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

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2014-001524
Lower Court Case No. 2011-CP-07-3329

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

v.

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

APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REHEARING

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TABLE OF CONTENTS

Table of Authorities iii

I. Standard of Review 1

II. Governing Documents 2

A. Ability to Swap Memberships 2

B. Improper Amendment of Governing Documents 4

III. It is fine with the Dennises to supplement the Record 8

Conclusion 9

TABLE OF AUTHORITIES

CASES

Callawassie Island Members Club, Inc. v. Dennis,
425 S.C. 193, 821 S.E.2d 667 (2018) ..... *passim*

Germain v. Nichol,
299 S.E.2d 335 (S.C. 1983) 3

S.C. Dep't of Nat. Res. v. Town of McClellanville,
345 S.C. 617, 550 S.E.2d 299 (2001) 1

Town of Summerville v. City of N. Charleston,
378 S.C. 107, 662 S.E.2d 40 (2008) 1

STATUTES

S.C. Code § 15-3-510 3

S.C. Code § 33-31-140 6

S.C. Code § 33-31-1021 6–7

RULES

S.C. R. App. P. 210(g) 3

MISCELLANEOUS

Casablanca (Warner Bros., 1942) 5

I. Standard of Review

In its ruling, this Court misapprehends that the Supreme Court did not address Appellants' argument as to the standard of review. The *Dennis* Court had before it two **questions of law**. The mere scintilla standard, which ought to have operated to thwart summary judgment in this case, **goes to fact**. The Club misleads this Court by suggesting that the Supreme Court opinion somehow subsumes this issue; that would be impossible and outside of the scope of the Court's review. The *Dennis* opinion is not a comprehensive edict in favor of the Club, swallowing all issues like a boundless black hole. It is full of language that limits—deliberately and repeatedly—the scope of the decision. But the Club would like to gloss over one of the Supreme Court's careful checks on the boundaries of its opinion:

> **The questions before us in this appeal are questions of law**. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) ("It is a question of law for the court whether the language of a contract is ambiguous."); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law . . . ."). We review questions of law de novo. Because the ambiguity of contracts and statutes are **questions of law**, we do not view the evidence in any particular light. Rather, we read the contract or statute to determine if its meaning is clear and unambiguous.

Callawassie Island Members Club, Inc. v. Dennis, 425 S.C. 193, 821 S.E.2d 667 (2018) (some internal citations omitted) (emphasis added). These words are clear and unambiguous: the Court was looking only at matters of law and not at questions of fact. The Supreme Court remanded to this Court to consider issues going to the facts.

This Court should find that the circuit court improperly granted summary judgment where there is evidence in the record of disputed factual questions that can only be decided by a jury, including but not limited to (i) evidence of the Club's disparate treatment of its members, (ii) evidence of the Club's unauthorized amendment of material portions of its governing documents, and (iii) evidence of shifting provisions relating to liability. Rehearing and remand on this question would be proper.

II. Governing Documents

A. Ability to Swap Memberships

The Club's Petition (p. 2-3) attempts to blame the Dennises for not including documents in the record on appeal that neither side—nor the trial court—identified as relevant to the appeal.[1] The Club does not deny that it did not seek to have those

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[1] The Supreme Court dissent noted that:

> The majority contends the Club's 2008 Plan, 2009 Bylaws, and 2009 Rules unambiguously require a resigning member to continue to pay—potentially for that member's lifetime and beyond—dues, fees, and food and beverage minimums unless their membership is reissued. The majority's categorical reliance on these documents **is stunning because neither the trial judge nor the Club has identified them as the controlling documents.**
>
> . . . .
>
> Even throughout this appeal, the Club has been inconsistent in identifying which documents form the contract between the parties, and has instead relied on different versions of the plan, bylaws, and rules at various stages. For example, in its brief to the court of appeals, the Club suggested all of the numerous documents together form the contract, and argued they must be read as a whole. However, in its petition for rehearing to the court of appeals, the Club argued the 1994 plan, bylaws, and club rules unambiguously entitle it to judgment as a matter of law. Thereafter, in its brief to this Court, the Club never stated with specificity which documents entitle it to judgment as a matter of law, instead merely asserting, "Several controlling documents, which have been amended and revised over the years, govern membership in the Club." While the Club does delineate the order of primacy as "the CIPOA covenants, CIMC's By-Laws, its Membership Plan, and

materials included in the record.[2] The South Carolina Appellate Court Rules require that, when preparing the Record on Appeal, counsel certify that "the Record on Appeal contains all materials proposed to be included by any of the parties and **not any other material**." Rule 210(g), SCACR (emphasis added). The Club's argument—that the Dennises should have included material that neither side designated or believed to be relevant—would violate the Appellate Court Rules and would compromise the required certification of counsel.

The Club does acknowledge that sworn testimony supports the argument that the Dennises sought, and were denied, to swap their membership. (R. pp. 159-161). However, the Club claims that the three-year statute of limitations had run on such a claim. The statute of limitations for contract actions applies to the commencement of actions for breach of contract actions, not to defenses.[3] Here, the Dennises assert the Club's improper denial as part of their defense, and as a fact demonstrating the Club's

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its General Club Rules," it never set forth which version of each subset controls. Thus, I disagree with the majority's pronouncement that the 2008 Plan, 2009 Bylaws, and 2009 Rules control when the Club itself has never argued that.

425 S.C. at 206–207, 821 S.E.2d at 674 (emphasis added).

[2] The Club's only cited case for this argument is off-point. In *Germain v. Nichol*, 299 S.E.2d 335, 335 (S.C. 1983), the appellant argued that the evidence did not justify the award of actual damages. However, the appellant did not present the appeals courts with any of the trial testimony, so there was no support for the argument. The South Carolina Supreme Court ruled that, in that circumstance, the appellant's argument failed because the appellant had the burden of providing the Court with a sufficient record upon which the Court could make its decision. Here, no party or court identified the 2008 and 2009 governing documents to be relevant until the South Carolina Supreme Court issued its ruling.

[3] S.C. Code Ann. § 15-3-510 ("The periods for the **commencement of actions** other than for the recovery of real property shall be as prescribed in the following sections.") (emphasis added).

disparate treatment (*inter alia*). There is no three-year statute of limitations on defenses or facts.[4]

Finally, the Club intimates that this issue is not preserved. There is no serious question that the membership swap issue was argued to the trial court at summary judgment (and denied), was appealed to this Court, and therefore was properly preserved. (*See, e.g.*, R. pp. 85, 159–161, 285, 290, 345; *Final Brief of Appellants*, filed Jan. 26, 2015, pp. 15–16).

B. Improper Amendment of Governing Documents

In this portion of its Return, the Club trots out its familiar refrain, first claiming that the Supreme Court decided this issue and, next, harping on issue preservation. This Court should not sing along. The terms of the contract itself, as well as statutory limitations, require that the Club obtain the approval of its members before making substantive changes—affecting the rights and obligations of its members—to the governing documents. Evidence in the Record shows that the Club failed to do so.

The Supreme Court did not decide the question of whether the Club's unilateral, secret modifications to the material rights of its members were proper. This question was not before that Court, and the words that the Club quotes are nothing more than dictum taken from what the opinion describes as "a general discussion of the membership arrangement and the membership documents that govern that arrangement." *Dennis,*

[4] Additionally, with regard to the Club's argument that expulsion was not mandatory, Appellants further incorporate their previous arguments and citations that the governing documents were improperly amended, and the purported permissiveness of expulsion is improper. *See, e.g.*, Appellants' *Petition for Rehearing*, filed Jan. 31, 2020, at pp. 11–18.

425 S.C. at 198, 821 S.E.2d at 670. This "general discussion" by the Court is not a ruling on a substantive issue with the weight of precedence. The questions for certiorari review did not include this one, which this Court had deliberately left undecided, and which is now before this Court for original appellate review on remand.

A question of fact exists as to whether the Club's unilateral, material modifications to its governing documents were improper. This is so because the governing documents do not allow amendment affecting the rights and obligations of members without a vote of the members.[5] That argument alone—which the Club does not even address in its Return—is sufficient to compel remand for a jury determination of whether the Club followed the amendment procedures contained within its own contract. If it failed to do so, as the evidence shows, then those material modifications are invalid.

Next, the Club appears shocked (shocked!)[6] to have learned in *Appellants' Petition for Rehearing* that the Nonprofit Corporation Act might pertain to its attempted unilateral amendment of its governing documents. But this is no surprise ambush. The Dennises have been arguing for at least six years that the Club's actions and practices violate the Act, and that the Club secretly amended its documents to affect the rights of members without a vote of the members. This not a new issue, as the Club attempts to characterize it. Appellants have simply brought to the Court's attention the Definitions section of a statute that has always controlled the actions of the Club, ever since it elected to organize

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[5] "[A]ny such amendment or modification [of the Rules] shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. p. 510).

[6] *Casablanca* (Warner Bros., 1942) (Captain Renault: "I'm shocked, shocked to find that gambling is going on in here!).

itself as a nonprofit, mutual benefit corporation. (*See, e.g.*, R. pp. 3, 4, 9, 14-16, 25, 261, 269-270, 277, 289, 291, 292, 297, 302, 312, 449, 521) (discussing the requirement that the Club comply with the provisions of the Nonprofit Corporation Act).

The Club is not prejudiced by an argument that its governing documents and its board's actions must comply with the Act. Presumably, its governing documents were drafted in an attempt to comply with the Act—which is precisely why, by the documents' own terms, the board's ability to modify the Rules "**is subject to and controlled by** the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. p. 510). The Club, in organizing itself under the Act, was of course aware that the Act's definition of "bylaws" included the Club's Rules.[7] It was in order to comply with the Act that the Plan was drafted to require that:

> ***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. 470, 491) (emphasis added). The Club and its documents are servants to the Act, and not its master. Where the Act requires that changes in "bylaws" be approved by affected members, it is implicit that the governing documents are drafted in compliance with that requirement.

The Club is wrong that the Nonprofit Corporation Act unreservedly allows amendment to the bylaws without a vote of the members. (*Return to Appellants' Petition*

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[7] "'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, Definitions.

for Rehearing, p. 7). The very section of the Act that appears as a block quote in the Club's *Return* goes on to put the following limits on the board's purported freedom:

> (c) 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.
>
> (d) 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. The evidence in the Record shows that Appellants did not receive the required notice, and nor did they approve any change in the method of computation of dues, including but not limited to the documents' provisions relating to suspension and expulsion (which limited a member's obligation to pay dues to four months following suspension), nor to liability (which contemplated that dues would accrue against a membership until it was reissued).

A key issue before this Court on appeal is whether the circuit court improperly disregarded evidence that the Club had modified its governing documents without notice to or a vote of the members. There is evidence in the Record of the Club's practice of making unilateral, secret, material changes to provisions affecting the rights and obligations of its members, without notice to or approval of the members, as required by the Act and the contract itself. This Court should therefore remand for a jury to consider, as a question of fact, whether the Club violated notice and vote requirements, rendering its amendments void.

The Dennises have been arguing since the inception of this case that the Club's practices violate the Act. This is not a new issue; it is existing authority in support of a previously-raised issue that the trial court decided wrong.

III. It is fine with the Dennises to supplement the Record.

The Club suggests that this Court should order supplementation of the Record with complete versions of the governing documents, throughout all the years of amendments. The Dennises are amenable to that, as well as to the submission of other additional evidence.[8] *See, e.g.*, Appellants' *Motion to Supplement Record on Appeal*, filed Feb. 12, 2016.

In truth, however, it makes more sense to simply have a trial on the evidence, rather than going through contortions as to what is in the record versus what is not. Everyone knows that the record is not complete; in the wake of the Supreme Court's

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[8] The Club claims that the Supreme Court has already rejected Appellants' argument that it is erroneous to uphold the contract when the record does not contain full copies of the governing documents. More accurately, when the Dennises were seeking rehearing as to the Supreme Court's decision that the resignation provisions were unambiguous, they questioned how the Supreme Court majority could look to the "four corners" of documents that were not entirely in the Record. The Petition for Rehearing was denied, presumably because the Supreme Court majority was only looking to the provisions of the documents concerning resignation.

This Court, however, has before it issues that are less compartmentalized than those of the Supreme Court, including the question of amendment and enforcement. If this Court is considering granting the Club's Petition for Rehearing, which urges this Court to affirm the circuit court's sweeping grant of summary judgment that dispensed of the Dennises' contractual counterclaims and defenses, this Court should properly have before it the **entire contract**, including the complete versions of the Plan, Bylaws, and Rules, and their numerous amendments over the years, as well as the depositions taken of witnesses regarding those documents and related issues.

Dennis ruling everyone now is focusing on different issues and documents than at the outset of this journey.

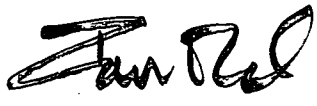
Regardless, the evidence—contained within the Record as it exists now—shows that a question of fact exists as to whether the board's amendments were made in compliance with the contract and the statute. Further, as this Court properly found, the evidence—contained within the Record as it exists now—shows that a question of fact exists as to whether the Club violated the Nonprofit Corporation Act by treating members of the same class differently. Should the Court find these issues dispositive, then the case should be remanded for a jury to determine the force and effect of the body of the Club's documents and practices.

CONCLUSION

For the reasons set forth above, as well as in their *Petition for Rehearing*, the Dennises respectfully request that this Court would deny the Club's *Petition for Rehearing*, grant their petition, and remand the case in its entirety to the circuit court for trial.

Respectfully submitted,

FORD WALLACE THOMSON LLC



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February 21, 2020

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IN THE COURT OF APPEALS

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In the Court of Common Pleas for the Fourteenth Circuit

Carmen T. Mullen, Circuit Court Judge

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

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

v.

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

CERTIFICATE OF SERVICE

I certify that I have served the *Appellants' Reply in Support of Petition for Rehearing* on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on February 21, 2020, addressed to their attorneys of record:

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Respectfully submitted,

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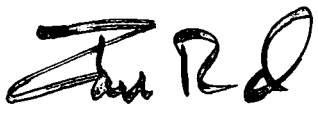

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February 21, 2020

VIA FEDERAL EXPRESS; OVERNIGHT DELIVERY AND FAX

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

Re: *The Callawassie Island Members Club Inc. vs. Ronnie D. Dennis and Jeanette Dennis*
SC Court of Appeals Case No.: 2014-001524

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of the Appellants' Reply in Support of Petition for Rehearing and Certificate of Service in the above-referenced matter.

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,

Ian S. Ford
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ISF/ja
Enc. - as stated
cc: All Counsel of Record

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