

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-002187
South Carolina Court of Appeals Opinion No. 5434

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S.C. SUPREME COURT

The Callawassie Island Members Club, Inc. Petitioner,

v.

Ronnie D. Dennis and Jeanette Dennis Respondents.

AMICUS CURIAE BRIEF OF
THE CALLAWASSIE ISLAND PROPERTY OWNERS ASSOCIATION, INC.
IN SUPPORT OF PETITIONER

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and

INTRODUCTION

The community of Callawassie Island, South Carolina is unique and more than just another South Carolina Lowcountry planned golf community. Situated in Beaufort County mid-way between Beaufort and Hilton Head Island, the planned development of Callawassie Island was established in 1986 and is situated on an 880 acre private island accessed through an around-the-clock manned security gate at the entrance of a ¼ mile causeway, bridge and thirteen (13) miles of privately maintained roadways. Although surrounded by coastal rivers and tidal marshes, covered with magnificent moss-draped live oaks, magnolias, and stunning natural landscapes, the community is best known for and anchored around its world class amenities.

Many of Callawassie's property owners make it no secret that they were attracted to and bought property on Callawassie because of the availability of first-rate amenities around which the "active lifestyle" private community is centered: a private, award-winning, championship, 27-hole golf course designed by the legendary Tom Fazio, rated among the top courses in South Carolina; a 26,000 square foot clubhouse; the water front River Club House; four community docks; two waterfront resort style swimming pools; a first-rate Cybex equipped fitness center with a special aerobic room, overseen by a full time certified fitness coordinator; six Har-Tru tennis courts alongside the tennis pro shop, patio and pavilion which is the site of its Pro-Am Tournament, "Wimbledon Callawassie Style;" and equipment and provisions for kayaking, trail walking, bird watching, fishing, boating and all manner of Lowcountry activities.¹ As a private

¹ See: *Callawassie Island, Visit Callawassie Island*, <http://www.callawassieisland.com/visitdiscover>; See also: *Real Estate Scorecard* <http://realestatescorecard.com/community-reviews/coastal-south-carolina/callawassie-island>.

island community, only Callawassie Island property owners and their guests are permitted access to and use of these amenities.

Amicus Curiae, The Callawassie Island Property Owners Association, Inc. ("POA"), a nonprofit corporation governed by the South Carolina Nonprofit Corporation Act ("Act"), is a homeowners association all of whose members own property within the planned development of Callawassie Island. All property on Callawassie Island (including common property, individually owned parcels of real property, and amenity property) is subject to certain declarations and covenants, as amended from time-to-time² ("Governing Documents"), which include express promises and affirmative obligations by each member to the POA and to the other association members.

Under the POA Governing Documents, all Callawassie Island property owners are automatically members of the POA by virtue of his or her property ownership and each is required to remain a member of the association for as long as they own their property. This is an important promise that every member makes to the association, and to all other association members, because the POA relies on the continued membership of all property owners for its very existence. If POA members are permitted to disregard their promise to the POA and are

² **"1983 Amended Declaration"**: *Amended and Restated General Declaration for Callawassie Island and Provisions for the Callawassie Island Property Owners Association*, dated December 22, 1983 and recorded on November 19, 1985 in the Beaufort County Register of Deeds Office at Book 435, Page 329; **"1993 Amended Declaration"**: *Amended and Restated General Declaration for Callawassie Island and Provisions for the Callawassie Island Property Owners Association*, dated March 20, 1993 and recorded in the Beaufort County Register of Deeds Office at Book 623, Page 546; and, **"1997 Amended Declaration"**: *Amended and Restated General Declaration for Callawassie Island and Provisions for the Callawassie Island Property Owners Association*, dated February 25, 1998 and recorded in the Beaufort County Register of Deeds Office at Book 1040, Page 111; **"2001 Amended Declaration"**: *Amended and Restated General Declaration for Callawassie Island and Provisions for the Callawassie Island Property Owners Association*, dated December 1, 2001, and recorded on December 3, 2001, in the Beaufort County Register of Deeds Office at Book 435, Page 329; **"2012 Amended Declaration"**: *Amended and Restated General Declaration for Callawassie Island and Provisions for the Callawassie Island Property Owners Association*, dated December 15, 2011, and recorded on April 25, 2012, in the Beaufort County Register of Deeds Office at Book 3137, Page 3004.

permitted to resign at will and not be bound to fulfill their POA obligations, the consequences to the POA will be devastating.

The POA is governed by its members and is funded through all members paying POA dues, assessments, fees and charges for as long as they own their property. All of the Callawassie Island common elements such as streets, causeways, walkways, bridges, infrastructure, open spaces and lagoons are privately owned, managed and maintained by CIPOA.

The fundamental premise of the Callawassie Island community is that each property owner will bear his or her fair share of the cost of owning, maintaining, operating and/or upgrading the privately owned roadways, infrastructure and other common facilities. Accordingly, by virtue of their property ownership, members contractually commit to and promise that they are not allowed to simply abandon and walk away from their financial commitments and obligations to the POA and its other members when it no longer suits them. Rather, they commit to passing them to a new property owner/member who will be responsible for the obligations attendant to property ownership.

The Callawassie Island POA has a serious interest in and has become aware of the South Carolina Court of Appeals' decision in *The Callawassie Island Members Club, Inc. v. Dennis*, Opin. No. 5434 (S.C. Ct. App. August 3, 2016) (the "Opinion"). The *Dennis* Opinion poses an existential threat to the POA and to other similarly-situated community organizations in South Carolina and it could have a potentially devastating effect on individual property values in Callawassie Island and to any other private communities throughout South Carolina. A large majority of the Callawassie Island POA members are universally troubled by the serious legal issues, and dilemma, presented by the South Carolina Court of Appeal's *Dennis* decision and the potential adverse consequences to individual property values and the community as a whole.

Amicus Curiae, The Callawassie Island Property Owners Association, Inc., is in a position to provide this court with a unique perspective from those property owner/association members who have the most at stake in this particular case. For the reasons stated herein, CIPOA wishes to submit this brief as a friend of the Court to assist in the Court's consideration of this matter.

ISSUE ON APPEAL
ADDRESSED BY AMICUS CURIAE

Did the Court of Appeals err in its interpretation of South Carolina Code § 33-31-620 and its application to the facts as presented in this case?

STATEMENT OF CASE

Amicus Curiae, The Callawassie Island Property Owners Association, Inc. adopts by reference the Statement of the Case of Petitioner, The Callawassie Island Members Club, Inc., in accordance with South Carolina Rule of Civil Procedure, Rule 208(b)(6).

ARGUMENT

THE COURT OF APPEAL'S *DENNIS* OPINION ERRS IN ITS APPLICATION
OF S.C. CODE § 33-31-620 BY FAILING TO CONSIDER
AND TO APPLY S.C. CODE § 33-31-620 (B).

In its Opinion, the Court of Appeals cited as the principal basis for its ruling S.C. Code § 33-31-620 of the Nonprofit Corporation Act:

§ 33-31-620. Resignation.

- (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.

In Article II of the Opinion the Court discussed that the Act obligates members of non-profits to pay dues incurred *before* resigning membership in the corporation, but not *after* resignation [emphasis added by the Court]. The Court went on to state:

To do so, we believe, would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations. In essence, Appellants would be trapped like the proverbial guests in the Eagles' hit *Hotel California*, who are told "you can check-out anytime you like, but you can never leave."

(See App., at p. 7).

Accordingly, the *Dennis* Court held as follows: "We find section 33-31-620 protects club members from such continuing liability after resignation." (See App., at p. 7).

It is readily apparent that the *Dennis* Court focused on subsection (a) of S.C. Code § 33-31-620 allowing that a non-profit membership may be resigned at any time with little or no consideration given to subsection (b). The Official Comment to S.C. Code § 33-31-620 makes clear the legislature's intent regarding this provision, which states in part:

...A nonprofit cannot force a person to belong to it. However, a person may be liable to the corporation for wrongfully withdrawing in violation of contractual or other obligations to remain as a member. Under section 6.20 (b) a person may be liable for obligations incurred or commitments made prior to the resignation. These commitments may extend beyond the time the member resigns....

(See S.C. Code § 33-31-620, Official Comment).

The Court's *Dennis* Opinion totally disregards subsection (b) of S.C. Code § 33-31-620 and clearly conflicts with the related Official Comment.

Non-profit member associations, which includes home owner associations, are common throughout South Carolina and the United States. The Community Associations Institute reports that at the end of 2015, there were 6,750 common interest community associations in South Carolina, forty five percent or 3,037 of which were non-condominium/cooperative property

owners associations. See, Community Associations Institute, *National and State Statistical Review for 2015*, (accessed: January 4, 2017), http://www.cairf.org/research/factbook/2015_statistical_review.pdf. Typically, as is the case in *Dennis*, such associations are organized as mutual benefit nonprofit corporations to own, operate, maintain, manage and/or upgrade common element infrastructure but also community amenities such as golf courses, swimming and tennis facilities and clubhouses. Through the payment of membership purchases, assessments, dues or other charges, homeowners collectively contribute to the stream of revenue that maintains and supports a much greater number of amenities and benefits to the community than each individual homeowner could possibly afford independently.

It is commonly understood by purchasers of such property, as well as the general public, that by taking title to property in such planned developments the buyer contractually promises to become a member of the owners' association and thereby commits to certain financial obligations that go with membership. South Carolina law was long ago settled that the proper recording of a declaration of covenants or similar homeowners' association governing documents is a binding and contractually enforceable agreement by the purchaser of property in such a community. This was the holding in the matter of *Harbison Community Association, Inc. v. Mueller*, 319 S.C. 99, 459 S.E. 2D 860 (Ct. App. 1995). In confirming the contractual obligations, the *Harbison* Court stated:

A covenant is enforceable against a subsequent grantee, even if not in the grantee's deed, if the grantee has actual or constructive notice of the covenant. 20 Am. Jur. 2d Covenants, Conditions and Restrictions § 26 (1965).

A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title. *Carolina Land Co. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975). The Declaration was recorded and noted in the J.C. Roy Company deed, within the Muellers' chain of title. Thus, the Muellers had constructive notice of the Declaration. Moreover, Mr. Mueller testified he had actual notice of the Declaration. Accordingly, the Muellers are bound by the terms

of the Declaration, and the circuit court erred, as a matter of law, in finding the Muellers not bound by the covenant because it was not in their deed.

Id. at 103, 863.

Also, it is commonly understood that a non-profit member in such communities is only released from the financial membership commitments, typically, by selling their property and attendant membership with the new buyer stepping into that membership spot. Because members' dues and assessments are the primary, if not only, source of revenue for such associations, the continuity of membership is absolutely critical to the ongoing fiscal health of a community association, the maintenance and preservation of its infra structure and amenities, and community property values as a whole.

If the *Dennis* opinion means that non-profit members are free to resign and not be bound by their affirmative continuing contractual obligations to their community associations and fellow non-profit members, it may also mean that the availability of bank financing for individual properties within a homeowners' association may not be available due to the lack of legally enforceable private road maintenance obligations. Pursuant to the Federal National Mortgage Association ("Fannie Mae") standard lending guidelines for federally insured lending institutions an adequate legally enforceable agreement or covenant for maintenance of private roads, bridges and streets is required. *See*: Federal National Mortgage Association, *Selling Guide Fannie Mae Single Family*, *FannieMae.com*. N.p., 06 Dec. 2016. Web. 30 Jan. 2017. <http://www.fanniemae.com/>.

Should *Dennis* mean that an individual property owner is free to resign an association membership and not be bound to his or her respective share of ongoing attendant financial obligations, federally insured lenders will no longer be able to rely on the affirmative obligations

set out in duly recorded covenants, the protections of S.C. Code § 33-31-620 (b), or Article 1, Section 4 of the South Carolina Constitution with regard to such contractual obligations. It is not only foreseeable but likely that institutional financing would no longer be available for properties in private communities precipitating or resulting in the complete collapse of private community property values statewide. The *Dennis* impact on the Callawassie Island POA and other similar private communities could be devastating.

Because the Callawassie Island POA and other similar community associations are so dependent upon the constant source of revenue from a consistent level of membership, recent economic recessions, foreclosures, and declining interest in golf communities have presented stiff economic challenges to such community associations. A Nevada Law Journal article summarizes well the fundamental issue facing such homeowners and their associations:

From Orange County, Florida to Orange County, California, homeowners' associations ("HOAs") across America's Sunbelt are struggling due to the nation's recent mortgage crisis and resulting economic recession. As homeowners become unable to meet their financial obligations, HOA assessments are often among the first expenses cut from family budgets.

See Casey Perkins, *Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners' Associations*, 10 Nev. L.J. 561 at 561 (2010). The article continues:

Associations fund their budgets primarily through collection of assessments from the community's homeowners. These assessments, unlike membership fees or dues, represent a share of the common expenses associated with operating the community. When homeowners pay their assessments as scheduled, the association can function and provide required facilities and services. However, collection of these assessments depends on the financial strength of the individual owners as well as overall economic conditions. As a result, with overall foreclosure rates at record highs and the country in recession, HOAs are at great risk of experiencing future revenue shortfalls.

See Casey Perkins, *Note: Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners' Associations*, 10 Nev. L.J. 561 at 570 (2010).

With these challenges, the community association managers have faced stiff challenges: "Through the Great Recession, being a director of a condo or homeowners association became an unmitigated pain. You [sic] suffering the same loss of value as other owners, while soaking up complaints about your perceived inability to keep the place looking good." (See Michael Pollick, *Condos on the Road Back*, Sarasota Herald-Tribune, April 8, 2015, available at <http://www.heraldtribune.com/news/20150404/condos-on-the-road-back>).

Golfing communities have been doubly impacted through the same financial downturns by a drop in the popularity of golf in the United States. According to the National Golf Foundation, between 2005 and 2009, the number of Americans who played golf fell nearly 10 percent, from 30 million to 27.1. See Rick Woodson, *Confronting Financial Hazards, Golf Clubs Aim to Regain Footing*, Rochester Business Journal (April 1, 2011), available at <http://www.rbj.net/article.asp?aID=187234>. That number dropped another million from 2009-2010, down to 26.1 million. See Gene Yasuda, *U.S. Golf Participation Falls for Third Consecutive Year*, Golf Week (May 9, 2011), available at <http://golfweek.com/2011/05/09/us-golf-participation-falls-third-consecutive-year>. By 2015, that number further fell to 24.1 million down from 24.7 million the two prior years. See Joe Barks, *Final 2015 Numbers for Golf Show 600,000 Dip in Overall Participation*, Club & Resort Business (March 9, 2016), available at <http://clubandresortbusiness.com/2016/03/final-2015-numbers-golf-show-600000-dip-overall-participation>.

It has become increasingly difficult for such associations to continue collecting the revenue that they need to survive. In fact, law firms representing owners' associations "...have had to become debt collection specialists, pursuing delinquent homeowners for their HOA clients..."; in fact, one firm in the western United States saw its HOA collection clients "...soar

[] from 632 in 2009 to nearly 3,000...." in early 2011. See Jeff Manning, *Another Symptom of the Downturn: Unpaid Fees at Housing Associations*, The Oregonian (April 11, 2011), available at http://www.oregonlive.com/business/index.ssf/2011/04/another_symptom_of_the_downturn.html.

It could be suggested that the facts and circumstances of the *Dennis* case are unique in its application only to social or country clubs and that it would be dangerous to categorize such social clubs with the same legal distinctions as a property owners association. However, arguments have already been advanced in claims currently pending in the trial courts of South Carolina seeking declaratory judgment on the rights of POA members under S.C. Code § 33-31-620 to void mandatory community club memberships³.

It is genuinely questionable how many, if any, homeowners' association might survive under the Appellate Court's interpretation and application of the Act. The Attorney General on February 3, 2014 issued an Opinion in responding to the question, "Do S.C. Code §§ 33-31-620 and 33-31-621 concerning resignation and termination in a nonprofit corporation apply to a nonprofit corporation that is also a property owner's association?" The Attorney General clearly confirmed that S.C. Code § 33-31-620 (a) and (b) is applicable to South Carolina homeowners'

³ See: The Callawassie Island Members Club, Inc. vs. Homer L. Knearl and Katherine T. Knearl vs. Callawassie Island Property Owners Association, Inc., Beaufort County, South Carolina, Court of Common Pleas, Civil Action No. 2014-CP-07-00397, matter pending; The Callawassie Island Members Club, Inc. vs. Terry F. Miskolczi and Nancy J. Hepburn vs. Callawassie Island Property Owners Association, Inc., Beaufort County, South Carolina, Court of Common Pleas, Civil Action No. 2014-CP-07-00128, matter pending; The Callawassie Island Members Club, Inc. vs. Nick Mitrousis and Denise Mitrousis vs. Callawassie Island Property Owners Association, Inc., Beaufort County, South Carolina, Court of Common Pleas, Civil Action No. 2014-CP-07-00398, matter pending; The Callawassie Island Members Club, Inc. vs. William C. Symons, Jr., and Patricia Y. Symons vs. Callawassie Island Property Owners Association, Inc., Beaufort County, South Carolina, Court of Common Pleas, Civil Action No. 2014-CP-07-00875, matter pending; The Callawassie Island Members Club, Inc. vs. James E. Newcombe and Lolita Trifiletti Newcombe vs. Callawassie Island Property Owners Association, Inc., Beaufort County, South Carolina, Court of Common Pleas, Civil Action No. 2012-CP-07-03222, matter pending.

associations that are duly organized and registered with the Secretary of State. *See* 2014 WL 1398587, at *1 (S.C.A.G. Feb. 3, 2014) ("S.C. Code § 33-31-620 and § 33-31-621).

The very bedrock on which most community associations like Callawassie are built and survive is that those who own property within the association, and thus benefit from its infrastructure and amenities, are required to be members of the association and to pay assessments and dues for as long as they own their property. Under the *Dennis* Opinion such a requirement is potentially void and S.C. Code § 33-31-620 (b) of no effect because the Court has held that members must be allowed to resign at any time and permitted to avoid prior commitments for their continued financial obligations. Allowing the Court of Appeals decision to stand eliminates the certainty of a consistent level of revenue and jeopardizes the existence of all homeowners associations and affiliated community amenity clubs within South Carolina.

The Appellate Court expressed its belief that unless Callawassie Island Club members were relieved of post-resignation commitments that they otherwise "...would be trapped like the proverbial guests in the...*Hotel California*, who are told "you can check-out anytime you like, but you can never leave" *See*: App., at p. 7. In total disregard of S.C. Code § 33-31-620 (b) the Court in its *Dennis* ruling in so many words held that "you" can resign any time and not be bound to "your" contractual promises made.

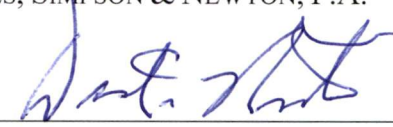
Construing S.C. Code § 33-31-620 to effectively nullify subsection (b) of that statute will potentially undermine the enforceability of organizational documents controlling common interest property associations, the result of which will be overwhelmingly negative to such associations and will further deprive individual homeowners of being able to rely on their neighbors to contribute and collectively combine resources to create community clubs and

associations through which they can collectively benefit from amenities that they could never afford individually.

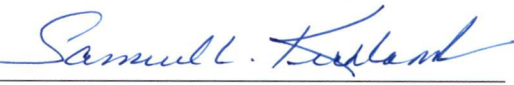
CONCLUSION

Amicus Curiae, The Callawassie Island Property Owners Association, Inc., supports the arguments made by Petitioner, The Callawassie Island Members Club, Inc., and for the foregoing reasons respectfully requests that this Honorable Court grant the Petition for Writ of *Certiorari*, vacate the Court of Appeals' Opinion and affirm the trial court's grant of summary judgment to Petitioner.

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