

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2015-000001

RECEIVED

FEB 13 2020

SC Court of Appeals

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.

**RETURN TO APPELLANTS'
PETITION FOR REHEARING**

The Appellants Gregory L. Martin, Michael J. Frey, and Mark K. Quinn have petitioned this Court for a rehearing of its recent unpublished opinion in *Callawassie Island Members Club, Inc. v. Martin*, Op. No. 2019-UP-393 (S.C. Ct. App. re-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 Appellants in their petition for rehearing.

I. Governing Documents are Not an Illegal Contract

As an initial argument in their petition for rehearing, the Appellants make an exaggerated and melodramatic plea for this Court to intervene in the parties’ contractual dealings and declare the governing documents to be “illegal,” “unconscionable,” and against public policy. The Appellants go so far as to ask this Court to issue “a decision that finds the Club’s documents and practices to be illegal” and “unenforceable.” *See*, Appellants’ Petition for Rehearing, p. 4. Remarkably, this is relief that was not even sought in the court below.

Quite clearly, these claims of illegality, unconscionability, and unenforceability were never raised in the trial court and are not properly preserved for appellate review. The orders on appeal do not address such claims. The Appellants did not ask the trial court to declare that the governing documents are “perpetual contracts” that are contrary to public policy or that they are illegal, unconscionable, or otherwise unenforceable. These are arguments 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"). *See also, Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal").

This is clear from a review of the Appellants' Amended Answers and Counterclaims where defenses of illegality and unconscionability and unenforceability based on public policy were never affirmatively pled as counterclaims or defenses. 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 where the illegality of the contract was not raised as an affirmative defense in the answer. *See also*, Rule 8(c), SCRCF (specifically listing "illegality" as an 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. As mentioned, the prayers in the Appellants' Amended Answers and Counterclaims did not seek rescission nor any declaration that the governing documents are illegal, unconscionable, or unenforceable as a "perpetual contract" that is against public policy. Those are

issues that the trial court was not asked to decide. Accordingly, the Appellants should be precluded from now making such arguments for the first time on appeal.

That is particularly true because these arguments are actually being made 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).

Additionally, and perhaps most importantly, these arguments are in direct contravention of the Supreme Court's decision in the companion case of *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). In *Dennis*, the Supreme Court analyzed the very same "membership arrangement and the membership documents that govern that arrangement" as are at issue in these cases. 821 S.E.2d at 670. The Supreme Court recognized that three documents -- the Bylaws, the Plan, and the Rules -- "govern the membership" and that "[t]he three documents reference each other and are intended to operate together." *Id.* The Supreme Court determined that "[w]hen the Dennises resigned in 2010, the

membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules.” *Id.* The Supreme Court also found “[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments.” *Id.* In reinstating the summary judgment in favor of CIMC, the Supreme Court concluded that the Dennises made a commitment to pay dues, fees, and other charges until the reissuance of their membership and that contractual obligation was binding and legal under the South Carolina Nonprofit Corporation Act. The Appellants, however, are asking this Court, in essence, to disregard the *Dennis* decision which, as this Court has recognized correctly in its opinion, is controlling and dispositive.

In sum, the first issue for rehearing is not timely raised, is not preserved, and is entirely lacking in merit.

II. Disparate Treatment Claim

As their second issue, the Appellants claim that there is a genuine issue of material fact as to whether they were disparately treated in violation of the Nonprofit Corporation Act. They point to this Court’s recent decision in the *Dennis* case where this Court ruled 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.” Opinion No. 5696, at 5. This Court in

Dennis cited to S.C. Code Ann. §§ 33-31-610 and 33-31-611(c) of the Act.¹ Based on *Dennis*, the Appellants ask this Court to “remand Appellants’ cases for a jury trial on Appellants’ breach of contract and Nonprofit Act counterclaims.” *See*, Appellants’ Petition for Rehearing, p. 5.

In its opinion in these three cases, this Court did not address the “Appellants’ breach of contract and Nonprofit Act counterclaims” based on disparate treatment, and correctly so. As the record reflects, *the Appellants have not brought any such counterclaims*. The Appellants attempted to bring such counterclaims originally, but those counterclaims were dismissed by Judge Carmen T. Mullen in her orders filed April 10, 2014. Judge Mullen dismissed four counterclaims “because the Non-Profit Corporations Act explicitly limits challenges to corporate authority to claims which are asserted derivatively” and “the claims the Defendants attempt to make must be asserted derivatively.” (Quinn R. 17-18; Martin R. 6-7; Frey R. 19). That included a counterclaim based on S.C. Code Ann. §§ 33-31-610 and 33-31-611(c). Importantly, the Appellants have not appealed Judge Mullen’s orders. The Notices of Appeal filed by the Appellants do not identify Judge Mullen’s orders as being appealed.

¹ CIMC has filed a petition for rehearing on this issue in *Dennis*. Therefore, this Court’s decision in *Dennis* is not yet a final one. CIMC relies on and incorporates by reference the arguments made in its petition for rehearing in *Dennis* as additional bases for rejecting the Appellants’ claims of disparate treatment in these consolidated cases.

The Appellants were permitted by Judge Mullen's orders to plead a "statutory defense" based on S.C. Code Ann. §§ 33-31-610 and 33-31-611(c). However, that statutory defense was never argued to Judge Ernest Kinard when he heard the motions for summary judgment. (Quinn R. 1187-1218; Martin R. 1183-1215; Frey R. 1205-1237). Likewise, Judge Kinard's orders in the cases do not address the statutory defense. (Quinn R. 4-11; Martin R. 11-18; Frey R. 4-11). Therefore, the issue is not properly preserved for appellate review.

Likewise, in their opening and reply briefs filed in this Court, the Appellants did not argue the statutory defense. There is no mention of the statutory defense in the Statement of Issues on Appeal.² There is no specific reference to or discussion of S.C. Code Ann. §§ 33-31-610 and 33-31-611(c) in the Argument sections of those briefs. There is no analysis of those Code sections with applicable case law or other authorities. At best, there may be a passing reference once or twice to some members being allowed to concede their memberships back to CIMC in settlement of a fees dispute. Tellingly, this Court did not address the statutory defense in its first opinion filed May 2, 2018 (now withdrawn) nor in its current re-filed opinion. That is obviously not an oversight but rather a recognition that the

² Rule 208(b)(1)(B), SCACR, requires the statement of issues on appeal to be "concise and direct." In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), the Supreme Court reaffirmed the well-established rule of appellate law that "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." 692 S.E.2d at 903. Likewise, the Court reiterated that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Id.*

statutory defense was not asserted as an issue on appeal. Nonetheless, even if the issue was raised, it has certainly been abandoned. *See, Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993) (“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”); *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (same).

III. Governing Documents

A. Resignation vs. Expulsion

The Appellants claim that this Court failed to properly distinguish between resignation and expulsion. The Dennises resigned from the Club, and as a result, the Appellants attempt to distinguish the *Dennis* decision by claiming that they were expelled. However, there is absolutely no evidence that CIMC Board expelled the Appellants from the Club.

In actuality, each Appellant alleged that he resigned or otherwise tried to force his expulsion from CIMC by non-payment. In his Amended Answer and Counterclaims, Martin sought “a finding that the Defendants obligations to the Club terminated at the time of [his] resignation in November 2011.” (Martin R. 60). In later filings, Martin concedes that he “resigned from CIMC.” (Martin R.

262). Similarly, in his Second Amended Answer and Counterclaims, Frey alleged that his “membership was terminated as of January 2010 (4 months after delinquency) or in the alternative was resigned as of May 2010.” (Frey R. 101). In later filings, Frey also concedes that he “resigned from CIMC.” (Frey R. 281). Likewise, in his Amended Answer and Counterclaims, Quinn sought “a finding that [his] membership was resigned as of December 2009.” (Quinn R. 52). Later, in the Second Amended Answer and Counterclaims, Quinn pled that “the Defendant’s membership was resigned and/or terminated as of December 2009.” (Quinn R. 84). In later filings, Quinn also concedes that he “resigned from CIMC.” (Quinn R. 265).

Therefore, based on the Appellants’ own representations, they were no different from the Dennises in that they resigned their memberships. Nonetheless, it is immaterial whether the Appellants formally resigned or simply stopped making payments to try to force their expulsion. It is clear that each Appellant attempted to end or terminate their membership by non-payment. As the Supreme Court has explained, whether a member resigns his membership or is terminated in some other way, the member remains liable for unpaid dues, fees, and charges until the membership is re-issued.³

³ The Supreme Court in *Dennis* explained that “even if we were to treat the ‘termination’ provision and the ‘resignation’ provision as governing the same event, there is no ambiguity.” *Dennis*, 821 S.E.2d at 671. Focusing on the 2009 Rules which applied not only to the Dennises’ resignation but also to each of the Appellants’ resignations or terminations, the Supreme Court explained as follows: “Any member may terminate membership in the Club. ...

The Nonprofit Corporation Act supports that conclusion. Relying on S.C. Code Ann. § 33-31-620(b), the Supreme Court in *Dennis* ruled 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.” *Dennis*, 821 S.E.2d at 673. S.C. Code Ann. § 33-31-620(b) states: “The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation.” S.C. Code Ann. § 33-31-620(b). That language is virtually identical to S.C. Code Ann. § 33-31-621(e), which provides: “A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension.” S.C. Code Ann. § 33-31-621(e). S.C. Code Ann. § 33-31-621(e) should be interpreted consistently with the similar language in S.C. Code Ann. § 33-31-620(b) per the Supreme Court’s decision in *Dennis*. As a result, a member who is suspended or expelled will still be held liable to pay dues, fees, and other charges after the suspension or expulsion.

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.*

Hence, there is no material difference based upon the type of termination -- the member remains responsible for obligations incurred or commitments made.⁴

In sum, the Appellants attempt to draw a distinction between a resignation and some other type of “termination,” but it is a classic distinction without a difference. They argue that S.C. Code Ann. § 33-31-620(b) only applies to a resignation. But, they ignore that S.C. Code Ann. § 33-31-621(e) creates the same liability to pay dues, fees, and other charges after a suspension or expulsion. Additionally, the Appellants try to argue that they did not tender their resignations and thus S.C. Code Ann. § 33-31-620(b) does not apply to them (unlike the Dennises). But, not surprisingly, their pleadings defy them. All three Appellants cite to S.C. Code Ann. § 33-31-620 in their Amended Answers and Counterclaims. But they also cite to S.C. Code Ann. § 33-31-621 in the alternative. (Quinn R. 82-83; Martin R. 83-84; Frey R. 99-100).

Remarkably, the Appellants also continue to press the debunked “mandatory expulsion” argument. The Appellants rely on language in the 2001 Rules stating: “Any member whose account is not settled within the four (4) months period following suspension *shall* be expelled from the Club.” (Quinn R. 1335; Martin R.

⁴ The trial court likewise recognized that S.C. Code Ann. § 33-31-621(e) preserves the same liability as S.C. Code Ann. § 33-31-620(b). (Quinn R. 8; Martin R. 15; Frey R. 8) (“Likewise, § 33-31-621 reinforces the notion that members who are terminated or expelled remain liable for obligations, even beyond resignation”).

1354; Frey R. 1350). (Emphasis added).⁵ However, in 2007, the Rules were properly amended, and the “mandatory expulsion” language was removed. The 2007 Rules state: “Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club.” (Quinn R. 1439; Martin R. 1435; Frey R. 1440). (Emphasis added). The 2009 Rules continued to use the same “may be expelled” language. (Quinn R. 1475; Martin R. 1471; Frey R. 1476). Citing that same language, the Supreme Court in *Dennis* explained that “the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition.” *Dennis*, 821 S.E.2d at 673.⁶ Those same 2009 Rules, as applied to the Appellants, show that expulsion was likewise not mandatory in the 2009-2010 time frame.

B. Amendment of Governing Documents

The Court is correct in ruling that there is no genuine issue of material fact to preclude summary judgment as to whether the governing documents were

⁵ Regrettably, the Appellants insinuate that the Supreme Court in *Dennis* ruled that “mandatory expulsion arises only after the board has suspended a member.” *Dennis*, 821 S.E.2d at 204. *See*, Appellants’ Petition for Rehearing, p. 10. However, when read in context, it is clear that the Supreme Court was addressing the 2001 Rules which they first point out “were not in effect when the Dennises resigned in 2010.” *Id.* Yet, the Court proceeds to say “[e]ven if those rules did apply ...,” and then makes the statement taken out of context by the Appellants. The bottom line is that the 2001 Rules do not apply. They do not apply to the Dennises’ resignation, and they do not apply to the Appellants’ resignations or terminations. As the Supreme Court states in the next sentence, “the 2009 Rules, which were in effect when the Dennises resigned, *do not make expulsion mandatory under any condition.*” *Id.* (Emphasis added).

⁶ The Supreme Court also found “there is no ambiguity as to expulsion from the Members Club.” *Dennis*, 821 S.E.2d at 673.

properly amended. In *Dennis*, 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.

Nevertheless, the Appellants 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 or at oral argument. The Appellants 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 has been raised to this Court as a new issue raised for the first time in a petition for rehearing, which is improper. *See, 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).

Second, 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 the trial court record nor in any appellate brief previously filed with this Court.

Third, the Appellants are arguing that the amendment of the governing documents made the contract "become illegal over time." *See*, Appellants' Petition for Rehearing, p. 12. However, a review of the Appellants' Amended Answers and Counterclaims shows that they never pled that the contract or the governing documents were illegal. Therefore, they should be precluded from now arguing illegality for the first time on appeal and particularly on rehearing.

Finally, even if the Court considers the merits, the Appellants' 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. As the Supreme Court has already held in *Dennis*, 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 Appellants does not impact or change the Supreme Court’s ruling, based on the same evidentiary record as in these cases, 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 670.⁷ It also does not impact or change this Court’s ruling that “the evidence does not raise a genuine issue of material fact regarding whether the governing documents were properly changed.” Slip Op. at 10.

IV. Damages/Attorney’s Fees

A. Damages

This Court correctly ruled that the language of the governing documents do not create a cap on a resigned member’s liability for unpaid dues and fees. Slip Op. at 13. The Court further explained that “the governing documents do not contain any provisions that preclude the Club from collecting by other means the amounts in excess of the value of the equity membership.” Slip Op. at 13. Yet, in a footnote, the Court stated that “[t]he governing documents neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership” and describes this as an “apparent ambiguity.” Slip Op. at 13, n.2. Seizing on that footnote, the Appellants suggest that this is an *actual* ambiguity, which it is not. As this Court has held previously, an actual ambiguity arises only

⁷ In their petition for rehearing, the Appellants misstate the hierarchy of the governing documents. They suggest that the Plan for Offering of Memberships is “supreme” to the Bylaws. *See*, Appellants’ Petition for Rehearing, p. 15. This is contrary to state law as well as the Supreme Court’s decision in *Dennis*. 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.

when a contract “is inconsistent on its face or is reasonably susceptible of more than one interpretation.” *Abu-Shawareb v. South Carolina State University*, 364 S.C. 358, 613 S.E.2d 757, 760 (Ct. App. 2005). Silence alone does not create an ambiguity. *Id.* See also, *Jordan v. Security Group, Inc.*, 311 S.C. 227, 428 S.E.2d 705, 707 (1993). Thus, the absence of language in the governing documents that actually *negates* a cap or expressly states that there is no cap on unpaid dues and fees does not render the documents ambiguous on that point.

Additionally, this Court includes the following language in its analysis: “[w]hile this provision provides unpaid dues will be deducted from the amount paid for the equity membership...” Slip Op. at 13. The Appellants seize on that language to suggest that the Court has recognized that an “offset” must be applied to the damages awarded by the trial court. The operative language from the 2008 Plan is as follows: “Any unpaid dues, fees and other Charges plus interest accrued under the then prevailing terms of the General Club Rules *will be deducted* from the amount to be paid to the resigned member *upon the reissuance* of his/her resigned Equity Membership.” (Quinn R. 1452-1453; Martin R. 1448-1449; Frey R. 1452-1453). (Emphasis added). The Appellants, however, misread this provision as requiring an offset. Only if the dues and fees remain unpaid when the membership is reissued, then they will be paid first from the proceeds of the

reissued membership. No deduction occurs until the reissuance of the membership. Contrary to the Appellants' argument, there is no offset.⁸

B. Attorney's Fees

As this Court correctly ruled, the Appellants' argument that the governing documents do not provide for CIMC to recover attorney's fees was an issue raised for the first time in their Rule 59(e) motions, which makes the argument untimely. The trial court, in fact, recognized that "CIMC's authority to collect its attorney's fees ... was raised for the first time at the hearing for reconsideration." (Quinn R. 13; Martin R. 9; Frey R. 15). It is, however, well settled that "a party cannot for the first time raise an issue by way of a Rule 59(e) motion that could have been raised at trial." *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995). Here, the issue was not even raised in the Rule 59(e) motion but rather for the first time at the hearing on the Rule 59(e) motion, which is obviously not timely. (Quinn R. 329-330; Martin R. 333-334; Frey R. 352-353).

Nonetheless, even if the Court were to address the merits, the decision of the trial court was correct. The governing documents are properly construed to

⁸ The Appellants' "offset" argument is untimely asserted for the first time on rehearing. The Appellants have not previously claimed an offset in the trial court or on appeal. In fact, such an offset was not pled as an affirmative defense in their Amended Answers and Counterclaims. South Carolina law recognizes that a non-statutory offset is an affirmative defense that must be pled. *See, Gambrell v. South Carolina National Bank*, 250 S.C. 380, 158 S.E.2d 200 (1967); *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939). *See also, Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) (statutory right to setoff not an affirmative defense falling within residuary clause of Rule 8(c), SCRCP, because setoff was required by statute).

include the recovery of “all costs and expenses” to CIMC, including reasonable attorney’s fees, if a legal action is commenced by CIMC “to collect any amount owed” or “to enforce any liability of a member to the Club.” (Quinn R. 1475; Martin R. 1471; Frey R. 1476).

V. Counterclaims

A. Breach of Contract

The Appellants argue that this Court’s affirmance of the summary judgment on the breach of contract counterclaims is in error in three respects. Their position is without merit.

First, the Appellants point to the alleged unlawful amendments of the governing documents. The Court correctly ruled on that issue for the reasons discussed above.

Second, the Appellants claim that there exist “questions of fact about the validity of the amendments.” *See*, Appellants’ Petition for Rehearing, p. 24. This appears to be a restatement of the first point.

Third, the Appellants argue that “the evidence in the [r]ecord 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.” *See*, Appellants’ Petition for Rehearing, p. 24. This argument has

already been debunked. Contrary to the Appellants' apparent understanding, their counterclaims based on "disparate treatment" under the Nonprofit Corporation Act were dismissed by an unappealed order issued by Judge Carmen Mullen. The trial court dismissed those counterclaims because they were impermissibly brought as a direct claim rather than as a derivative action. (Quinn R. 17-18; Martin R. 6-7; Frey R. 19). Because Judge Mullen's order in each case was not appealed, those orders are the law of the case and the dismissal of those counterclaims cannot now be challenged on appeal. *See, Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case").

B. Negligent Misrepresentation

The Court's analysis of the negligent misrepresentation claim is correct. The Appellants' explanation of this cause of action is continually changing. In their petition for rehearing filed May 29, 2018, the Appellants argued that the expulsion language as contained in Section 13.3.1 of the 2001 Rules constitutes a representation that "members must be expelled after nonpayment." *See*, Appellants' Petitions for Rehearing, dated May 29, 2018, p. 3. However, as discussed above and as determined by the Supreme Court in *Dennis*, that expulsion provision was amended in the 2007 and 2009 Rules to be discretionary rather than mandatory. As a result, the Appellants have not shown that any false

representation was made by the 2001 Rules. Instead, that representation was no longer in effect in the 2009-2010 time frame because the Rules had been amended in the interim.

Now, in the current petition for rehearing, the Appellants contend more generally that false representations are “the provisions of the governing documents ... together with the reassurances of its membership director to the Appellants.” The Appellants then make up some non-existent dialogue that has no support in the record. *See*, Appellants’ Petitions for Rehearing, pp. 24-25. That clearly cannot serve as a basis for reversing summary judgment on this claim.⁹


⁹ In Section VIII of their petition for rehearing, the Appellants 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,

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

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

February 13, 2020

RECEIVED

FEB 13 2020

SC Court of Appeals

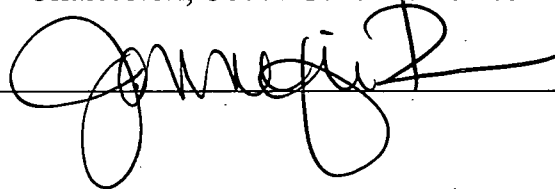
CERTIFICATE OF SERVICE

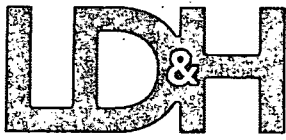
The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent The Callawassie Island Members Club, Inc., does hereby certify that service of the **Return to Appellants' Petition for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 13th day of February 2020:

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





**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

February 13, 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*

Hand Delivered

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

RECEIVED

FEB 13 2020

SC Court of Appeals

Of Counsel

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

RE: The Callawassie Island Members Club, Inc. v. Gregory L. Martin and Rebecca L. Martin
Appellate Case Number: 2015-000001
Civil Action Number: 2012-CP-07-3218
Our File Number: 79.20032

RE: The Callawassie Island Members Club, Inc. v. Michael J. Frey and Grace I. Frey
Appellate Case Number: 2015-000002
Civil Action Number: 2012-CP-07-3209
Our File Number: 79.20033

RE: The Callawassie Island Members Club, Inc. v. Mark K. Quinn and Sherry B. Quinn
Appellate Case Number: 2015-000003
Civil Action Number: 2012-CP-07-3216
Our File Number: 79.20034

Dear Ms. Kitchings:

Please find enclosed for filing the original and eleven copies of the **Return to Appellants' Petition for Rehearing** in the above referenced matter. Please file copies in each matter 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

The Honorable Jenny Abbott Kitchings
February 13, 2020
Page Two

cc: (w/ Enclosure)

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