

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2015-00002

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SC Court of Appeals

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

v.

Michael J. Frey and Grace I. Frey Defendants.

Of whom, Michael J. Frey is Appellant.

SUPPLEMENTAL RESPONDENT'S BRIEF

ANDREW F. LINDEMANN
LINDEMANN, DAVIS & HUGHES, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Respondent

M. DAWES COOKE, JR.
JOHN W. FLETCHER
BARNWELL WHALEY PATTERSON
& HELMS, LLC
Post Office Drawer H
Charleston, South Carolina 29402
(843) 577-7700

STEPHEN P. HUGHES
HOWELL, GIBSON & HUGHES, P.A.
Post Office Box 40
Beaufort, South Carolina 29901
(843) 522-2400

Counsel for Respondent

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INTRODUCTION

This case is before this Court on appeal from the entry of summary judgment in favor of Plaintiff-Respondent Callawassie Island Members Club, Inc. ("CIMC"), which is a member-owned amenities club on Callawassie Island, Beaufort County, South Carolina. CIMC filed this lawsuit to enforce its contractual rights. CIMC seeks to recover dues and other amounts due from the Defendants Michael J. Frey and Grace I. Frey, who are equity members of CIMC. (R. 25-46). CIMC claims that, under the governing documents, the Freys agreed to and are required to continue to meet their financial obligations until CIMC reissues their membership to a new member. Reissuance can occur either by transfer in connection with the sale of the Freys' property on Callawassie Island or sale via the membership resale list.

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

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

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

The Freys have asserted counterclaims and argued, for various reasons, that they are not obligated to remain members of CIMC and can abandon their financial responsibilities to their fellow members whenever they want. In their Second Amended Answer and Counterclaims, the Freys asserted counterclaims for breach of contract and negligent misrepresentation. (R. 94-106).

The trial court correctly granted CIMC summary judgment as to Appellant Michael J. Frey because the unambiguous documents provide that CIMC is entitled to the relief demanded. The trial court denied summary judgment as to Defendant Grace I. Frey, pending the completion of further discovery. (R. 4). Michael Frey filed an appeal to this Court.

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

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

- (c) The trial court improperly granted summary judgment to CIMC on its claims because there is a scintilla of evidence that whether the Appellant was "expelled" from the Club and whether the Club's governing documents were improperly changed on the issue of expulsion;
- (d) The trial court improperly granted summary judgment to CIMC on its claims because, pursuant to this Court's ruling in *Dennis*, S.C. Code Ann. § 33-31-620 does not require a resigning member of the Club to continue paying dues until reissuance of their membership, notwithstanding the parties' clear agreement to the contrary;
- (e) The trial court improperly granted summary judgment to CIMC as to the Appellant's breach of contract counterclaims, because (as set forth above) there are ambiguities in the governing contract documents;
- (f) The trial court properly granted summary judgment to CIMC as to the Appellant's negligent misrepresentation counterclaims;
- (g) The Appellant failed to preserve his argument that the trial court improperly granted summary judgment to CIMC as to the Appellant's statutory violation counterclaims;
- (h) In light of the foregoing rulings, this Court also reversed the grant of attorneys' fees to CIMC; and
- (i) In light of the foregoing rulings, this Court did not address CIMC's additional sustaining grounds, pursuant to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate court need not address remaining issues when resolution of prior issue is dispositive).

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

for rehearing and authorized the filing of supplemental briefs in light of the Supreme Court's decision in *Dennis*.

ARGUMENTS

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

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

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

The court of appeals' reasoning ignores subsection 33-31-620(b), which provides, “The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation.” S.C. Code Ann. § 33-31-620(b) (2006). Subsection 33-31-620(b) contemplates two categories of debt for which a resigned member continues to be responsible after resignation: (1) “obligations incurred ...

before resignation” and (2) “commitments made before resignation.” S.C. Code Ann. § 33-31-620(b). The dues, fees, and other charges the Dennises owe fall into the “commitments made” category. The 1994 Plan -- which was in effect when the Dennises joined -- and the 2008 Plan -- which was in effect when the Dennises resigned -- both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges “until his or her equity membership is reissued by the Club.” When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. *Therefore, we find the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620.*

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

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

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

In its decision in *Dennis*, the Supreme Court recognized that “[t]here is no question the Dennises are contractually bound to the Members Club.” *Dennis*, 821 S.E.2d at 670, n.2. The Supreme Court explained:

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

Id.

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

¹ This ruling was not challenged by Frey in his petition for rehearing.

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

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

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

Id., n.1.

The same is true in the present case. Frey has alleged that he resigned or otherwise tried to force his expulsion from CIMC by non-payment in late 2009 or at

least by May 2010.² At that time, like in *Dennis*, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules. Consequently, consistent with the Supreme Court's decision in *Dennis*, there is no genuine issue of material fact in dispute as to which version of the governing documents controls the relationship between Frey and CIMC in the 2009-2010 time frame.

Likewise, consistent with the Supreme Court's decision in *Dennis*, there is no genuine issue of material fact in dispute regarding the authority for the CIMC Board to amend the General Club Rules without a vote of the full membership. This issue has arisen only in the context of Frey's "mandatory expulsion" argument. Frey relies on language in the 2001 Rules stating: "Any member whose account is not settled within the four (4) months period following suspension *shall* be expelled from the Club." (R. 1350). (Emphasis added). However, in 2007, the Rules were properly amended, and the "mandatory expulsion" language was removed. The 2007 Rules state: "Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club." (R. 1440). (Emphasis added). The 2009 Rules continued to use the same "may be expelled" language. (R. 1476). Citing that same language, the Supreme Court in *Dennis* explained that "the

² In his Second Amended Answer and Counterclaims, Frey pled that he "ceased paying dues and fees in October 2009." (R. 96). Frey further alleged that his "membership was terminated as of January 2010 (4 months after delinquency) or in the alternative was resigned as of May 2010." (R. 101).

2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition.” *Dennis*, 821 S.E.2d at 673.³ Those same 2009 Rules, as applied to Frey, show that expulsion was likewise not mandatory in the 2009-2010 time frame.

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

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

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

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

from the club.” (Slip Op. at 6). This Court’s error, however, was in citing to the amendment provision for the Plan for Offering of Memberships rather than the amendment provision for the General Club Rules.⁴ As the Supreme Court explains in *Dennis*, the Bylaws provide that the Board of Directors has the authority to “[a]dopt, alter, amend or repeal the General Club Rules governing use of the Club and all its facilities by members.” (R. 1483). *See, Dennis*, 821 S.E.2d at 670, n.1. Thus, an amendment of the Rules *does not require a vote of the full membership*. Frey, in fact, does not cite to any evidence suggesting that the General Club Rules were not properly amended in 2007 or 2009. Moreover, he cites to no contractual document that required a vote of the members to approve any changes to the General Club Rules.

As a result, contrary to what this Court previously determined, there is no material issue of fact in dispute. The 2009 Rules govern Frey’s resignation or attempt to force his expulsion from CIMC during the 2009-2010 time frame, and those Rules do not include the “mandatory expulsion” provision. This is precisely what the Supreme Court ruled in *Dennis*, and it is equally applicable and binding in this case.

⁴ The 2007 and 2009 versions of the General Club Rules provide that “[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships.” (R. 1430, ¶ 1.3 (2007 version); R. at 1465, ¶ 1.3 (2009 version); *accord* R. at 1330 (1994 version); R. 1343, ¶ 1.3 (2001 version)).

In sum, there is absolutely no evidence that CIMC Board expelled Frey from the Club. Even if "suspended" from the Club for non-payment, Frey did not have the right to automatically "expel" himself by simply remaining delinquent for four additional months. Therefore, regardless of whether Frey submitted his resignation or attempted to force his own expulsion by non-payment, Frey remains obligated to pay his dues, fees, and other charges until such time as his membership is reissued. That trial court ruling is fully consistent with the Supreme Court's decision in *Dennis* and should be affirmed.

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

In its opinion in *Dennis*, the Supreme Court rejected all arguments that the governing documents -- the 2008 Plan, the 2009 Bylaws, and the 2009 Rules -- are ambiguous in any respect. First and foremost, the Supreme Court cited to Section 5.11 of the 2008 Plan, entitled "Payment of Dues and Other Charges by Resigning Members," which states: "An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club." (R. 1453-1454). The Supreme Court concluded that "[t]his language unambiguously provides the Dennises are obligated

to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued.” *Dennis*, 821 S.E.2d at 670. The Supreme Court recognized that “[t]here are no provisions in the 2009 Bylaws or 2009 Rules that contradict this.” *Id.*

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

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

Finally, the term “unpaid” in the 2009 Rules is not ambiguous, despite the fact it is not defined. The court of appeals explained its interpretation of this provision by stating, “It is unclear whether the language relating to

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

Id. (Citation omitted).

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

Moreover, the Supreme Court in *Dennis* rejected any reliance on extrinsic evidence to argue that the governing documents are ambiguous. The Supreme Court explained “because we find the terms of the membership documents are

unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning.” *Dennis*, 821 S.E.2d at 672. The Supreme Court thus applied the parol evidence rule to bar consideration of testimony that contradicts or varies the terms of the membership documents, including testimony of what the members were allegedly told by Ellen Padgett, a former membership coordinator, about the expulsion process. In its May 2, 2018 opinion, this Court relied on the very same parol evidence to preclude summary judgment. On rehearing, that evidence must now be rejected consistent with the Supreme Court’s decision in *Dennis*.

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

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

members, such as the Dennises and Frey, remain obligated for dues, fees, and other charges until reissuance of their memberships. Thus, the summary judgment on Frey's breach of contract counterclaim should be affirmed.⁵

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

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

CIMC relies on prior briefing on this issue. In sum, the analysis by the trial court should be affirmed. The governing documents are properly construed to include the recovery of "all costs and expenses" to CIMC, including reasonable attorney's fees, if a legal action is commenced by CIMC "to collect any amount owed" or "to enforce any liability of a member to the Club." (R. 1476).

⁵ The Court's analysis of the negligent misrepresentation claim in its May 2, 2018 opinion is correct and should be affirmed on rehearing. In his petition for rehearing on this issue, Frey argues that the expulsion language as contained in Section 13.3.1 of the 2001 Rules constitutes a representation that "members must be expelled after nonpayment." See, Frey's Petition for Rehearing, p. 3. However, as discussed above and as determined by the Supreme Court in *Dennis*, that expulsion provision was amended in the 2007 and 2009 Rules to be discretionary rather than mandatory. As a result, Frey has not shown that any false representation was made by the 2001 Rules. Instead, that representation was no longer in effect in the 2009-2010 time frame because the Rules had been amended in the interim.

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

CONCLUSION

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

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES P.A.

BY: 

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

M. DAWES COOKE, JR. #1376
JOHN W. FLETCHER #69550
BARNWELL WHALEY PATTERSON
& HELMS, LLC
Post Office Drawer H
Charleston, South Carolina 29402
(843) 577-7700

STEPHEN P. HUGHES #2805
HOWELL, GIBSON & HUGHES
Post Office Box 40
Beaufort, South Carolina 29901
(843) 522-2400

Counsel for Respondent
The Callawassie Island Members Club, Inc.

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