

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2014-001524
Case No. 2011-CP-07-3322

RECEIVED

JAN 31 2020

SC Court of Appeals

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

v.

Ronnie D. Dennis and Jeanette Dennis,..... Appellants.

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

The Respondent Callawassie Island Members Club, Inc. ("CIMC") has petitioned this Court for a rehearing of the recent decision in *Callawassie Island Members Club, Inc. v. Dennis*, Op. No. 5696 (S.C. Ct. App. filed December 18, 2019).

BACKGROUND

Upon appeal from an earlier decision of this Court reversing the Circuit Court's grant of summary judgment to CIMC, the South Carolina Supreme Court filed an Opinion reversing this Court and reinstating that summary judgment. *See, The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 673 (2018). In its Opinion, the Supreme Court resolved all substantive issues in favor of CIMC. Specifically, the Supreme Court found that CIMC had not violated the South Carolina Nonprofit Corporation Act. The Supreme Court held 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." 821 S.E.2d at 673. The Supreme Court thus concluded that the Dennises remain obligated to continue to pay dues, fees, and other charges after their resignation from the Club. In fact, the Court expressly "reinstate[d] the summary judgment for all unpaid dues, fees, and other charges." 821 S.E.2d at 668.

The Supreme Court also included a thorough analysis of the operative documents that governed the relationship between CIMC and the Dennises. 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." *Dennis*, 821 S.E.2d at 670. The Supreme Court

conclusively 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.*

Moreover, the Supreme Court rejected all arguments that those governing documents 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.*” *Dennis*, 821 S.E.2d at 670. (Emphasis in original). 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.” *Id.* The Supreme Court recognized that “[t]here are no provisions in the 2009 Bylaws or 2009 Rules that contradict this.” *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.” *Dennis*, 821 S.E.2d at 670. By footnote, the Supreme Court cited the provisions in those documents that authorized such amendments:

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. Based on that analysis, the Supreme Court rejected the Dennises’ “mandatory expulsion” argument. The Supreme Court recognized that the supposed mandatory expulsion language, on which this Court had relied in reversing summary judgment, had been removed from the 2009 Rules. Instead, the 2009 Rules stated: “Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club.” *Dennis*, 821 S.E.2d at 673. (Emphasis in original). Citing that language, the Supreme Court explained that “the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition.” *Id.*

The Supreme Court reversed this Court’s finding of 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 Supreme Court 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 similarly rejected this Court’s determination that the term “unpaid” in the 2009 Rules was undefined and thus ambiguous.

Finally, the Supreme Court 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 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 expulsion.

In short, the Supreme Court's Opinion was a complete rejection of the substance of the Dennises’ arguments. The Supreme Court, in fact, explicitly “reinstate[d] the summary judgment for all unpaid dues, fees, and other charges.” *Dennis*, 821 S.E.2d at 668.

The Dennises nonetheless filed a Petition for Rehearing in which they argued, in part, that certain issues argued in their original Appellant’s Brief had not been decided by this Court. On November 14, 2018, the Supreme Court *denied* the

petition for rehearing, stating:

The petition for rehearing is denied. However, we did overlook the procedural fact that the court of appeals found it unnecessary to address all issues raised before it, so we substitute the attached revised opinion remanding this case to the court of appeals to address the other issues. In all other respects, the opinion is unchanged.

The Supreme Court substituted a new opinion that was identical to the original opinion, except for the following addition: "[b]ecause Respondents [the Dennises] raised other issues to the court of appeals that have not yet been addressed, we remand to the court of appeals *for further proceedings consistent with this opinion.*" *Dennis*, 821 S.E.2d at 668. (Emphasis added). The Supreme Court did not, however, identify the "other issues" that were being remanded for this Court's further consideration.

On remand, this Court allowed supplemental briefing "to address the remaining, undecided issues on appeal" and also held oral argument on May 7, 2019. As a threshold consideration, this Court was required to identify the "other issues" remanded by the Supreme Court. The Appellants Ronnie Dennis and Jeanette Dennis sought to re-litigate the summary judgment granted to CIMC *in toto*. CIMC, in contrast, focused on the fact that the Supreme Court had explicitly reinstated the summary judgment for CIMC and argued that only remedy-related issues asserted by the Dennises remained for adjudication on remand. Those issues were two-fold: (1) whether the Dennises' monetary liability for post-resignation

dues and fees should be capped at \$31,000, which was the amount paid for their equity membership in 1999, and (2) whether the circuit court erred in considering “late filed affidavits” of trial counsel in its award of attorney’s fees to CIMC.

Nonetheless, in its opinion filed on December 18, 2019, this Court affirmed in part and reversed in part the summary judgment granted to CIMC. In reversing in part, this Court found that “a genuine issue of fact exists as to whether the Club violated the Nonprofit Corporation Act by allowing some club members to concede their memberships and not others.” Slip Op. at 8. Summary judgment was reversed as to that issue alone. CIMC respectfully submits that the points discussed below were overlooked or misapprehended by this Court with respect to that specific ruling.

ARGUMENTS

I. The Court’s decision is not consistent with the opinion of the Supreme Court’s, which explicitly reinstated the summary judgment in CIMC’s favor.

As discussed above, the Supreme Court in its opinion had explicitly “reinstate[d] the summary judgment for all unpaid dues, fees, and other charges.” *Dennis*, 821 S.E.2d at 668. However, by its decision issued December 18, 2019, this Court purports to overturn the Supreme Court’s directive. This Court has once

again sought to reverse that summary judgment, which is decidedly not consistent with the Supreme Court's opinion and thus beyond the scope of the remand. CIMC respectfully submits that this Court overlooked that its authority on remand was limited to the remedy-related issues as discussed by CIMC in the supplemental briefing. This Court was not authorized on remand to reverse the summary judgment previously granted by the Circuit Court and reinstated by the Supreme Court. The issues addressed on remand should have been limited to issues that did not conflict with the Supreme Court's decision, specifically the remedy-related issues.

II. The Court failed to consider or overlooked applicable rules of statutory construction and issues related to the application of the provisions of the Nonprofit Corporation Act.

In its opinion, this Court found that “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 issue of fact as to the claim that the Club violated the Nonprofit Corporation Act.” Slip Op. at 5. The Dennises allege that CIMC violated Sections 33-31-610 and 33-31-611(c) of the Act by allowing certain club members to concede their memberships and not others.¹ This Court

¹ The Court has overlooked that the Dennises, in their original appellants' brief to this Court, raised and addressed this issue in a single, conclusory paragraph citing no supporting

concluded that the Circuit Court erroneously treated this issue as a question of law and explained that “the determination of whether the Club violated the Act is more appropriately an issue to be determined by a factfinder.” Slip Op. at 6.

This Court cited to Section 33-31-610, which provides: “All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.” S.C. Code Ann. § 33-31-610. This Court also considered Section 33-31-611(c), which states: “[w]here 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 Ann. § 33-31-611(c). In reliance thereon, this Court appears to conclude that CIMC’s ability to compromise and settle disputes with club members over their liability for outstanding dues and fees might be limited, if not outright prohibited, by these Code sections. The Court would allow a factfinder to determine that CIMC cannot settle those disputes in exchange

authority. Thus, this issue was not even presented initially for appropriate appellate review. For, it is well settled that “an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.” *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also, Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

for a club member conceding his membership because that would not be treating all members equally in the “transfer” of their membership rights. The Court failed, however, to consider that its statutory interpretation of those Code sections is in contravention of the strong public policy in favor of settlements, which has been strongly emphasized in many decisions by both the Supreme Court and this Court. In *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014), the Supreme Court reaffirmed that “[o]ur courts have a long standing policy favoring settlements.” 754 S.E.2d at 490. In *Chester v. South Carolina Dept. of Public Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010), the Supreme Court emphasized that statutes should be interpreted to avoid “thwart[ing] our strong public policy favoring the settlement of disputes.” 698 S.E.2d at 560. See, *Darden v. Witham*, 258 S.C. 380, 188 S.E.2d 776, 778 (1972) (“The courts favor settlements and agreements amongst litigants”); *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824, 830 (2015) (applying “South Carolina’s strong public policy favoring the settlement of disputes”); *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888, 890 (1987) (“litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law”). Thus, the provisions of the Nonprofit Corporation Act should not be interpreted in such a manner that discourages, impedes, or even prevents the settlement of disputes by litigants. Certainly, it is not contrary to law for litigants to be treated differently in

settlement of disputes. Litigants, including the CIMC, must have the flexibility to devise a settlement that is acceptable for the litigants involved and should not be hamstrung by the terms of agreements reached with others. To interpret the Act in that manner will serve only to discourage or prevent the settlement of disputes.

This Court's statutory interpretation is not only inconsistent with public policy, but it also overlooks several additional points.

First, the Court errs in treating the concession of a membership in settlement of a dispute as a "transfer" of rights as addressed in Sections 33-31-610 and 33-31-611(c). The settlements where members were allowed to concede their membership as a term of the settlement reached do not involve transfer rights; instead, those cases involve agreements for the members to abandon their memberships.

Second, the concept of "unequal treatment" in violation of Section 33-31-610 is akin to an equal protection violation under the United States and South Carolina Constitutions. In *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E.2d 161 (2013), the Supreme Court explained that "[t]he *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." 744 S.E.2d at 168. "[A] claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." *Id.* Thus, to prevail in an equal

protection analysis, the plaintiff must show that he was treated differently than what the Supreme Court termed a “similarly situated comparator.” 744 S.E.2d at 169. The plaintiff must show that there are no “material differences” between himself and the comparator who was treated differently. *Id.* In the present case, as in the *Town of Hollywood* case, there has been no evidence offered that the plaintiff was treated differently from a “similarly situated comparator.” The Dennises, who have the burden of proof, failed to present evidence that the other members who have reached settlements with CIMC are “similarly situated comparators.” The evidence in the record reflects that settlements where members were allowed to concede their memberships as part of negotiated settlements were only with *non-property owners*.² In other words, none of those settlements were with CIMC members in the position of the Dennises, that is, members who sought to resign their membership while *continuing to own property* on Callawassie Island. The true comparators to the Dennises are those members who owned property and remained similarly obligated to pay dues and assessments until the re-issuance of their memberships -- as the Supreme Court has confirmed. Clearly, the evidence cited by this Court in its opinion does not satisfy the burden of showing

² James Carling, a former CIMC Board member, testified that the offers to concede memberships as part of settlement negotiations involved “individuals who no longer owned property that were given the opportunity to make payment to the club and concede their memberships.” (R. 133-134). That distinction was understood. Subsequent questions from the Dennises’ counsel referenced “those members who were not property owners” (R. 134) and “members who didn’t own property.” (R. 135).

even a scintilla of evidence of a similarly situated comparator who was treated differently than the Dennises. In short, the Dennises have failed to present evidence of a genuine issue of material fact. As in the *Town of Hollywood* case, the Dennises have presented no evidence that CIMC has treated them differently than a similarly situated member so as to merit a reversal of the summary judgment.

Third, this Court erred in concluding that the application of the business judgment rule presents a question of fact for a factfinder. On this issue, the Circuit Court ruled as follows:

[T]he record demonstrates that to the extent members were treated differently, such treatment was in furtherance of the negotiated settlements of debts owed to CIMC. The CIMC Board is authorized, both by its governing documents and S.C. Code § 33-31-302 to take such actions. Therefore, this Court will not review the *intra vires* corporate action by CIMC, where it was exercising its business judgment, and there has been no evidence suggesting self-dealing, fraud, or bad faith on the part of the Board of Directors.

(R. 21). As the Circuit Court correctly ruled as a matter of law, the CIMC Board enjoys broad powers in accordance with Section 31-33-302, inclusive of the power to resolve disputes over fees and assessments owed by members. There are a myriad of legitimate reasons why parties to a collection matter might, and often should, agree to a compromise. The Dennises have neither shown nor pointed to any evidence of self-dealing, fraud, or bad faith on the part of the CIMC Board. In

the absence of such evidence, the application of the business judgment rule presents an issue of law that was correctly decided by the Circuit Court at the summary judgment stage.

Finally, the Court erred in holding that a factfinder might determine that the remedy for past violations of Sections 33-31-610 or 33-31-611(c) is nullification of the binding contracts of other members like the Dennises. It would be paradoxical to find that the remedy for having violated the Act by settling with some members in the past – if that was indeed illegal -- is to require CIMC to violate the Act again by also treating them differently than other members. Two wrongs do not make a right.³ In fact, the Act, in Section 33-31-304, prescribes the *exclusive* means by which to challenge a nonprofit corporation's action on the ground that the

³ The Supreme Court has explained:

[Defendant], however, contends that it would be inequitable not to refund the taxes paid by her, on the ground that other taxpayers owning property similar to hers were not required by the fiscal authorities to return it for taxation, and that thereby a greater burden was imposed upon her than her proper proportion of taxes. In the first place, it cannot be successfully contended that the taxes paid by her on the property described in the complaint should be refunded, as in that event she would occupy towards the owners of similar property throughout the state who had paid taxes thereon practically the same relation which she now occupies towards those in Greenwood county who have not returned their property for taxation. It was inequitable and unjust for them to refuse to return their property for taxation, and pay their proportionate part of the taxes, and it would be equally inequitable and unjust for her to be excused from paying her proportion of the burden imposed upon the taxpayers. *Two wrongs do not make a right.*

Paris Mountain Water Co v. Mills, 82 S.E. 417, 98 S.C. 304 (1914). (Emphasis added).

corporation lacks or lacked power to act. Section 33-31-304 states:

- (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
- (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

S.C. Code Ann. § 33-31-304. Thus, the Act does not permit a nonprofit corporation's allegedly illegal actions to be challenged in the manner the Dennises seek to do here.

In sum, the Court erred in its interpretation and application of Sections 33-31-610 and 33-31-611(c), in its determination that the Dennises had presented a genuine issue of material fact to preclude summary judgment, and in reversing the Circuit Court's application of the business judgment rule as an issue of law.

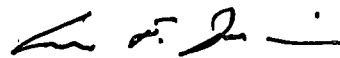
CONCLUSION

Based on the foregoing discussion, the Respondent Callawassie Island Members Club, Inc. respectfully requests that the Court rehear its decision in this case and reinstate the summary judgment in its favor on all issues as explicitly directed by the Supreme Court.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES P.A.

BY:



ANDREW F. LINDEMANN #13030
5 Calendar Court
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

January 31, 2020

*Counsel for Respondent
The Callawassie Island Members Club, Inc.*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2014-001524
Case No. 2011-CP-07-3322

RECEIVED

JAN 31 2020

SC Court of Appeals

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

v.

Ronnie D. Dennis and Jeanette Dennis,..... Appellants.

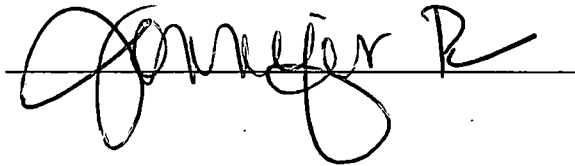
CERTIFICATE OF SERVICE

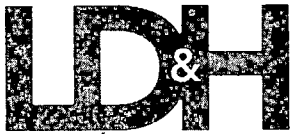
The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent The Callawassie Island Members Club, Inc., does hereby certify that service of the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon 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 31st day of January 2020:

M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
Barnwell Whaley Patterson & Helms, LLC
Post Office Drawer H
Charleston, South Carolina 29402-0197

Stephen P. Hughes, Esquire
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, South Carolina 29901

Ian S. Ford, Esquire
Neil D. Thomson, Esquire
Ford Wallace Thomson, LLC
715 King Street
Charleston, South Carolina 29403

A handwritten signature in black ink, appearing to read "Ian S. Ford", is written over a horizontal line. The signature is cursive and stylized.



**LINDEMANN
DAVIS &
HUGHES**

Telephone (803) 881-8920
Facsimile (803) 862-1181

5 Calendar Court, Suite 202 (29206)
Post Office Box 6923
Columbia, South Carolina 29260

January 31, 2020

ANDREW F. LINDEMANN*
Direct Dial: (803) 881-8921
Email: andrew@ldh-law.com

JAMES M. DAVIS, JR.†
Direct Dial: (803) 881-8922
Email: jim@ldh-law.com

JOEL S. HUGHES†
Direct Dial: (803) 881-8923
Email: joel@ldh-law.com

*Also Admitted in North Carolina
†Certified Mediator

Of Counsel

STEVEN R. SPREEUWERS
Direct Dial: (803) 373-2268
Email: steve@ldh-law.com

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
JAN 31 2020
SC Court of Appeals

RE: The Callawassie Island Members Club, Inc. v. Ronnie D. Dennis and Jeanette Dennis
Court of Appeals Appellate Case Number: 2014-001524
Civil Action Number: 2011-CP-07-3322
Our File Number: 79.10273

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's \$50.00 check for the filing fee. By copy of this letter, I am serving copies on all counsel of record.

If you have any questions, please advise.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
January 31, 2020
Page Two

cc: (w/ Enclosures)

M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
Barnwell Whaley Patterson & Helms, LLC
Post Office Drawer H
Charleston, South Carolina 29402-0197

Stephen P. Hughes, Esquire
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, South Carolina 29901

Ian S. Ford, Esquire
Neil D. Thomson, Esquire
Ford Wallace Thomson, LLC
715 King Street
Charleston, South Carolina 29403