IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

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

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants

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

APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REHEARING

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The Club has chosen to scrap the fine musical and literary references that we once had going. Instead, it has taken up a trite and formulaic new theme song, which consists mostly of the following refrain:

> *Dennis* has subsumed everything in its path,
> leaving nothing to decide in its aftermath;
> Whatever they argue, we'll just say it's unpreserved,
> Yeah, 'cause victory for the Club is totally deserved.[1]

This Court should not allow the Club's superficial new tune to get stuck in its head.

As to the first couplet, the Supreme Court expressly limited its holding in *Dennis* to the issues in that case, the documents in the Record of that case, and the facts of that case. *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 202, 821 S.E.2d 667, 672 (2018). The issues in this case **are different from those in *Dennis***, the documents in this Record **are different from those in *Dennis***, and the facts of this case **are different from those in *Dennis***. The Club vastly exaggerates the decision's reach.

As to the refrain's second couplet, the Club's boilerplate issue preservation argument does not apply: (1) for the individual reasons discussed in separate sections below and in the previous briefing; (2) because Appellants have **not** raised new issues, they have simply argued existing issues using existing authority; but also (3) because issue preservation rules are not absolute, they are not jurisdictional, and this Court has the discretion to decide the issues before it. This Court's discretion is attested to by the South Carolina Appellate Court Rule on the content of an Appellant's initial brief, which anticipates this Court's flexibility to render decisions: "Broad general statements *may* be

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[1] Club, "Subsumption" *All Alone in the Clubhouse* (Prometheus Records 2020).

disregarded by the appellate court. *Ordinarily,* no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR (emphasis added). There are numerous exceptions to issue preservation rules that should apply here, if necessary, both in South Carolina and nationwide; here is a short list of some of them:

- When to strictly apply issue preservation rules would have the effect of upholding a contract that is otherwise void as against public policy or statutory law. *Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010) (disregarding issue preservation rules to find, *sua sponte,* that a contract was void for illegality).
- In the interest of judicial economy, particularly where the question is likely to arise on remand for trial. *Jeter v. South Carolina Dept. of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 147 n.6 (2006) ("Regardless of preservation problems, we address this issue in the interest of judicial economy.").
- In order to avert manifest injustice. *State v. Johnson,* 416 P.3d 443, 453–54 (Utah 2017) ("[T]here may be exceptional circumstances when errors not excepted to are so clearly erroneous and prejudicial to the fundamental rights of a defendant that an appellate court will of its own accord take notice thereof.") (internal citations omitted).
- Where a party presents a new argument or authority in support of a previously raised question. *Kerbs v. California Eastern Airways,* 33 Del. Ch. 69, 90 A.2d 652, 34 A.L.R.2d 839 (Del. 1952) ("While the plaintiffs did not urge this precise reason for the illegality of the directors' act upon the Chancellor, they did,

however, argue its illegality. . . . when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered.").

- Where there is no prejudice to the responding party. *Blumberg Associates Worldwide, Inc. v. Brown and Brown of Connecticut*, 84 A.3d 840, 879 (Conn. 2014) ("In summary, we conclude that, although the defendants did not preserve the claim that the plaintiff's claim under the prevention doctrine failed as a matter of law because the allegedly hindering conduct occurred before the contract existed, the Appellate Court properly raised that claim sua sponte.")

This is *not* to imply that any of Appellants' issues are not preserved—they are—it is instead to note that the Club's flagship argument on issue preservation is leaky.

If this Court is nonetheless tempted to sing along with the Club's theme song, Appellants respectfully suggest that the question of whether the Club improperly amended its governing documents has always been squarely preserved (and, in fact, has already been decided in Appellants' favor by this Court—Unpublished Op. No. 2018-UP-180 at p. 6: "Viewing this evidence in the light most favorable to [Appellant], there is a genuine issue of material fact regarding whether the governing documents were improperly changed . . . ."). The amendment issue is independent grounds for complete reversal of the trial court's grant of summary judgment, and—to borrow the Club's own pet word—it subsumes every other issue on appeal, including the questions of breach of contract, disparate treatment, Appellants' defenses, liability, and attorney's fees.

I. The prospect of being trapped in a perpetual contract is indeed dramatic.

The Club scoffs at Appellants' first argument as exaggerated and melodramatic. Perhaps the Club's cold, corporate heart cannot fathom the very real human distress borne by the members it has selected to persecute, who have watched and felt powerless as the Club unilaterally stripped them of their rights, imposed upon them unbargained-for obligations, and grimly pursued them for hundreds of thousands of dollars in dues that will accumulate until the end of time. Nor did those members anticipate that a relatively straightforward collections lawsuit over a social club membership would fester into a looming appellate blessing upon a perpetual contract.

The Club is wrong to characterize Appellants' arguments in this regard as new and unpreserved, and the Club is wrong to accuse Appellants of having failed to raise defenses of illegality and unenforceability. To the contrary, the Appellants brought—as affirmative defenses and counterclaims—causes of action against the Club for: breach of contract, violation of the Nonprofit Corporation Act, failure to allow members to approve fundamental changes, misrepresentation, and disparate treatment, *inter alia*. (R. pp. 37-44, 82-88).[2] Appellants have been arguing on appeal that summary judgment was improper because questions of fact exist that should have precluded summary judgment, including on their defenses and counterclaims. Either a jury should be given the

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[2] As in Appellants' initial brief, citations to the Record on Appeal in this brief are to the *Quinn* Record on Appeal. The same documents are in the Records on Appeal in *Martin* and *Frey*. Appellants would be glad to provide parallel citations to the Records in *Martin* and *Frey*, if the Court so wishes.

opportunity to determine whether the Club's documents and practices are illegal, or this Court should do so outright; that has been the essence of Appellants' issues on appeal from the moment they filed their initial briefs.

II. Disparate Treatment Claim

The Club's Return argues only that this issue was not preserved for appeal. Appellants properly pled disparate treatment under the Nonprofit Corporation Act as a defense, and properly preserved it for review. (*See, e.g.*, R. pp. 86–87; *Appellants' Petition For Rehearing*, filed Jan. 31, 2020, pp. 4–5 n.5 (identifying this issue pled and argued at least twelve times, including (i) as an affirmative defense, (ii) in motions, and (iii) in the appeal briefs); *see also* R. pp. 110, 135, 211)).

The Club's Return makes no arguments on the actual merits of this issue as it applies to these Appellants' specific situations. This Court ruled correctly on this issue in *Dennis* (Op. No. 5696 at p. 5), and the same ruling properly should be entered in favor of Appellants here.

III. Governing Documents

A. Resignation vs. Expulsion

The Club argues that this is a resignation case only and does not involve expulsion. This sidesteps the inconvenient fact that – for years – the Club and Appellants have been fighting about whether or not Appellants were, or should have been, expelled under the governing documents. As stated in Appellants' initial appeal brief, "This is the exit

method that applies to Mark Quinn." *Brief of Appellant*, filed Aug. 27, 2015, p. 5;[3] *see also id.* at 6 ("Under these terms and circumstances, Mark Quinn was expelled in or about May of 2010, if not earlier."). While Appellants salute the sheer *chutzpa* it takes for the Club now to argue that this is only a resignation case, Appellants would respectfully point to the following pages in the Record on Appeal that show otherwise: 5, 6, 8, 35-36, 38-39, 49, 50, 52-53, 80-81, 83-84, 110, 130, 132-133, 206, 208, 222-224, 230-231, 234, 236, 237, 244-245, 247-248, 254, 325-327, 330-337, 345-346, 348, 354-355, 389-390, 392, 424-427, 433, 438-439, 441-444, 469-470, 475-476, 478, 488, 490-491, 509, 536-538, 540-541, 545-548, 625, 629, 674, 677-678, 680, 897-900, 902-903, 926-928, 941, 943- 946, 959, 1038, 1042, 1049, 1104, 1105-1107, 1112, 1116-1117, 1119, 1158, 1162-1166, 1169, 1195, 1203, 1206-1207, 1211-1215, 1223, 1225-1226,[4] 1229-1231, 1234, 1235, 1564. This case is, and always has been, very much about expulsion of Appellants.

Perhaps sensing that its argument is not flawless, the Club next argues that, regardless, expulsion is the same as resignation or termination, and that it is not mandatory under any circumstances. This is contradicted by (1) the Supreme Court, (2) the governing documents, and (3) the documentary evidence.

First, in the Supreme Court's *Dennis* Opinion, both the majority and dissent were clear that expulsion was different from resignation, with different procedures and consequences. The majority and dissent each appear to believe that expulsion ends a

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[3] The same argument was made in the briefs of Martin and Frey, on the same pages.

[4] "It is a little bit like being expelled from school but still having to pay tuition [for years and decades to come]. We think that that is a misreading of the statute. We also respectfully assert we should be at least be allowed a trial on those issues." (R. pp. 1225-1226).

person's obligations to the Club, although the majority ruled that the expulsion process was not invoked with regard to the Dennises and therefore was not relevant under the Dennises' particular facts.[5]

Second, the governing documents are clear that expulsion is different from resignation—each exit path is addressed in different parts of the governing documents, with different procedures and consequences. Under the governing documents, "expulsion" severs a member's relationship with the Club, and it ends a person's obligations to the Club. The bylaws state that "expulsion" causes a person to "cease to be an equity member," meaning they no longer have member responsibilities such as dues and other charges. (R. p. 1303 (B-11, § 8(b)); *see also* R. p. 1449 (2008 Plan, § 3.4(b), identifying "expulsion" as a way in which a "person shall cease to be an Equity Member.")).[6]

Third, the documentary evidence is clear that when a member is expelled, their membership ends forever, along with future obligations. Expelled members are required to surrender their membership certificates. (*See, e.g.*, R. pp. 509, 1562, 1563, 1564). The Club's Resale List shows that such memberships belong to the Club (the Club's "Membership Pool"), not to the former member. (R. p. 1548, 1549; *see also* R. p. 899 line

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[5] The Supreme Court majority discussed that that expulsion—unlike resignation—would arise only after a specific process involving suspension and then expulsion, which the majority held did not take place with regard to Mr. and Mrs. Dennis. The dissent explicitly discussed how expulsion would end a member's liability for future dues. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 204, 213, 821 S.E.2d 667, 673, 677 (2018).

[6] *See, e.g., Appellants' Petition for Rehearing*, filed Jan. 31, 2020, at pp. 7–9; *see also Brief of Appellant*, filed August 27, 2015, at pp. 3–6, 13–18, 29–32; *Reply Brief of Appellant*, filed Aug. 27, 2015, at pp. 1, 6–8.

25 - p. 900 line 14). Moreover, "[a]ny Member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club Facilities under any circumstances." (R. p. 321). The documents show that expulsion ends a person's future membership obligations in the same way that it ends their membership rights, forever.

Finally, the Club makes an unpreserved argument that expulsion is treated the same as resignation under S.C. Code § 33-31-621. The Supreme Court did not rule on § 33-31-621 in *Dennis*, and the opinion has no applicability to a different section of the statute with drastically different terms. For example, § 33-31-621 requires that expulsion procedures be "fair and reasonable" and "carried out in good faith" and "tak[e] into consideration all of the relevant facts and circumstances." Section 33-31-621 also specifies that an expelled member "*may* be liable to the corporation" for certain obligations, which is different from the verbiage of § 33-21-620. (emphasis added). The Club's telling failure to address, or even acknowledge, these important points of statutory interpretation speaks volumes, and this new argument should be discarded.

B. 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*, 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. That "general discussion" certainly should not control in these appeals, since the *Dennis* Court was careful to confine its holding to the record before it in that case, which was a markedly different record than that of these Appellants.

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 themselves prevent substantive amendment affecting the rights and obligations of members without a vote of the members.[7] That argument alone—which the Club does not 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!—to have learned[8] in *Appellants' Petition for Rehearing* that the Nonprofit Corporation Act might pertain to its attempted

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[7] "[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).

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

unilateral amendment of its governing documents. But this is no surprise ambush. The Appellants 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 cited the Definitions section of a statute that has always controlled the actions of the Club, ever since it elected to organize itself as a nonprofit, mutual benefit corporation. (*See, e.g.*, R. pp. 105, 106, 111, 136, 176-177, 212, 303, 334, 1225-1226, 1233, 1344, 1389, 1484, 1494 (discussing, *inter alia*, the Club's requirement to comply with 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 (emphasis added)). The Club, in organizing itself under the Act, was of course aware that the Act's definition of "bylaws" included the Club's Rules.[9] 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.

[9] "'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.

(R. p. 1272) (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 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).

The 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 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 Appellants 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 law in support of a previously-raised issue that the trial court decided incorrectly.

IV. Damages/Attorney's Fees

A. Damages

The Club contends that the Appellants' argument on set-off was not preserved, and that it was raised for the first time in the Petition for Rehearing. Any attentive reader over the last five or more years would surely have noticed that the Appellants have been arguing since their opposition to the Club's motion for summary judgment that they are entitled to a have any amount deemed to be owed to the Club offset by their membership contribution.[10] For the moment setting aside, for the sake of argument, the evidence that the Club unauthorizedly modified the governing documents to affect the computation of

[10] *See, e.g.*, R. pp. 232-233, 236-237 ("As to damages, taking the [Appellant's] allegations as true, the [Appellant] overpaid on dues and fees and is seeking return of the overpayment. In addition, the [Appellant] is owed for the amount of equity he still holds in the membership or for which he was never paid when he should have been rightly expelled."); *Brief of Appellant* at pp. 13, 17-20, p. 20 n.9 ("Alternatively, the Order incorrectly failed to allow Mark Quinn a credit of $26,000 for his equity contribution, toward the judgment amount [because the] documents specify that unpaid dues are to be 'deducted from' a member's equity in the Club."), p. 41; *Reply Brief of Appellant* at pp. 8–9, pp. 15–16; *Supplemental Brief of Appellant* at p. 10.

its members' dues and liability, the contractual language entitling Appellants to have their judgment reduced by the amount of their membership contributions is unambiguous and should be construed by this Court to allow such a set-off.

B. Attorney's Fees

The Club's Return makes no new points on this issue, and fails to address the law and arguments made in Appellants' *Petition* (*see, e.g.*, pp. 21–23). In the trial court, Appellants submitted briefing on this issue "as instructed by the [Trial] Court," and the trial court ruled on the issue, thus preserving it for appeal. (*See, e.g.*, R. pp. 265, 1245–1246).

The Return's one-sentence argument on the substance of this issue does not refute the arguments or law in the *Brief of Appellants*, filed Aug. 27, 2015, at pp. 35–39. *See also Reply Brief of Appellants*, filed Aug. 27, 2015, at p. 4. If, as the Club argues, the governing documents should be strictly interpreted, those documents should be strictly interpreted against the Club as well.

V. Counterclaims

A. Violation of the Nonprofit Corporation Act constitutes breach of contract.

At this point in its brief, the Club appears to be just flinging words onto the page willy-nilly. It seems to argue, utterly without basis, that Judge Mullen's dismissal of Appellants' counterclaim for disparate treatment under the Nonprofit Corporation Act bleeds over to preclude their breach of contract counterclaim. First, to be clear, Judge Mullen's order did *not* dismiss Appellants' *defenses* under the Nonprofit Corporation

Act.[11] Further, it did not dismiss Appellants' counterclaims for breach of contract nor for misrepresentation.

Nothing in Judge Mullen's order prohibits Appellants from arguing that the Club's improper amendment without membership approval, in violation of the terms of the governing documents, was a breach of contract. Nothing in Judge Mullen's order prohibits Appellants from arguing that, because the Club was organized pursuant to the Nonprofit Corporation Act, its governing documents must comply (and remain complaint) with the Act's requirements. Nothing in Judge Mullen's order prohibits Appellants from arguing that uniform treatment of members was an implicit term of the contract, which impliedly incorporates the requirements and protections of the Nonprofit Corporation Act by virtue of the Club's organization thereunder. And nothing in Judge Mullen's order precludes Appellants from arguing that any violation of the Act by the Club constitutes a breach of contract.

Because evidence exists sufficient to raise a question of fact as to whether the Club breached its contract with Appellants, the case should be remanded to the trial court for a jury to try the facts.

B. Negligent Misrepresentation

Eschewing reasoned argument altogether, the final section of the Club's *Return* (p. 21) propounds simply that Appellants' argument "clearly cannot serve as a basis for reversing summary judgment" as to negligent misrepresentation. As discussed in

[11] The Order found that Appellants could not bring certain counterclaims against the Club because the court held those claims must necessarily be asserted as a derivative action.

Appellants' *Petition* (pp. 24–25) and the case law cited therein, Appellants raised at least a scintilla of evidence as to the falsity of the Club's statements regarding concession, termination, suspension, and expulsion, which evidence should have defeated summary judgment on the misrepresentation counterclaim.

CONCLUSION

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

Respectfully submitted,

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February 21, 2020

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

CERTIFICATE OF SERVICE

I certify that I have served the *Appellants' 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 20, 2020, addressed to their attorneys of record:

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February 21, 2020

VIA FEDERAL EXPRESS; OVERNIGHT DELIVERY AND FAX

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

Dear Ms. Kitchings:

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

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

With kind regards, I am,

Very truly yours,

Ian S. Ford
Neil D. Thomson
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ISF/ja
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