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IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

GRAND HARBOR GOLF & BEACH CLUB, INC.,
a Florida not-for-profit corporation,

Appellant,

Case No. 4D23-1378
L.T. Case No. 2021-CA-000308

v.

GRAND HARBOR GOLF CLUB,
LLC, a Delaware limited liability
company, ICAHN ENTERPRISES
HOLDINGS, L.P., a Delaware limited
partnership, GHG ASSET MANAGEMENT,
LLC, a Delaware limited liability company,
VERO BEACH ACQUISITION, LLC, a
Delaware limited liability company, GH VERO
BEACH DEVELOPMENT, LLC, a Delaware
limited liability company, IEH GH MANAGEMENT,
a Delaware limited liability company, AREP
FLORIDA HOLDINGS, LLC, a Delaware limited
liability company, and CHRISTOPHER CARD,
an individual,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This summary-judgment appeal involving a country club in Indian River County presents a question of contract interpretation: does the contractual duty to maintain a property "in good working order, ordinary wear and tear excepted," include the obligation to replace assets that can no longer be repaired? (R. 71). The trial court said no. (R. 6312-15). But as we explain, the trial court erred in distinguishing on-point Florida precedent and in relying instead on one out-of-state case to reach a conclusion at odds with the contract. *See infra* at pp. 17-21.

The trial court's error was particularly acute given the additional contractual obligation for the prior owner to operate this country club facility, for the benefit of its members, "in a manner comparable to other similar country club facilities in the State of Florida." (R. 73). After the owner failed to act as a steward for the members and let the club become rundown and in disrepair, the club's members fled in droves to those other facilities—a surefire sign that the club was not being competitively kept "in good working order." (R. 38, 4636). This Court should reverse so the club is not on the hook for the prior owner's failure to properly maintain it.

The club is formed, and the developer accepts the obligation to operate and maintain it until turned over to the members.

In the late 1980s, a Vero Beach developer partnered with legendary golf-course architects Pete Dye and Joe Lee to build a world-class country club facility. (R. 70, 3193). Nestled in a private master-planned community along the Indian River, Appellant Grand Harbor Golf & Beach Club boasts two 18-hole championship golf courses, a clubhouse, a pool complex, marina access, an oceanfront beach club, and a tennis complex. (R. 35, 70-71, 75, 3239).

As is common in private communities like this, the developer-owner and the club entered into a turnover agreement, known as the "Agreement to Sell," in which the owner agreed to a future purchase of the property by the club and a turnover of the management and control of the club to its members. (R. 70). The turnover date was to be determined by the sale of a specified number of equity memberships in the club. (R. 73, 6309). In the meantime, the Agreement to Sell set forth the parties' obligations to each other before turnover. (R. 35-36, 70-79).

The club retained a beneficial interest in the property and enjoyed full rights to the facilities for its members. (R. 35, 70). The

owner, meanwhile, held legal title to the club and exercised exclusive control over the club's management, finances, and operations. (R. 36, 70-79). The owner appointed every officer, manager, and member of the club's board of governors. (R. 36, 73). Initial capital contributions, in the tens of millions of dollars, went to the owner as the future purchase price for the club. (R. 36, 72). The owner also profited from the sale of new equity memberships, collected all dues and other revenue of the club, and was entitled to retain the club's operating cash profits. (R. 36, 72-73). And the owner had access to the club's finances, including full use of annual dues totaling $4-5 million. (R. 36, 44, 73).

In exchange for its profit and control, the Agreement to Sell assigned to the owner three important obligations. (R. 70-79). *First*, the owner needed to fund any operating deficits of the club. (R. 36, 73). *Second*, the owner needed to operate the club "in a manner comparable to other similar country club facilities in the State of Florida." (R. 36, 73). And *third*, the owner needed to maintain the club facilities "in good working order, ordinary wear and tear excepted." (R. 36, 71).

Carl Icahn adds the club to his portfolio and chooses to increase profits by cutting back on maintenance.

In 2004, companies affiliated with well-known investor Carl Icahn became the successor to the club's developer-owner. (R. 35, 38-40). These Icahn entities are the Appellees here. (R. 6568). Icahn stepped into the original developer-owner's shoes and assumed all obligations from the Agreement to Sell, including the three important obligations addressed above. (R. 35, 791-92).

But what Icahn apparently did not anticipate, when buying the club, was that the community would sell-out slowly—the club's equity memberships were limited to residents—leading to Icahn's continuing control of the club year after year as the turnover date was never reached. (R. 45, 75, 5568). As Icahn increasingly looked for ways to cut costs and increase profits as the turnover date stayed in the future, the club precipitously declined. (R. 3118-27).

For starters, despite full control of the club's finances, Icahn failed to build up any reserves. (R. 3118-19). Instead, one Icahn entity leased the club facilities to another Icahn entity, charging $660,000 per year in rent for more than a decade and depleting the club's accounts by more than $8.5 million in the process. (R. 3119,

5402). Making matters worse, Icahn operated the club on the cheap, consistently deferring repair, replacement, and renovation year after year to save money. (R. 3120). It was an operation all about cutting costs to benefit Icahn's portfolio. (R. 37, 40, 3120, 5510). Although Icahn and its employees had a fiduciary duty to act in the club's best interest, that was not high on the priority list. (R. 3120-21). The result was financial mismanagement, organizational dysfunction, and the deterioration of the club facilities. (R. 3118-27, 5486).

One example is Icahn's decision to cut back on the golf course maintenance staff, causing the courses to further deteriorate. (R. 37, 3617, 4851). Rocks in the bunkers, drainage issues in the fairways, weeds on the greens. (R. 3193-99). As the United States Golf Association noted in a consulting report commissioned by the club, a "total renovation" was well "overdue." (R. 3193). Indeed, Icahn's failure to replace the irrigation system routinely caused flooding on the golf courses. (R. 3198-99, 4278, 4357, 5824).

The same went for the club's other facilities. (R. 3235, 5089). The boardwalk and cabana deck at the beach club, for instance, were in such disrepair that they were structurally unsound, unsafe, and

in need of replacement. (R. 5089-5109). It would take millions upon millions to fix the facilities. (R. 3250-52).

By 2020, the club was indisputably outdated, rundown, and longing for repairs and replacements. (R. 6310). Hundreds of members—people who live in the Grand Harbor community and previously used the facilities—fled their home club. (R. 4636). And this all happened on Icahn's watch: the turnover date still had never been reached. (R. 3118, 4276-77).

To save the club, its members agree to an early turnover, but only by expressly preserving their ability to bring this lawsuit.

Despite being unwilling to spend any money to fix the problems, Icahn recognized the club's state of deterioration. (R. 3119, 5462, 5470). At first, Icahn asked the members to foot the entire bill for a capital improvement plan. (R. 86). This understandably caused backlash, considering Icahn's maintenance and other contractual responsibilities under the Agreement to Sell. (R. 70). So Icahn pivoted instead to suggesting an early turnover. (R. 44-45, 3123, 5816). This all culminated in the fall of 2020 when Icahn threatened to send the club into bankruptcy, shuttered the club facilities, and

repudiated its duty to operate the club or to fund its capital assessments. (R. 37, 44, 3119).

To preserve their interests in the club, the members made the difficult decision to negotiate an early turnover. (R. 47, 5816). Key in doing so, however, was preserving their ability to bring claims against Icahn for the deteriorated condition of the premises and the substantial sums the club would have to spend to fix them. (R. 3177, 5826-27). Indeed, preserving these claims was a dealbreaker; early drafts of the proposed turnover agreement lacking a reservation of rights failed to garner enough support from the members. (R. 3130).

Ultimately, Icahn and the members settled on something called the "Omnibus Agreement Regarding Turnover," in which Icahn agreed to "implement turnover of control" of the club to the members. (R. 3177). The Omnibus Agreement largely replaced the original Agreement to Sell and governed the transfer of the facilities. (R. 3181).

As the members insisted, the Omnibus Agreement included a section specifically entitled "Reservation of Rights and Claims; No Release." (R. 3181). In this section, the parties agreed that the club was not releasing any "rights, claims, counterclaims, and defenses"

against Icahn "arising out of or in connection with the Agreement to Sell." (R. 3181). "For the avoidance of doubt," the Omnibus Agreement said, "notwithstanding anything contained anywhere" else in the Omnibus Agreement, the club "expressly reserve[d]" and "d[id] not discharge or release" Icahn from liability for "any claims or causes of action that the Club may have relating to deficit funding, capital expenditures, maintenance, and operation of the Club Facilities." (R. 3181). Of course, although the club preserved these potential claims, Icahn also did not "admit the existence of any such claims or causes of action" or "any obligation . . . to make capital expenditures of any kind." (R. 3181).

The club sues to enforce the contract.

After the facilities were transferred from Icahn to the members, they set out to right the ship. (R. 4250, 4259, 4261). Part of doing so was filing this lawsuit against Icahn, which was fundamentally about the inadequate maintenance, deferred repairs, and assets of the club that had significantly deteriorated during Icahn's control. (R. 32).

Count 1 was a claim for breach of the Agreement to Sell. (R. 49). Counts 2 through 16 were tort claims based on Icahn's financial

mismanagement, breaches of fiduciary duty, and repeated decisions to place its own interests ahead of the club's. (R. 50-66). Count 17 was a claim for specific performance related to two disputed pieces of property. (R. 67).

Before trial, the club teed up a legal question for the trial court in a motion for partial summary judgment. (R. 2282). That is, the club asked the trial court to rule, as a matter of law, that Icahn's duty under the Agreement to Sell to keep the club in "good working order, ordinary wear and tear excepted," included the obligation to replace any assets that could no longer be successfully repaired. (R. 2285-86). This duty, the club said, was especially heightened given Icahn's additional contractual obligation to ensure the club was competitive with similar clubs. (R. 3118, 5839-40). After all, the owners of those other clubs did not let them get rundown and in disrepair. (R. 3118). In support of its motion, the club cited Florida cases holding that a duty to maintain a property in good working order includes a duty to replace assets that can no longer be repaired. (R. 2287-88).

Icahn responded that it had no such duty. (R. 2997). But to support its view that it could simply allow the facilities to get outdated, rundown, and in disrepair without any liability, Icahn cited

no law from Florida. (R. 3002-04). Rather, Icahn relied mainly on a case from Pennsylvania to argue that its duty to maintain did not require it to replace assets even when they could no longer be repaired. (R. 3003-04).

Icahn also argued that even if it had breached its maintenance duty under the Agreement to Sell, any such breach was excused by the club accepting the facilities in their "where is, as is" condition—a part of the Agreement to Sell that, in Icahn's view, was not extinguished by the Omnibus Agreement. (R. 2504). Icahn cross-moved for summary judgment on this issue and argued that the entire case should be resolved in its favor because the club's claims all boiled down to a maintenance duty Icahn did not have. (R. 2494).

The trial court rules for Icahn and against the members.

The trial court sided with Icahn. (R. 6308). Distinguishing the Florida cases on the sole basis that they arose in the landlord-tenant context, the trial court embraced the Pennsylvania case's interpretation of Icahn's maintenance obligation, finding that "there is no provision anywhere in the Governing Documents that imposes a requirement on [Icahn] to pay for capital repairs/replacements." (R. 6312-15). The trial court found that Icahn was responsible only

for "operating" the club, which encompasses "maintenance expenditures, not capital expenditures." (R. 6313).

The trial court also accepted Icahn's argument that the "where is, as is" clause—a routine provision in agreements to transfer real property—"shows that [Icahn] had no obligation to pay for capital repairs or replacements (which obligation would eviscerate the 'where is, as is' provision), and it also bars [the club's] claims related to the condition of the Club Facilities as a matter of law." (R. 6314). The trial court said that the Omnibus Agreement's reservation of rights "did not create new claims related to the condition of the Club Facilities; it only reserved claims if they already existed." (R. 6314). And because the Agreement to Sell did not require Icahn to make capital repairs or replacements, the trial court said, the reservation of rights was meaningless because the club never could have brought those claims at all. (R. 6314).

Although the trial court's summary-judgment ruling ostensibly was limited to the breach-of-contract issue on whether Icahn had a duty to replace the irreparable assets, the court interpreted its ruling to bar all the club's claims other than the claim for specific performance. (T. 20-21, 42-43, 45). That is because the trial court

read the “where is, as is” clause to prevent the club from bringing any claim related to the condition of the facilities after turnover, and the condition of the facilities was a necessary component of the club’s tort claims too. (T. 45). Thus, following some procedural formalities, the trial court entered a final judgment in Icahn’s favor on counts 1 through 16. (R. 6504-05, 6580-81). To avoid a trial on count 17 alone, Icahn agreed to judgment in the club’s favor on that count. (R. 6506-07; T. 26, 36-37, 62-64).

This timely appeal followed. (R. 6568). Although it is not relevant here—because the facts, legal arguments, and appellate issues are distinct—another appeal involving Icahn’s similar failure to properly maintain the Grand Harbor community’s common areas is pending in case number 4D23-1191.

SUMMARY OF THE ARGUMENT

For 16 years, a wholly owned affiliate of Carl Icahn's investment company operated the Grand Harbor Golf and Beach Club on the cheap. Repairs were constantly deferred, replacements were never made, and the club started to fall apart. Equally important, Icahn failed to build up any reserves or to come up with a plan to make the capital improvements to the club everyone could see coming a mile away. Instead, Icahn pocketed millions for itself while trying to wait out the turnover of the club to its members.

But Icahn miscalculated. The turnover date was never reached. So when it became increasingly clear that the club was in trouble, as hundreds of members fled to nicer clubs, and Icahn would be responsible, Icahn pivoted into forcing the members to accept an early turnover. To save the club from ruin, they agreed, but only on the express condition that they be able to bring claims against Icahn for its failure to properly maintain the facilities.

Those claims are well-taken. The club's governing documents make clear that Icahn had the obligation before turnover to "maintain" the facilities "in good working order, ordinary wear and tear excepted." This is an obligation, under Florida case law that

tracks the ordinary meaning of the words, that includes the duty to replace assets when those assets can no longer be successfully repaired. Otherwise, the assets cannot be "in good working order." And it is an obligation made even more important here, where the governing documents assigned to Icahn the added responsibility to operate the club "in a manner comparable to other similar country club facilities in the State of Florida." By failing to replace the irreparable and outdated assets, Icahn failed in its duty to competitively operate the club like those comparable facilities.

But the trial court let Icahn escape liability. Apparently of the misguided view that the club's members wanted an upgraded facility rather than simply to have the club enforce the turnover agreement adopted when it was built, the trial court ruled that Icahn's maintenance duty did not include the duty to replace. Adding insult to injury, even though the club had specifically negotiated for a reservation of rights, the trial court said that the club had waived its right to bring these claims by accepting an early turnover. Because the trial court's rulings are not supported by the contractual language, by the case law, or by common sense, this Court should reverse.

STANDARD OF REVIEW

This appeal presents issues of contract interpretation resolved on summary judgment. The standard of review is therefore *de novo*. *See Fla. Inv. Grp. 100, LLC v. Lafont*, 271 So. 3d 1, 4 (Fla. 4th DCA 2019) ("A summary judgment is reviewed *de novo*. A trial court's interpretation of a contract is also reviewed *de novo*.") (citations omitted).

ARGUMENT

I. The trial court erred in granting summary judgment for Icahn on the club's claims for failure to maintain the facilities.

The trial court made two erroneous rulings that, taken together, deprived the club of its ability to bring any claims against Icahn for the deteriorated condition of the facilities. *First*, the trial court ruled that, under the Agreement to Sell, Icahn's twin duties to maintain the premises "in good working order, ordinary wear and tear excepted," and "in a manner comparable to other similar country club facilities in the State of Florida," did not include the duty to replace assets when the assets could no longer be successfully repaired. *Second*, the trial court ruled that the Agreement to Sell's "where is, as is" provision, which it found to have survived the Omnibus Agreement, waived the club's ability to argue that Icahn breached its maintenance obligations. We address each erroneous ruling in turn.

A. The trial court erred in ruling that Icahn's duty to maintain did not include the obligation to replace assets that could no longer be repaired.

This should not have been a difficult case. No Florida decision before now supports Icahn's and the trial court's view that a duty to

maintain a property in good working order, ordinary wear and tear excepted, excludes the duty to replace an asset when that asset can no longer be successfully repaired. In fact, several Florida decisions say exactly the opposite.

To "maintain" a property in good working order, the case law holds, necessarily includes the obligation to "repair *and* replace." *Benton Inv. Co. v. Wal-Mart Stores, Inc.*, 704 So. 2d 130, 131-32 (Fla. 1st DCA 1997) (emphasis added). This makes sense: if an asset cannot be successfully repaired, it cannot be maintained in "good working order" without replacing it. That goes even when "ordinary wear and tear" is excepted from the duty to "maintain."

Consider *Rizzo v. Naranja Lakes Condominium Ass'n*, 498 So. 2d 451 (Fla. 3d DCA 1986). There, after reciting the general principle that an obligation to maintain a property in good working order includes the obligation to replace an asset that no longer works, the court held that the "exception of 'ordinary wear and tear' merely relieves the [party] of any duty . . . to maintain the [property] in a 'like-new' condition." *Id.* at 452. As another court would later summarize it, this language does not "eliminate the [party's] obligation to make capital replacements and repairs, which wear out

. . . and cannot be corrected by ordinary maintenance." *Apple Glen Invs., L.P. v. Exp. Scripts, Inc.*, No. 8:14-cv-1527-T-33EAJ, 2016 WL 909322, at *12 (M.D. Fla. Mar. 10, 2016) (applying Florida law).

This conclusion is confirmed by *Capitol Funds, Inc. v. Arlen Realty, Inc.*, 755 F.2d 1544 (11th Cir. 1985). As in *Rizzo*, *Capitol Funds* explained that the "most reasonable and logical interpretation" of the exception for "ordinary wear and tear" is that the party "is not required to keep the premises in like-new or nearly new condition, but rather is required merely to keep it serviceable and in good repair." *Id.* at 1549. This does not require annual painting, or replacing an air conditioner just because a new model is available. *Id.* But it *does* require replacement when repair is no longer an option. *Id.*

These cases should have been the starting and ending point for the trial court's analysis here. They address the duty to maintain and the exception for ordinary wear and tear, and they hold that replacement of an irreparable asset is part of the duty to maintain. Yet the trial court chose not to follow these cases because they arose in the landlord-tenant context and "have never been extended outside" it. (R. 6315). But nothing in *Benton*, *Rizzo*, *Apple Glen*, or

Capitol Funds limits the courts' analysis to landlord-tenant facts. The trial court simply invented this distinction because it disagreed with their holdings.

The trial court said it would not apply these landlord-tenant cases to this "complex commercial business transaction with astute parties." (R. 6315). Really, though, the "astute parties" here were one and the same: the then-developer, and Icahn's predecessor-in-interest, negotiated the Agreement to Sell with itself. There was no "complex commercial business transaction." Besides, *Capitol Funds* considered the same point raised by the trial court and said it wouldn't matter anyway: "The court cannot rewrite the contract to eliminate the risks assumed by competent parties." 755 F.2d at 1549. So the trial court should not have rewritten the contract here either. *See Barakat v. Broward Cnty. Hous. Auth.*, 771 So. 2d 1193, 1195 (Fla. 4th DCA 2000) ("It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain.").

Simply put, the only Florida cases addressing this issue are contrary to the trial court's ruling, and the trial court's stated rationale for failing to follow those cases does not withstand scrutiny.

See Mercury Ins. Co. of Fla. v. Coatney, 910 So. 2d 925, 926 (Fla. 1st DCA 2005) (noting a trial court's obligation to follow precedent).

Rather than apply the well-reasoned Florida cases, the trial court relied on an unpublished "memorandum opinion" from a Pennsylvania intermediate appellate court. *See Twp. of Lower Yoder v. Borough of Westmont*, No. 932 C.D. 2016, 2017 WL 2350448 (Pa. Comm. May 31, 2017). That case held that a duty to "maintain" a sewer system in "good repair" did not encompass a duty to replace it. *Id.* at *3. But the duty in *Yoder* was different from Icahn's duty here. Keeping something in "good repair" is not the same as keeping it in "good working order." Indeed, the contractual obligation in *Yoder* was, literally, limited to "repair." No wonder, then, that the court decided that "repair" did not cover replacement.

All the same, even if *Yoder* applied here, a survey of other states shows that Pennsylvania is an outlier. For example, an Ohio appellate court has held that a duty to maintain imposes a duty "to do whatever . . . necessary to keep the [property] functional." *Andrews v. Schmelzer*, No. 96-CA-67, 1997 WL 219163, at *3 (Ohio Ct. App. Mar. 28, 1997). "This duty includes a duty to replace [the asset], if this is the only action that can be taken to fulfill [the party's]

obligation of 'maintenance.'" *Id.* A more recent Colorado appellate decision concluded the same thing: "maintaining a structure would include undertaking anything necessary to repair, restore, or replace it so as to keep it in existence." *Montezuma Valley Irrigation Co. v. Bd. of Cty. Comm'rs of Cty. of Montezuma*, 486 P.3d 428, 432 (Colo. App. 2020). A Texas case also agrees. *See Lindemann Props., Ltd. v. Campbell*, 524 S.W.3d 873, 882 (Tex. App. 2017) ("We hold that the terms 'operate' and 'maintain' in the granting clause are at least broad enough to include the right to remove and replace the original pipe with pipe of the same size when necessary. . . . [I]f the condition of a pipeline easement is such that in order to maintain it, replacement is necessary, then the term 'maintain,' as expressly used in the easement, was broad enough to include removal and replacement.") (citations and emphasis omitted).

These cases are persuasive because they track the most important principle of contract interpretation: giving words their plain and ordinary meaning. *See Adv. Op. to Att'y Gen. re Impl. of Amd. 4*, 288 So. 3d 1070, 1078 (Fla. 2020) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.") (quoting Antonin Scalia & Bryan A.

Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). The plain and ordinary meaning of "maintain" is to "care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep." *Maintain*, Black's Law Dictionary (11th ed. 2019). Put another way, maintaining something requires "preserv[ing]" it from "failure or decline." *Maintain*, Merriam-Webster, https://www.merriam-webster.com/dictionary/maintain; *see Parrish v. State Farm Fla. Ins.,* 356 So. 3d 771, 776 (Fla. 2023) (explaining that courts may look to both legal and non-legal dictionaries to help define the plain and ordinary meaning of words in a contract). These definitions encompass replacing an asset that has failed and can no longer be repaired.

Some common examples bear this out. If a chef is required to "maintain" a functioning kitchen, and the oven breaks, the chef would have to get a new oven to comply with the duty to "maintain" an operational kitchen. Similarly, if a bathroom must be "maintained in good working order," and a toilet breaks and cannot be fixed, the toilet would have to be replaced for the bathroom to be "maintained in good working order."

The trial court tried to skirt these obvious examples by noting that Icahn's contractual responsibilities here were limited to "operating" the club. "Operating expenses encompass maintenance expenditures," the trial court said, "not capital expenditures." (R. 6313). But this is a false dichotomy.

For one thing, drawing this line assumes the court's own conclusion that it was possible for Icahn to fulfill its maintenance obligation without making replacements. For another, it ignores the language of the contract. Nothing within the Agreement to Sell's maintenance obligation limits it to "ordinary" or "routine" maintenance that excludes "capital" repairs. Instead, the Agreement to Sell assigned to Icahn the responsibility to keep the facilities "in good working order" while operating a competitive club. Assets that have reached the end of their useful lives and cannot be repaired, resulting in crumbling facilities, do not satisfy these obligations because the assets no longer work as intended and because crumbling facilities are not competitive.

To return to basics: if a wooden bridge rots and falls, it cannot be "maintained in good working order" without being replaced. If an irrigation system chronically causes a golf course to flood and become

unplayable, the golf course cannot be "maintained in good working order" without replacing the irrigation system. If a boardwalk on the beach is structurally unsound and dangerous for someone to walk across, it is not "in good working order." As it so happens, these are the exact kinds of existing problems at the club that Icahn claims it had no duty to address. (R. 5824).

Icahn's maintenance obligation was further heightened by its added contractual duty to operate the club in a comparable manner to other area clubs. In other words, Icahn's duty to maintain the club was specifically tied to how similar clubs maintained their facilities. And those other clubs did not let their golf courses and facilities fall apart—as the exodus of hundreds of members from this club to those clubs proves.

The trial court's interpretation, which overlooked this special contractual provision intended to give guidance on how Icahn was to fulfill its duty to maintain, improperly rendered it meaningless. *See Goff v. Kenney-Goff*, 145 So. 3d 928, 929-30 (Fla. 4th DCA 2014) (explaining that "[i]n interpreting a contract, it must be assumed that each clause has some purpose" and that "the court should interpret the contract in such a way as to give effect to every provision"). How

can a high-end country club be competitive with other clubs when it has flooded golf courses, rotting bridges, and crumbling pavilions? The trial court's order offers no answer.

In sum, the trial court erred in concluding that Icahn had no duty under the Agreement to Sell to replace assets that could no longer be repaired. Icahn did not operate a competitive club and it did not maintain the facilities in good working order.

B. The trial court erred in casting aside the specific reservation of rights and ruling that the generic "where is, as is" provision barred the club's claims.

The trial court's first error led directly to its second. The trial court found that the Agreement to Sell's "where is, as is" provision—a clause saying the club agreed to accept the facilities from Icahn in their "where is, as is" condition—"bars" the club's "claims related to the condition of" the facilities. (R. 6314). The trial court reached this conclusion despite the club's negotiated reservation of rights in the Omnibus Agreement, finding that this reservation "only reserved claims if they already existed." (R. 6314).

To begin with, the trial court was necessarily wrong that the reservation of rights failed to preserve the club's claims because the trial court was wrong that the club's claims did not exist under the

Agreement to Sell. Put differently, if Icahn had a duty to replace the assets, as we have already explained, then the club reserved its right to bring a claim for Icahn's failure to do so because those claims "already existed." Thus, under the trial court's own analysis, a reversal of the trial court's erroneous interpretation of Icahn's maintenance duty compels a reversal of its interpretation of the "where is, as is" provision as well.

But beyond that, the trial court was just wrong in its interpretation of the Omnibus Agreement's reservation of rights. The reservation of rights could hardly have been clearer: "For the avoidance of doubt," it said, "notwithstanding anything contained anywhere" else in the Omnibus Agreement, the club "expressly reserve[d]" and did not "discharge or release" Icahn from "liability for any claims or causes of action" that the club had "relating to deficit funding, capital expenditures, maintenance, and operation" of the facilities before turnover. (R. 3181); *see also* (R. 3181) (providing that the club "hereby reserves all of its rights, claims, counterclaims, and defenses"). This specific language controls over any more generic language, like the "where is, as is" clause, that might conflict. *See Williams-Paris v. Joseph*, 329 So. 3d 775, 781 (Fla. 4th DCA 2021)

("[W]hen certain provisions of a contract appear to conflict, it is a general principle of contract interpretation that a specific provision dealing with a particular subject will control over a different provision dealing only generally with that same subject.") (citation omitted).

Besides, what does the reservation of rights to bring a claim related to the operation and maintenance of the facilities even mean if, as the trial court concluded, the "where is, as is" clause waived the club's ability to bring any claim related to the maintenance and operation of the facilities? The trial court should have interpreted the reservation of rights as it was plainly written. *See Fla. Farm Bureau Gen. Ins. Co. v. Worrell*, 359 So. 3d 890, 893 (Fla. 5th DCA 2023) ("[T]he goal is to arrive at a 'fair reading' of the contract and apply the text to the given facts before the Court.") (quoting Scalia & Garner, *Reading Law* at 33). By not doing so, the trial court rendered the reservation of rights meaningless. *See U.S.B. Acquisition Co. v. Stamm*, 660 So. 2d 1075, 1080 (Fla. 4th DCA 1995) ("Every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible."). And it failed to interpret the Omnibus Agreement as a whole. *See Hillcrest Country Club Ltd.*

P'ship v. Zyscovich, Inc., 288 So. 3d 1265, 1269 (Fla. 4th DCA 2020) ("A contract should be read as a whole") (citation omitted).

The trial court's interpretation had the added effect of rendering the Agreement to Sell's maintenance obligation itself meaningless. Under the trial court's analysis of the "where is, as is" clause, Icahn could simply let the club crumble, become uncompetitive, and ultimately fall apart and yet the club was powerless to do anything about it. This interpretation fails not only multiple basic rules of contract construction, but the smell test too.

By contrast, the "where is, as is" clause is not rendered meaningless by allowing the club to bring these specific claims. These claims relate to Icahn's failures *before* turnover. Accepting the property "as is" prevents the club from bringing claims related to the property *after* turnover. It bars the club from complaining about things like, say, clouds on title, or regulatory burdens, or other physical conditions on the property that possibly impact the future ability to run a successful club.

In any event, to the extent all "doubt" was not "avoid[ed]" about the interaction between the reservation of rights and the "where is, as is" provision, (R. 3181), the trial court should have looked to

extrinsic evidence of the parties' intent. *See Waveblast Watersports II Inc. v. UH-pompano, LLC*, 291 So. 3d 657, 661 (Fla. 4th DCA 2020) ("Where the language used in a contract is ambiguous or unclear, the court may consider extrinsic matters to explain, clarify, or elucidate the ambiguous language with reference to the subject matter of the contract, the circumstances surrounding its making, and the relation of the parties.") (cleaned up).

Had the trial court done so, it would have seen undisputed evidence that the club would never have agreed to the Omnibus Agreement without the reservation of rights. (R. 3130, 5826-27). Indeed, the first proposed early turnover agreement (which did not include the reservation of rights) failed to receive the required approval when presented to the members, while a revised version (which added this language) passed. Thus, the club specifically bargained for the reservation of rights, the parties specifically contemplated this lawsuit, and the Omnibus Agreement specifically preserved the club's ability to bring it.

In sum, the trial court erred in concluding that the "where is, as is" clause barred the club's claims.

CONCLUSION

This Court should reverse the trial court's summary-judgment rulings, hold that Icahn had a duty to replace assets that could no longer be repaired, and remand for further proceedings.

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I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limitation requirements of Florida Rule of Appellate Procedure 9.210(a)(2)(B). This brief contains 5796 words.

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