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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001
Lower Court Case Nos. 2012-CP-07-03209, 2012-CP-07-03216, 2012-CP-07-03218

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Michael J. Frey and Grace I. Frey, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants

Of whom
Gregory L. Martin, Michael J. Frey, and Mark K. Quinn
are the Appellants

APPELLANTS' PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Appellants Gregory L. Martin, Michael J. Frey, and Mark K. Quinn hereby petition for rehearing as to this Court's Opinion No. 2019-UP-393, filed December 18, 2019 (the "Opinion"). As set forth below, Appellants respectfully submit that the Opinion overlooks material principles of law, and that it overlooks or misapprehends matters in the Record.[1]

I. This Court cannot in good conscience uphold an illegal contract.

As it stands, this Court's Opinion has condemned the Appellants, and any number of other members of the Callawassie Island Members Club, to an inescapable bondage, in which they are to be held captive indefinitely by a golf and social club. The idea of being a slave to a golf club seems almost comical . . . except that it's not. Because of the Opinion, the Appellants (and many others like them) are facing hundreds of thousands of dollars of ever-accumulating dues and fees, without any end in sight. Resignation is meaningless. Trying to sell their property is useless. No one in their right mind will step in to take their place, but that is exactly what seems to be required.[2]

When the Club first began to file its legion of lawsuits against its members, no one would have imagined this outcome of perpetual, inescapable liability. We know it is not what the hapless members of the Club signed up for—for who would? Foreseeing this possible aftermath of its decision in *Dennis*, the Supreme Court balked. Justice Few

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1 Citations to the Record on Appeal in this brief are to the Quinn Record on Appeal. The same documents are in the Records on Appeal in Martin and Frey. Appellants would be glad to provide parallel citations to the Records in Martin and Frey, if the Court so wishes.

2 And, of course—even if a such a martyr or maniac *were* to step in—the Club has the exclusive right to determine the qualifications for membership, and it reserves the sole authority to approve applications and to reject whom it pleases. (R. p. 1448).

hastened to make clear that his majority opinion was "*not* deciding" the question of perpetual liability. *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 202, 821 S.E.2d 667, 672 (2018) (emphasis in original) ("*Dennis* Opinion"). Justice Hearn, writing passionately for the dissent, cautioned against the very result at which this Court has arrived. This Court, too, recognizes the injustice of its decision; its footnote 2 quietly rebels against the prospect of perpetual liability; but the note ends with a shrug, as if to sigh: "but what can be done?" Op. p. 13 n.2.

Something **must** be done. This Court is not an agent of injustice. The members of the Club should be afforded relief on the simple grounds that the Club's practices and governing documents are illegal. They are illegal because they have been unilaterally warped and modified without notice to the members in order to create an inescapable servitude. They are illegal because their unbargained-for terms are unconscionable and against public policy. They are illegal because they are disparately enforced. They are illegal because the Opinion has mistakenly construed their terms in a way that allows the Club to circumvent the law.

This Court should "not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." *Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010) (disregarding issue preservation rules to find, *sua sponte*, that a contract was void for illegality).[3] "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance **in any way** towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal

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[3] *See, e.g.*, Reply Br. of App. at p. 15 (arguing that the Club's practices violate public policy).

contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract." *McMullen v. Hoffman*, 174 U.S. 639, 654, 19 S. Ct. 839, 43 L. Ed. 1117 (1899) (emphasis added).

This Court misapprehends its own power. The *Dennis* Court expressly punted on the question of perpetual liability, and it sent the ball right back to this Court with these encouraging words from the dissent: "at some point courts are called upon to step in to alleviate a provision contrary to public policy." *Dennis*, 425 S.C. at 210, 821 S.E.2d at 676. **It has come to that point.** Perpetual contracts are against public policy. *See Childs v. City of D.C.*, 87 S.C. 506, 70 S.E. 296 (1911) (holding that "it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually" and noting that "courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other."); *see also Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994) ("Historically, perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract."). Courts do not enforce contracts that are against public policy. *White v. JM Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004) ("courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."), *citing Berkebile v. Outen*, 311 S.C. 50, 53–54, 426 S.E.2d 760, 762 (1993) (stating "[a]n illegal contract has always been unenforceable") *and Batchelor v. American Health Ins. Co.*, 234

S.C. 103, 107 S.E.2d 36 (1959) (noting that contracts violating public policy—as expressed in constitutional provisions, statutes, or judicial decisions—are void).

As further set forth below, this Court should withdraw its Opinion and substitute a decision that finds the Club's documents and practices to be illegal, that permits the contract to be terminated at will, or that remands the case for trial on the question of whether the Club's contract is (or has wrongfully become) perpetual and therefore unenforceable.[4]

II. There is a genuine issue of material fact as to whether the Appellants were disparately treated in violation of the Nonprofit Corporation Act.

In its recent ruling in *Dennis*, this Court correctly held that:

> We find the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed material issue of fact as to the claim that the Club violated the Nonprofit Corporation Act.

Op. No. 5696 at p. 5. The same disputed material issue of fact exists here.[5] As in *Dennis*,

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[4] The Club might respond by arguing that this issue has not been preserved for appellate review. To the contrary: (a) the question of whether the Club's documents create an illegal contract has been part of these disputes since 2012; furthermore, (b) the question of whether the Club's documents have been properly amended—having the result of creating a perpetual obligation—has also been at the forefront of this litigation since its inception.

[5] This issue was preserved and argued by Appellants, including pleading it as an affirmative defense (R. pp. 86–87, violation of S.C. Code § 33-31-610 *et seq.*); in their motions before the trial court (R p. 335: "The Defendant was denied the opportunity to concede his membership offered to other similarly situated members."), R. p. 333 ("In addition, the Defendant presented evidence that concessions were allowed in numerous circumstances which clearly violate the rights of the Defendant who has not been 'allowed' to concede his membership where others of the same class of membership have been."); in their Brief of Appellant at p. 2 (citing § 33-31-610), p. 5 (discussing expulsion of other members, but not Appellants), p. 17 (discussing expulsion of other members, but not Appellants), p. 25 (discussing Club's practice of expelling other members, but not Appellants), p. 26 (discussing testimony about the Club allowing other members to concede their memberships), p. 40 (citing § 33-31-610 "disparate treatment of members"), p. 42 (discussing the Club's roster of conceded members on which Appellants relied), p. 45 (arguing "the Club has not provided adequate bases for its differential treatment in conceding and expelling some members without further financial obligation, but not others (such as the

the Record here includes examples of the Club allowing some members to concede[6] their memberships and end all financial obligations to the Club, including concession letters from the Club (R. pp. 1551–1564), the Club's resale list, which identifies members who conceded their memberships, as well as members who were expelled, (R. pp. 510–511, 1548–1549), and deposition testimony from a former board member (R. p. 466, lines 3–5). Yet, the Appellants were not permitted to concede their memberships, and the Club contends that—although Appellants were suspended—they were not expelled like other members.

This is a "live by the sword, die by the sword" moment: if the Club's governing documents are to be strictly enforced against the Appellants, then the Club is also bound to adhere to their terms and to apply them consistently to its membership. The evidence in the Record of disparate treatment defies the mutuality of the parties' contract, and it flies in the face of the Nonprofit Corporation Act's definition that members' "rights are considered the same if they are determined by a formula **applied uniformly**." S.C. Code § 33-31-140 (emphasis added). In its *Dennis* ruling, this Court relied upon similar evidence of the Club's unequal application of its rules to its members, and it properly remanded for trial on the question. Under the law of South Carolina, the same facts compel the same disposition here; accordingly, this Court should remand Appellants' cases for a jury trial on Appellants' breach of contract and Nonprofit Act counterclaims.

[Appellants]"); and in the Reply Brief of Appellant, at p. 12 (discussing the Club allowing other members to concede their memberships, but not Appellants).

6 This argument applies equally to the Club's selective expulsion of some members, but not others such as Appellants.

III. This Court errs in the Opinion's section on Disregarding Evidence.

This Court overlooks that the disputed facts in evidence made summary judgment improper. Affirmance of the circuit court's flawed order, which contains numerous errors of fact and law, is simply not just.

A. Contract and Governing Documents

The Opinion holds that the Appellants' obligations to the previous Island Club transferred to this Club. As a threshold matter, this Court overlooks that the Club's governing documents—particularly their provisions on liability, resignation, termination, and expulsion (which have been manipulated by the Club over the years to create a permanent payment obligation)—are against public policy. Furthermore, its current Opinion mistakenly applies the *wrong provisions* of the contract to the Appellants. Finally, the Court misapprehends that questions of fact exist as to whether the documents have been unlawfully amended and disparately enforced.

1. Resignation vs. Expulsion

This Court disregards the key detail that, with regard to exit paths, Appellants' cases are different from the *Dennis* case. The trial court's orders in Appellants' cases were written by a different circuit court judge (from *Dennis*), at a different time, and involving different factual and contractual issues. One of those different issues is Appellants' means of disassociation from the Club—in *Dennis*, the issue before the Supreme Court was the scope of the Dennises' obligations under the **resignation** provisions of the Club documents; here, the separate issue is the scope of the Appellants' obligations under the

distinctly different suspension and **expulsion** provisions.[7] Yet the Opinion's section on the "Governing Documents" (§ I.B) improperly analyzes the Appellants' cases under the resignation provisions, rather than the expulsion provisions. In so doing, the Opinion misreads and fails to give meaning to the plain terms of the Club's governing documents.

a. Resignation is different from expulsion at issue here.

The Club's governing documents are clear that expulsion is distinct from resignation, with different procedures and legal ramifications. Under the governing documents, "expulsion" severs a member's relationship with the Club, and it ends a person's obligations to the Club. The bylaws state that "expulsion" causes a person to "cease to be an equity member," meaning they no longer have member responsibilities such as dues and other charges. (R. p. 1303 (B-11, § 8(b)); *see also* R. p. 1449 (2008 Plan, § 3.4(b), identifying "expulsion" as a way in which a "person shall cease to be an Equity Member.")). Even the 2009 Rules recognize that expulsion ends membership:

> 14.1.5: Expulsion. Any Member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club Facilities under any circumstances. An expelled member . . . shall have the obligation to surrender his or her membership certificate for reissuance by the Club to a new member.

(R. p. 1512).

Similarly, the dissenting Supreme Court justices emphasized that expulsion ends membership:

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[7] Appellants' briefs are clear that the exit path at issue in their cases was expulsion, not resignation: "[Expulsion] is the exit method that applies to Mark Quinn" and "Under these terms and circumstances, Mark Quinn was expelled in or about May of 2010, if not earlier. He has been barred from the Club since then. . . ." Quinn, *Brief of Appellant*, Aug. 27, 2015, at pp. 5, 6. The same argument was made in the briefs of Martin and Frey, on the same pages.

> Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so "shall be expelled from the Club," **ending their liability for future dues**.

425 S.C. at 677, 821 S.E.2d at 213 (emphasis added). That is different from resignation, under which a membership endures, and the resigned person may use the facilities until the membership is reissued to a new member of the Club's choice. *See* R. p. 1453 (2008 Plan, p. 12, § 5.11).

Therefore, the Opinion's error in focusing on resignation rather than expulsion carries significant weight, under the terms of the contract itself. Because the suspension and expulsion provisions apply here, there are issues of fact as to whether Appellants were expelled, when they were expelled, and the amount of money owed at expulsion, if any.[8]

b. This Court mistakenly applies the *Dennis* Opinion's conclusion on resignation to the expulsion at issue here.

In *Dennis*, the Supreme Court majority admonished that:

> In response to the "logical end" argument [by the Supreme Court dissent], we point out that—as in all cases before this Court—we decide only the issues before us in *this* case. **The "logical end" of our analysis goes no further** than required by the four corners of the governing documents **in this case when applied to the facts of this case**. . . .

425 S.C. at 202, 821 S.E.2d at 672 (italics in original; bolding added). The Supreme Court was clear that the *Dennis* facts and Opinion do not reach the expulsion issue:

> This provision makes it clear that **mandatory expulsion arises only after the board has suspended a member**, which is discretionary with the board.

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[8] The *Dennis* Opinion rules that parol evidence cannot be admitted with regard to certain unambiguous provisions of the governing documents (specifically, § 5.11). However, that Opinion does not appear to prohibit referring to testimony relating to the Club's other practices, which raises an issue of fact, as set forth in the previous briefing which is incorporated herein.

> Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered.

Id., 425 S.C. at 673, 821 S.E.2d at 204 (emphasis added). However, this Court's Opinion's first point under Governing Documents (§ I.B.1) mistakenly addresses a "resignation" of Appellants, and concludes that "Because the governing documents at issue in *Dennis* are the same documents at issue in the instant cases, we affirm the grant of summary judgment to the Club on its claims against Appellants." Op. p. 8. This reasoning mixes legal apples (resignation) and oranges (expulsion), and it defies the direct instruction of the Supreme Court. The Opinion therefore should be corrected and the case remanded for trial.

c. S.C. Code Ann. § 33-31-620 applies only to resignation, not to expulsion at issue here.

The Opinion's error also is significant because, by erroneously applying the resignation provisions of the governing documents here, the Opinion mistakenly relies on portions of the Nonprofit Corporation Act that apply only to resignation (not to expulsion). A large part of the *Dennis* decision focuses on statutory language that "A member may **resign** at any time." S.C. Code § 33-31-620(a) (2006) (emphasis added). Based on the this Court's mistaken understanding that this is a resignation case, the Opinion concludes that (based on *Dennis*) this Court has "no choice but to hold the requirement that members continue to pay dues, fees, and other charges **after resignation** until their membership is reissued is not prohibited by the Act [§ 33-31-620]." Op. p. 12 (emphasis added). But, again, this is not a resignation case; it involves Appellants'

suspension (which is undisputed)[9] and their expulsion, which the documents state should have followed automatically, after four months' suspension. This is a different exit path from resignation, governed by different document provisions and law.

2. Expulsion

When the Opinion (§ I.B.2) does turn to expulsion, it acknowledges that Appellants were suspended, and that the Club's governing documents require expulsion after four months of suspension. That alone should mandate a ruling in favor of Appellants based on the Supreme Court's statement that "**mandatory expulsion arises only after the board has suspended a member.**" *Dennis*, 425 S.C. at 673, 821 S.E.2d at 204 (emphasis added).

The Opinion goes on to correctly identify testimony and evidence that properly should create a question of fact as to the Club's application of its expulsion provisions, such as the testimony of Ellen Padgett, the affidavit of Jeff Spencer, and the list of suspended members that includes Appellants—but it finds that it need not consider these facts because the Rules were revised in 2007 to remove the mandatory expulsion language. Op. pp. 9–10.[10] A jury trial on this issue is appropriate because, as set forth

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9 *See* R. pp. 1548, 1567.

10 Additionally, even later versions of the Club documents expressly state that a member may be suspended only for a period of up to one (1) year. By specifying a one-year term maximum for suspension, even the amended documents specifically contemplate that the member automatically is expelled after one year. (R. p. 1512: 2009 Rules: "14.1.3. Suspension. The Board of Directors may suspend a member and his or her family or guests from some or all Club privileges for a period of up to one (1) year. Dues and other obligations shall accrue during such suspension and shall be paid in full before reinstatement to full privileges.").

Even if, assuming *arguendo*, this Court were to hold that the Club properly amended the expulsion provision ("shall" to "may"), the Appellants' uncontroverted suspension status for a one-year period sent them to expulsion from the Club. There is no evidence in the Record that the Appellants paid in full during suspension (or paid at all), and thus they were not reinstated

below, questions exist as to whether the 2007 Rules were invalidly amended.[11] The Court's reasoning in this regard must be reconsidered.

3. Amendment

Relying on a passage from the most lowly of the governing documents, the Opinion inexplicably reverses this Court's previous holding that questions of fact exist as to whether the documents were properly amended.[12] In so doing, the Opinion overlooks that: (a) the effect of the amendments to the documents was to render the contract void as against public policy; (b) a question of fact exists as to whether the procedure for amendment was illegal; (c) a question of fact exists as to whether the amendments were in violation of superior provisions which should have operated to prevent them.

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as members under 2009 Rule 14.1.3. As such, the only allowable path for Appellants post-suspension—in accordance with the Club's own governing documents—is expulsion.

[11] Importantly, the circuit court's order (which is before this Court on appeal) erroneously and inappropriately cites Club Rules from 2014 in support of its holding that an expelled member would be liable to the Club for ongoing dues. (R. pp. 6-7). As previously argued, this Court should reverse the circuit court's holding because the provision cited by the order: (1) appeared for the first time in the rules *after the Club filed its lawsuits against Appellants*, (2) was not applicable to the Appellants, and (3) was the product of an invalid unilateral amendment procedure by the Club. *See* App. Br. pp. 31-32.

[12] This Court previously held, properly, that:

> [Appellant] contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club . . . [Appellant] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Appellant], 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 [Appellant's] suspension from the club.

(Unpublished Op. No. 2018-UP-180 at p. 6) (citing *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof)).

a. If the Amendments were indeed properly made (which is disputed), their result was to render the contract illegal.

At the outset, it is worth noting that the Appellants did not enter into a perpetual contract with indefinite liability. The contract by which they agreed to be bound had a finite term, mandatory provisions for exit by expulsion, and it clearly limited liability to the amount of equity contribution. The contract **became illegal over time** because the Club unilaterally amended its provisions. The Appellants seek either an outright ruling from this Court that those amendments were invalid as a matter of law, or (at a minimum) that questions of fact exist for the jury as to whether the amendments were made in compliance with the law and enforced by the Club uniformly.

b. Evidence exists that the amendment of the Rules was unlawful.

In its analysis of whether the Rules were properly modified by the Club, which relies on a single provision found within the Rules themselves, the Opinion fails to take into account that **all of the governing documents are subservient to the law, which overshadows the documents' own hierarchy.** *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751, 756 (2007) ("[I]t is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract."). The law expressly prevents the Club from making the changes that it did, without a vote of the members.

Importantly, regardless of the moniker that the Club attaches to them, be it "Plan," or "Rules," or "Terms of Indenture," all of the Club's governing documents are actually

"Bylaws" as defined by the law of South Carolina. Specifically, the Nonprofit Corporation Act clearly sets forth in its Definitions:

> (4) "Bylaws" means the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation **irrespective of the name or names by which the rules are designated.**

S.C. Code § 33-31-140 (emphasis added). Thus, pursuant to the law of this state, the Club's "Rules" are truly corporation "Bylaws," and they are bound by the law's explicit requirements for their amendment.

This Court's Opinion overlooks that the Club ran afoul of the law when it amended its Rules, in secret, to change language that affected the rights of its members, including members' legal and financial obligations to the Club. South Carolina law puts the following limitations on the amendment of a nonprofit corporation's governing documents (*i.e.*, bylaws):

- "Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member." S.C. Code § 33-31-611.
- "A notice of a meeting for members at which bylaws are to be adopted, amended, or repealed shall state that the purpose, or one of the purposes, of the meeting is to consider the adoption, amendment, or repeal of bylaws and contain or be accompanied by a copy or summary of the proposal." S.C. Code § 33-31-1021.
- "Unless otherwise provided in the articles, an amendment to the bylaws which relates solely to the dues required for membership and which establishes or

changes an amount for, or method of computation of, dues, must be approved by the members." S.C. Code § 33-31-1021.

As the Appellants have contended throughout the years of this litigation, a question of fact exists as to whether the Club provided the required notice, or sought the required membership approval, prior to stealthily amending the Rules (which are actually "bylaws") to affect the substantive rights and obligations of certain members of the Club. There is no evidence whatsoever within the Record of such notice or vote; in fact, the Opinion overlooks evidence to the contrary.[13] Importantly, if the amendments were invalid, it follows that the Appellants did not make a commitment to pay dues and fees in perpetuity.

Because the Club, as a matter of law, could not have unilaterally amended the documents to affect the substantive rights, the transfer rights, nor the liability of members, this Court's Opinion overlooks that a question of fact exists as to whether the process by which it altered the Rules violated the law.

c. Evidence exists that the Rules' amendments were in violation of superior provisions which should have operated to prevent them.

Additionally, the Opinion overlooks that the Club's documents themselves expressly prohibit the Club from secretly affecting the substantive rights and obligations

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[13] This Court had already concluded that such evidence exists. (*See* Op. No. 2018-UP-180 at p. 6: "[Appellant] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Appellant], there is a genuine issue of material fact regarding whether the governing documents were improperly changed.") It is unclear, to the Appellants, why this Court would have so radically reversed its previous holding in this regard.

of its members. The Opinion fails to contemplate the import of the very language that it cites in support of its decision. It quotes two sentences from the 2007 and 2009 Rules:

> [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.**

Op. p. 10 (emphasis added). The first quoted sentence indeed seems to permit certain amendment of the Rules by the Club board. However, the Club board's authority is clearly restricted by the second sentence, which indisputably subjects any such modification to the requirements of the higher governing documents.

The Opinion errs when it overlooks the fact that the higher-level governing documents require a vote of membership for "[a]ny amendment or modification" which materially and adversely affects the rights of the equity members.

The hierarchy of the Club's governing documents is that the Plan is supreme, the By-laws are next, and the Rules are the lowliest. The provisions of the Club Rules that the board is entitled to modify are those that pertain to day-to-day items such as hours of operation, pets in the pool area, golf tee times, clubhouse dress attire, dining room reservations, and "bona fide swimming attire." (*See, e.g.*, R. pp. 1313, 1316–1320). These standard operational issues within the Rules do not require a full vote of membership, which would be cumbersome to affect (from a practical standpoint) each time the Board experienced a change of heart on "cutoffs, dungarees, and bermudas." (R. p. 1318, ¶ 8). A vote is not required as to when the golf course "may be used by Juniors under thirteen

years of age" because that change does not affect a fundamental modification of the legal rights and financial obligations of members.

But the Plan—to which the Rules are subject—governs the documents' provisions regarding the fundamental legal rights of members and the transfer of memberships. The Plan has always required a vote of members for important issues:

> **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.

(R. p. 1272) (emphasis added). The Bylaws explicitly state that *the Plan* applies to "Membership transfer provisions," which are at issue here (*inter alia*). (R. p. 1486, § 10.1(e)).

Similarly, the suspension and expulsion of members is governed by the Bylaws, which may only be amended by a vote of the members.[14] (R. p. 489: Bylaws Art. XIV, § 3 "Suspension"; § 5, "Expulsion"). The Bylaws state that equity membership certificates are not transferrable except as provided in the Bylaws. (R. p. 486 § 10.a).

The issues in this lawsuit—and the dozens of other similar lawsuits the Club is ravenously pursuing against its members—involve modifications of the fundamental

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[14] The By-laws provide that a vote of the members is required for amendments:

> After the Closing Date, these By-Laws may be altered, amended, or repealed by a majority vote of all of the members of the Board of Directors and a majority of the votes cast by the equity members of the Club entitled to vote, in person or by proxy, at any duly called or constituted annual or special meeting of the equity members of the Club at which a quorum of equity members is present. A proposed amendment must be set forth in the notice of the meeting.

(R. p. 491).

legal rights and obligations of equity members. Modifications to the exit rights of equity members certainly "materially and adversely affect[ ] the rights of the equity members" and require a vote of the members, as do modifications to the provisions governing a member's liability to the Club upon disassociation. Such fundamental terms cannot be simply inserted into the Rules, disseminated to the members, put into practice by the Club, and then unilaterally changed by the Club's board; instead those provisions are expressly subject to and must follow the amendment process of the controlling governing documents, such as the Plan and the Bylaws. As the Supreme Court stated, "The three documents reference each other and are intended to operate together." *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670.

That the Club's board has tucked certain provisions in the Rules—and quietly massaged them over the years into something grotesque—does not change the fact that the process for modification of members' legal transfer rights is "**subject to and controlled by**" the amendment provisions of the higher-level documents (Plan and Bylaws). In contract terms, the Opinion's ruling on this point allows one party (the Club) to unilaterally change material terms of a contract (the membership agreement, bylaws, and rules) without consent of, or consultation with, the other party to the contract (the Appellants, and scores of other members). Such a "contract" is no contract at all—it is servitude. As the facts of this and many other Callawassie cases show, that servitude has become never-ending if the Club's interpretation is allowed.

Accordingly, the Appellants respectfully submit that the Opinion errs when it holds the Rules' amendment provision prevails over the amendment provisions of the Plan and the By-laws.

B. Nonprofit Corporation Act

The Opinion mistakenly distills Appellants' arguments on the Nonprofit Corporation Act into a single line-item on resignation, and it incorrectly concludes that it must affirm based on the Supreme Court's decision in *Dennis*, which ruled only on the application of S.C. Code § 33-31-620. This limited holding in the Opinion improperly disregards that Appellants also argued that there was a question of fact as to whether the Club violated the Act by improperly amending the governing documents (*see supra*) and disparately enforcing the governing documents.[15]

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[15] *See Brief of Appellant*, p. 11, fn. 2 ("In the alternative, even if the alleged contract was unambiguous, [Appellant] is still entitled to a trial on disputed issues of fact, such as . . . whether the Club may allow certain members to concede their memberships back to the Club, but deny that right to other members such as [Appellant]"); p. 15 ("Ellen Padgett . . . testified that after four months of non-payment, members would be expelled"); p. 17 ("Documents produced by the Club show that certain members were automatically suspended and then expelled. Although not consistent in its procedures, the Club would send letters to members who had not paid dues for four months, declare them 'expelled,' and tell them to 'surrender your membership certificate to the Club to the attention of the Membership Director Ellen Padgett . . . .'" (citing R. p. 1549, showing at least 15 expelled and numerous conceded members and R. pp. 1562–63); p. 25 ("Consistent with the requirements of the governing documents, the Club had a practice of requiring expulsion of non-paying members after four months of delinquency . . . "); *Reply Brief of Appellant*, p. 12 ("After 2001 and during [Appellants'] membership, the Club maintained a roster of certain members who had 'conceded' their membership obligation as a means of exiting the Club . . . .").

IV. Damages/Attorney's Fees

A. Damages

In affirming the circuit court's award of damages, the Opinion fails to take into account the Appellants' argument on set-off. Moreover, it overlooks that the documents were improperly amended to alter a member's ultimate liability.[16]

1. Any amount of damages awarded at trial should be offset by the amount of the Appellants' membership contribution.

Notwithstanding the question of amendment, the Opinion mistakenly disregards the Appellants' argument that the terms of the documents entitle them to a set-off in the amount of their equity contribution, as against any damages awarded.[17] This is incongruous, particularly since the Court cites the 2008 Plan and observes that "this provision provides unpaid dues **will be deducted from** the amount paid for the equity membership . . .". Op. p. 13 (emphasis added). Accordingly, the Opinion should be withdrawn and substituted with an opinion that finds that any damages awarded to the Club should be offset by Appellants' membership contribution, which has already been paid. To do otherwise would allow the Club an improper windfall.

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16 For the reasons stated herein, and in the previous briefing, Appellants specifically assert and preserve their arguments that any damages are limited, or capped, at the amount of Appellants' equity contributions.

17 *See, e.g., Brief of Appellant* at pp. 13, 17–20, p. 20 fn. 9 ("Alternatively, the Order incorrectly failed to allow Mark Quinn a credit of $26,000 for his equity contribution, toward the judgment amount [because the] documents specify that unpaid dues are to be 'deducted from' a member's equity in the Club."), p. 41; *Reply Brief of Appellant* at pp. 8–9, pp. 15–16; *Supplemental Brief of Appellant* at p. 10.

2. The question of liability is inextricably linked to the question of amendment.

The Opinion fails to take into account that a question of fact exists as to whether the governing documents were improperly amended by the Club to affect a member's liability. Throwing its hands up in the air on the question, the Opinion notes that the documents seemingly "neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership." Op. p. 13, fn. 2. The Court goes on to describe this lack of clarity as an "apparent ambiguity." *Id.* Appellants respectfully suggest that one reason that the documents appear ambiguous **is because they have been improperly amended over time**. Given that the Club drafted the documents, and subsequently modified them, South Carolina law requires that they be construed against the Club and in favor of a trial on the issue.

As set forth in Section III, above, the Nonprofit Corporation Act forbids amendment to bylaws affecting the computation of dues without membership approval. S.C. Code § 33-31-1021. The Act also requires notice to members in advance of the amendment of bylaws. S.C. Code § 33-31-1021. The governing documents themselves prohibit amendments which "materially and adversely affect the rights of the equity members" without their approval. (R. p. 1272). As this Court at one time correctly ruled, the Appellants submitted more than a scintilla of evidence in support of their argument that the Club illegitimately amended its own documents in a manner which materially and adversely affected their rights and obligations. Op. No. 2018-UP-180 at p. 6; *see, e.g.*, R. pp. 244–245, Affidavit of Mark Quinn, ¶¶ 4–8.

A question of fact exists as to whether the Club improperly amended its documents in order to alter the Appellants' liability to the Club.[18] Accordingly, the circuit court's decision should be reversed to allow a jury to determine the appropriate measure of damages.

B. The Opinion overlooks that the question of attorney's fees was raised to and ruled upon by the circuit court.

The Opinion's determination on issue preservation mistakenly assumes that the question of attorney's fees was raised for the first time in Appellants' motion to reconsider. In fact, the question of the validity of the Club's claim for attorney's fees was

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[18] There can be no dispute that the provisions governing liability *have* been changed through the years. Compare these sections, for example, and note the intentional removal of material terms like "accrue against":

- An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club. **These 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.

  R. p. 1264 (emphasis added) (1994 Plan).

- 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 . . . will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.

  R. pp. 1452–1453 (2008 Plan) (removing the material term "accrue against," *inter alia*).

- Any equity member may resign from the Club by giving written notice to the Secretary. **Dues, fees and charges shall accrue against a resigned equity membership** until the resigned equity membership is reissued by the Club.

  R. p. 1303 (1994 Bylaws) (emphasis added)

  Note that this entire provision has been removed from the 2009 Amended and Restated Bylaws. (R. pp. 1489–1497).

first raised by Appellants in their Answer, where they denied that the Club was entitled to the relief it sought. (R. p. 34). The Club's argument for summary judgment was grounded in its contention that it was entitled to relief based on the contract between the parties. The Club never actually cited nor argued the particular contractual provisions pursuant to which it claimed to be entitled to attorney's fees—it just made the broad claim that it was entitled to them. It is neither logical nor just that Appellants would have been required to argue *against* attorney's fees any more specifically that the Club was required to argue *in favor* of them. In fact, the circuit court's initial order granting summary judgment did not even cite any provision within the governing documents in support of its award of attorney's fees. (R. pp. 4–11). The purpose of a Rule 59 motion to reconsider is to obtain a ruling from the circuit court when it has failed to make one.

At the hearing on Appellants' Motion to Reconsider, Judge Kinard was particularly interested in the question of attorney's fees. *See, e.g.*, R. p. 1245 (Judge Kinard: "So I don't know about that. So just draft me an order confirming what I ruled before and address the attorney's fees. . . . And I am not ruling on that because I haven't studied that issue. I haven't studied that issue. . . ."). He requested that the parties provide supplemental briefing on the issue, which the Appellants submitted—and to which the Club did not object. (R. p. 265). After considering the supplemental briefing, the circuit court made a ruling on the question of attorney's fees. (R. p. 13). The Opinion overlooks that it is that particular ruling that is now properly before the Court on appeal.

The procedural fact that the circuit court indeed made a ruling on the question sufficiently establishes this Court's jurisdiction to review the judge's decision. *See Roche*

v. S.C. Alcholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E. 2d 243 (1975) (explaining that the purpose of an appeal is to determine whether the trial judge acted erroneously); *see also I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (noting that "the long-established preservation requirement [is that] the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments . . . [which] enable[s] the lower court to rule properly after it has considered all relevant facts, law, and arguments."). Our Supreme Court "has cautioned that issue preservation 'is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants.'" *Johnson v. Roberts*, 812 S.E.2d 207, 422 S.C. 406, 412 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019), *quoting Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Further, "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Atl. Coast Builders & Contractors, LLC* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part).

For the reasons set forth in Appellants' briefs, the circuit court's decision on the question of attorney's fees was improper and should be reversed.

V. Counterclaims and Defenses

A. Breach of Contract

For numerous reasons, many of which have been detailed above, the Opinion is wrong to affirm the circuit court's grant of summary judgment to the Club on Appellants' breach of contract counterclaims. First, the Club's unilateral amendment of the contract—which amendment was unlawful, contractually void, and procedurally

invalid—would itself constitute a breach of contract. Second, the questions of fact about the validity of the amendments (and the resulting uncertainty as to what terms apply) pertain as equally to the Appellants' counterclaims as they do to the Club's underlying breach of contract claim. Third, the evidence in the Record of the Club's disparate application of the terms of the governing documents to different members raises questions as to whether Club breached the contract by applying it unequally to its members—who were all to be treated the same under the terms of the contract and the umbrella of the Nonprofit Corporations Act. For these reasons, the Opinion should be withdrawn and substituted with a decision that returns the Appellants' cases to circuit court for trial on their breach of contract counterclaims.

B. Negligent Misrepresentation

The Opinion is mistaken in its analysis of the Appellants' misrepresentation claim. It correctly quotes the law, which is that "the plaintiff must show 'the defendant made a *false* representation *to the plaintiff*,'" but it goes on to misconstrue the law's application to the facts in the Record. Op. pp. 14–15, *citing Sauner v. Pub. Serv. Auth of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (emphasis added by Court in its Opinion).

Here, the Appellants are claiming that the Club's representations were the provisions of it governing documents, including the Rules, which supplied clear terms for various exit paths from membership (which governing documents should have been provided *to the Appellants*), together with the reassurances of its membership director *to the Appellants*, coupled with the Club's practice of publishing *to its membership* (including *to the Appellants*) its list of suspended, conceded, and expelled members. These

representations basically represented to Appellants: "Hey. No worries if you don't want to be a member of the Club anymore. You can be suspended and expelled, and you won't need to pay dues anymore. It's easy. Just look at all these other folks who we've let out. **You'll be treated the same.**" Clearly, these representations were as false as this brief is long. If the Club's documents, and its broadcast practice of allowing members to conclude their liability by concession/termination/suspension/expulsion were actually true, then we all could have gone home and put our feet up, years ago.

At the very least (which is all that is required to deny summary judgment), this Court overlooks that Appellants raised a scintilla of evidence as to the falsity of the Club's statements regarding concession, termination, suspension, and expulsion, which evidence should have defeated summary judgment on the misrepresentation counterclaim. *See Breedin v. Smith*, 126 S.C. 346, 120 S.E. 64 (1923) ("the falsity of the alleged representations upon which they acted, was a question of fact for determination by the triors of fact under proper instructions of the court"); *Midland Mutual Life Ins. Co. v. Harrell*, 331 S.C. 394, 503 S.E.2d 189 (Ct. App. 1998) (stating that the truth or falsity of the representation is a question of fact for trial where evidence is presented to that effect).

C. Quinn's and Frey's Section 33-31-621(d) Issue

The Opinion rules that the statute of limitation issue was not preserved. (Op. p. 15). As discussed in Section III.B, above, "where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 333, 730 S.E.2d at 287. Here, Appellants repeatedly plead both statute of limitations and § 33-31-621 in their pleadings. (*See, e.g.*,

R. pp. 51, 52, 59, 82, 83, 87). When the trial court did not explicitly address the statute of limitations issue in its order, Appellants properly requested a ruling in their Motion to Reconsider under Rule 59.[19] (R. p. 338: "In its Order the Court fails to rule on the Defendant's statute of limitations argument and the limitations on damages argument and rulings thereon are requested."). In their Brief of Appellant, Appellants argued that the Club's claim was time-barred, including under § 33-31-621. *See, e.g.*, Br. of App. pp. 40–41 ("The trial court erred by dismissing the Quinns' statutory violation claim (S.C. Code § 33-31-621) because the Club is time-barred from challenging the Quinn's mandatory expulsion."). Mindful that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants,"[20] Appellants respectfully submit that this issue was preserved, and that the Club's claims are time-barred for the reasons articulated in their previous briefing, which is incorporated herein.

VI. Discovery

In light of this Court's decision in *Dennis*, which remanded that case for trial on the question of the Club's disparate treatment of its members, this Court should reconsider and reverse its decision on discovery in Appellants' appeal. *See* Opinion No. 5696 ("[W]e find a genuine issue of fact exists as to whether the Club violated the Nonprofit Corporation Act by allowing some members to concede their memberships

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19 "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." *Pye v. Est. of Fox*, 336 S.C. 1, 4, 633 S.E.2d 505, 510 (S.C. 2006) (internal quotations and citations omitted).

20 *Johnson*, 812 S.E.2d 207, 422 S.C. at 412 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019) (internal quotations and citations omitted).

and not others."); *see also* Brief of Appellant, pp. 44-46 ("The furtherance and completion of discovery is essential to the [Appellants'] defense of the Club's claims, and in support of the [Appellants'] prosecution of their counterclaims. For example, the Club has not provided adequate bases for its differential treatment in conceding and expelling some members without further financial obligation, but not others (such as the [Appellants]) . . . .").

The Court's Opinion in this case notes that the circuit court's holding on discovery was based on its finding that the governing documents are unambiguous. However, this analysis overlooks the questions of fact raised by Appellants in their defenses and counterclaims, including the question of whether the Club failed to uniformly apply its governing documents to the members, in practice. The depositions that the Appellants sought to take pertained to factual issues **outside of** the terms of the documents, such as the Club's differential treatment in conceding and expelling some members without further financial obligation, but not others (such as the Appellants) (without any heed to what documents might have to say on the matter), as well as the question of what procedure (if any) that the Board might have used when it amended the Rules to alter the rights and obligations of its captive members.

The Court misapprehends that ongoing discovery on Appellants' pending counterclaims and defenses should have rendered summary judgment premature. Because the Appellants have already submitted Brobdingnagian evidence on the questions of whether the documents were amended improperly and applied disparately, those issues should be remanded for trial and further discovery permitted.

VII. This Court's recognition of apparent ambiguity in the governing documents is grounds for trial.

This Court misapprehends that the Court is only legally authorized to interpret unambiguous contracts. The Opinion candidly observes:

> The governing documents neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership. This **apparent ambiguity**, if read to authorize the collection of dues, could require club members to pay dues in perpetuity.

Op. p. 13, fn. 2. When it goes on to make a ruling on documents that it finds to be ambiguous, the Court overlooks that it is invading the purview of the jury.

The Supreme Court in *Dennis* had before it only certain provisions, pertaining to resignation. It found those specific provisions to be unambiguous. However, the Supreme Court was not entirely clear as to whether was holding the entire contract to be unambiguous, or simply the limited provisions before it.[21] The Appellants have requested a jury trial for determination of the facts, and they have been arguing all along that the Club's documents, either because of their muddy "amendment" process, or their conflicting provisions, or their stark contrast with the Nonprofit Act, are ambiguous. If this Court agrees that the provisions on liability (which it has mistakenly interpreted to be perpetual—in violation of public policy) are ambiguous, then the Opinion misapprehends the law by failing to remand the matter for trial.

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[21] Since the Supreme Court had before it in the *Dennis* Record on Appeal only an incomplete smattering of the governing documents, and because the issue was not even before it on appeal, it seems very unlikely that Court could have made such a broad ruling, which would pertain to documents it had not even examined.

VIII. Previous Points Preserved

To the extent not specifically discussed above, Appellants incorporate herein all of their previous briefs to this Court, so as to preserve for appellate review any undecided issues.

IX. Mmes. Martin, Frey, and Quinn

This Court's Opinion states that Appellants "and their wives" became members of the Club, and makes numerous statements about Appellants' wives in the "Facts" section. Op. pp. 4–6. Appellants anticipate that, with regard to the Club's claims against Rebecca L. Martin, Grace I. Frey, and Sherry B. Quinn still pending in the trial court, the Club will point to those statements as appellate determination of certain facts or legal matters related to Mmes. Martin, Frey, and Quinn, despite the fact that they are not appellants here. Appellants respectfully request that the Opinion clarify that this Court is not adjudicating any facts or legal conclusions specific to Mmes. Martin, Frey, and Quinn, to avoid confusion later in the lower court.

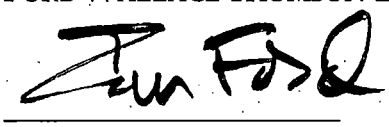
CONCLUSION

This Court should not uphold the contract at issue. The Opinion overlooks that questions of fact exist as to the validity of the Club's changes to the contract, the legality of the contract's increasingly perpetual nature, and the nonuniform manner in which the Club applied its ever-morphing provisions to its membership. The circuit court improperly disregarded evidence of those questions of fact; its order is erroneous, and it should be reversed.

For the reasons set forth above, Appellants respectfully submit that this Court should withdraw its Opinion No. 2019-UP-393 and remand the Appellants' cases for trial by jury.

Respectfully submitted,

FORD WALLACE THOMSON LLC



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January 30, 2020

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit
J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001
Lower Court Case Nos. 2012-CP-07-03209, 2012-CP-07-03216, 2012-CP-07-03218

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Michael J. Frey and Grace I. Frey, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants

Of whom
Gregory L. Martin, Michael J. Frey, and Mark K. Quinn
are the Appellants

CERTIFICATE OF SERVICE

I certify that I have served the *Appellants' Petition for Rehearing* on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on January 30, 2020, addressed to their attorneys of record:

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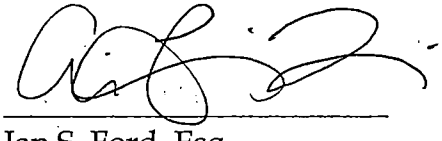

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January 30, 2020

VIA FEDERAL EXPRESS; OVERNIGHT DELIVERY

The Honorable Jenny Abbot Kitchings
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *The Callawassie Island Members Club Inc. vs. Gregory L. Martin and Rebecca L. Martin*
The Calllawassie Island Members Club Inc. vs. Michael J. Frey and Grace I. Frey
The Callawassie Island Members Club Inc. vs. Mark K. Quinn and Sherry B. Quinn
SC Court of Appeals Case No.: 2015-000001

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of the Appellants' Petition for Rehearing, along with the filing fee and Certificate of of Service in the above-referenced matters.

Thank you in advance for your assistance with this matter. Should you have any questions or concerns, please do not hesitate to contact my office.

With kind regards, I am,

Very truly yours,

Ainsley F. Tillman
Ian S. Ford
Neil D. Thomson

AFT/ja
Enc. – as stated

cc: All Counsel of Record