THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-002187
Lower Court Case No. 2011-CP-07-3322

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

v.

Ronnie D. Dennis and Jeanette Dennis, ... Respondents.

RETURN TO RESPONDENTS' PETITION FOR REHEARING

The Respondents Ronnie D. Dennis and Jeanette Dennis have petitioned this Court for a rehearing of its recent published opinion in *The Callawassie Island Members Club, Inc v. Dennis*, Op. No. 27835 (S.C. S.Ct. filed August 29, 2018). In response, the Petitioner Callawassie Island Members Club, Inc. ("Club") submits

that this Court properly ruled on all of the issues challenged by the Dennises in their petition for rehearing.

I. The Court applied the proper legal standard for determining whether contract language is ambiguous.

The Dennises initially argue that the Court failed to apply the proper test for determining whether the pertinent contract language is ambiguous. The Dennises are mistaken. While the Court cites only to *Williston on Contracts* in the section of the opinion captioned "Ambiguity of Membership Documents," the discussion by the Court reflects a proper understanding and application of South Carolina law on the issue of contract ambiguity. The Court correctly ruled that the language in the membership documents "unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued." (Slip. Op. at 5). The Court further recognized that such provisions in the documents "are necessary to ensure the Club will remain viable in the future." (Slip Op. at 6).

The Dennises suggest, however, that the contract language must be deemed ambiguous because there is a disagreement among the various judges in this case as to its meaning. That argument is flawed for several reasons. First, an ambiguity is not determined merely by counting votes. Second, the dissenting justices and the Court of Appeals only construed the term "unpaid" as being ambiguous

because it was undefined. Those judges did not find any actual ambiguity because they did not construe the term to definitively have a different construction or meaning.[1] Third, and most importantly, a mere disagreement in judicial opinions does not automatically render a contract ambiguous. If that were the case, an appellate court could never reverse a trial court's determination that a contract is ambiguous because there would, at the very least, be a disagreement among judges. Courts from other jurisdictions have rejected this premise. *See e.g., TMW Enterprises, Inc. v. Federal Ins. Co.*, 619 F.3d 574, 580 (6th Cir. 2010) ("a disagreement among three judges about whether a contractual provision is ambiguous does not establish that it is ambiguous"); *In re Insurance Installment Fee Cases*, 211 Cal.App.4th 1395, 1409 (2012) ("an agreement is not ambiguous merely because the parties (or judges) disagree about its meaning"); *International Paper Co. v. Madison Oslin, Inc.*, 985 So.2d 879, 890, n.8 (Ala. 2007) (concurrence) ("a disagreement between judges as to the meaning of language does not render that language ambiguous. If it did, whenever this Court disagreed with a lower court's interpretation of statutory or other language, or whenever there was a dissent among the members of this Court as to the meaning of certain language,

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[1] The Court correctly ruled that "unpaid" is not an ambiguous term and "means any payment the Dennises are obligated to make according to the terms of the membership documents that has not been made." (Slip Op. at 6). The Court properly recognized, unlike the dissent, that the Rules cannot be read in a vacuum, separate and apart from the Bylaws and the Plan, in order to find an ambiguity that does not exist. In fact, the Rules include language stating that "[a]ll rules and regulations contained herein shall be subject to and controlled by the applicable provisions of the By-Laws." (App. 626).

we would have to conclude that the language is ambiguous and to analyze the language on those terms").

In sum, the Court did not fail to apply the proper rules of construction under South Carolina law. A rehearing on this basis is not warranted.

II. The Court correctly ruled that the membership documents in existence at the time of the Dennises' resignation in 2010 are controlling, and those documents are sufficiently included in the appellate record to permit a proper adjudication of the issues.

The Dennises next argue that the Court failed to recognize that there exists a "question of fact" as to which versions of the membership documents are applicable to this dispute. However, the Court correctly ruled that the Club has consistently argued that it is entitled to summary judgment regardless of which set of membership documents control. (Slip Op. at 4). Moreover, it is undisputed that the Dennises resigned their membership in 2010. As the Court ruled, at that time "the membership documents in effect were the 2008 Plan [for Offering of Memberships], the 2009 Bylaws, and the 2009 Rules." (Slip Op. at 4). The Dennises continue to complain, nonetheless, that the trial court failed to specify which documents were controlling. Even if that were true, this Court is permitted to "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." *See*, Rule 220(c), SCACR.

The Dennises further complain that the appellate record includes only

portions of the 2008 Plan, the 2009 Bylaws, and the 2009 Rules, and for that reason, the Court's opinion is flawed and requires a remand. The Dennises accuse the Club of "cherry-pick[ing] a few single pages from assorted amendments spanning the course of almost twenty years." (Petition, p. 5). However, the Dennises overlook that the duty to present a proper and complete record for appeal falls on the original appealing party to the Court of Appeals – that would be the Dennises. *See*, *Germain v. Nichol*, 278 S.C. 508, 299 S.E.2d 335, 335 (1983) (holding that the appealing party has the burden of providing a sufficient record). Before the trial court, it was the Dennises' responsibility to "set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP. Therefore, if the record is deficient or incomplete, that is the Dennises' fault. Nevertheless, the Court was correct in concluding that the record was sufficient to proceed to address the merits based on the portions of the operative membership documents that are in the record.[2]

Further, the Dennises suggest that the Club never argued that the 2008 Plan,

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[2] At any rate, as the Club's counsel stated at oral argument, all of the membership documents were submitted to the trial court at its request and, therefore, are part of the lower court record. (App. 547-548). It is undisputed that the 2008 Plan explicitly says, "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." (App. 652-653). Yet, if the Court determines that complete copies of the 2008 Plan, the 2009 Bylaws, and the 2009 Rules are needed for a proper adjudication of this appeal, the proper remedy is not a remand to the lower court but rather an order from this Court requiring supplementation of the appellate record with documents that are properly in the lower court record. There is no logic to remanding a case because the appellate record is incomplete when the trial court already has those documents in its record.

the 2009 Bylaws, and the 2009 Rules were the operative documents. The Club disputes that, but that point is frankly immaterial. The Court correctly determined, and it is undisputed, that the Dennises resigned their membership in 2010, and as a result, the operative documents are the 2008 Plan, the 2009 Bylaws, and the 2009 Rules. Again, Rule 220(c) authorizes this Court to affirm the trial court on any basis appearing in the record.

III. The Court correctly ruled that the Dennises resigned their membership in the Club in 2010, and as a result were not subject to, or entitled to, mandatory expulsion.

The Dennises also contend that the Court failed to consider evidence that they were suspended by the Club. Yet, in making this argument, the Dennises do not dispute (nor can they) that they actually resigned their membership in the Club in 2010. (App. 311, 314-315). The Dennises nonetheless point to documents that post-date 2010 that give their "status" as "S" which the Dennises presume means "suspended." The Dennises also cite to a 2013 affidavit of Jeff Spencer, the Club's general manager, in which he attests that the Club "has been forced, owing to non-payment, to suspend the Defendants' membership rights and privileges pursuant to the applicable documents." (App. 564). By 2013, of course, the Dennises had resigned their membership, but the 2008 Plan (like prior versions) provides that "[a] resigned member will be entitled to use the Club Facilities so long as the resigned member is obligated and continues to pay all dues, fees and other Charges

associated with the resigned Equity Membership." (App. 653). After their resignation from the Club, the Dennises ceased payments of dues and fees. As a result, they were precluded or "suspended" on that basis from continued use of the Club amenities. However, their membership had already been resigned in 2010. It was their continued use of the amenities until the membership was reissued that was "suspended" thereafter for non-payment.

Thus, the Court is correct in ruling "no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered." (Slip Op. at 9). At any rate, as the Court also recognized correctly, the Dennises were not entitled to a mandatory expulsion even if they had been suspended. The 2009 Rules changed the "shall be expelled" language in the 2001 Rules, as relied upon by the Court of Appeals, to the discretionary "may be expelled." (App. 366-367, 543-544).[3] That fully supports

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[3] In footnote 3 of the petition, the Dennises argue that the Club relied on the 2001 Rules in presenting its summary judgment motion. That is inaccurate. During the May 27, 2014 motion hearing, the Club's counsel argued as follows:

> And as far as expulsion goes, in this case, he's looking at the 2001 rules that say *shall.* Well, since 2007, they've said *may.* His clients didn't default until the end of 2010, where I believe the 2009 rules would have been the ones in effect, which say *may.* So, they're not time travelers. These folks defaulted in 2010, and the rules at that time say *may be expelled.* They weren't expelled. They send [sic] a resignation letter, which was fine, but that doesn't mean they don't have a continuing obligation to pay until their membership is re-issued.

(App. 543-544). (Emphasis in original transcript).

the Court's ruling that "the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory *under any condition.*" (Slip Op. at 9). (Emphasis added).[4]

The Dennises nonetheless insist that they were expelled by the Club, and as an expelled member, they have no continuing obligation to pay dues and fees to which they previously committed. That contention is unsupported by the record. It is undisputed that the Dennises resigned in 2010. Mr. Dennis confirmed that he submitted a resignation letter. (App. 311, 314-315). Moreover, as stated above, the 2009 Rules made expulsion discretionary with the Club. There is no evidence that the Club made any attempt to expel the Dennises, who were deemed "resigned members" by their own voluntary actions. In short, the Court's analysis is clearly correct on these issues, and there is no valid basis for a rehearing.

IV. The Dennises are not entitled to a cap on their monetary liability for post-resignation dues and fees.

In their petition for rehearing, the Dennises attempt to interject a new issue. They argue that their monetary liability for post-resignation dues and fees should

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[4] The Dennises also argue that the Court overlooked a 2007 letter that cited the "shall be expelled" language, but that letter is immaterial because it pre-dated the 2009 Rules which indisputably include the "may be expelled" discretionary language. Likewise, the Dennises claim that Court disregarded witness testimony to the effect that expulsion was mandatory. However, as the Court correctly ruled, the parol evidence rule bars consideration of testimony that contradicts or varies the terms of the membership documents. The Court explained "because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning." (Slip Op. at 8).

be capped at $31,000, which was the amount paid for their equity membership in 1999. (App. 216). This new argument lacks merits on both procedural and substantive bases.

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

Moreover, as to its merits, the Dennises rely on language from the 1994 Plan which is different from the 2008 Plan, which is the operative document as correctly determined by the Court. The 2008 Plan provides as follows:

> 5.11 PAYMENT OF DUES ANO OTHER CHARGES BY RESIGNING MEMBERS
>
> An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees and other Charges associated with his/her membership until his/her Equity Membership is reissued by the Club. *Any unpaid dues, fees and other Charges plus interest accrued under the then prevailing terms of the General Club Rules will be deducted from the amount to be paid to the resigned*

> *member upon the reissuance of his/her resigned Equity Membership.* A resigned member will be entitled to use the Club Facilities so long as the resigned member is obligated and continues to pay all dues, fees and other Charges associated with the resigned Equity Membership.

(App. 652-653). (Emphasis added). The highlighted language demonstrates that there is no cap on the resigned member's liability for unpaid dues and fees. Instead, the indebtedness will be deducted from the amount to be paid upon reissuance of the membership. However, there is no provision precluding the Club from collecting by other means amounts in excess of the value of the equity membership.

Even relying on the 1994 Plan, as the Dennises do, the result is the same. The 1994 Plan states that "[t]hese dues will accrue against and be deducted from the amount to be paid to the resigned member upon reissuance of his or her resigned membership." (App. 591). That language likewise does not create a cap on a resigned member's liability for unpaid dues and fees. This issue, even if properly preserved and presented, which it was not, does not warrant a rehearing or a revision of the Court's opinion.

V. The Court correctly interpreted and applied the entirety of Section 33-31-620 of the Nonprofit Corporation Act.

The Dennises contend that the Court's opinion "guts" the legislative intent of Section 33-31-620 of the Nonprofit Corporation Act which allows a member of

a non-profit corporation to resign. They argue that Section 33-31-620(a) "means nothing" as a result of the Court's opinion. However, as the Court correctly ruled, Section 33-31-620(a) cannot be read without also giving effect to Section 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). Reading the whole statute so as to give effect to both subsections, the Court explained that a member may resign at any time but continues to be responsible after resignation for "commitments made before resignation." (Slip Op. at 10). More specifically, the Court correctly concluded that "the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620." (Slip Op. at 10).

In its application in the present case, the Dennises were permitted to resign from the Club but were required to pay their dues, fees and other charges until their membership is reissued – which is precisely the commitment they made in 1999, when they "agree[d] to be bound by all of [the] respective terms and conditions" of the 1994 Plan. (App. 216). Those same requirements continued in the 2008 Plan,

which was in effect when the Dennises resigned their membership.[5] Accordingly, the Court's interpretation and application of Section 33-31-620 does not warrant a rehearing.

VI. The factual challenges made by the Dennises are not pertinent to any dispositive claim or issue and relate only to a "factual analysis" that the Court expressly found should not be conducted.

The Dennises also take exception with what they term "broad factual characterizations." They inappropriately interject by footnote purported facts not in the record in an attempt to dispute the Court's factual statements. This basis for rehearing is misplaced.

The "broad factual characterizations" of which the Dennises complain are all asserted as part of the Court's rebuttal of the dissent's suggestion of a "harsh result" – which the Court states is "a factual analysis we should not conduct in this case because the governing documents are unambiguous." (Slip Op. at 7). The Court has explained that the very factual analysis now being challenged by the Dennises is unnecessary and immaterial and was addressed by the Court solely to respond to the dissent. In effect, the factual analysis – by the Court's own explanation – is not controlling or dispositive of the actual issues decided on appeal. The Court confirms that point by specifically stating that "[w]e are *not*

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[5] Contrary to the Dennises' argument, the "articulation" of "commitments made" is not a question of fact for the jury. Those commitments made are set forth in what the Court concluded are unambiguous membership documents.

deciding whether the governing documents could support perpetual liability under these or any other facts." (Slip Op. at 7). (Emphasis in original). Indeed, as the Court makes clear, "[t]he 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." (Slip Op. at 7). In sum, the "broad factual characterizations" of which the Dennises now complain are immaterial to the actual adjudication of the case and certainly do not present any basis for a rehearing.

VII. The Dennises have not made a proper showing for a remand to the Court of Appeals to address any additional issues on appeal.

As a final issue for rehearing, the Dennises argue that the Court's reversal of the Court of Appeals' decision and reinstatement of the trial court's summary judgment deprived them of adjudication of other issues raised to the Court of Appeals. They seek a remand to the Court of Appeals. This argument has no merit and does not warrant a rehearing or a remand for two primary reasons.

First, to the extent not already covered by the issues on which the writ of certiorari was sought by the Club, the Dennises should have re-asserted those same issues on appeal as additional sustaining grounds for the Court of Appeals' decision. *See generally, Elam v. South Carolina Department of Transportation,*

361 S.C. 9, 602 S.E.2d 772 (2004). They did not do so.[6]

Second, the issues for which the Dennises seek a remand to the Court of Appeals are encompassed within this Court's decision, including issues related to the alleged "suspension" and "expulsion" of the Dennises, arguments related to the sufficiency of the membership documents in the record, and a challenge to the Club's authority to amend the Plan, Bylaws and Rules.[7] Potentially, the only issue not decided by this Court is whether the trial court abused its discretion in considering a "late filed affidavit" of trial counsel setting forth the incurred attorney's fees and costs, which were then included in the judgment. (App. 102-103, 430-432). That issue does not warrant a remand, or alternatively, can be resolved pursuant to Rule 220(b), SCACR.

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[6] Likewise, those issues were not raised or preserved in the Dennises' return to the Petition for Writ of Certiorari.

[7] The Court has already ruled that "these documents were amended several times over the years, as permitted by the Bylaws, the Plan and the Rules." (Slip Op. at 4). By footnote, the Court cited the provisions in those documents that authorized such amendments.

CONCLUSION

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

Respectfully submitted,

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October 2, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Petitioner, does hereby certify that service of the **Return to Respondents' Petition for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 2nd day of October 2018:

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