

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 5696
(S.C. Ct.App. filed December 18, 2019)

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Apr 27 2020

S.C. SUPREME COURT

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

v.

Ronnie D. Dennis and Jeanette Dennis, ... Petitioners-Respondents.

SUPPLEMENTAL APPENDIX

Andrew F. Lindemann #13030
Lindemann, Davis & Hughes, P.A.
5 Calendar Court, Suite 202
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, P.A.
Post Office Box 40
Beaufort, South Carolina 29901
(843) 522-2400

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

Ian S. Ford #12463
Neil D. Thomson #71209
Ainsley F. Tillman #70551
Ford Wallace Thomson, LLC
715 King Street
Charleston, South Carolina 29403
(843) 277-2011

*Counsel for Petitioners-Respondents
Ronnie D. Dennis and Jeanette Dennis*

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis, Appellants.

Appellate Case No. 2014-001524

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5696
Heard May 7, 2019 – Filed December 18, 2019

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Ian S. Ford and Neil Davis Thomson, both of Ford
Wallace Thomson, LLC, of Charleston, for Appellants.

M. Dawes Cooke, Jr., John William Fletcher, and
Bradley B. Baniyas, all of Barnwell Whaley Patterson &
Helms, LLC, of Charleston; Stephen P. Hughes, of
Howell Gibson & Hughes, PA, of Beaufort; James
Andrew Yoho, of Carlock Copeland & Stair, LLP, of
Charleston; and Andrew F. Lindemann, of Lindemann,
Davis & Hughes, PA, of Columbia, for Respondent.

LOCKEMY, C.J.: This case comes before this court on remand after the supreme court's decision in *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193,

821 S.E.2d 667 (2018), with instructions to address the Dennises' remaining issues on appeal.

FACTS/PROCEDURAL BACKGROUND

In 1999, Ronnie and Jeanette Dennis purchased property on Callawassie Island. At that time, the Dennises joined a private non-profit club known as the Callawassie Island Club, and paid \$31,000 to become "equity members." In their application, the Dennises agreed their membership would be governed by the "Plan for the Offering of Memberships in The Callawassie Island Club," which the developer of Callawassie Island created in 1994. The 1994 Plan included exhibits labeled as Bylaws and Rules. The 1994 Plan stated, "An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club." Similarly, the 1994 Bylaws stated, "Any equity member may resign from the Club by giving written notice to the Secretary. Dues, fees, and charges shall accrue against a resigned equity membership until the resigned equity membership is reissued by the Club."

The 1994 Plan contemplated that the members would eventually take over the assets and operation of the Island Club. In 2001, the members of the Island Club formed The Callawassie Island Members Club, Inc. (the Club) for this purpose. The Club assumed ownership and operations of all Island Club amenities, including a golf course and driving range, tennis courts, a swimming pool, and a clubhouse. The members of the Island Club—including the Dennises—received a membership certificate to the Club and continued to enjoy the benefits of membership. The Club established its own Bylaws, Plan, and Rules in 2001, each of which was amended several times over the years.

In 2010, the Dennises decided they no longer wanted to be in the Club, so they submitted a "letter of resignation" and stopped making all payments. Those payments included \$634 per month for the membership, "special assessments" that totaled \$100 per month, and yearly food and beverage minimums of \$1,000. In 2011, the Club filed a breach of contract action against the Dennises, alleging the unambiguous terms of the membership documents required the Dennises to continue to pay their membership dues, fees, and other charges until their membership is reissued. The Dennises denied any liability, alleging they were told by a club manager that their maximum liability would be only four months of dues, because after four months of not paying, they would be expelled. The Dennises also alleged the membership arrangement violates the South Carolina Nonprofit

Corporation Act. *See* S.C. Code Ann. §§ 33-31-101 to -1708 (2006 & Supp. 2019).

The Club filed a motion for summary judgment. The circuit court held a hearing and issued an order granting summary judgment. The circuit court found the membership documents unambiguously require a resigned member to continue to pay dues, fees, and other charges until the membership is reissued. The court rejected the Dennises' arguments relating to the Nonprofit Corporation Act.

The Dennises appealed, and this court reversed on both issues. *See Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016). We found there was "some ambiguity in the governing documents as to whether club members are liable for dues accruing after resignation." 417 S.C. at 616, 790 S.E.2d at 438. In addition, we found the provisions of the documents that require the Dennises to continue to pay their membership dues after resignation violate section 33-31-620 of the Nonprofit Corporation Act. 417 S.C. at 618-19, 790 S.E.2d at 439. We found it unnecessary to address the other issues raised on appeal, 417 S.C. at 619 n.5, 790 S.E.2d at 440 n.5, and remanded to the circuit court for trial, 417 S.C. at 619, 790 S.E.2d at 440.

The Club filed a petition for a writ of certiorari, which the supreme court granted. In a 3-2 decision, the supreme court reversed this court and reinstated summary judgment in favor of the Club. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). The supreme court held the membership documents¹ unambiguously provide that club members are required to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued. *Id.* at 200, 821 S.E.2d at 670. The court found this requirement was not prohibited by section 33-31-620 of the Nonprofit Corporation Act. *Id.* at 206, 821 S.E.2d at 673. The supreme court remanded to this court to address the remaining issues on appeal. *Id.* at 206, 821 S.E.2d at 674.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRPC, which provides that summary judgment is proper when there is no genuine issue as

¹ The supreme court found the 2008 Plan, the 2009 Bylaws, and the 2009 Rules were in effect when the Dennises resigned in 2010. *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670.

to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

The Dennises assert the following issues were neither addressed by this court nor reached by the supreme court.

I. Standard of Review

The Dennises contend the circuit court improperly shifted the burden of proof and failed to apply the "mere scintilla" standard. This issue was decided by the supreme court when the court cited the applicable standard of review. *See Dennis*, 425 S.C. at 198, 821 S.E.2d at 669. Accordingly, we need not address this issue.

II. Governing Documents

A. Ability to Concede/Swap Memberships

The Dennises argue genuine issues of fact exist as to whether they were treated differently from other Club members. The Dennises contend (1) the Club refused to allow them to swap memberships with another willing club member, and (2) the Club allowed other members to concede memberships but refused to do so for the Dennises.

The circuit court found that to the extent club members were treated differently, such treatment was in furtherance of the negotiated settlements of debts owed to the Club. The circuit court held the board of directors was authorized by the Club's governing documents and section 33-31-302 of the Nonprofit Corporation Act to take such actions. Therefore, the circuit court stated it would not review the *intra vires* corporate action of the Club, where it was exercising its business judgment, and there was no evidence suggesting self-dealing, fraud, or bad faith on the part of the board.

The Dennises argue they have been injured by the Club's denial of their request to swap a golf membership with the less costly social membership of another member. Jeannette Dennis testified the Dennises, unlike other club members, were unable to swap memberships. The Dennises rely on the Club's 1994 Bylaws to support their position that such swaps were permitted by the Club. Pursuant to the 1994 Bylaws,

Social Members may, at all times subject to availability, upgrade to a Golf Membership upon the payment of the difference between the membership contribution for a Golf Membership, and the membership contribution for a Social Membership, at the time of the upgrade. The downgrade of a Golf Membership to a Social Membership is not permitted unless there is another equity member who desires to upgrade to the Golf Membership.

The 1994 Bylaws were not in effect when the Dennises resigned in 2010. The full version of the 2009 Bylaws, which were in effect at the time the Dennises resigned, is not in the record.

Next, the Dennises argue they were injured by the Club's refusal to allow them to concede their membership. The Dennises cite a number of examples of the Club allowing some members to concede their memberships and end all financial obligations to the Club. The record includes concession letters from the Club, the Club's resale list which documents the members who conceded their memberships, and deposition testimony from a former board member and membership director. The governing documents do not contain any provisions governing the concession of a club membership.

We find 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 material issue of fact as to the claim that the Club violated the Nonprofit Corporation Act. We discuss the Act below.

B. Nonprofit Corporation Act

The Dennises argue the circuit court failed to consider sections 33-31-610 and 33-31-611(c) of the Act. The Dennises assert that while these provisions of the Act

require all club members to have the same rights, they were treated differently from other members with regard to previous requests to swap or concede their membership.

Section 33-31-610 provides,

[a]ll members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

S.C. Code Ann. § 33-31-610 (2006). Section 33-31-611(c) states, "[w]here transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member." S.C. Code Ann. § 33-31-611(c) (2006).

The circuit court treated the determination of whether the Club violated the Act by allowing other members to concede memberships as a question of law. We hold the determination of whether the Club violated the Act is more appropriately an issue to be determined by a factfinder. Accordingly, we reverse the circuit court's grant of summary judgment and the accompanying award of damages.

C. Amendment of Governing Documents

The Dennises argue genuine issues of fact exist as to whether the Club's governing documents were properly amended. Specifically, they contend the Club changed language in section 13.3.1 of the Rules from "shall be expelled" to "may be expelled" without discussion among the board and without presentation to club members. The Dennises rely on the deposition testimony of Karen Norwood, former board president, who testified the change was made without consultation with club members.

Pursuant to section 13.3.1 of the 2001 Rules, "[a]ny member whose account is delinquent for sixty (60) days from the statement date *may* be suspended by the Board of Directors. . . . Any member whose account is not settled within the four

(4) months' period following suspension *shall* be expelled from the Club." (emphasis added).

The record does not contain any subsequent version of section 13.3.1. Assuming this rule remains unchanged except for the "shall" and "may" language in the 2009 Rules, which were in effect when the Dennises resigned in 2010, we need not decide this issue. As noted by the supreme court, the rules regarding expulsion are clear that mandatory expulsion arises only after the board has suspended a member, which is discretionary with the board. *See Dennis*, 425 S.C. at 204, 821 S.E.2d at 673. Here, the Dennises resigned; they were never suspended. Thus, the expulsion provision was never triggered.

In addition, pursuant to the 2001 Rules, the board had the right to change the rules without a vote of the membership. Section 1.3 of the 2001 Rules provides "[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships."² Accordingly, we find a genuine issue of fact does not exist as to whether the governing documents were properly amended.

D. Contract

The Dennises argue there is no evidence in the record supporting the circuit court's conclusions that club members voted to take over the assets of the Club. This issue was addressed by this court and the supreme court; therefore, we need not address this issue on remand. The supreme court held:

We begin our analysis of this case with a general discussion of the membership arrangement and the membership documents that govern that arrangement. Three documents governed the Dennises' membership in the Island Club and the Members Club—the Bylaws, the Plan, and the Rules. The three documents reference each other and are intended to operate together. When the Dennises first joined the Island Club, the 1994 versions of those documents applied. However, these documents were amended several times over the years, as permitted

² The 2009 Rules contain the same provision.

by the Bylaws, the Plan, and the Rules. The first amendments occurred when the club assets were transferred from the Island Club to the Members Club in 2001, at which point the Members Club enacted its own Plan, Bylaws, and Rules. All three documents were further amended several times during the 2000s. There 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, 425 S.C. at 198-99, 821 S.E.2d at 670. Noting our prior rejection of the Dennises's argument that there was no evidence their Island Club membership transferred to the Club, the supreme court specifically found there was "no question" the Dennises were contractually bound to the Club.

III. Attorney's Fees

Because of our reversal of the grant of summary judgment to the Club, we also reverse the award of attorney's fees to the Club. *See Camburn v. Smith*, 355 S.C. 574, 581, 586 S.E.2d 565, 568 (2003) ("An award of attorney's fees will be reversed [when] the substantive results achieved by counsel are reversed on appeal.").

CONCLUSION

We affirm the circuit court's grant of summary judgment on the Dennises' claim that the Club improperly amended the governing documents. In addition, we find a genuine issue of fact exists as to whether the Club violated the Nonprofit Corporation Act by allowing some club members to concede their memberships and not others. Accordingly, we reverse the grant of summary judgment as to this issue and remand to the circuit court for trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and MCDONALD, JJ., concur.

The South Carolina Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

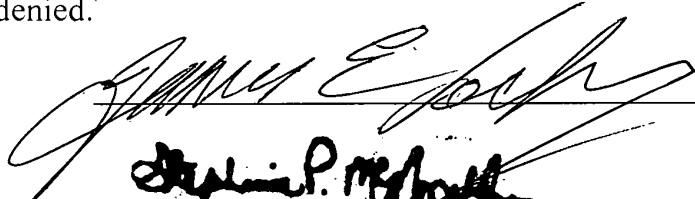
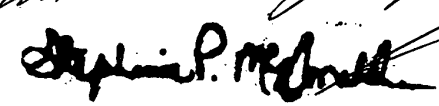
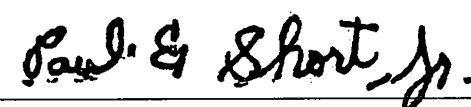
v.

Ronnie D. Dennis and Jeanette Dennis, Appellants.

Appellate Case No. 2014-001524

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting rehearing. Accordingly, the petitions for rehearing are denied.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:

Stephen P. Hughes, Esquire
James Andrew Yoho, Esquire
M. Dawes Cooke, Jr., Esquire
Bradley B. Baniyas, Esquire
John William Fletcher, Esquire

FILED

mailed 27, 2020

Ian S. Ford, Esquire
Neil Davis Thomson, Esquire
Andrew F. Lindemann, Esquire
Ainsley Fisher Tillman, Esquire

The South Carolina Court of Appeals

The Callawassie Island Members Club, Inc., Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis, Appellants.

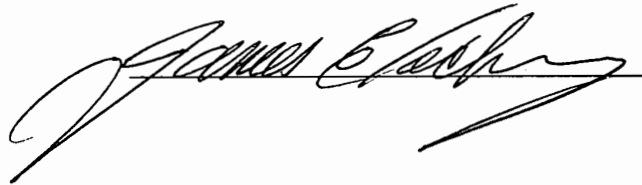
Appellate Case No. 2014-001524

The Honorable Carmen T. Mullen
Beaufort County
Trial Court Case No. 2011CP0703322

ORDER

Appellants filed a motion asking this Court to allow the parties to serve and file supplemental briefs in order to address the remaining, undecided issues on appeal. The motion is Granted. Any supplemental brief must be served and filed no later than January 30, 2019. The parties may not argue against established precedent in this case.

FOR THE COURT

 C.J.

Columbia, South Carolina

cc:

Stephen P. Hughes, Esquire
James Andrew Yoho, Esquire
M. Dawes Cooke, Jr., Esquire
Bradley B. Baniyas, Esquire
John William Fletcher, Esquire
Ian S. Ford, Esquire

FILED

December 18, 2018

Neil Davis Thomson, Esquire
Andrew F. Lindemann, Esquire

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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-07-3322

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SC Court of Appeals

The Callawassie Island Members Club, Inc. Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis Appellants.

APPELLANTS' PETITION FOR REHEARING

Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
FORD WALLACE THOMSON LLC
715 King St., Charleston, SC 29403
843.277.2011
www.FordWallace.com

Attorneys for Appellants

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This Court is correct. A question of material fact exists as to whether the Club treated its members differently. There is evidence that the Club haphazardly applied its ever-evolving rules to its members, liberating some, while tightening the vise on others. The Nonprofit Corporation Act—the legal umbrella under which the Club was formed—dictates that the Club must treat its members uniformly. Furthermore, the Club has a contractual duty to apply its documents consistently and precisely.

However, the Court's Opinion overlooks that the Club's disparate treatment of its members is just a symptom of the disease. The corporate body of the Callawassie Island Members Club belongs to a troubled mind. Over time, that unsettled mind has imposed upon its body ever-tightening manacles. The Dennises—and many others—are constrained by fetters for which they never bargained. Therein lies the source of the disease: the contract by which the Club and its members are bound has been unilaterally changed into something un contemplated, grotesque, and certainly not mutual.¹

The corrupted rules have led to a jumbled mess, which even the Club does not fully understand nor evenly apply. Since the Club filed this case in 2011, at least seven lawyers, one circuit court judge, three Court of Appeals judges (twice), and five Supreme Court justices have tried to sort out the mess, seeking to align the contract, the facts, and the law. Respectfully, the Dennises submit that questions of facts exist that prevent such determinations by the court.

¹ "If I cannot inspire love, I will cause fear." Shelley, Mary Wollstonecraft (1797–1851), *Frankenstein, Or, The Modern Prometheus: the 1818 Text*, Oxford; New York: Oxford University Press, 1998.

Appellants Ronnie D. Dennis and Jeanette Dennis petition this Court for rehearing as to certain portions of Opinion No. 5696, filed December 18, 2019 (the “Opinion”). As set forth below, Appellants respectfully submit that the Opinion overlooks or misapprehends the following points:

I. Standard of Review

The first issue before this Court on appeal was the circuit court’s improper application of the standard of review. The crux of the Dennises’ argument on this issue is that the trial court—in its haste to dispense with this case based on contractual provisions—improperly disregarded evidence that implicated questions of fact, which should have been for the jury. This Court found in its Opinion that it need not address the issue, reasoning that the Supreme Court had decided the question “when [it] cited the applicable standard of review.” Op. No. 5696, p. 4.

This determination by the Opinion overlooks the plain language within *Dennis*, which clearly excludes the question of the summary judgment standard from the decision. The *Dennis* Court particularly delineated that “[t]he questions before us *in this appeal are questions of law*.” *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018) (emphasis added). Because the *Dennis* Court was deciding only (two) questions of law, based on specific contractual language that it found to be unambiguous, it could not and did not make any determination on the scintilla standard, which is designed to evaluate whether any question of fact exists that would properly be heard by a jury—preventing summary judgment by the Court.

The Dennises requested a jury trial on numerous issues, which were not solely contractual in nature, which were not before the Supreme Court, and which this Court has mistakenly overlooked. The Dennises contend that the circuit court improperly shifted the burden of proof and failed to apply the “mere scintilla” standard in granting summary judgment on those issues. Those questions of fact included (*inter alia*):

- The question of which documents (or version of them) should apply;²
- The question of whether the applicable documents had been properly amended;
- The question of whether the Club applied the (ever-shifting) provisions of its governing documents uniformly to its members;
- The question of whether the Club violated the Nonprofit Corporation Act;
- The questions of damages and attorney’s fees.

This Court has properly remanded this case for trial on the question of whether the Club violated the Nonprofit Corporation Act by treating its members disparately and failing to apply the provisions of its governing documents uniformly.

The Dennises respectfully request that this Court would reconsider its Opinion, so as to more fully correct the error made by the trial court, when it disregarded material facts to grant summary judgment to the Club. *See, e.g., Radcliffe v. S. Aviation Sch.*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946) (“A scintilla of evidence is **any material** evidence

² In this regard, the trial court’s order on appeal is patently erroneous, citing disparate snippets from the governing documents, without rhyme or reason, without regard to the questions of fact raised as to the amendment process, and without any apparent rationale for its application of cherry-picked provisions from at least three separate versions of the documents.

that, if true, would tend to establish the issue in the mind of a reasonable jury.”) (emphasis in original) (quoting *In re Crawford*, 205 S.C. 72, 30 S.E.2d 841, 849 (1944)); see also *Bethea v. Floyd*, 177 S.C. 521, 181 S.E. 721, 724 (1935) (defining “scintilla” as the smallest trace); see also *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.”).

It cannot be said that the Dennises did not submit any evidence whatsoever in opposition to the Club’s motion for summary judgment. The circuit court, therefore, improperly disregarded that the law of this state dictates that a mere scintilla (*i.e.*, “the smallest trace”) of evidence is sufficient to defeat summary judgment and to create a jury question for trial. *Bethea*, 177 S.C. at 521, 181 S.E. at 724. This Court should remand this entire case for a trial on the merits, in order to allow a jury to decide the questions of fact.

II. Governing Documents

A. Ability to Swap Memberships

While correctly reversing the circuit court as to a member’s ability to concede membership, the Opinion seems to reject the Dennises’ argument that there is a genuine issue of fact as to whether or not the Dennises should have been allowed to **swap** their memberships. Op. p. 5. The apparent basis for this rejection is that the Dennises cite to the 1994 Bylaws for the swapping provision, but that the 2009 Bylaws were in effect when the Dennises resigned in 2010, and those Bylaws are not in the Record. *Id.* This ruling inadvertently overlooks the simple reality that the Record on Appeal is a creature of the parties.

Back in 2014, when they first appealed the circuit court's decision, the Dennises designated matter to be included in the Record, particularly identifying those provisions of the governing documents that they contended were applicable to their arguments against the court's improper grant of summary judgment. The Club, pursuant to Rule 209, SCACR, also had full opportunity to designate those governing documents upon which it planned to rely. The fact that the Club failed to entirely identify the governing documents from 2008 and 2009 indicates that **even the Club did not consider those documents to be controlling.** (*See Designation of Matter to Be Included in the Record on Appeal*, filed on Oct. 20, 2014). Nor did the Dennises consider those documents to be controlling; the Dennises designated and included the 1994 Plan, By-Laws, and Rules, as well as the 2001 Rules, in their entirety. (*See Appellant's Designation of Matter to Be Included in the Record on Appeal*, filed with the Court of Appeals on Sept. 24, 2014). The bottom line is that the Court has before it the 1994 documents in their entirety, which the Club contends have not been altered to affect the substantive rights of members.

This Court should therefore reconsider its Opinion and assume that the 1994 Bylaws (and the swap provision that they contain) apply to the question of whether the Club failed to uniformly apply its own policies. Certainly, the 1994 Bylaws—along with the evidence³ contained in the Record—present a question of fact on the issue, which is best decided by a jury.

³ Mrs. Dennis testified that they made several attempts to swap their membership (R. pp. 159-161) and, had the Dennises been allowed to do that swap, they would have been social members (as opposed to perpetually-obligated equity members).

B. Improper Amendment of Governing Documents

The Opinion wrongly concludes that the Court need not address the Dennises' argument that a question of fact exists as to whether the governing documents were properly amended. The Court based this decision on two factors: (1) that the Dennises were never suspended,⁴ and (2) that the board purportedly had the right to change the rules without a vote of the membership. Op. p. 7. This analysis overlooks the scope of the Dennises' argument on this issue, and it misapprehends that the Club's unilateral amendment of the contract by which it sought to bind its members violated statutory law as well as the contract itself. Because the question of the Club's amendment of the documents is at the heart of this entire lawsuit, and because the Dennises raised at least a scintilla of evidence that the amendment process was corrupt and illegal, this Court should reconsider its Opinion and remand for trial on the issue.

⁴ On the suspension issue, the Supreme Court ruled that "Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered." *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673. The Dennises respect the Supreme Court's ruling. However, the record shows that the Club **did** suspend the Dennises. For example:

- The Club's general manager, Jeff Spencer, signed two separate affidavits attesting that the Dennises had been suspended. (R. p. 429) (affidavit dated Sept. 24, 2013); (R. p. 435) (affidavit dated Nov. 8, 2013).
- The status of the Dennis membership is twice listed as suspended ("S") Club's documents. (R. p. 39) (July 31, 2011: "Status: S"); (R. p. 436) (November 7, 2013 member history: "Status: S").

To be clear, the Dennises raised this in their Petition for Rehearing to the Supreme Court, which was denied without elaboration on this point. However, it remains befuddling (to the Dennises) as to how it can be concluded that the Dennises were never suspended when the Club's own witnesses and documents clearly, and repeatedly, show that they were.

1. The Dennises' argument was not limited to suspension.

The Court mistakenly compartmentalizes the amendment question to pertain only to the Club's modification of those portions of the documents dealing with suspension and expulsion. However, in their initial Brief to this Court, the Dennises identified the following areas in which they contend the documents were improperly amended:

- Change of "shall" to "may" expulsion language; (Final Brief of Appellants, pp. 33-35)
- Changes to the portions of the documents pertaining to a members' ultimate liability to the Club; (*Id.*, p. 34)
- Changes pertaining to the obligations of members; (*Id.*, p. 34)
- Insertion of language to include ongoing liability of expelled members; (*Id.*, p. 34)
- Changes that favored the developer; (*Id.*, pp. 34-35)
- Changes regarding concession; (*Id.*, pp. 34-35)
- Changes affecting transfer rights. (*Id.*, p. 36)

As set forth below, the Opinion overlooks that a question of fact for trial exists as to whether those changes were made in conformity with the law and the Club's governing documents.

2. If the Amendments were indeed properly made, their result was to render the contract illegal.

At the outset, it is worth noting that the Dennises did not enter into a perpetual contract with indefinite liability. The contract by which they agreed to be bound had a finite term, mandatory provisions for exit by expulsion, and it clearly limited liability to the amount of equity contribution. The contract has become illegal over time because

the Club has unilaterally changed its provisions. The Dennises seek either an outright ruling from this Court that those amendments were illegal as a matter of law, or (at a minimum) that questions of fact exist for the jury as to whether the amendments were made in compliance with the law and enforced by the Club uniformly.

3. The Club's unilateral, secret amendment of the governing documents violated statutory law.

The Opinion erroneously concludes that the Club Rules can be changed without a vote of the membership. Op. p. 7. The Opinion's determination that amendment was proper hinges on a passage within the Rules themselves. Citing the 2001 Rules, this Court holds:

[T]he board had the right to change the rules without a vote of the membership. Section 1.3 of the 2001 Rules provides "[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for Offering of Memberships." Accordingly, we find a genuine issue of fact does not exist as to whether the governing documents were properly amended.

Id. This decision overlooks that the Board—as a matter of law—did not have the power to affect substantive rights of members without a vote of the membership.

As this Court well knows, this is a document-driven case, where the issues are shaped by the copious governing documents of the Callawassie Island Members Club. Those documents, in order of self-imposed hierarchy, are the Plan, the By-laws, and the Rules. In its analysis of whether the Rules were properly amended by the Club, the Opinion fails to take into account that **all of the governing documents are subservient to the law, which overshadows the documents' own hierarchy.** *Catawba Indian Tribe v.*

State, 372 S.C. 519, 642 S.E.2d 751, 756 (2007) (“[I]t is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract.”). The law expressly prevents the Club from making the changes that it did, without a vote of the members.

Importantly, regardless of the moniker that the Club attaches to them, be it “Plan” or “Rules” or “Terms of Indenture,” all of the Club’s governing documents are actually “Bylaws” as defined by the law of South Carolina. Specifically, the Nonprofit Corporation Act clearly sets forth in its Definitions:

(4) “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 (emphasis added). Thus, pursuant to South Carolina law, the Club’s “Rules” are truly corporation “Bylaws,” and they are bound by statutory law’s explicit requirements for their amendment.

This Court’s Opinion overlooks that the Club ran afoul of the law when it amended its Rules, in secret, to change language that affected the rights and obligations of its members. South Carolina law puts the following limitations on the amendment of a nonprofit corporation’s governing documents (*i.e.*, “bylaws”):

- “Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member.” S.C. Code § 33-31-611.

- “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.” S.C. Code § 33-31-1021.
- “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.

As the Dennises have contended throughout the years of this litigation, a question of fact exists as to whether the Board provided the required notice, or sought the required membership approval, prior to stealthily amending the Rules (which are actually “bylaws”) to affect the substantive rights and obligations of the members of the Club. There is no evidence whatsoever within the Record of such notice or vote; in fact, the Opinion overlooks evidence to the contrary. (*See, e.g.*, R. pp. 205–206). Importantly, if the amendments were invalid, it follows that the Dennises did not make a commitment to pay dues and fees in perpetuity.

Because the Club, as a matter of law, could not have unilaterally amended the documents to affect the substantive rights, the transfer rights, nor the liability of members, a question of fact exists as to whether the process by which it altered the Rules violated the law.

4. The Club's unilateral, secret amendment of the governing documents violated Club procedure.

Furthermore, the Opinion overlooks that the Club's documents themselves expressly prohibit the Club from secretly affecting the substantive rights of members. Although the Rules reserve for the Board the right to modify them, that authority is clearly restricted by the requirement that "[a]ny such amendments or modifications 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). The Opinion errs when it overlooks the fact that the higher-level governing documents require a vote of membership for "[a]ny amendment or modification" which materially and adversely affects the rights of the equity members.⁵ Op. p. 7.

The hierarchy of the Club's governing documents is that the Plan is supreme, the By-laws are next, and the Rules are the lowliest. As discussed at oral argument before this Court, the Club Rules are for day-to-day items such as hours of operation, pets in the clubhouse, golf tee times, clubhouse dress attire, dining room reservations, and swimming attire. (*See, e.g.*, R. pp. 495, 499, 500). That is why the Club's Rules do not require a vote of the full membership—they are for standard operational issues only. The

⁵ This issue was not reached by the Supreme Court, which—only having isolated snippets of the governing documents before it in the Record—focused instead on whether or not certain provisions governing documents were ambiguous or contradicted previous versions of those same provisions, and not on whether the Club followed the proper process for amendment. *See Dennis*, 425 S.C. at 199, 821 S.E.2d at 670 ("There 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.").

Rules are *not* for fundamental modifications of the legal rights and obligations of members.

The Plan governs fundamental legal rights of members and the transfer of memberships. For that reason, the Plan requires a vote of members for important issues:

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) (emphasis added). The Bylaws explicitly state that *the Plan* applies to “Membership transfer provisions,” which are at issue here (*inter alia*): (R. p. 525 § 10.1(e)).

Similarly, the suspension and expulsion of members is governed by the Bylaws, which may only be amended by a vote of the members.⁶ (R. p. 489: Bylaws Art. XIV, § 3: “Suspension”; § 5: “Expulsion”). The Bylaws state that equity membership certificates are not transferrable except as provided in the Bylaws. (R. p. 486 § 10.a).

The issues in this lawsuit—and the dozens of other similar lawsuits the Club is ravenously pursuing against its members—involve modifications of the fundamental legal rights and obligations of equity members. Modifications to the exit rights of equity members certainly “materially and adversely affect[] the rights of the equity members”

⁶ The By-laws provide that a vote of the members is required for amendments:

After the Closing Date, these By-Laws may be altered, amended, or repealed by a majority vote of all of the members of the Board of Directors and a majority of the votes cast by the equity members of the Club entitled to vote, in person or by proxy, at any duly called or constituted annual or special meeting of the equity members of the Club at which a quorum of equity members is present. A proposed amendment must be set forth in the notice of the meeting.

(R. p. 491).

and require a vote of the members. Such fundamental terms cannot be simply inserted into the Rules, disseminated to the members, put into practice by the Club, and then unilaterally changed by the Club's board; instead those provisions are expressly subject to and must follow the amendment process of the controlling governing documents, such as the Plan and the Bylaws. As the Supreme Court stated, "The three documents reference each other and are intended to operate together." *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670.

That the Club's board has tucked certain provision in the Rules—and quietly massaged them over the years into something grotesque—does not change the fact that process for modifications of members' legal transfer rights are controlled by the amendment provisions of the higher-level documents (Plan and Bylaws). In contract terms, the Opinion's ruling on this point allows one party (the Club) to unilaterally change material terms of a contract (the membership agreement) without consent of, or consultation with, the other party to the contract (the Dennises, and scores of other members). Such a "contract" is no contract at all—it is servitude. As the facts of this and many other Callawassie cases show, that servitude has become never-ending if the Club's interpretation is allowed.

Accordingly, the Dennises respectfully submit that the Opinion errs when it holds the Rules' amendment provision prevails over the amendment provisions of the Plan and the By-laws.

III. Contract: Any contract that existed is no longer valid or is not properly before this Court.

The Opinion reiterates its finding from its previous opinion (Op. No. 5434) and the Supreme Court that any obligations to the previous Island Club transferred to this Club. The Opinion overlooks the fact that, as discussed above, the alleged contract *became* illegal and therefore invalid due to the Club's improper amendments (*inter alia*). As discussed above, those amendments were done improperly (unilaterally, and without a necessary vote by members) and resulted in a perpetual, unconscionable contract (which is unlawful under South Carolina law).

Further, the Supreme Court concluded *sua sponte* that "When the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules." *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670. Until the Supreme Court so ruled, no party or court had recognized those documents as controlling. 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.**

Id., 425 S.C. at 206–207, 821 S.E.2d at 674 (emphasis added). That is why neither the Club nor the Dennises put the entirety of those documents into the Record on Appeal—nobody thought they were the controlling documents.

Having received this new instruction from the Supreme Court, it is erroneous to continue to uphold the alleged contract at issue when the purported "terms"—the 2008

Plan, 2009 Bylaws, and 2009 Rules—are not fully in the Record. It is erroneous to uphold such a purported contract, in a light most favorable to the Dennises, when the Record does not contain the full amended versions of the three governing documents that “reference each other and are intended to operate together.” *Dennis*, 425 S.C. at 198–99, 821 S.E.2d at 670, cited at Opinion p. 7.

The Dennises simply request as additional grounds for vacating summary judgment, and remanding for jury trial, that a factfinder should be provided the opportunity to review the governing documents, and their amended versions, in their entirety. That would include, as this Court has held, the method by which those documents were amended.

IV. Previous Points Preserved

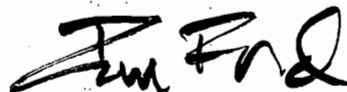
In the event that this Court grants the Club’s Petition for Rehearing, the Dennises incorporate herein all of their previous briefs to this Court, so as to preserve for appellate review any undecided issues.

CONCLUSION

This Court should not only remand this case for trial on the issue of the Club's disparate treatment of its members, but it should also allow a jury to decide numerous other evidentiary issues raised by the Dennises. Those issues include the question of whether the Club has improperly amended its documents to alter material provisions on swapping, liability, transfer rights, membership obligations and commitments. For the reasons set forth above, the Dennises respectfully request that this Court would grant their petition and remand the case in its entirety to the circuit court for trial.

Respectfully submitted,

FORD WALLACE THOMSON LLC

A handwritten signature in black ink, appearing to read "Ian Ford", written over a horizontal line.

Ian S. Ford, Bar No. 12463
Neil D. Thomson, Bar No. 71209
Ainsley F. Tillman, Bar No. 70551
715 King St., Charleston, SC 29403
843.277.2011

Attorneys for Appellants

January 30, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

RECEIVED

JAN 31 2020

SC Court of Appeals

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

v.

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

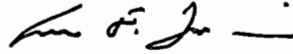
PETITION FOR REHEARING

The Respondent Callawassie Island Members Club, Inc. petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Callawassie Island Members Club, Inc. v. Dennis*, Op. No. 5696 (S.C. Ct. App. filed December 18, 2019).

The grounds for the Respondent's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondent's petition for rehearing is based on the Court's decision in *Callawassie Island Members Club, Inc. v. Dennis*, Op. No. 5696 (S.C. Ct. App. filed December 18, 2019); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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.

January 31, 2020

THE STATE OF SOUTH CAROLINA
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**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

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

BACKGROUND

Upon appeal from an earlier decision of this Court reversing the Circuit Court's grant of summary judgment to CIMC, the South Carolina Supreme Court filed an Opinion reversing this Court and reinstating that summary judgment. *See, The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 673 (2018). In its Opinion, the Supreme Court resolved all substantive issues in favor of CIMC. Specifically, the Supreme Court found that CIMC had not violated the South Carolina Nonprofit Corporation Act. The Supreme Court held that "the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620." 821 S.E.2d at 673. The Supreme Court thus concluded that the Dennises remain obligated to continue to pay dues, fees, and other charges after their resignation from the Club. In fact, the Court expressly "reinstate[d] the summary judgment for all unpaid dues, fees, and other charges." 821 S.E.2d at 668.

The Supreme Court also included a thorough analysis of the operative documents that governed the relationship between CIMC and the Dennises. The Court recognized that three documents -- the Bylaws, the Plan, and the Rules -- "govern the membership" and that "[t]he three documents reference each other and are intended to operate together." *Dennis*, 821 S.E.2d at 670. The Supreme Court

conclusively determined that “[w]hen the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules.” *Id.*

Moreover, the Supreme Court rejected all arguments that those governing documents are ambiguous in any respect. First and foremost, the Supreme Court cited to Section 5.11 of the 2008 Plan, entitled “Payment of Dues and Other Charges by Resigning Members,” which states: “An Equity Member who is on the waiting list to sell his/her membership *will be obligated to continue to pay to the Club all dues, fees and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club.*” *Dennis*, 821 S.E.2d at 670. (Emphasis in original). The Supreme Court concluded that “[t]his language unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued.” *Id.* The Supreme Court recognized that “[t]here are no provisions in the 2009 Bylaws or 2009 Rules that contradict this.” *Id.*

The Supreme Court also found “[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments.” *Dennis*, 821 S.E.2d at 670. By footnote, the Supreme Court cited the provisions in those documents that authorized such amendments:

The 1994 Bylaws provide the “Bylaws may be altered, amended, or repealed.” The 1994 Plan provides the “Plan may be amended in accordance with the Bylaws.” Similarly, the 1994 Bylaws provide the board of the Island Club have [sic] the authority to “[a]dopt, alter, amend, or repeal the Rules governing use of the Club.”

Id., n.1. Based on that analysis, the Supreme Court rejected the Dennises’ “mandatory expulsion” argument. The Supreme Court recognized that the supposed mandatory expulsion language, on which this Court had relied in reversing summary judgment, had been removed from the 2009 Rules. Instead, the 2009 Rules stated: “Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club.” *Dennis*, 821 S.E.2d at 673. (Emphasis in original). Citing that language, the Supreme Court explained that “the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition.” *Id.*

The Supreme Court reversed this Court’s finding of ambiguities in the contract language. First, the Supreme Court rejected this Court’s reliance on differences in language between the 1994 Bylaws and 1994 Plan as “not sufficient to create an ambiguity” and as “irrelevant.” *Dennis*, 821 S.E.2d at 671. Moreover, the Supreme Court explained that “even if we were to treat the ‘termination’ provision and the ‘resignation’ provision as governing the same event, there is no ambiguity.” *Id.* The Supreme Court focused on the 2009 Rules which state: “Any member may terminate membership in the Club. ... Notwithstanding termination,

the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold.’” *Id.* The Supreme Court similarly rejected this Court’s determination that the term “unpaid” in the 2009 Rules was undefined and thus ambiguous.

Finally, the Supreme Court rejected any reliance on extrinsic evidence to argue that the governing documents are ambiguous. The Supreme Court explained, “because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning.” *Dennis*, 821 S.E.2d at 672. The Supreme Court applied the parol evidence rule to bar consideration of testimony that contradicts or varies the terms of the membership documents, including testimony of what the members were allegedly told by Ellen Padgett, a former membership coordinator, about expulsion.

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

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

petition for rehearing, stating:

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

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

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

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

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

ARGUMENTS

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

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

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

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

In its opinion, this Court found that "the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed issue of fact as to the claim that the Club violated the Nonprofit Corporation Act." Slip Op. at 5. The Dennises allege that CIMC violated Sections 33-31-610 and 33-31-611(c) of the Act by allowing certain club members to concede their memberships and not others.¹ This Court

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

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

This Court cited to Section 33-31-610, which provides: “All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.” S.C. Code Ann. § 33-31-610. This Court also considered Section 33-31-611(c), which states: “[w]here transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member.” S.C. Code Ann. § 33-31-611(c). In reliance thereon, this Court appears to conclude that CIMC’s ability to compromise and settle disputes with club members over their liability for outstanding dues and fees might be limited, if not outright prohibited, by these Code sections. The Court would allow a factfinder to determine that CIMC cannot settle those disputes in exchange

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³ The Supreme Court has explained:

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

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

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

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

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

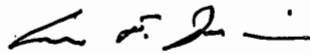
In sum, the Court erred in its interpretation and application of Sections 33-31-610 and 33-31-611(c), in its determination that the Dennises had presented a genuine issue of material fact to preclude summary judgment, and in reversing the Circuit Court's application of the business judgment rule as an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

CONCLUSION

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

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES P.A.

BY: 

ANDREW F. LINDEMANN #13030
5 Calendar Court
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

M. DAWES COOKE, JR. #1376
JOHN W. FLETCHER #69550
BARNWELL WHALEY PATTERSON
& HELMS, LLC
Post Office Drawer H
Charleston, South Carolina 29402
(843) 577-7700

STEPHEN P. HUGHES #2805
HOWELL, GIBSON & HUGHES
Post Office Box 40
Beaufort, South Carolina 29901
(843) 522-2400

January 31, 2020

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

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-07-3322

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SC Court of Appeals

The Callawassie Island Members Club, Inc. Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis Appellants.

APPELLANTS' RETURN TO RESPONDENT'S PETITION FOR REHEARING

Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
FORD WALLACE THOMSON LLC
715 King St., Charleston, SC 29403
843.277.2011
www.FordWallace.com

Attorneys for Appellants

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The Callawassie Island Member's Club is like a board game—the longest, worst Monopoly game ever, perhaps—with intricate rules, written in fine print, subject to cunning misinterpretation by competitive older brothers, but which all the players are obliged to follow. So, too, are the Rules of Court. As this Court knows, appellate practice has a fixed procedure, with its own rules within the rules. Parties, attorneys, judges, and justices are all bound by the South Carolina Appellate Court Rules and the surrounding jurisprudence, which set forth the mandatory path to the reinstatement or reversal of a lower court's order.

The Club would like to ignore those rules by inflating the *Dennis* decision far beyond its discrete, finite bounds into a comprehensive mandate in favor of the Club. Clinging to dictum and scrambling for purchase on the one-line reinstatement of summary judgment, the Club would have this Court forget that the Supreme Court had before it on certiorari only *two limited issues*. And the Supreme Court decided only those *two limited issues*.

Those two issues arose from the confines of this Court's own opinion, which itself reviewed only two of the *Dennises'* issues on appeal, and which deliberately left undecided those that remained.¹ Those two issues were made more concrete by the Club itself in its petition for certiorari. Those two issues were identified by the Supreme Court, which delineated them to be questions of law (not fact) as to the ambiguity of certain, specified portions of the Club documents and the application of particular sections of the

¹ "Based upon our reversal of the grant of summary judgment, the court need not address Appellants' remaining issues on appeal." *Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016).

Nonprofit Corporation Act.² See *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). Those two issues were decided by the Supreme Court, in an opinion rather replete with dicta, which explicitly recognized that the Dennises “raised other issues to the court of appeals that have not yet been addressed” and which therefore

² The Club asked the Supreme Court to answer only two questions:

1. Did the Court of Appeals err in its *sua sponte* revision and judicial repeal of Code of Laws of South Carolina (1976), as amended, Section 33-31-620, ignoring uncontroverted key facts in the record and disregarding the language of subsection (b) of the statute?
2. Did the Court of Appeals err in concluding that the Dennises presented evidence of ambiguity, where the parties’ written contract clearly stated that members of Petitioner, The Callawassie Island Members Club, Inc. must fulfill the financial obligations of membership in CIMC until the reissuance of their membership?

Petitioner The Callawassie Island Members Club, Inc.’s Brief on Appeal, filed with the South Carolina Supreme Court on October 25, 2017.

With respect to the issues before it on certiorari, the Supreme Court made the following specific holdings, which are now the law of this case:

Payment after resignation: “[Section 5.11 of the 2008 Plan] unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued.”

Parol evidence: “First, because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning.”

Nonprofit Corporation Act: “The dues, fees, and other charges the Dennises owe fall into the ‘commitments made’ category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises resigned—both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges ‘until his or her equity membership is reissued by the Club.’ When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. Therefore, we find 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.”

Callawassie Island Members Club, Inc. v. Dennis, 425 S.C. 193, 200-206, 821 S.E.2d 667, 670-674 (2018).

“remand[ed] to the court of appeals to address the remaining issues.” *Dennis*, 425 S.C. at 195, 206, 821 S.E.2d at 667, 674 (emphasis added).

In a sequential nutshell, for illustrative purposes, the procedural posture of this case is this:

- 1) the circuit court wrongly granted summary judgment to the Club;
- 2) the Dennises appealed the circuit court’s order on numerous grounds;
- 3) this Court reversed the circuit court, finding two issues to be dispositive and thus declining to address the Dennises’ remaining issues on appeal;
- 4) the Club petitioned for (and the Supreme Court granted) certiorari on those two discrete issues;
- 5) the Supreme Court decided only those two issues;
- 6) the Supreme Court remanded the case to this Court to address the Dennises’ remaining issues on appeal, each and every one of which constitutes independent grounds to reverse the circuit court’s erroneous holding;
- 7) this Court correctly reversed the circuit court on a separate issue (disparate treatment), previously unreviewed by any appellate court;
- 8) the Club doesn’t like it;
- 9) we are all back at it again, reading and writing briefs.

The Club is overreaching when it bloats the Supreme Court’s holding into “a complete rejection of the substance of the Dennises’ arguments.” (*Memorandum in Support of Petition for Rehearing*, p. 5). The rules of the game simply do not allow the Club’s lavish interpretation. The Supreme Court is only empowered to review a **final** decision of the

Court of Appeals, which means that the Court of Appeals must have actually rendered an opinion on an issue before the question can be reviewed. Rule 242(a), SCACR. Before a party can begin to seek certiorari, it must first obtain a final decision on an issue from the Court of Appeals by filing a Petition for Rehearing. Rule 242(c) (“a decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals.”). Rule 242 of the SCACR confines the issues that may even be presented to the Supreme Court for review, limiting them such that “[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”

In this case, the Club only raised *two issues* in its Petition for Certiorari.³ The Supreme Court must respect the boundaries of its jurisdiction on certiorari, and so it does not decide questions that are not specifically presented to it for review. *See Kennedy v. Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322 (2001) (comparing appellate courts to children, better behaved than my own, who “do not speak unless spoken to and do not answer questions that they are not asked.”).

The Club’s supposed broad mandate in favor of itself is nothing more than dictum. Justice Few, in a recent concurring opinion, discussed the nonbinding nature of “expansive terms that [are] completely unnecessary to resolve the narrow dispute before

³ The Club identified the issues for certiorari: “(A) The Court of Appeals Misconstrued the South Carolina Nonprofit Corporation Act in a Manner That Is Contrary to All Statutory Interpretation Canons and Poses an Existential Threat to Nonprofit Corporations;” and “(B) The Court Incorrectly Determined That Genuine Issues of Material Fact Exist for Trial with Regard to Whether the Parties’ Agreements Are Ambiguous.” (The Callawassie Island Members’ Club’s Petition for *Writ of Certiorari*, filed in the Court of Appeals on October 26, 2016).

the Court in [a] case.” *Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 177-178 (2018). The *Gordon* opinion unambiguously snubbed superfluous language contained within an otherwise precedential opinion, explaining: “because the Court’s expansive statement was not necessary to the decision of the case, the statement is dictum.” *Id.* (Few, J., concurring), citing *Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining “dictum ‘is a statement on a matter not necessarily involved in the case, . . . is not binding as authority . . . , [and] is not the court’s decision.’” (quoting 21 C.J.S. Courts § 227 (2006))). Indeed, so adamantly does Justice Few feel about unnecessarily expansive language that he states, not once, but twice in his *Gordon* concurrence: “**Dictum is not the law.**” *Gordon*, 425 S.C. at 395, 823 S.E.2d at 177, 178 (emphasis added).

The *Dennis* majority itself recognized the limits of its own opinion: “we point out that—as in all cases before this Court—we **decide only the issues before us** in *this* case.” *Dennis*, 425 S.C. at 202, 821 S.E.2d at 672 (italics in original; bolding added). Again, the Court had before it only two issues for certiorari review. The constraints of the rules and the appellate process are precisely the reason that the Supreme Court found it necessary to remand to this Court for its determination on previously undecided issues raised by the *Dennises* on appeal.

Despite the Club’s bluster, this Court unquestionably has the authority to reverse the circuit court’s error in failing to allow a jury to decide a question of fact. Certainly, this Court should decide the “remedy-related issues” touted by the Club, as well. The *Dennises* urge this Court to rehear this case and substitute its opinion with one that reverses the circuit court grant of summary judgment, remands for trial, and holds that

there is a question of fact as to the Club's remedy because of its improper amendment of the governing documents in a manner that materially affected the obligations of its members.

I. The Club cannot avoid the Nonprofit Corporation Act by rebranding its disparate treatment as "public policy."

As its vanguard point, the Club argues that public policy favors settlements generally, which trumps the Legislature's specific requirements in the South Carolina Nonprofit Corporation Statute.⁴ (Br. pp. 8-10). To support this startling assertion, the Club's Petition cites to a hodgepodge of cases on different points, none of which is

⁴ This issue was correctly preserved, including in the *Final Brief of Appellants*, filed Jan. 26, 2015 (pp. 37-38: "The Appellants also contend that they were treated differently from other members in violation of state law SC § 33-31-610 . . ."; "concessions were allowed in numerous circumstances which clearly violate the rights of the Appellants who have not been 'allowed' to concede their membership where others of the same class of membership have been"; p. 36: arguing under and citing to S.C. Code § 33-31-611), and in the *Supplemental Brief of Appellants*, filed Jan. 30, 2019 (p. 7: "The Dennises' appellate brief argues that these provisions [§ 33-31-610, -611] require all members to have the same rights and obligations with respect to transfer, but that the Dennises were treated differently from other members with regard to previous requests to transfer or concede their membership . . ."; p. 16: arguing "the important issue of improper disparate treatment of members under S.C. Code § 33-31-610 . . .").

remotely analogous to the situation here.⁵ The Club's argument basically references a generalized statement (settlements can be good) and then leaps to the unsupported conclusion that the Club's desired outcome is legally mandated here (settlements can be good, so the Club is allowed to do whatever it wants, whenever it wants, with whomever it wants).

The Club's argument also is based on the incorrect implication that the dozens of other members unshackled from their memberships were all "negotiated settlements." The Club's Petition is conspicuously missing any citation to the Record on Appeal for that untrue assertion. Instead, the Record on Appeal shows that the Club allowed at least 36 members to "concede" – or simply walk away from – their memberships. (R. p. 93). Indeed, the Club has a form for those it allows to depart, called the "CALLAWASSIE ISLAND MEMBERS CLUB, INC. MEMBERSHIP CONCESSION FORM." (R. p. 95). As this Court correctly points out, "The governing documents do not contain any provision governing the concession of a club membership" (Op. p. 5) – in other words, *favours* were

⁵ None of the Club's cited cases involve facts, statutes, challenges, or rulings that are relevant to the specific issues in this appeal. *See, e.g., Hudson ex rel. Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (workers compensation case, in which it was argued that it was error to grant an award in lump-sum in the Workers Compensation Commission); *Chester v. South Carolina Dept. of Public Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010) (Tort Claims Act case involving smoke on Interstate 95; focusing on to whether other tortfeasors could be joined under S.C. R. Civ. P. 19); *Darden v. Witham*, 258 S.C. 380, 188 S.E.2d 776 (1972) (divorce case in which court refused to modify husband's agreed-upon payments based on the remarriage of his former wife); *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015) (automobile accident involving the appeal of a jury award and a challenge to allocation of a previous settlement for purposes of set-off against the jury award); *Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) (automobile accident involving a covenant not to execute or proceed and whether it can be disclosed to the jury; the South Carolina Supreme Court noted that "settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process").

given to some members, but not to others. *Important favors*, involving the transfer and redemption of some memberships, emancipating some fortunate members from thousands upon thousands of dollars of future dues, costs, and assessments that often extend in perpetuity.

The Record on Appeal also shows that at least 15 other members were allowed, to their great relief, to be expelled. (R. p. 93). The Record shows that often there was no “negotiated settlement” of any sort—the Club simply told certain, select members that they were free. (R. pp. 106, 107: “Our records indicate that you have not [brought the membership account current], and according to the Club Rules, you are hereby expelled from membership in the Callawassie Island Members Club, Inc. Please surrender your membership certificate to the club . . .”). The Nonprofit Corporation Act requires that all members have the same rights for transfer and redemption (*inter alia*); the Act is designed to prevent a board of directors from inconsistently interpreting its governing documents in a manner that rewards its cool friends and slights the unpopular crowd.

In addition to being a logical fallacy, and based on an incorrect premise, the Club’s argument is a red herring. Appellants are not challenging other purported “settlements” with persons not parties to this lawsuit, and Appellants are not seeking to reverse the favors given to some lucky ex-members. Instead, Appellants are asking for a trial on whether the Club violated the Nonprofit Corporation Act by discriminating against certain members such as these Appellants (*inter alia*). Or, more specifically, Appellants assert that they have presented at least a “mere scintilla” of evidence of this factual issue sufficient to deny summary judgment in the trial court.

In sum, the Club's allusion to "public policy" is not an end-run around the requirements of the Nonprofit Corporation Act. As this Court correctly concludes, "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 material issue of fact as to the claim that the Club violated the Nonprofit Corporation Act." Op. p. 5.

II. The Club's equal protection argument is wrong.

The Club inappropriately tries to foist a constitutional law analysis onto the Dennises' disparate treatment claim under the Nonprofit Corporation Act. This shoe does not fit. First, the proper analysis is found within the statutory framework of the Act itself; second, the Club's argument fails even under its suggested equal protection rubric.

The Club elected to organize pursuant to the Nonprofit Corporation Act, which defines the relationship between a nonprofit organization and its members. Arguably, the Act does allow members to be differently situated, because there can be different **classes** of memberships, with different rights and obligations. The Club chose to have the following classes (or categories) of equity memberships: (1) Golf Membership; (2) Social Membership. (R. pp. 450, 455). The Dennises belong to the Golf Membership class of membership in the Club. (R. pp. 187-188). The Act is unequivocal that **all members of the same class must be treated equally**, having "the same rights and obligations with respect to voting, dissolution, redemption, and transfer" S.C. Code § 33-31-610.

In its quasi-constitutional law argument, the Club attempts to create yet another class of memberships entirely. It now baldly claims – without support in the Record –

that the Club justifiably settled with members who are differently situated than the Dennises, because those particular members do not own property on the island. This new argument is an attempt to circumvent the governing documents and the clear language of statute. The documents and the statute unambiguously define the Dennises' "similarly situated comparators" as those who belong to the class of members holding Golf Memberships, like the Dennises. The Club's documents specifically contemplate that some holders of equity Golf Memberships might not own property in Callawassie, and yet the Club did not give those members their own class nor otherwise differentiate them from the other categories of equity members.

**PERSONS WHO DO NOT
OWN PROPERTY
IN CALLAWASSIE**

The Club may offer equity memberships to such other persons who do not own property in Callawassie as the Partnership or the Club determines appropriate from time to time.

(R. p. 457). Under the Club's proposed equal protection analysis, the Dennises are entitled to the same treatment as other members of the same membership category, regardless of where those members might own real estate.

The statute is clear that members of the same class (*i.e.*, Golf Membership holders) must be treated equally and have the same rights and obligations. Lest the Club fret that it does not really understand what it means to "have the same rights," the Act provides the definition. It states that "rights are considered the same *if they are determined by a formula applied uniformly.*" S.C. Code § 33-31-140(5) (emphasis added). Therein lie the questions of fact as to whether the Club has failed in its necessary equal treatment of its members. Evidence exists that—not only did the Club not really have a formula (given that its "formula" consisted of a mishmash of decidedly unformulaic, ever-shifting

governing documents and informal practices)—but that it also took whatever iteration of the “formula” happened to be applicable at that particular moment in time and applied it disparately to its similarly-situated members.

For example (setting aside improper amendment), the Club might argue that it does have a formula for redemption and transfer, as set forth in its governing documents. The governing documents perhaps have a superficial veneer of prescribed method for resignation and expulsion, and the accompanying transfer and redemption rights and obligations. But the evidence shows that the Club then defied its own formula by inventing an extra-contractual “Membership Concession Form.” (R. p. 95). A question of fact thus exists as to what “formula” the Club might have been following as to its treatment of its members (*inter alia*).

Further, the membership certificate itself sets forth a member’s rights as to redemption and transfer, stating: “Consideration for the transfer of this Certificate will be payable to the holder **only** when an individual who is acceptable to the Club acquires this Certificate and pays the required purchase price for membership” (R. p. 188) (emphasis added). But at least a scintilla of evidence shows that the Club redeemed the membership certificates of many privileged members, giving them the right to transfer their membership back to the Club in exchange for the valuable consideration of the absolution of their debts and the release from bondage of future payments. (*See, e.g.*, R. pp. 93-99).

Finally, regardless of whether it had a formula, a question of fact exists as to whether the Club failed to apply that formula uniformly. The evidence shows that the

Club liberated at its whim certain lucky members, accepting their concessions or expelling them to release them from future payment obligations. (See R. p. 93). But it treated the Dennises differently (*res ipsa loquitur*, this lengthy lawsuit). This Court correctly found that the evidence in the Record of disparate treatment warrants a trial on the question.

III. The Club disparately enforces its members' transfer rights and obligations.

The Club's Petition argues, in conclusory fashion, that concession of a membership is not a "transfer" under the Nonprofit Corporation Act. This is simply wrong. Although the Nonprofit Corporation Act does not define "transfer," *Black's Law Dictionary* defines the term to mean:

Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. • The term embraces every method — direct or indirect, absolute or conditional, voluntary or involuntary — of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. . . .

Black's Law Dictionary 1803 (11th ed. 2019).

The Club documents are clear that when a member is divested of a membership (by whatever means) the membership is automatically "transferred" to the Club, and *only* to the Club:

D. TRANSFER OF EQUITY MEMBERSHIP

MEMBERSHIPS MAY BE TRANSFERRED ONLY TO THE CLUB

A member may **transfer** his or her membership **only** to the Club. A member who owns a residential unit or lot in Callawassie or such other community designated

by the Club may arrange for the Club to reissue his or her resigned membership to the purchaser of his or her residential unit or lot in Callawassie or the other designated community.

(R. p. 460) (emphasis added). So too with “concession” of a membership—the Club’s “Membership Concession Form” specifies that conceded memberships go back to the Club. (R. p. 95).⁶ There is no “abandon[ing]” of a membership, as the Petition intimates; the membership is transferred to the Club. Under any reasonable understanding of the word, a person ridding themselves of a membership by conveying it back to the Club is affecting a “transfer.”

Therefore, the claims here involve the “transfer” of Appellants’ membership under the Nonprofit Corporation Act, including, *inter alia*, § 33-31-610 and § 33-31-611(c), and the rights that accompany such a transfer. The evidence shows that the Club gave some of its members consideration for the transfer of their membership to the Club (via concession, etc.), while imposing perpetual obligations on other members seeking to do the same. This Court correctly held that a question of fact exists as to whether the Club failed to uniformly apply its provisions on transfer. Further, the evidence shows that the Club improperly restricted the Dennises’ transfer rights by its unilateral modification of provisions pertaining to liability, expulsion, and swapping within its governing documents, in violation of § 33-31-611(c). The Club’s secret changes to the governing documents, and the discriminatory fashion in which it applied its provisions on transfer rights, violate the Nonprofit Corporation Act.

⁶ That is why, on the Club’s membership resale list, conceded and expelled memberships are noted as being in the Club’s “Membership Pool” (R. p. 93)—those memberships have been transferred to the Club, which gets the proceeds if the membership is sold again.

IV. The business judgment rule does not inoculate the Club from the Nonprofit Corporation Act.

This Court properly reversed the circuit court's finding that the business judgment rule insulates the Club from the requirements of the Nonprofit Corporation Act. The Club argues – without any legal citation – that, it is immune from the requirements of the Nonprofit Corporation Act, and from a jury trial.⁷ A nonprofit corporation's board cannot avoid the requirements of the Nonprofit Corporation Act simply by claiming it is exercising “business judgment.” Similarly, the business judgment rule does not free a nonprofit corporation of its legal obligations to its members.⁸

Moreover, “the business judgment rule is not a cloak that protects a corporation from a violation of its own bylaws” and does not protect *ultra vires* acts. *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 781 S.E.2d 903, 911 (S.C. 2016). For example, this Court has correctly noted that no provisions in the governing documents provide for concession of memberships, yet the board has allowed *dozens* of members to concede their membership – to the point that the Club had a standard *form* for concessions. *Cf. id.* (“acts

⁷ Case law is replete with examples of jury trials involving the business judgment rule. *See, e.g., Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 781 S.E.2d 903, 911 (S.C. 2016) (“the Board will not be entitled to the protection of the business judgment rule if the jury finds that the Board acted beyond the scope of its authority, or acted with corrupt motives or in bad faith.”) (emphasis added); *id.* at 912 (“However, when viewed in the light most favorable to Respondent, there is at least a scintilla of evidence in the record to indicate an issue of material fact as to whether the Board breached its duty to investigate, as set forth by the trial court.”).

⁸ *Cf. Seabrook Island Prop. Owners Ass'n v. Pelzer*, 356 S.E.2d 411, 414 (S.C. App. 1987) (“The Association argues that its flat fee system of charges is reasonable and was adopted in good faith in the exercise of business judgment. This argument misses the point. Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.”).

beyond the scope of [a corporation's] powers, however, are ultra vires acts"). Such acts, and the Club's disparate treatment of its members in violation of the Nonprofit Corporation Act, would not be protected by the business judgment rule. *See id.* ("any ultra vires action of the Board, as well as any failure of the Board to comply with its affirmative duties under the governing documents, are not subject to the business judgment rule"). In sum, the Club's myriad inconsistent and unlawful actions raise questions of fact, for which Appellants are entitled to a trial by jury.

V. Three wrongs don't make a right.

Finally, the Petition expounds that "[t]wo wrongs do not make a right," apparently arguing that although the Club may have violated its governing documents, the Club still is allowed to discriminate against Appellants. This, again, mis-characterizes the holding of this Court and Appellants' argument. The Nonprofit Corporation Act requires, *inter alia*, that all members have the same rights and obligations with respect to redemption and transfer (§ 33-31-610), and that transfer rights may not be restricted without approval of the affected member (§ 33-31-611(c)). The Record on Appeal shows that the Club has a practice of letting members out of their memberships by, *inter alia*, concession (e.g., the Club "Membership Concession Form" (R. p. 95)) and expulsion. (R. pp. 93, 106, 107). The statute requires that all members be afforded *consistent* and *equivalent* transfer and redemption rights, that those rights be uniformly applied, and that those rights not be changed without consent of the affected member. Treating Appellants equally to other

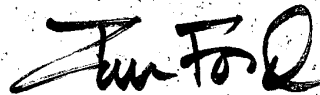
members is not "two wrongs," it is fundamental fairness required by the statute and the governing documents.

CONCLUSION

The Club's Petition relies on little more than a presupposed divine mandate, vague allusions ("public policy"), and colloquial sayings ("Two wrongs do not make a right"). None of these constitute a misapprehension of law or fact by this Court sufficient to compel rehearing with respect to its specific ruling on disparate treatment. For the reasons set forth above, as well as for those contained in the Dennises' own *Petition for Rehearing*, this Court should deny the Club's Petition and remand this case for trial.

Respectfully submitted,

FORD WALLACE THOMSON LLC

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

Ian S. Ford, Bar No. 12463

Neil D. Thomson, Bar No. 71209

Ainsley F. Tillman, Bar No. 70551

715 King St., Charleston, SC 29403

843.277.2011

Attorneys for Appellants

February 12, 2020

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

RECEIVED

FEB 13 2020

SC Court of Appeals

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' RETURN TO RESPONDENT'S
PETITION FOR REHEARING on all counsel of record by depositing a copy of it in the

United States Mail, postage prepaid, on February 12, 2020, addressed to their attorneys
of record:

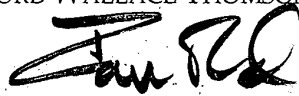
Stephen P. Hughes, Esq.
Howell, Gibson and Hughes
P.O. Box 40
Beaufort, SC 29901;

M. Dawes Cooke, Jr., Esq.
John Fletcher, Esq.
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402;

Andrew F. Lindemann, Esq.
Linderman David & Hughes
P.O. Box 6923
Columbia, SC 29260.

Respectfully submitted,

FORD WALLACE THOMSON LLC



Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
715 King St., Charleston, SC 29403
(843)-277-2011

Attorneys for Ronnie D. Dennis and Jeanette Dennis

February 12, 2020
Charleston, South Carolina

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

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FEB 18 2020

SC Court of Appeals

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), SCRPC. 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 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), SCRCF (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

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,

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

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
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FEB 24 2020

SC Court of Appeals

The Callawassie Island Members Club, Inc. Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis Appellants.

APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REHEARING

Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
FORD WALLACE THOMSON LLC
715 King St., Charleston, SC 29403
843.277.2011
www.FordWallace.com

Attorneys for Appellants

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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

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

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

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*

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

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.

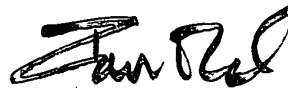
Regardless, the evidence—contained within the Record as it exists now—shows that a question of fact exists as to whether the board’s amendments were made in compliance with the contract and the statute. Further, as this Court properly found, the evidence—contained within the Record as it exists now—shows 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



Ian S. Ford, Bar No. 12463
Neil D. Thomson, Bar No. 71209
Ainsley F. Tillman, Bar No. 70551
715 King St., Charleston, SC 29403
843-277-2011

Attorneys for Appellants

February 21, 2020

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JAN 30 2019

SC 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-07-3322

The Callawassie Island Members Club, Inc. Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis Appellants.

SUPPLEMENTAL BRIEF OF APPELLANTS

Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
FORD WALLACE THOMSON LLC
715 King St., Charleston, SC 29403
843.277.2011
www.FordWallace.com

Attorneys for Appellants

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Since they last were before this Court, the Dennises continue to try to settle up the tab with the Hotel California. The parties now have moved from that dark desert highway and—in a shameless mixing of metaphors and record labels—are engaged in a *Hamilton*-like struggle for freedom as the scrappy American colonies versus the CIMC British crown.¹ All the Dennises seek is a fair fight at trial.

I. INTRODUCTION

On November 14, 2018, the South Carolina Supreme Court filed its Opinion in this case, reversing this Court's decision as to the two issues before it on certiorari, and remanding the case to this Court for its review of the remaining issues on appeal. Upon remand, the Dennises filed a *Motion for Leave to Submit Supplemental Briefs*, which this Court granted. Even if the Supreme Court did ultimately reject this Court's Hotel California metaphor as to the Club, it would be hard-pressed to deny that we have now found the passage back to the place we were before.

As the reader will soon gather, the purpose of this supplemental brief is to convey to the Court that the Supreme Court's decision in its *Dennis* Opinion did **not** resolve all of Appellants' numerous contentions of error on the part of the Circuit Court. The grounds set forth in this supplemental brief were previously raised to this Court, but they were not ruled upon. Although the Dennises presented numerous issues for its review,

¹ *Hamilton* (Invictus Sound 2015) ("I don't wanna fight/But I won't apologize for doing what's right"). (Weary of appellate brief-writing, we attorneys "just want to fight/not write.")

this Court initially found that two of the issues were dispositive; it therefore declined to address the remaining issues on appeal. The Supreme Court granted the Club's *Petition for Certiorari* as to those two issues. The issues argued below in this brief were not before the Supreme Court on certiorari, and the Supreme Court did not decide them. Therefore, the Appellants seek a ruling from this Court that summary judgment was not proper — as to these distinct issues — and that the case should be remanded for trial on their merits.

The second purpose of this brief is to request from this Court — particularly in light of the holding in the *Dennis* Opinion — a ruling that restricts the Club's damages to an amount not greater than the Dennises' equity membership contribution, which the Club has already received.

II. SCOPE OF *DENNIS* OPINION

When it seeks to evaluate the impact of the *Dennis* Opinion on the merits of the Dennises' remaining issues on appeal, this Court should be aware of the constraints of that Opinion, which is necessarily restricted to the questions that were before the Supreme Court on certiorari. "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions that they are not asked." *Kennedy v. Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322 (2001) (quoting *State v. Austin*, 306 SC 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)).

The Club asked the Supreme Court to answer **only two questions** as to this Court's decision on appeal in *Dennis*:

1. Did the Court of Appeals err in its *sua sponte* revision and judicial repeal of Code of Laws of South Carolina (1976), as amended, Section 33-31-620, ignoring uncontroverted key facts in the record and disregarding the language of subsection (b) of the statute?
2. Did the Court of Appeals err in concluding that the Dennises presented evidence of ambiguity, where the parties' written contract clearly stated that members of Petitioner, The Callawassie Island Members Club, Inc. (referred to herein as "CIMC" and "the Club") must fulfill the financial obligations of membership in CIMC until the reissuance of their membership?

(Petitioner *The Callawassie Island Members Club, Inc.*'s *Brief on Appeal*, at p. 1, Statement of Issues on Appeal.) In answering the Club's questions, the Supreme Court was starkly divided, with two justices robustly dissenting. With respect to the issues before it on certiorari, the Supreme Court made the following specific holdings, which are now the law of this case:

1. Payment after resignation: "[Section 5.11 of the 2008 Plan] unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued."²
2. Parol evidence: "First, because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning."³
3. Nonprofit Corporation Act: "The dues, fees, and other charges the Dennises owe fall into the 'commitments made' category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises resigned—both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges 'until his or her equity membership is reissued by the Club.' When the Dennises joined the club, they

² *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 200, 821 S.E.2d 667, 670 (2018).

³ *Id.* at 203, 821 S.E.2d at 672.

made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. Therefore, we find 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.”⁴

In its Opinion, the Supreme Court acknowledges that the Dennises raised other issues to this Court, which this Court did not rule upon.

Importantly, many of the undecided issues preserved by the Dennises for appellate review in their initial brief to this Court were independent grounds for reversal of the Circuit Court’s summary judgment order. Those issues, as identified below, have not yet been reviewed by any appellate court.

III. ARGUMENT

A. Remaining issues

In the *Final Brief of Appellants*, the Dennises identified multiple errors by the Circuit Court in their Statement of Issues on Appeal, some of which contain sub-points. Many of those issues were neither decided by this Court, nor were they reached in the Supreme Court’s *Dennis* Opinion.

[I.⁵ Did the Trial Judge err by failing to apply the proper legal standard in its granting of the Plaintiffs motion for summary judgment?]

Numerous issues relating to the proper legal standard, and the application of that standard to certain issues, were not previously reached by this Court. In this section of

⁴ *Id.* at 206, 821 S.E.2d at 673.

⁵ Heading numbering in [brackets] corresponds with the numbering in the *Final Brief of Appellants*, which was filed with this Court on January 26, 2015, and which is incorporated herein by reference.

their appellate brief, Appellants argued, for example, that the trial court (1) improperly shifted the burden of proof onto the Dennises (App. Br. at p. 4) and (2) failed to apply the “mere scintilla” standard (*id.* at p. 5; *see also id.* at p. 35 citing *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 575–576, 757 S.E.2d 399, 404 (2014) (“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law” and “should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts.” (internal quotations and citations omitted))). Neither of those issues was affected by the *Dennis* Opinion, and each constitutes grounds for reversing the trial court’s order.

[II. Did the Trial Judge improperly grant summary judgment where the Appellants presented more than a mere scintilla of evidence showing a genuine issue of numerous material facts?]

[B. There is a genuine dispute as to the interpretation and application of the documents governing the relationship between the parties.]

In this section, the Dennises argued, *inter alia*, that genuine issues of fact exist as to whether they were treated disparately from other members, including when (1) the Club improperly refused to allow them to “swap memberships”⁶ with a willing Social member (App. Br. at pp. 15, 32), and (2) the Club improperly allowed dozens of other members to concede memberships (and it expelled members) but refused to do so for the Dennises (discussed *infra* Part III.C; *see also* App. Br. at pp. 20, 23, 31, 34). The Dennises also argued

⁶ Membership “swapping” was a Club practice permitted under the governing documents where a social member and a golf equity member would exchange memberships.

(3) that liability accrued only against the membership, not against the member (discussed *infra* Part III.B; see App. Br. at pp. 13, 14, 16, 18–19). When viewed against the “mere scintilla” standard and the requirement that all inferences be taken in favor of the Dennises, the trial court erred in granting summary judgment. These issues were not reached by the *Dennis* Opinion, and each constitutes grounds for reversing the trial court’s order.

[C. Evidence of representations made to the Appellants which support their defenses and/or which present claims for the Appellants which would also mitigate damages if awarded.]

In this section, the Dennises argued, *inter alia*, that genuine issues of fact exist as to whether the governing documents were properly changed (see App. Br. at pp. 30, 34–35) and whether certain members were allowed out of the Club, a benefit which the Club improperly denied to the Dennises and which harmed their ability to sell their membership (see *infra* Part III.C; see also App. Br. at pp. 31, 32). These issues were not reached in the *Dennis* Opinion, and each constitutes grounds for reversing the trial court’s order.

[III. Did the Trial Judge, in granting summary judgment, fail to take all reasonable inferences in the light most favorable to the Appellants and rely upon findings for which there was no evidence in the record supporting such finding, or for which the evidence available contradicts the findings made?]

In this section, the Dennises argued, *inter alia*, that the trial court erred in making specific findings that were not supported by evidence in the record and in granting summary judgment based on such unsupported findings (see, e.g., App. Br. at pp. 33–34). Both constitute grounds for reversing the trial court’s order.

[IV. Did the Trial Judge err in failing to properly apply South Carolina law and the Nonprofit Corporation Act, including, among other laws, S.C. Code Ann. § 33-31-302(18), § 33-31-610, and § 33-31-621(e)?]

In this section, the Dennises argued that the trial court improperly failed to consider—and incorrectly granted summary judgment in the teeth of—their defense based on *other* parts of the South Carolina Nonprofit Corporation Act, including S.C. Code § 33-31-610 and § 33-31-611. For example, § 33-31-610 states that:

All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

Section 33-31-611(c) states:

- (c) Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member.

The Dennises' appellate brief argues that these provisions require all members to have the same rights and obligations with respect to transfer, but that the Dennises were treated differently from other members with regard to previous requests to transfer or concede their membership (*see* App. Br. at pp. 36–37; *see also supra*). Moreover, changes to the governing documents regarding transfer of memberships were not properly approved by the members and the affected members. (*See* App. Br. at pp. 30, 34–35; *see also* R. p. 204, line 11–p. 206, line 23 (testimony of board member Karen Norwood)). These issues, and these specific provisions of the Nonprofit Corporation Act, were not reached in the *Dennis* Opinion, and they constitute grounds for reversing the trial court's order.

[V. Did the Trial Judge improperly award damages to the Respondent, including the award of attorneys' fees and damages based upon an affidavit not served upon the Appellants, nor presented at the hearing, and upon which the Appellants were never allowed to [cross examine] the Respondent?]

In this section, the Dennises argued that the trial court improperly relied on late affidavits that were not properly served and did not contain the necessary information to support the trial court's order (App. Br. at pp. 39–40). As a result, the Dennises did not have a proper opportunity to contest those damages. *See, e.g., Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. . . . Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." (internal citations omitted)). The *Dennis Opinion* did not reach this issue, and it constitutes grounds for reversing the trial court's order.

The Dennises rely on the briefing in their Brief of Appellants for the arguments on the preserved issues summarized above. Certain other issues, however, call for special attention under the *Dennis Opinion*. They are discussed below.

B. The Dennises' liability must be strictly limited to their membership contribution.

While the measure of damages was not precisely before the Supreme Court on certiorari, its decision in *Dennis* has remarkable implications for the question of what damages are ultimately recoverable by the Club in the legion of lawsuits that it has filed against its members. Put simply, if the Club benefits from “unambiguous” terms in the governing documents, it must be bound by them, too.

The *Dennis* Opinion itself contains an underlying dialogue between the majority and the dissent, in which the justices discuss the potential repercussions of their decision on the liability of the many ill-fated members of the Callawassie Island Members Club. Justice Hearn, writing for the dissent, expresses concern that the Court’s decision might lead to the absurd – yet very real – result of perpetual, inescapable liability on the part of members, whose largely fictional “resignation” from the Club regrettably offers them no relief from the payment of dues, even when they are beyond the grave. *Dennis*, 425 S.C. at 212 n.6–7, 821 S.E.2d at 677 n.6–7.

The majority directly addresses and mollifies the dissent’s concern, explicitly limiting its holding by emphatically “not deciding whether the governing documents could support perpetual liability under these or any other facts.” *Id.* at 202, 821 S.E.2d at 672 (emphasis in original).

It is for this Court, then, to make the decision on damages – and perpetual liability – that the Supreme Court majority did not. The Dennises seek a ruling from this Court that it was error for the Circuit Court to award damages to the Club in the amount of \$51,131.76, because, properly, the Club’s recovery must be limited to (and offset by)

the amount of the Dennises' membership contribution. Such a holding by this Court is supported by the Club's governing documents, as well as by the Supreme Court's decision. The interpretation of an unambiguous contract is a question of law, and this Court may construe the membership documents at issue in this case *de novo*, without deference to the trial court's findings. *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013).

The *Dennis* Opinion determined that the governing documents that were before it in the Record are not ambiguous. 425 S.C. at 202, 821 S.E.2d at 672 (declining to consider whether its opinion renders a "harsh result," because "the governing documents are unambiguous"). Since that is the case as to those provisions, this Court should look to those unambiguous provisions for the answer to the majority's question of "whether the governing documents could support perpetual liability," whereby resigned Club members must pay dues, far into the distant future, to infinity and beyond. *Id.* The unequivocal answer is that the documents support no such thing. By their own express terms, the governing documents confine a member's ultimate liability to the Club to the loss of a return on his or her membership contribution.

The intricate workings of membership in the Club are set forth in the Plan for the Offering of Memberships, which has been amended over the years, but in some ways remains consistent. See 425 S.C. at 199, 821 S.E.2d at 670 ("There is no evidence [in the particular record before the Court in *Dennis*] 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.”).⁷ Membership in the Club works in this way: if a person is offered (in the Club’s sole discretion) the privilege of becoming an equity member, he or she must purchase the membership by making a “membership contribution” in the amount required by the Club (in the Dennises’ case, that amount was \$31,000). (R. p. 87). If, in the future, an equity member no longer wishes to be a member, one option⁸ is that he or she may indicate an intent to resign from the Club. Upon this tendered resignation, the membership is optimistically placed by the Club on a resale list, to be purchased by some other person who aspires toward membership. When such a prospective buyer has been found – if the Club approves of that person, in its sole discretion – the membership is re-issued by the Club, and the former member is entitled to receive from the Club a reimbursement of his or her original contribution.⁹ ... At least, this is how the documents cheerfully imagine the process will go.¹⁰

⁷ The specific governing documents that were before the Supreme Court in *Dennis*, beginning with the 1994 Plan for the Offering of Memberships, may be found starting on R. p. 447, followed by other governing documents, including certain By-Laws, Rules, and excerpts from various amendments.

⁸ The Record shows that other exit options include (1) expulsion and (2) conceding the membership back to the Club. (See, e.g., *supra* Part III.B-C & App. Br. at pp. 20, 23, 31, 34.)

⁹ “Each person who desires to acquire an equity membership must deliver or mail to the Club a completed and signed Application for Membership, a Membership Purchase Agreement, and a check (in U.S. funds) for the required membership contribution.” (R. p. 450). “If an equity member resigns from the Club . . . then the resigned membership will . . . be placed on the waiting list to be reissued by the Club” (R. p. 460). “Repayment of Membership Contribution.” (R. p. 461).

¹⁰ In reality, there is no market for memberships in the Callawassie Island Membership Club, and the placement of a membership on the resale list amounts to perpetual financial purgatory.

The documents make the following statements, which clearly govern a member's expectations as to the amount of his liability to the Club:

- An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club. **These dues will accrue against and be deducted from the amount to be paid to the resigned member upon reissuance of his or her resigned membership.**

(R. p. 462) (emphasis added) (1994 Plan).

- An equity member will be entitled to receive upon the reissuance of his or her resigned equity membership an amount equal to the greater of: (a) the membership contribution which the resigned member paid to the Club or (b) eighty percent of the membership contribution paid by the purchaser of the resigned member's membership. **The Club will be entitled to deduct from the amount to be paid to the resigned member any amount which the resigned member owes to the Club.**

(R. p. 461) (emphasis added) (1994 Plan).

- An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees, and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club. **Any unpaid dues, fees, and other Charges . . . will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.**

(R. p. 522-523) (2008 Plan) (emphasis added).

- Any equity member may resign from the Club by giving written notice to the Secretary. **Dues, fees and charges shall accrue against a resigned equity membership** until the resigned equity membership is reissued by the Club.

(R. p. 485) (1994 Bylaws) (emphasis added).

- After the purchaser [of a resigned membership] becomes an equity member and upon receipt of his or her membership contribution, the Club shall promptly remit the amount due to the resigned member

as provided by Section 9(b) of this Article **less any amount which the resigned member owes to the Club.**

(R. p. 487) (1994 By-laws) (emphasis added).

- The Club shall have a lien **against each membership** for any unpaid annual dues or other charges made by that member of the Club. . . All such liens may be foreclosed by the Club, in an action at law or in equity. . . .

(R. p. 489) (1994 Plan) (emphasis added).

- In accordance with the By-Laws, the Club shall have a lien **against each membership** for any unpaid dues or other charges

(R. p. 517) (2001 Rules) (emphasis added).

- Article XI, Delinquencies, The Club shall have a **lien against each membership** for any unpaid assessments, fees, annual dues, or other charges

(R. p. 525) (2009 By-Laws) (emphasis added).

These unambiguous provisions are unmistakable in their effect: dues, fees, and charges accrue against a resigned equity **membership**—and not against the member personally. In fact, the clear language of the documents evidences an intent by the Club to seek recourse for unpaid dues against the **value of the membership**. Ultimately, the Club may reclaim the **membership** through foreclosure, and recoup its lost dues from the membership contribution when it is reissued. (R. p. 489). It is clear that, in the end, a member only may be liable up to the amount of their already-paid equity contribution (\$31,000 for the Dennises).

Indeed, the *Dennis* Court nodded toward such a determination. Justice Hearn, writing for the dissent, construed that “unpaid dues and fees accrue against membership only, rather than on an ongoing basis against the member personally;” therefore, she

conveyed her concern about “taking the majority’s view to its logical end” to “create unlimited liability where none previously existed.” 425 S.C. at 210, 821 S.E.2d at 676. The majority’s reply to the dissent’s concern is telling: “In response to the ‘logical end’ argument . . . the summary judgment we affirm is for less than four years of unpaid dues. We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts.” *Id.* at 202, 821 S.E.2d at 671-672 (emphasis in original).

Pursuant to the express terms of the Club’s governing documents, the trial court erred in ordering damages in excess of the Dennises’ equity contribution, and in not providing for a setoff for their equity contribution. This Court is free to construe the force and effect of unambiguous contracts, and to hold that the plain language of the governing documents operates to restrict any recovery by the Club to an amount not greater than Appellant’s already-paid equity contribution of \$31,000. *Dennis* at 203, 821 S.E.2d at 672 (citing *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) (“Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument’s force and effect.”)); *see also Bennett*, 405 S.C. at 4, 747 S.E.2d at 427.

As set forth above, and in the Appellants’ previous briefs to this Court, the governing documents expressly do *not* support perpetual liability. As a matter of law, they limit liability to a finite amount. Appellants respectfully request that this Court hold that—on remand to the Circuit Court for trial—the maximum damages the Club may claim must be confined to the amount of the member’s equity contribution (here, the \$31,000 already paid).

C. The Record shows that the Dennises were disparately treated and improperly denied benefits that were provided to other similarly-situated members.

As discussed in the Brief of Appellant and in *supra* Parts [II.B]–[II.C], one of Appellants’ defenses (and claims against the Club) is that the Club allowed dozens of other members to concede their memberships, but improperly refused that treatment to Appellants. (See App. Br. at pp. 20–21, 23, 31, 34). The Record shows, for example:

- The resale list catalogues at least 36 members who were allowed to concede their memberships. (R. p. 93). That list states that those memberships are back in the “membership pool,” meaning they belong to the Club, not to the members who forfeited them.
- Club board member James Carling testified as follows: “Q. And what does it mean to concede their membership? A. Basically turn their membership back in.” (R. p. 134, lines 3–5).
- Club membership director Lindsey Cooler testified as follows: “Q. Okay. What would it mean to concede a membership? . . . A. To give back to CIMC. . . Q. —if any member concedes a membership, what’s your understanding of what that means for them going forward? Do they have any further obligations to the club? . . . [A.] To my knowledge they do not.” (R. p. 215, lines 5–25).
- The Record shows that numerous other members were allowed to concede or leave the Club:
 - R. p. 96: “I am happy to inform you your application to concede from the Callawassie Island Members Club, Inc. has been accepted.”

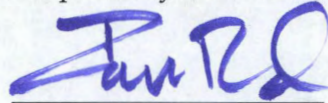
- R. p. 98: "Therefore, CIMC is willing to accept return of this membership to CIMC as part of a negotiated settlement, which also includes payment of the equivalent of one years' due's \$8,672, subject to your agreement that this transaction shall remain confidential."
- R. p. 99: "As a summary, Mrs. Brice has agreed to pay \$3,500 to the Club and relinquish her membership in the Club in exchange for a release of any and all claims the Club might have against Mrs. Brice."
- R. p. 103: Allowing McBee Butcher to leave the Club at the end of the year.
- R. p. 104: "Therefore, CIMC is willing to accept return of this membership to CIMC as part of a negotiated settlement which also includes payment of the equivalent of one year's dues \$6,524, subject to your agreement that this transaction shall remain confidential."
- R. p. 105: "It is the clubs [sic] intention to allow you to cede your membership back to the club as part of a negotiated settlement."

In addition to the important issue of improper disparate treatment of members under S.C. Code § 33-31-610 (*see supra* Part [IV]), there are genuine issues of material fact as to whether the Club (a) has changed its membership rules regarding concession without proper approval (*see also* App. Br. at pp. 34-35), and (b) restricted the transfer of memberships without the restriction properly being "approved by the members **and** the affected member." S.C. Code § 33-31-611(c) (emphasis added) (discussed in *supra* Part [IV] and App. Br. at pp. 36-37). The *Dennis* Opinion did not reach these issues, and each constitutes grounds for reversing the trial court's order.

IV. CONCLUSION

Many thousands of words have been spent, before many courts and judges, trying to make sense of the Club's documents and practices. That is a mess of the Club's own making, and the law requires that evidence be construed against the Club on summary judgment. Regardless of the Supreme Court's determination of two issues involved in this case, summary judgment was not proper as to numerous other issues, as set forth above and in the Dennises' original appellate brief to this Court. The Dennises respectfully request that this Court reverse the Circuit Court's erroneous grant of summary judgement as to those issues, and that it remand this case for trial on their merits. Further, the Dennises request a ruling from this Court that the Club would be bound by the provisions within its own governing documents, which limit its recourse against its members to its ability to retain their membership contribution.

Respectfully submitted,



Ian S. Ford, Bar No. 12463
Neil D. Thomson, Bar No. 71209
Ainsley F. Tillman, Bar No. 70551
FORD WALLACE THOMSON LLC
715 King St., Charleston, SC 29403
843.277.2011

Attorneys for Appellants

January 29, 2019

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-07-3322

RECEIVED

JAN 30 2019

SC Court of Appeals

The Callawassie Island Members Club, Inc. Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis Appellants.

PROOF OF SERVICE

I certify that I have served the Supplemental Brief of Appellants on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on January 29, 2019, addressed to their attorneys of record:

Stephen P. Hughes, Esq.
Howell, Gibson and Hughes
P.O. Box 40
Beaufort, SC 29901;

M. Dawes Cooke, Jr., Esq.
John Fletcher, Esq.
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402;

Andrew F. Lindemann, Esq.
Lindemann, Davis, & Hughes, P.A.
Post Office Box 6923
Columbia, South Carolina 29260

Respectfully submitted,

FORD WALLACE THOMSON LLC



Ian S. Ford, Esq.
Neil D. Thomson, Esq.
Ainsley F. Tillman, Esq.
715 King Street
Charleston, SC 29403
T. 843.277.2011

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2016-002187
Lower Court Case No. 2011-CP-07-3322

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

v.

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SUPPLEMENTAL RESPONDENT'S BRIEF

ANDREW F. LINDEMANN
LINDEMANN, DAVIS & HUGHES, P.A.
5 Calendar Court
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Respondent

M. DAWES COOKE, JR.
JOHN W. FLETCHER
BARNWELL WHALEY PATTERSON
& HELMS, LLC
Post Office Drawer H
Charleston, South Carolina 29402
(843) 577-7700

STEPHEN P. HUGHES
HOWELL, GIBSON & HUGHES, P.A.
Post Office Box 40
Beaufort, South Carolina 29901
(843) 522-2400

Counsel for Respondent

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INTRODUCTION

This case is before this Court on remand from the South Carolina Supreme Court for a very limited purpose. The Plaintiff-Respondent Callawassie Island Members Club, Inc. ("CIMC") is the owner and operator of the amenities serving property owners within the Callawassie Island residential community in Beaufort County, South Carolina. CIMC filed this lawsuit to enforce its contractual rights against the Appellants Ronnie D. Dennis and Jeanette Dennis ("Dennises") on behalf of CIMC's members. Specifically, CIMC sought to recover dues, fees, and other charges owed by the Dennises. The Dennises asserted counterclaims and argued that they could abandon their contractual obligations while remaining property owners of the property served by the CIMC amenities.

In their Appellants' Brief to this Court, the Dennises identified and limited their appeal to the following issues:

- I. Did the Trial Judge err by failing to apply the proper legal standard in its granting of the Plaintiff's motion for summary judgment.
- II. Did the Trial Judge improperly grant summary judgment where the Defendants presented more than a mere scintilla of evidence establishing a genuine issue of material fact as to:
 - A. There is a genuine dispute of material facts concerning the controlling documents which may govern the relationship between the parties and whether there exists a contractual relationship between the parties at all.

- B. There is a genuine dispute as to the interpretation and application of the documents governing the relationship between the parties.
 - C. Evidence of representations made to the Defendants which support their defenses and/or which present claims for the Defendants which would also mitigate damages if awarded.
 - D. Evidence of damages incurred by the Defendants due to the actions and misrepresentations of the Plaintiff.
- III. Did the Trial Judge, in granting summary judgment, fail to take all reasonable inferences in the light most favorable to the Defendants and rely upon findings for which there is no evidence in the record supporting such finding, or for which the evidence available contradicts the findings made.
- IV. Did the Trial Judge err in failing to properly apply law and the South Carolina Nonprofit Corporation Act, including, among others, S.C. Code Ann. § 33-31-302(18), § 33-31-610, and § 33-31-621(e).
- V. Did the trial Judge improperly award damages to the Plaintiff, including the award of attorneys' fees and damages based upon an affidavit not served upon the [Defendants], nor presented at the hearing, and upon which the [Defendants were] never allowed to cross-exam the Plaintiff.

See, Appellants' Brief, pp. 1-2.

On August 3, 2016, this Court filed Opinion No. 5434 reversing the trial court's grant of summary judgment to CIMC. In that Opinion, this Court held that CIMC's policies violated the South Carolina Nonprofit Corporation Act, S.C. Code Ann. § 33-31-620; CIMC's governing documents were ambiguous regarding the termination of the Dennises' contractual obligations; and a genuine issue of

material fact existed as to whether Ellen Padgett could bind CIMC to alleged representations that the Dennises "would never be obligated to pay for more than four months of past dues." *See, Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435, 438 (Ct. App. 2016). In a footnote, this Court explained that "[b]ased upon our reversal of the grant of summary judgment, the court need not address Appellants' remaining issues on appeal." 790 S.E.2d at 440, n.5

CIMC filed a Petition for Writ of Certiorari, which the South Carolina Supreme Court granted. After further briefing and argument, the South Carolina Supreme Court filed an Opinion reversing this Court and reinstating summary judgment in favor of CIMC. *See, The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 673 (2018).

In its Opinion, the Supreme Court resolved all substantive issues in favor of CIMC. Specifically, the Supreme Court found that CIMC had not violated the South Carolina Nonprofit Corporation Act. The Supreme Court held that "the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620." 821 S.E.2d at 673. The Supreme Court thus concluded that the Dennises remain obligated to continue to pay dues, fees, and other charges after their resignation from the Club.

In fact, the Court expressly “reinstate[d] the summary judgment for all unpaid dues, fees, and other charges.” 821 S.E.2d at 668.

The Supreme Court also included a thorough analysis of the operative documents that governed the relationship between CIMC and the Dennises. The Court recognized that three documents -- the Bylaws, the Plan, and the Rules -- “govern the membership” and that “[t]he three documents reference each other and are intended to operate together.” *Dennis*, 821 S.E.2d at 670. The Supreme Court conclusively determined that “[w]hen the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules.” *Id.*

Moreover, the Supreme Court rejected all arguments that those governing documents are ambiguous in any respect. First and foremost, the Supreme Court cited to Section 5.11 of the 2008 Plan, entitled “Payment of Dues and Other Charges by Resigning Members,” which states: “An Equity Member who is on the waiting list to sell his/her membership *will be obligated to continue to pay to the Club all dues, fees and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club.*” *Dennis*, 821 S.E.2d at 670. (Emphasis in original). The Supreme Court concluded that “[t]his language unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued.” *Id.* The

Supreme Court recognized that “[t]here are no provisions in the 2009 Bylaws or 2009 Rules that contradict this.” *Id.*

The Supreme Court also found “[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments.” *Dennis*, 821 S.E.2d at 670. By footnote, the Supreme Court cited the provisions in those documents that authorized such amendments:

The 1994 Bylaws provide the “Bylaws may be altered, amended, or repealed.” The 1994 Plan provides the “Plan may be amended in accordance with the Bylaws.” Similarly, the 1994 Bylaws provide the board of the Island Club have [sic] the authority to “[a]dopt, alter, amend, or repeal the Rules governing use of the Club.”

Id., n.1. Based on that analysis, the Supreme Court rejected the Dennises’ “mandatory expulsion” argument. The Court recognized that the supposed mandatory expulsion language, on which this Court had relied in reversing summary judgment, had been removed from the 2009 Rules. Instead, the 2009 Rules stated: “Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club.” *Dennis*, 821 S.E.2d at 673. (Emphasis in original). Citing that language, the Supreme Court explained that “the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition.” *Id.*

The Supreme Court likewise analyzed and reversed the rulings of this Court

in *Dennis* finding ambiguities in the contract language. First, the Supreme Court rejected this Court's reliance on differences in language between the 1994 Bylaws and 1994 Plan as "not sufficient to create an ambiguity" and as "irrelevant." *Dennis*, 821 S.E.2d at 671. Moreover, the Supreme Court explained that "even if we were to treat the 'termination' provision and the 'resignation' provision as governing the same event, there is no ambiguity." *Id.* The Supreme Court focused on the 2009 Rules which state: "Any member may terminate membership in the Club. ... Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold." *Id.*

The Supreme Court also rejected this Court's determination that the term "unpaid" in the 2009 Rules was undefined and thus ambiguous. The Supreme Court wrote:

Finally, the term "unpaid" in the 2009 Rules is not ambiguous, despite the fact it is not defined. The court of appeals explained its interpretation of this provision by stating, "It is unclear whether the language relating to unpaid dues refers to unpaid dues owed at the time of resignation or unpaid dues accruing before and after resignation." We find there is nothing unclear. "Unpaid" means any payment the Dennises are obligated to make according to the terms of the membership documents that has not been made. We have already discussed that the membership documents include obligations to pay before and after the date of resignation. The Dennises admit they have not made the payments. According to the plain language of the membership documents, the Dennises'

unpaid dues, fees, and other charges are “unpaid.”

Id. (Citation omitted).

Finally, the Supreme Court rejected any reliance on extrinsic evidence to argue that the governing documents are ambiguous. The Supreme Court explained “because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning.” *Dennis*, 821 S.E.2d at 672. The Supreme Court applied the parol evidence rule to bar consideration of testimony that contradicts or varies the terms of the membership documents, including testimony of what the members were allegedly told by Ellen Padgett, a former membership coordinator, about expulsion.

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

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

The petition for rehearing is denied. However, we did overlook the procedural fact that the court of appeals

found it unnecessary to address all issues raised before it, so we substitute the attached revised opinion remanding this case to the court of appeals to address the other issues. In all other respects, the opinion is unchanged.

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

After remand, this Court issued an Order on December 18, 2018, allowing the parties to file supplemental briefs "to address the remaining, undecided issues on appeal." According to that directive, "[t]he parties may not argue against established precedent in this case." *See*, Order filed December 18, 2018.

ARGUMENTS

The threshold issue on remand is the identification of those issues that have been remanded for further consideration by this Court. As mentioned, the Supreme Court did not identify those issues. Not surprisingly, the parties have a very different view of the issues remaining for adjudication. Based on the Dennises' previously filed Motion for Leave to Submit Supplemental Briefs, they are seeking to re-litigate this appeal essentially *in toto* and attempt to re-argue issues that the Supreme Court has flatly rejected or that the Dennises have not properly raised or preserved for appellate review.

The appropriate starting point to determine what issues remain to be adjudicated on remand is the Dennises' Statement of Issues on Appeal in their Appellants' Brief to this Court. In that brief, the Dennises limited their appeal to the following issues:

- I. Did the Trial Judge err by failing to apply the proper legal standard in its granting of the Plaintiff's motion for summary judgment.
- II. Did the Trial Judge improperly grant summary judgment where the Defendants presented more than a mere scintilla of evidence establishing a genuine issue of material fact as to:
 - A. There is a genuine dispute of material facts concerning the controlling documents which may govern the relationship between the parties and whether there exists a contractual relationship between the parties at all.

- B. There is a genuine dispute as to the interpretation and application of the documents governing the relationship between the parties.
 - C. Evidence of representations made to the Defendants which support their defenses and/or which present claims for the Defendants which would also mitigate damages if awarded.
 - D. Evidence of damages incurred by the Defendants due to the actions and misrepresentations of the Plaintiff.
- III. Did the Trial Judge, in granting summary judgment, fail to take all reasonable inferences in the light most favorable to the Defendants and rely upon findings for which there is no evidence in the record supporting such finding, or for which the evidence available contradicts the findings made.
- IV. Did the Trial Judge err in failing to properly apply law and the South Carolina Nonprofit Corporation Act, including, among others, S.C. Code Ann. § 33-31-302(18), § 33-31-610, and § 33-31-621(e).
- V. Did the trial Judge improperly award damages to the Plaintiff, including the award of attorneys' fees and damages based upon an affidavit not served upon the [Defendants], nor presented at the hearing, and upon which the [Defendants were] never allowed to cross-exam the Plaintiff.

(Final Brief of Appellants, pp. 1-2). These are the issues that the parties argued to this Court and are the only issues that may be considered in this case.¹ When those

¹ 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 explained that "broad general statements of issues may be disregarded by this Court." 692 S.E.2d at 903. The Supreme Court reaffirmed the well-established rule of appellate law that "[o]rordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *Id.* 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.*

issues are analyzed in view of what has already been conclusively decided by the Supreme Court, it is clear that this Court is left to decide only a couple of remedy-related issues, as will be addressed in more detail below.

The following is CIMC's analysis of the five issues raised by the Dennises in their Statement of Issues on Appeal:

I. Did the Trial Judge err by failing to apply the proper legal standard in its granting of the Plaintiff's motion for summary judgment.

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. *Dennis*, 821 S.E.2d at 669. The Supreme Court found no error in the legal standard applied by the trial court.

II. Did the Trial Judge improperly grant summary judgment where the Defendants presented more than a mere scintilla of evidence establishing a genuine issue of material fact as to:

A. There is a genuine dispute of material facts concerning the controlling documents which may govern the relationship between the parties and whether there exists a contractual relationship between the parties at all.

As discussed above, the Supreme Court clearly determined that there was no dispute as to the controlling documents or the existence of a contract. 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.”

Dennis, 821 S.E.2d at 670.

Moreover, the Supreme Court recognized that “[t]here is no question the Dennises are contractually bound to the Members Club.” *Dennis*, 821 S.E.2d at 670,

n.2. The Supreme Court explained:

The Dennises argued to the court of appeals there was no evidence their Island Club membership transferred to the Members Club. The court of appeals rejected this argument, stating, “We hold a question of fact does not exist as to whether Appellants were members of [the Members Club].” 417 S.C. at 615, 790 S.E.2d at 438. We agree.

Id. Hence, the Supreme Court, as this Court had previously, ruled that there existed a binding contractual relationship between CIMC and the Dennises.

II. Did the Trial Judge improperly grant summary judgment where the Defendants presented more than a mere scintilla of evidence establishing a genuine issue of material fact as to:

B. There is a genuine dispute as to the interpretation and application of the documents governing the relationship between the parties.

This issue has been adjudicated by the Supreme Court, which explained that the interpretation of the governing documents presented a question of law that is reviewed *de novo*. *Dennis*, 821 S.E.2d at 669 (“[b]ecause the ambiguity of contracts and statutes are questions of law, we do not view the evidence in any particular light”). In addition, as to the merits, the Supreme Court’s Opinion includes a full

and complete analysis of the governing documents, including their interpretation and application to the Dennises. This issue cannot be re-litigated on remand.

Although not included as an issue specifically identified in their Statement of Issues on Appeal, Section II.B of the Dennises' Appellants' Brief does briefly mention a remedy-related argument -- contained in a single, conclusory paragraph with no citations of authority -- to the effect that their monetary liability for post-resignation dues and fees should be capped at \$31,000, which was the amount paid for their equity membership in 1999.²

Despite not being properly asserted, if this Court is inclined to consider the merits of this issue on remand, the argument should be soundly rejected. As the Supreme Court already ruled, the interpretation of the governing documents presents an issue of law only and not one of fact as the Dennises suggest. The Dennises rely on language from the 1994 Plan which is different from the 2008 Plan. The Supreme Court has already determined, however, that the 2008 Plan is the controlling version of the Plan. *See, Dennis*, 821 S.E.2d at 670 ("[w]hen the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules"). The 2008 Plan provides as follows:

² This issue is not preserved or properly presented for consideration on appeal. This Court has repeatedly explained that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also, Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

5.11 PAYMENT OF DUES AND OTHER CHARGES BY RESIGNING MEMBERS

An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees and other Charges associated with his/her membership until his/her Equity Membership is reissued by the Club. *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.* A resigned member will be entitled to use the Club Facilities so long as the resigned member is obligated and continues to pay all dues, fees and other Charges associated with the resigned Equity Membership.

(R. 522-523). (Emphasis added).³ The highlighted language demonstrates that there is no cap on the resigned member's liability for unpaid dues and fees. Instead, the indebtedness will be deducted from the amount to be paid upon reissuance of the membership. There is no provision, however, precluding CIMC from collecting by other means the amounts in excess of the value of the equity membership.

Even relying on the 1994 Plan, as the Dennises do, the result is the same. The 1994 Plan states that "[t]hese dues will accrue against and be deducted from the amount to be paid to the resigned member upon reissuance of his or her resigned membership." (R. 462). That language likewise does not create a cap on a resigned member's liability for unpaid dues and fees. In short, this issue, even if properly

³ The Supreme Court has previously cited to and relied on Section 5.11 of the 2008 Plan. See, *Dennis*, 821 S.E.2d at 670.

preserved and presented, which it was not, does not warrant a reversal or remand as to the amount of the judgment entered in the trial court.

II. Did the Trial Judge improperly grant summary judgment where the Defendants presented more than a mere scintilla of evidence establishing a genuine issue of material fact as to:

C. Evidence of representations made to the Defendants which support their defenses and/or which present claims for the Defendants which would also mitigate damages if awarded.

As discussed above, the Supreme Court determined that the alleged misrepresentations by Ellen Padgett were "irrelevant" on the contract claims because the governing documents are clear that there is no "right" to be expelled after four months. *See, Dennis*, 821 S.E.2d at 672 ("under the circumstances of this case, Padgett's statement about expulsion and Cooler's statement about resignation are irrelevant").

II. Did the Trial Judge improperly grant summary judgment where the Defendants presented more than a mere scintilla of evidence establishing a genuine issue of material fact as to:

D. Evidence of damages incurred by the Defendants due to the actions and misrepresentations of the Plaintiff.

On this issue, the Dennises argued in their Appellants' Brief to this Court that "they have been injured because they have not been allowed to concede their membership and have not been expelled as they should." *See*, Appellants' Brief, p. 32. Their "mandatory expulsion" defense, however, was fully adjudicated and rejected by the Supreme Court. *See, Dennis*, 821 S.E.2d at 673 ("the 2009 Rules,

which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition”).

The Dennises further argued that they were “damaged because they were denied the ability to swap a Golf membership with another membership holder with a less costly Social membership.” *See*, Appellants’ Brief, p. 32. To the extent that issue remains to be adjudicated by this Court on remand, that issue does not warrant reversal or a remand to the Circuit Court. The only evidence in the record regarding the “swap” issue is in the deposition of Jeanette Dennis, who testified that the alleged attempted membership swap with the Allreds 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. As a result, even if the claim is preserved for appeal, the “swap” claim was properly dismissed.

III. Did the Trial Judge, in granting summary judgment, fail to take all reasonable inferences in the light most favorable to the Defendants and rely upon findings for which there is no evidence in the record supporting such finding, or for which the evidence available contradicts the findings made.

The Dennises argued that there is no evidence supporting the trial court’s conclusions that there was a vote by members to take over the assets of the Club and that CIMC properly amended its governing documents. The Supreme Court addressed these issues as follows:

We begin our analysis of this case with a general discussion of the membership arrangement and the

membership documents that govern that arrangement. Three documents governed the Dennises' membership in the Island Club and the Members Club -- the Bylaws, the Plan, and the Rules. The three documents reference each other and are intended to operate together. When the Dennises first joined the Island Club, the 1994 versions of those documents applied. However, these documents were amended several times over the years, as permitted by the Bylaws, the Plan, and the Rules. The first amendments occurred when the club assets were transferred from the Island Club to the Members Club in 2001, at which point the Members Club enacted its own Plan, Bylaws, and Rules. All three documents were further amended several times during the 2000s. There 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. When the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules.

Dennis, 821 S.E.2d at 670. This issue cannot be re-litigated on remand.

IV. Did the Trial Judge err in failing to properly apply law and the South Carolina Nonprofit Corporation Act, including, among others, S.C. Code Ann. § 33-31-302(18), § 33-31-610, and § 33-31-621(e).

The Dennises argued in the trial court and on appeal that the trial court failed to correctly apply the provisions of the Nonprofit Corporation Act. This issue was addressed by the Supreme Court, and to the extent that the Dennises raised various sections of the Act other than S.C. Code Ann. § 33-31-620, those issues would be subsumed in the decision of the Supreme Court. The Supreme Court explained that “[t]he Dennises argue the provisions in the membership documents that require them

to continue to pay dues, fees, and other charges after resignation violate the Nonprofit Corporation Act.” *Dennis*, 821 S.E.2d at 673. The Court then proceeded to find that the requirement that a member continue to pay dues, fees, and other charges after resignation did not violate the Act.

Nonetheless, to the extent that the Court is inclined to address the other statutory provisions of the Act on remand, the decision of the trial court should be affirmed. The trial court ruled as follows:

The Defendants contend that CIMC has treated members differently, in violation of S.C. Code Ann. § 33-31-610. This contention is premised upon the assertion that CIMC has allowed some resigning members to be relieved of their dues obligation while continuing to assess dues against similarly-situated members. The Defendants also contend CIMC has violated members' rights under § 33-31-611 relating to transfers of memberships as well as § 33-31-620 and -621 regarding resignation, termination, and expulsion of members. However, the record demonstrates that to the extent members were treated differently, such treatment was in furtherance of the negotiated settlements of debts owed to CIMC. The CIMC Board is authorized, both by its governing documents and S.C. Code § 33-31-302 to take such actions. Therefore, this Court will not review the *intra vires* corporate action by CIMC, where it was exercising its business judgment, and there has been no evidence suggesting self-dealing, fraud, or bad faith on the part of the Board of Directors.

(R. 21). In their Appellants' Brief to this Court, the Dennises do not identify any legal error in the trial court's analysis. Instead, they focus their arguments on S.C. Code Ann. § 33-31-620, which, as noted, the Supreme Court fully adjudicated.

Moreover, to the extent the Dennises rely on S.C. Code Ann. § 33-31-621(e), which addresses expulsion (rather than resignation),⁴ that argument is meritless because the Supreme Court has already ruled that the Dennises were not expelled. The Supreme Court found that “no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered.” *Dennis*, 821 S.E.2d at 673. At any rate, as the Supreme Court also recognized, the Dennises were not entitled to a mandatory expulsion even if they had been suspended. *Id.*⁵

V. Did the trial Judge improperly award damages to the Plaintiff, including the award of attorneys' fees and damages based upon an affidavit not served upon the [Defendants], nor presented at the hearing, and upon which the [Defendants were] never allowed to cross-exam the Plaintiff.

The Dennises argued to the Court of Appeals that the trial judge erred in considering “late filed affidavits” of trial counsel setting forth the incurred attorney’s fees and costs as well as a supplemental affidavit reflecting the updated amount of unpaid dues, fees, and other charges owed by the Dennises at the time of the hearing.

⁴ S.C. Code Ann. § 33-31-621(e) 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).

⁵ Nonetheless, even if S.C. Code Ann. § 33-31-621(e) were to apply, it should be interpreted consistent with the similar language in S.C. Code Ann. § 33-31-620(b) per the Supreme Court’s decision. In short, a member who is suspended or expelled may still be held liable to pay dues, fees, and other charges after the suspension or expulsion.

(R. 430-435). The Supreme Court did not decide this remedy-related issue, and it may be considered on remand.

The affidavit of trial counsel simply provided the trial court with information regarding the attorneys' fees and costs incurred by CIMC in prosecuting the action to that point in the litigation. (R. 430-432). The trial court relied on that affidavit and found that the attorney's fees and costs were "justified, reasonable, and appropriate based on the experience of the attorneys involved and the type of action." (R. 23). The affidavit of Jeff Spencer was a "supplemental" affidavit and provided updated information on the unpaid amounts owed by the Dennises at the time of the hearing. (R. 433-435).

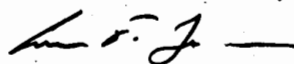
The applicable standard of review on this issue is abuse of discretion. The Dennises fail to identify any abuse of discretion by the trial court in accepting and relying upon the affidavits at issue. The Dennises failed to make a contemporaneous objection to the admission of those affidavits at the November 8, 2013 hearing, when those affidavits were first discussed with the trial court. (R. 459-460). The Dennises did raise an objection as to the timing of those affidavits at the arguments on their motion to reconsider, but they never disputed the accuracy of the monetary amounts identified in those affidavits. (R. 388-340). In short, this issue does not warrant a reversal of the attorney's fees award as entered below.

CONCLUSION

In its opinion, the South Carolina Supreme Court clearly and explicitly “reinstate[d] the summary judgment for all unpaid dues, fees, and other charges.” *Dennis*, 821 S.E.2d at 668. That is the law of this case and cannot be re-litigated on remand. In recognition of that, this Court already counseled that “[t]he parties may not argue against established precedent in this case.” *See*, Order filed December 18, 2018. Based thereon, the Respondent Callawassie Island Members Club, Inc. respectfully requests this Court to affirm *in toto* the trial court on the remedy-based issues asserted by the Dennises that may remain for adjudication on remand. This Court is specifically asked to affirm the judgment amount awarded by the trial court, including the award of attorney’s fees and costs.

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

-and-

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.

January 30, 2019

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent, does hereby certify that service of **Supplemental Respondent's Brief** 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 30th day of January 2019:

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

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