge, jointly and severally, liability under the AWCA of any and all employers party to such agreement"); Or. Admin. R. 436-050-0270(1)(g) (2018) (requiring employers applying for certification as a self-insured employer group to submit a "'Group Self-Insured Indemnity Agreement' or another form authorized by the director, that jointly and severally binds each member for the payment of any compensation and moneys due to the director by the group or any member of the group"); 34 Pa. Code § 125.133(c)(8)(i) (2018) (requiring workers' compensation group self-insured applicants to submit to the workers compensation bureau the group's "proposed trust agreement and bylaws, which shall include: (i) A pledge that each member will be jointly and severally liable for the expenses and other obligations of the fund and for each other member's workers' compensation liability which is

presence of joint and several liability among Fund members does not necessarily undermine a trust's identity as such; rather it is a function of the overriding policy concern of ensuring injured workers' claims are paid.

The Agreement resembles a trust in some respects, and it does not resemble a trust in other respects. However, the question of whether the Fund is a trust need not be resolved, for we elect to follow the precedent from other jurisdictions applying Rule 23(b)(1) to all actions which are derivative in nature, even if the entity in question is a trust. *See, e.g*., *Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.*, 46 N.Y.S.3d 246, 255 (App. Div. 2017) (finding the "analysis applicable to derivative actions against corporations has been held to apply to trusts" and finding that the joint and several liability of workers' compensation group self-insured trust members "does not require us to set aside the legal distinction [] between derivative and direct claims"); *see also In re Mortg. & Realty Tr. Sec. Litig.*, 787 F. Supp. 84, 86 (E.D. Pa. 1991) (applying the Rule 23 demand requirement to a derivative action against the board of trustees of a real estate investment trust). The key inquiry is whether the underlying challenge is properly characterized as derivative in nature. Accordingly, the applicability of the pre-suit demand and

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incurred while it is a member, including liability for assessments on claims incurred during a member's membership but not issued until after it has terminated membership"); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(e)(2) (2018) (requiring workers' compensation self-insured pool applicants to submit for approval "[i]ndemnity agreements between the pool and each member establishing each member's joint and several liability to the pool for all expenses, liabilities, and claims asserted against the pool by any person or entity"); 14 Va. Admin. Code § 5-370-40(A)(1) (2018) (providing "[a]n application submitted by a group self-insurance association shall be accompanied by the following items . . . 1. A copy of the members' indemnity agreement and power of attorney required by 14 VAC 5-370-120 binding the association and each member of the association, jointly and severally, to comply with the provisions of the Act and copies of any other governing instruments of the proposed group self-insurance association"); Wash. Admin. Code § 296-15-024(3)(a)(v) (2018) (requiring members of a workers' compensation group self-insurance fund to submit "[a]n indemnity agreement jointly and severally binding the group and each member to comply with the provisions of Title 51 RCW").

pleading requirements of Rule 23(b)(1) are to be determined not on the basis of whether the entity involved is or is not a trust, but rather, whether the claims at issue are direct or derivative. We turn now to that issue.

B. Direct or Derivative

Petitioners argue that the court of appeals erred in finding all of their claims were derivative in nature. Specifically, Petitioners allege that based on the joint and several liability the Act imposes upon members of the Fund, "the injury is to each beneficiary who must, individually, make up for any shortfall in trust assets." Based on this individual liability exposure, Petitioners argue their actions are direct rather than derivative. We agree in part and disagree in part, and we find Petitioners' complaint includes both direct and derivative claims.

"An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (citation omitted). An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action. *Id*. (citation omitted). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." *Id*. (citation omitted).

"If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder." *Id.* (quoting *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 703–04 (Ct. App. 1988)). "Of course, a suit based on the misconduct can be brought by the individual stockholder." *Id*. at 49, 557 S.E2d at 684–85 (quoting *Ward*, 295 S.C at 221, 367 S.E.2d at 703–04). "It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*, or as their interests were submerged in the corporation whose assets were thus dissipated." *Id*. at 49, 557 S.E.2d at 685 (quoting *Stewart v. Ficken*, 151 S.C. 424, 427, 149 S.E. 164, 165 (1929)).

"Specifically, to distinguish a derivative claim from a direct one, the court considers: (1) who suffered the alleged harm, the corporation or the suing stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually." 19 Am. Jur. 2d *Corporations* § 1923 (2015). Direct and derivative claims may be brought simultaneously. 19 Am. Jur. 2d *Corporations* § 1922 (2015). "When determining

whether a claim is derivative or direct, some injuries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually." *Id*. (citing *Carsanaro v. Bloodhound Techs., Inc*., 65 A.3d 618 (Del. Ch. 2013)); *see also Horizon House-Microwave, Inc. v. Bazzy*, 486 N.E.2d 70, 74 (Mass. App. Ct. 1985) (observing a shareholder may pursue both direct and derivative claims in a single action).

In evaluating Petitioners' claims in the underlying complaint, the court of appeals found:

> In the instant case, [Petitioners] allege the Board's decision to remove $5 million from the Fund harmed the Fund's ability to adequately cover its risks. Thus, the action is premised on the alleged harm to the overall Fund, not to individual members. Accordingly, we find the circuit court correctly held [Petitioners'] claims were derivative and subject to the pleading requirements of Rule 23(b)(1).

Patterson, 418 S.C. at 81, 791 S.E.2d at 302 (citations omitted).

While we agree with the court of appeals that Petitioners' claim that the removal of the $5 million impacted the Fund's ability to cover its risk is derivative in nature, this claim is by no means the *only* claim asserted in the complaint. Indeed, the court of appeals overlooked various other causes of action and forms of relief requested in the complaint.

Though discovery has not been conducted, one or more of Petitioners' additional claims may be direct in nature. We thus find the court of appeals erred in concluding that the complaint alleged *only* derivative claims. *See Accredited Aides Plus*, 46 N.Y.S.3d at 255 (finding certain claims by members of a workers' compensation group self-insured trust were direct, not derivative, in nature and observing that "just as the trust's deficits are eventually passed through to employer members as assessments by the Board, any recovery by the Board upon its claims on behalf of the trust will benefit the employer members by reducing the trust's deficit and the employer members' corresponding liabilities"). To the extent the court of appeals affirmed the dismissal of Petitioners' direct claims based on Rule 23, this was error.

Although we believe Petitioners' complaint may involve some direct claims, we nevertheless believe the court of appeals correctly found that certain claims were derivative in nature. Accordingly we turn now to what we view as the critical question before the Court—whether Petitioners' complaint met the pleading requirements of Rule 23 (b)(1).

C. Compliance with Rule 23(b)(1)

Lastly, Petitioners argue that even assuming Rule 23(b)(1) applies to their claims, the court of appeals erred in finding the requirements of that rule were not satisfied. We agree, for even if all claims are derivative and Rule 23(b)(1) applies, the demand and pleading requirements of Rule 23(b)(1) have been met.

Both the trial court and the court of appeals found evaluation of whether Petitioners' complaint complied with Rule 23(b)(1) was governed by the court of appeals decision in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). In *Whittle*, three shareholders of Carolina First Corporation brought a derivative action seeking to recover disproportionate stock bonuses paid to three executives. *Id*. at 180, 539 S.E.2d at 405. The complaint included general allegations that the plaintiffs made pre-suit demands upon the Board of Directors; however, the complaint stated "merely that the plaintiffs demanded 'certain information' and 'certain actions.'" *Id*. at 189, 539 S.E.2d at 409. The court of appeals concluded these allegations were not sufficiently particularized to satisfy the requirements of Rule 23(b)(1), holding "[a]t a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Id*. (citation omitted). The court of appeals noted that although the plaintiffs submitted copies of letters purporting to meet the pre-suit demand requirement, the letters could not be considered because they were not attached to the complaint; and in any event, the letters did not satisfy the pleading requirements of Rule 23(b)(1). *Id.* at 189–90, 539 S.E.2d at 410. Therefore, the court of appeals concluded the trial court did not err in refusing to consider them. *Id*. at 190, 539 S.E.2d at 410.

The facts of this case are distinguishable from those in *Whittle*. Here, although the January 30, 2013 pre-suit demand letter was not expressly incorporated by reference into the complaint, unlike in *Whittle*, the January 30, 2013 letter *does* constitute an adequate demand in this case. Another issue here is Petitioners' failure to include the magic phrase "which is incorporated herein by reference" in

their discussion of the letter in paragraph 8 of their complaint. Indeed, the allegations concerning the pre-suit demand in Petitioners' complaint are appreciably more detailed than those in *Whittle*. And certainly, when the January 30, 2013 letter is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied.[9] The trial court simply found it was precluded from looking at the January 30, 2013 letter, which was error.

Moreover, in light of the parties' submissions and the trial court's willingness to consider multiple affidavits and documents outside the four corners of the complaint, we reject an approach that approves of a trial court's consideration of everything *except* the pre-suit demand letter that was actually sent and received. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (explaining a complaint may be "deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint" (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004))); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002) (explaining that "when a

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[9] We reject Respondents' contention that such a finding eviscerates Rule 23(b)(1) and the business judgment rule. Petitioners' primary allegation is that the trustees failed to adhere to the absolute terms of a written contract—the Agreement—which provides: (1) "[T]his Agreement may not be amended so as to change its purpose as set forth [above] *or to permit the diversion of application of any of the funds of the* [*Fund*] *for any purpose other than those specified herein*"; and (2) "*In the event of termination, the remaining funds available in the* [*Fund*], after providing for all outstanding obligations, *shall be distributed*, through a formula determined by the [Board], *to the participating members*." (emphasis added); *cf. Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016) ("A corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto."). As a result, the gravamen of Petitioners' complaint is that *the Fund* failed to honor the non-discretionary terms of a written contract with its members, not that *the trustees* failed to exercise good faith, prudent judgment in the best interst of the corporate entity. While the latter might have implicated the business judgment rule, the former certainly does not. Our opinion today should in no way be read to denigrate the important role the business judgment rule plays in limiting *post hoc* secondguessing of the decisionmaking and conduct of corporate managers.

district court considers certain extra-pleading materials and excludes others, it risks depriving the parties of a fair adjudication of the claims by examining an

incomplete record"). Accordingly, we reverse the dismissal of Petitioners' complaint on the basis that it failed to comply with Rule 23(b)(1), SCRCP.

III.

For the foregoing reasons, we reverse the decision of the court of appeals and remand this case for further proceedings.

REVERSED AND REMANDED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Brian DeQuincey Newman, Respondent.

Appellate Case No. 2018-001654

Opinion No. 27845
Submitted October 23, 2018 – Filed November 14, 2018

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Joseph P. Turner, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Peter Demos Protopapas, of Rikard & Protopapas, LLC, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension for six months, retroactive to respondent's interim suspension.[1] We accept the Agreement and suspend respondent from the practice of law in this state for six months, retroactive to respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension by the Court on January 8, 2016. *In re Newman*, 415 S.C. 239, 781 S.E.2d 355 (2016).

Facts

Respondent failed to file state income tax returns and pay state taxes for the years 2012 and 2013. In 2016, respondent pled guilty to two counts of failing to file income tax returns and failing to pay state income taxes. Respondent was sentenced to one year, suspended to two years' probation, which was reduced to six months' probation based upon respondent having made full restitution. Respondent has completed his probation.

Respondent received a fee and deposited it into his operating account. Respondent treated the money as an advance fee pursuant to a written fee agreement with his client. Respondent acknowledges his written fee agreement neither informed the client of their right to terminate the lawyer-client relationship and discharge respondent nor informed the client they may be entitled to a refund of all or a portion of the fee if the agreed-upon legal services were not provided.

Finally, respondent acknowledges he failed to adequately maintain his financial records as required by the financial recordkeeping requirements of Rule 417, SCACR.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct contained in Rule 407, SCACR: Rule 1.5(f)(4), (5) (a lawyer may charge an advance fee and treat the fee as immediately earned if the lawyer and client agree in advance in a written fee agreement that notifies the client he or she has the right to terminate the lawyer-client relationship and discharge the lawyer, and notifies the client he or she may be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other aspects); Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude); and Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent further admits violating Rule 417, SCACR (financial recorded keeping).

Finally, respondent admits the allegations contained in the Agreement constitute grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR ("It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers . . . .").

Conclusion

We find respondent's misconduct warrants a definite suspension from the practice of law in this state for six months retroactive to January 8, 2016, the date of respondent's interim suspension. Accordingly, we accept the Agreement and suspend respondent for a period of six months, retroactive to his earlier interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Additionally, prior to seeking reinstatement, respondent must demonstrate his compliance with Rule 32, RLDE, Rule 413, SCACR, including completion of Legal Ethics and Practice Program Ethics School within the preceding year.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Levern Pyatt, Respondent.

Appellate Case No. 2018-001666

Opinion No. 27846
Submitted October 25, 2018 – Filed November 14, 2018

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Kelly B. Arnold, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

William Levern Pyatt, of Columbia, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

In November 2017, respondent's bank reported respondent had a check presented against insufficient funds on his real estate trust account (trust account). Respondent explained he forgot to tell his office manager to make a deposit to the trust account when respondent was out of town, resulting in a disbursement before

deposit. Respondent also admits he did not reconcile the trust account as required by Rule 1.15, RPC, Rule 407, SCACR (safekeeping of property of clients or third parties) and Rule 417, SCACR (financial recordkeeping) and was, therefore, unable to provide reconciliation reports during the Commission's investigation. However, to ensure his future compliance with both rules respondent has retained the services of a bookkeeper and a certified public accountant and has implemented electronic accounting software for the trust account.

Law

Respondent admits that by his conduct he has violated Rule 1.15, RPC, Rule 407, SCACR (safekeeping of the property of clients or third parties), and Rule 417, SCACR (financial recordkeeping). Respondent also admits his conduct constitutes grounds for discipline pursuant Rule 7(a)(1), RLDE, Rule 413, SCACR ("It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers . . . .").

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Within thirty days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Within nine months of the date of this order, respondent shall complete Legal Ethics and Practice Program Trust Account School and Law Office Management School. Finally, for a period of two years following the date of this order, respondent shall submit his monthly bank statement, reconciliation report, and trial balance report for his trust account to the Commission.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Chesterfield County. Effective December 4, 2018, all filings in all common pleas cases commenced or pending in Chesterfield County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Berkeley	Calhoun
Cherokee	Chester	Clarendon	Colleton
Dorchester	Edgefield	Fairfield	Florence
Georgetown	Greenville	Greenwood	Hampton
Horry	Jasper	Kershaw	Lancaster
Laurens	Lee	Lexington	Marion
McCormick	Newberry	Oconee	Orangeburg
Pickens	Richland	Saluda	Spartanburg
Sumter	Union	Williamsburg	York

Chesterfield - Effective December 4, 2018

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
November 8, 2018

The Supreme Court of South Carolina

Re: Amendments to Rule 401, South Carolina Appellate Court Rules

Appellate Case No. 2016-001445

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution, Rule 401 of the South Carolina Appellate Court Rules is amended as set forth in the attachment to this Order.

These amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 14, 2018

RULE 401
STUDENT PRACTICE RULE

(a) This Rule is adopted solely in aid of the clinical legal education programs at the University of South Carolina School of Law and the Charleston School of Law.

(b) An eligible law student may appear in any court or before any administrative tribunal on behalf of any indigent person, with that person's written consent, or on behalf of the State or any of its departments, agencies, institutions, or political subdivisions, with the written approval of the Attorney General. If referred to the clinical legal education program by a state or federal court, department, agency, institution, or other department of the University of South Carolina School of Law or the Charleston School of Law, an eligible law student may also appear in a court or before an administrative tribunal on behalf of a non-indigent person or non-profit organization with the written consent of the person or the written approval of the organization's governing body or executive officer. The consent or approval shall be filed in the record of the case and shall be brought to the attention of the judge or the presiding officer. In all cases, a supervising lawyer is required to be personally present throughout the proceeding.

(c) An eligible law student may engage in other activities, under a lawyer's general supervision, but outside the lawyer's presence, including:

> **(1)** preparation of the pleadings, briefs and other legal documents to be approved and signed by the supervising lawyer;
>
> **(2)** assisting indigent inmates of correctional institutions in preparing applications and supporting documents for post-conviction relief. If there is an attorney of record in the matter, all such assistance must be supervised by that attorney and all documents submitted to the court on behalf of the inmate must be signed by the attorney. Solicitation of representation of indigent inmates shall be a violation of this Rule;
>
> **(3)** mediate a dispute in a court annexed mediation program; provided the eligible law student has successfully completed a 40 hour mediation training program approved by the Board of Arbitrator and Mediator Certification of the Supreme Court's Commission on Alternative Dispute Resolution, and provided the eligible law student is supervised on-site by an attorney who is

licensed to practice law in South Carolina and holds a current certification in mediation from the Board of Arbitrator and Mediator Certification;

(4) providing to any indigent person or to any non-profit organization legal services not otherwise prohibited under this Rule, including legal services not directly related to a litigation matter, with the written consent of the indigent person or the written approval of the organization's governing body or executive officer. All such assistance must be supervised by an attorney who is licensed to practice law in South Carolina.

(d) In order to be eligible to make an appearance or otherwise participate in a legal clinic pursuant to this Rule, a law student must:

(1) be enrolled in the University of South Carolina School of Law or the Charleston School of Law;

(2) have successfully completed not less than 50% of the total number of credit hours required for graduation with a law degree and have completed a course in Professional Responsibility. Students appearing in court under this Rule must have also completed a course in Evidence;

(3) be certified by the Dean of the respective School of Law as being of good character and competent legal ability, and as being currently enrolled in a clinical course. The certification shall be filed with the Clerk of the Supreme Court and shall remain in effect for twenty-seven (27) months or until the announcement of the results of the first Bar examination following the student's graduation, whichever is earlier. The certification of students who pass the Bar examination shall remain in effect until they are admitted to the Bar. The certification may be withdrawn by the respective Dean at any time upon written notice to the Clerk or may be terminated by the Supreme Court without notice or hearing and without any showing of cause;

(4) neither ask for nor receive any compensation or remuneration of any kind for services performed pursuant to this Rule. Nothing in this provision shall be interpreted to prevent the law student from receiving course credit from the respective School of Law for his participation in the clinical programs, or to preclude the clinical programs from seeking attorney's fees where appropriate; and

(5) certify in writing that the student is familiar with, and will be governed by the Rules of Professional Conduct adopted by the Supreme Court. Any student who violates the Rules of Professional Conduct or fails to abide by the conditions of this Rule shall be subject to disciplinary action by the Supreme Court.

(e) The supervising lawyer shall be approved by the Dean of the respective School of Law and shall assume personal professional responsibility for the student's guidance and for supervising the quality of the student's work.