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

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

v.

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

RETURN TO APPELLANTS' PETITION FOR REHEARING

The Appellants Ronnie D. Dennis and Jeanette Dennis have petitioned this Court for a rehearing of its recent published opinion in *Callawassie Island Members Club, Inc. v. Dennis*, Op. No. 5696 (S.C. Ct. App. filed December 18, 2019). In response, the Respondent Callawassie Island Members Club, Inc. ("CIMC") submits that this Court properly ruled on all of the issues challenged by the Dennises in their petition for rehearing.

I. Standard of Review

On remand, the Dennises have continued to argue that the trial court failed to apply the "mere scintilla" standard as applicable to summary judgment motions. As this Court correctly ruled, this issue was decided by the Supreme Court or, at the very least, is subsumed in the Supreme Court's adjudication. The Supreme Court included in its Opinion a brief explanation of the applicable standard of review, which is the same standard as applied by the trial court. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 669 (2018). The Supreme Court found no error in the legal standard applied by the trial court. Thus, this Court correctly refused to re-litigate that issue on remand.

II. Governing Documents

A. Ability to Swap Memberships

The Dennises have argued that they were injured because they were denied the ability to swap a golf membership with a less costly social membership of another member. This Court rejected that argument because a full version of the 2009 Bylaws was not in the record, and that was the version in effect when the Dennises resigned their membership. In their petition, the Dennises seek to blame CIMC for the absence of a full version of the 2009 Bylaws from the record. However, it is well settled that the duty to present a proper and complete record for

appeal falls on the appealing party – that would be the Dennises. *See*, *Germain v. Nichol*, 278 S.C. 508, 299 S.E.2d 335, 335 (1983) (holding that the appealing party has the burden of providing a sufficient record). Moreover, before the trial court it was the Dennises' responsibility to "set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP. Therefore, if the record is deficient or incomplete, that is the Dennises' fault alone.

Nonetheless, the Dennises urge this Court to apply the 1994 Bylaws on this issue. However, the Dennises have not even shown that they pled this "swap" issue as an affirmative defense or counterclaim. There is no mention of the issue or the requisite factual background for the issue in their Answer and Counterclaim. (R. 41-54). Moreover, as the Dennises concede, the only evidence in the record regarding the "swap" issue is in the deposition of Jeanette Dennis. (R. 159-161). Mrs. Dennis testified of an attempted membership swap with the Greenes which allegedly was denied by CIMC in 2005. (R. 159-161). Clearly, that claim was time-barred by the three-year statute of limitations by the time this action was commenced in 2011. Therefore, on these additional bases, the "swap" claim was properly rejected by the trial court and this Court.

B. Amendment of Governing Documents

The Court was correct in ruling that there is no genuine issue of material fact to preclude summary judgment as to whether the governing documents were properly amended. In fact, the Supreme Court decided this issue. The Supreme Court ruled that "[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. Thus, this issue was decided by the Supreme Court with finality, and it is not subject to re-litigation on remand.

Nevertheless, the Dennises now try to make a new argument for the first time on rehearing to this Court -- an issue that was not even made in their previous briefs, at oral argument, or on rehearing to the Supreme Court. The Dennises argue that the General Club Rules should also be considered "bylaws" based on the definition contained in S.C. Code Ann. § 33-31-140(4), and as "bylaws," the Rules

could not be amended except by a vote of the members. This new issue should be rejected on several procedural and substantive bases.

First, as mentioned, this issue was already decided with finality by the Supreme Court and is not subject to re-litigation even based on a new legal argument or theory.

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

Third, this issue was never raised to the trial court and, as a result, cannot be made for the first time on appeal. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). In fact, a review of the record shows that

S.C. Code Ann. § 33-31-140(4) and its definition of "bylaws" were never cited in either the trial court record or in any appellate brief filed with this Court or the Supreme Court.

Fourth, the Dennises are arguing that the amendment of the governing documents made the contract "become illegal over time." *See*, Dennises' Petition for Rehearing, p. 7. Similarly, the Dennises claim that that the amendments resulted in an "unconscionable contract." *See*, Dennises' Petition for Rehearing, p. 14. However, a review of the Dennises' Answer and Counterclaim shows that they never pled that the contract or the governing documents were illegal or unconscionable. In *H.G. Hall Construction Co., Inc. v. J.E.P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (1984), the Supreme Court held that illegality of contract is an affirmative defense. 321 S.E.2d at 271. The Supreme Court declined a request to set aside a verdict because a contract was illegal because the illegality of the contract was not raised as an affirmative defense in the answer. *See also*, Rule 8(c), SCRCP (specifically listing "illegality" as affirmative defense). Likewise, in *D&D Leasing v. David Lipson, Ph.D. P.A.*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991), this Court ruled that unenforceability of a contractual provision is an affirmative defense. Therefore, the Dennises should be precluded from now arguing illegality or unconscionability for the first time on appeal and particularly on rehearing.

Finally, even if the Court considers the merits, the Dennises' new theory fails. Even if the Rules are to be treated as "bylaws," as they now assert, the South Carolina Nonprofit Corporation Act does not preclude an amendment of the Rules without a vote of the members. Under South Carolina law, "[a] corporation can only exercise the powers granted to it by law, its charter or articles of incorporation, and any by-laws made pursuant thereto." *Baumann v. Long Cove Club Owners Assn.*, 380 S.C. 131, 668 S.E.2d 420, 424 (Ct. App. 2008). South Carolina law permits the board of directors of a nonprofit corporation to amend the bylaws without a vote by the members in most cases. The Nonprofit Corporation Act provides that:

> (a) A corporation's board of directors may amend or repeal the corporation's bylaws unless:
>
> (1) the articles of incorporation or this chapter reserves this power exclusively to the members in whole or part or requires the consent of someone pursuant to Section 33-31-1030; or
>
> (2) the members in adopting, amending, or repealing a particular bylaw provide expressly that the board of directors may not adopt, amend, or repeal that bylaw or any bylaw on that subject.

S.C. Code Ann. § 33-31-1021(a). Thus, absent a reservation of the power to amend bylaws to the members, the board may amend the bylaws without a vote by the members. In this case, as the Supreme Court has already held, the Bylaws

granted the Board with the authority to "[a]dopt, alter, amend, or repeal the Rules governing use of the Club." *Dennis*, 821 S.E.2d at 670, n.1. The power to amend the General Club Rules was *not* reserved exclusively to the members. In effect, whether considered "bylaws" or not, the Rules could be adopted and amended by the Board without a vote of the members. Accordingly, this new argument offered by the Dennises does not impact or change the Supreme Court's determinative and final ruling that "[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.[1]

III. Absence of Complete Versions of Governing Documents in the Appellate Record

As the final issue raised in their petition for rehearing, the Dennises complain again that the full versions of the 2008 Plan, 2009 Bylaws, and 2009 Rules are not in the Record on Appeal. They suggest that it is "erroneous to uphold" the contract when the record does not contain full copies of the governing documents. *See*, Dennises' Petition for Rehearing, p. 15. That argument has

[1] In their petition for rehearing, the Dennises misstate the hierarchy of the governing documents. They suggest that the Plan for Offering of Memberships is "supreme" to the Bylaws. *See*, Dennises' Petition for Rehearing, p. 11. This is contrary to state law as well as the Supreme Court's decision. The correct hierarchy provides that the Bylaws control, then the Plan, and lastly the General Club Rules. As the Supreme Court recognized, the "Plan may be amended in accordance with the Bylaws." *Dennis*, 821 S.E.2d at 670, n.1. Nonetheless, "[t]he three documents reference each other and are intended to operate together." 821 S.E.2d at 670.

already been made to and rejected by the Supreme Court. Additionally, as pointed out above, the Dennises, as the appealing parties, are solely responsible for any inadequacy in the record on appeal. The governing documents were submitted to the trial court at its request and, therefore, are part of the lower court record. (R. 547-548). The Dennises should have ensured that a complete record was presented on appeal. Nonetheless, it is truly absurd to argue that the absence of the governing documents in the *appellate* record is a basis for reversing the summary judgment entered in the circuit court which does have those documents in its record. In short, even if this Court were to determine that complete copies of the 2008 Plan, the 2009 Bylaws, and the 2009 Rules may be needed for a proper adjudication of this appeal, the proper remedy is *not a reversal and remand* to the lower court as the Dennises request but rather an order from this Court requiring supplementation of the appellate record with documents that are properly in the lower court record. In effect, there is no logic to remanding a case only because the appellate record is incomplete when the trial court already has those documents in its record.[2]

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[2] In Section IV of their petition for rehearing, the Dennises attempt to "preserve for appellate review any undecided issues" which presumably means any grounds for rehearing not expressly raised. That is contrary to Rule 221(a), SCACR, which mandates that a petition "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." *See*, Rule 221(a), SCACR. It is not proper to attempt to assert some "catch-all" language to later assert other issues.

CONCLUSION

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

Respectfully submitted,

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Counsel for Respondent
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February 13, 2020

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 **Return to Appellants' Petition for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 13th day of February 2020:

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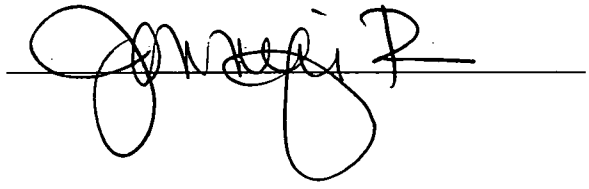

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February 13, 2020

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The Honorable Jenny Abbott Kitchings
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RE: The Callawassie Island Members Club, Inc. v. Ronnie D. Dennis and Jeanette Dennis
Supreme Court Appellate Case Number: 2016-002187
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 original and seven copy of the **Return to Appellants' Petition for Rehearing** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. 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

cc: (w/ Enclosure)

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