IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-00001
Lower Court Case No. 2012-CP-07-03218

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

v.

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

Of whom Gregory L. Martin is ..... Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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Respondent is fond of pointing out that "hard cases make bad law." In adopting this as its refrain, the Club strays far afield from the Eagles theme that this Court has previously sanctioned. This Court should not be tempted to "make it harder than it has to be."[1] This is a simple appeal as to a trial court's inappropriate grant of summary judgment. All Appellant Greg Martin wants is a fair trial.

ARGUMENT

This Court has granted the petitions for rehearing, filed by both Appellant and Respondent, and it has requested supplemental briefing in light of the South Carolina Supreme Court's opinion in *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018) ("*Dennis* Opinion").

For the reasons set forth below, this Court should recognize that the Supreme Court's decision in *Dennis* has no saving influence over many distinct and independent grounds for reversal of the Circuit Court's order on appeal in this case.

Further, based on the *Dennis* Court's holding that certain parts of the governing documents at issue are unambiguous, Appellant hereby petitions this Court for a specific ruling that would limit the amount of damages recoverable by the Club in this lawsuit, to an amount not greater than that of Appellant's membership contribution.

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[1] Eagles, "I Can't Tell You Why" *The Long Run* (Asylum Records 1979) (But, actually, we *can* tell you why.)

Finally, because it overlooked evidence in the Record as to the issue, this Court should reverse its previous decision as to the Appellant's counterclaim for negligent misrepresentation.

I. The Supreme Court's decision in *Dennis* was limited to the particular issues before the Court on certiorari.

When evaluating the *Dennis* Opinion's impact on the merits of Appellant's appeal, this Court should be aware of the constraints of the 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.)[2] In answering the Club's questions, the Supreme Court was starkly divided, with two justices robustly dissenting. The majority opinion emphasized that:

> In response to the "logical end" argument [in the dissent], we point out that—as in all cases before this Court—we decide only the issues before us in *this* case. The "logical end" of our analysis goes no further than required by the four corners of the governing documents in this case when applied to the facts of this case.

425 S.C. at 202, 821 S.E.2d at 672 (italics in original, underlining added). With respect to the issues before it on certiorari, the Supreme Court made the following specific holdings:

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." [3]

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."[4]

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 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

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[2] The Club also questioned this Court's quotation of lyrics from the Eagles' *Hotel California*. The Supreme Court declined to directly address the merits of that particular issue, instead "applaud[ing] the reference." 425 S.C. at 204 n.4, 821 S.E.2d at 673. Thus, we can infer that the Eagles theme prevails.

[3] 425 S.C. at 200, 821 S.E.2d at 670.

[4] *Id.* at 203, 821 S.E.2d at 672.

> other charges after resignation until their membership is reissued is not prohibited by section 33-31-620."[5]

The majority opinion observes that the Dennises never were suspended by the Club, and therefore they could not have been expelled. *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 ("This provision makes it clear that mandatory expulsion arises only after the board has suspended a member, which is discretionary with the board. Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered.")

The strong dissent is written in support of this Court's ruling, and it contends that numerous material issues of fact should have precluded summary judgment on the question of resignation. Among other things, the dissent states that:

> Lastly, the majority's holding which forecloses the ability to resign has the potential to lead to an absurd result. Instead of attempting to resign, members have more incentive to simply become "bad neighbors" and behave in such a way as to encourage the Club to suspend them, because suspension places them in a better financial situation than resignation. **Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so "shall be expelled from the Club," ending their liability for future dues.**

Id. at 213, 821 S.E.2d at 677 (emphasis added).

Given the precise, finite issues presented to, and decided by, the Supreme Court in *Dennis*—as well as the different facts and evidence within the Records on Appeal—many of the issues that **this** Court identified in the opening paragraph of its opinion in **this** case remain pending and unaffected by the *Dennis* Opinion:

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5 *Id.* at 206, 821 S.E.2d at 673.

> [Appellant] argues the circuit court erred in (1) failing to apply the "scintilla of evidence" standard to CIMC's motion for summary judgment, (2) disregarding the voluminous evidence he presented in opposing CIMC's motion for summary judgment, (3) awarding damages under incorrect contract provisions and under incorrect interpretations of the applicable documents, (4) granting summary judgment in favor of CIMC on his counterclaims when he submitted evidence raising numerous issues of material fact, and (5) granting summary judgment prematurely because he did not have a full and fair opportunity to complete discovery.

(Unpublished Op. No. 2018-UP-178 at 2). As set forth, below, this Court should reverse the Circuit Court's errors and remand this case for trial.

II. This Court should disregard the new arguments in the Club's *Petition for Rehearing.*

After this Court filed its Opinion on May 2, 2018, the Club retained new counsel, who filed a notice of appearance on May 11, 2018. On May 17, 2018, new counsel filed the Club's *Petition for Rehearing and Incorporated Memorandum in Support*, which contains new arguments not previously made by the Club, which should be stricken or disregarded.

Chief Justice Jean H. Toal has explained that, on appeal, "the prevailing party abandons any additional sustaining grounds it might have argued by failing to raise them in the party's appellate brief." Jean H. Toal et al., *Appellate Practice in South Carolina* 192 (3rd ed. 2016); *see also id.* at 432 ("Note where a party fails to argue an issue in the brief, it is not preserved for appellate review.") Chief Justice Toal cited to *I'On, L.L.C. v. Town of Mt. Pleasant,* where the Supreme Court held:

> Of course, a **respondent** may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—**by failing to raise it in the appellate brief**. *Maxey v. R.L. Bryan Co.*, 295 S.C. 334, 336 n. 2, 368 S.E.2d 466, 467 n. 2 (Ct. App. 1988); *May v. Hopkinson*, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct. App. 1986); *see also* Rule 208(b)(1)(B), SCACR ("[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal").

338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (emphasis added).

As Appellant pointed out in his *Reply Brief*, the Club, in its *Final Brief of Respondent*, entirely failed to address the Appellant's arguments regarding the Club's improper amending of the governing documents. (*See, e.g.*, App. Reply at p. 2: "The Club's brief does not address, or barely addresses, numerous points argued in [Appellant's] initial brief. Those points appear to be conceded, and include: . . . II.A(6) The trial court erred in disregarding evidence that the governing documents had been improperly changed by the Club.").

Despite its previous abandonment of the issue, the Club dedicates entire pages of its *Petition for Rehearing* to brand-new grounds that address—for the first time—Appellant's arguments about the Club's improper amending of the governing documents. (*See* Club *Petition for Rehearing*, at pp. 8-9). The Club's addition—at the rehearing stage—of new grounds for sustaining the trial court's decision is inappropriate, and this Court should consider the question of whether the documents were improperly amended to have been conceded by the Club.

III. This Court should remand the case for trial on the question of whether the Club improperly amended the governing documents.

The *Dennis* Opinion has no bearing on this Court's prior holding that a genuine issue of material fact exists as to whether the governing documents were improperly amended, particularly because the question was not before the Supreme Court on certiorari. This Court held:

> [Appellant] contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club . . . [Appellant] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Appellant], there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of [Appellant's] suspension from the club.

(Unpublished Op. No. 2018-UP-178 at 6) (citing *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof)).

This Court's holding is well-supported. As set forth in Appellant's brief, the governing documents do not permit the Club to unilaterally—and without notice or a vote—change the basic rights of membership (such as changing "shall be expelled" to "may be expelled"). The documents themselves prevent any alteration by the Club that "materially and adversely affects the rights of the Equity Members," unless such modification is "approved by a majority of the votes held by the Equity Members so affected." (R. at 1369) (Section 10.1). Evidence in the record shows that the Club made fundamental changes to the expulsion provisions of the governing documents without a

board vote, without a vote of members, and without notifying or allowing Appellant to vote on such changes (App. Br. pp. 24-25). As this Court already has held, there is a genuine issue of material fact as to whether or not key provisions in the governing documents were changed correctly, and the factual consequences of those changes.

As discussed in *supra* Part II, the Club's *Petition for Rehearing* contains new arguments on this point, which should be stricken or ignored. In addition, those new points are based on the Club's contention—apparently made in all seriousness—that the Club's admitted changes to the governing documents "plainly did not adversely affect the rights of members of the Club," and therefore did not require member approval. (Club *Pet. for Reh'g* at p. 9). As the dozens of pending Club cases show (four on appeal in this Court, two pending before the United States District Court, and literally dozens pending before the state trial court) the Club's unilateral and secret changes to the governing documents had fundamental effects on the rights of members. Those adverse effects are the direct result of the Club's attempt to end—by secretly amending its documents—the mandatory expulsion of members, and the Club's attempt to eliminate—by secretly amending its documents—the mandatory cap on members' liability to four months dues (*inter alia*). *See, e.g.*, R. p. 506 (resale list showing numerous expelled or conceded memberships); *see also* App. Br. II.A(6) ("Changes to the governing documents affecting a member's financial obligations must be approved by the persons so affected. (R. p. 1369)".)[6]

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[6] Another of the Club's new arguments is that it could amend the Club **Rules** without approval. (Club *Pet. for Reh'g* at p. 9). This is simply incorrect. As Appellant showed in his final brief (at p. 25), the Club Rules are for day-to-day issues relating to the

This Court's prior ruling on this issue remains valid, and there exist no grounds in the *Dennis* Opinion for its reversal. This Court should remand the case for trial on the issue of whether the governing documents were improperly amended by the Club.

IV. Appellant's liability must be strictly limited to his 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.

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use of the Club facilities (dress code, etc.). The Club Rules are not permitted to be unilaterally, and secretly, changed to make memberships inalienable and perpetual. Such fundamental changes to membership rights are required to be approved by the members so affected.

The majority directly addresses and mollifies the dissent's concern, explicitly limiting its holding by emphatically stating "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 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. Appellant seeks a ruling from this Court that it was error for the Circuit Court to award damages to the Club in the amount of $41,930.24, because, properly, the Club's recovery must be limited to (and offset by) the amount of the Appellant's membership contribution. Such a holding by this Court would be 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. *See Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013). By their own express terms, the Club's governing documents confine a member's ultimate liability to the Club to the loss of a return on his or her membership contribution.

The governing documents make the following statements, which clearly limit 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. 1260 (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. 1448–49 (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. 1299 (1994 Bylaws) (emphasis added).

- The Club shall have a lien **against each membership** for any unpaid dues, fees, and other Charges . . . .

  R. p. 1450 (2008 Plan) (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. 1482 (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. 1482 ("Delinquencies")). It is clear that, in the end, a member only may be liable up to the amount of his or her already-paid equity contribution ($31,000 for Appellant here).

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 Appellant's equity contribution, and in not providing for a setoff for his 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 Appellant's 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. Appellant respectfully requests 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).

V. This Court should reverse the Circuit Court's erroneous grant of summary judgment on numerous other issues not reached by the *Dennis* Opinion.

In its Order of May 2, 2018, after finding, as grounds for reversal of the Circuit Court, that the governing documents are ambiguous and the Nonprofit Corporation Act prevents the Club from prohibiting resignation (*inter alia*), this Court held: "[b]ased on our reversal of the grant of summary judgment, **the court need not address [Appellant's] remaining issues on appeal**." (Unpublished Op. No. 2018-UP-178 at p. 8) (emphasis added). Importantly, those remaining issues on appeal each constitute independent grounds for the reversal of the Circuit Court's grant of summary judgment, and they stand undisturbed in the wake of the *Dennis* Opinion. Therefore, Appellant respectfully requests that, even if this Court finds that *Dennis* mandates the reversal of portions of its previous opinion, it does not control as to the questions, previously briefed,[7] and identified below.

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[7] Appellant expressly incorporates herein by reference the *Brief of Appellant* and *Reply Brief of Appellant*, both of which were filed with the Court of Appeals on August 27, 2015.

[I. The trial court's Order should be reversed because it applied the wrong legal standard.] [8]

This issue is discussed on pages 9–11 of the *Brief of Appellant*, and at page 3 of the *Reply Brief of Appellant*. Summarized, the trial court failed to apply the "mere scintilla" standard required by South Carolina law. The Club neglected to address this issue in its brief, other than in an incorrect issue preservation argument. (*see* Reply p. 3). Not only did the Club apparently concede this issue, the question was not reached or decided in the *Dennis* Opinion. Thus, it is grounds for reversal of the trial court's grant of summary judgment.

[II. The trial court's Order should be reversed because Appellant presented more than a mere scintilla of evidence establishing genuine issues of material fact.]

This issue is discussed on pages 11-27 of the *Brief of Appellant*, and at pages 2–8 of the *Reply Brief of Appellant*. It contains several sub-parts, most of which were not reached by the *Dennis* Opinion. The overarching argument is that Appellant presented a tremendous amount of evidence to the trial court on numerous defenses and issues, certainly more than a scintilla, and therefore summary judgment was improper.

[II.A. Appellant presented more than a mere scintilla of evidence challenging the Club's interpretation of the alleged agreement, and whether the alleged agreement exists.]

These issues are discussed on pages 11–27 of the *Brief of Appellant*, and at pages 2 and 5–8 of the *Reply Brief of Appellant*. Summarized, Appellant argues, *inter alia*, that (1) the trial court order fails to establish the terms of the alleged agreement (App. Br. pp. 12–

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[8] The following issues below are numbered in [brackets] to correspond with their numbering in the Appellant's Brief.

13), (2) the trial court erred by disregarding the abundant evidence that Appellant had been expelled from the Club and had no further obligation (*id.* at 13–14), and (3) the trial court erred by disregarding abundant evidence that Appellant had no obligation beyond his equity interest in his purported Club membership (*id.* at 19–20; *see also supra* Part III). These issues were not reached in the *Dennis* Opinion, and each constitutes grounds for reversal of the trial court.

While the *Dennis* Opinion does appear to obviate those portions of the argument in Part II.A(4) (*id.* at 21–23) relating to the terms "unpaid" and "termination" under the governing documents,[9] the South Carolina Supreme Court explicitly did not reach arguments relating to expulsion, because it did not find evidence in the particular record before it that the Dennises had been suspended. *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 ("Here no suspension ever occurred; the Dennises resigned."). As discussed above, the majority in the *Dennis* Opinion held that "The 'logical end' of our analysis goes no further than required by the four corners of the governing documents in *this* case when applied to the facts of *this* case." *Id.* at 202, 821 S.E.2d at 672 (emphasis added). The dissent emphasized that "Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so 'shall be expelled from the Club,' ending their liability for future dues. . . ." *Id.* at 213, 821 S.E.2d at 677.

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[9] *Dennis* also negated arguments in II.A(4) relating to the Nonprofit Corporation Act's provision on resignation (App. Br. p. 22).

Appellant's argument against summary judgment as to the question of expulsion must prevail because there is Brobdingnagian evidence in ***this*** record—certainly more than a scintilla—that Appellant was expelled. As discussed in the *Brief of Appellant*, it is undisputed that Appellant had been suspended, thereby triggering the expulsion requirement. That conclusion is supported by, *inter alia*, (1) Club documents such as the suspended members list, (2) the testimony of other members such as Ronnie and Jeanette Dennis and Dick Mercier, and (3) the testimony of Club board members Harmon Switzer, Karen Norwood, and Jim Carling. (App. Br. pp. 15–18). As this Court stated in its ruling:

> There is evidence in the record that [Appellant] had been suspended by CIMC before the initiation of CIMC's action against him. CIMC's General Manager stated in an affidavit that CIMC had "been forced, owing to non-payment, to suspend" the membership rights and privileges of [Appellant].

(Unpublished Op. No. 2018-UP-178 at p. 5). Moreover, even the majority in *Dennis* acknowledged that mandatory expulsion exists under the wording of the documents before it:

> This provision makes it clear that **mandatory expulsion arises** only after the board has suspended a member, which is discretionary with the board.

425 S.C. at 204, 821 S.E.2d at 673 (emphasis added). In other words, the majority appears to acknowledge that mandatory expulsion occurs under the documents, but it did not believe that the particular facts of *Dennis* invoked that particular provision.

Closing the deal on expulsion is the fact that the Club's *Brief of Respondent* fails to address Appellant's expulsion argument and *Brief of Appellant* Part II.A(2)[10], and the issue

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[10] Part II.A(2) in the *Brief of Appellant's* argues that "The trial court erred by disregarding the abundant evidence that [Appellant] had been expelled from the Club and had no further obligation."

accordingly is conceded (*see* App. Reply p. 2). These issues were not reached in the *Dennis* Opinion, and each constitutes grounds for reversal of the trial court.

[II.B. Appellant presented more than a mere scintilla of evidence in support of his defenses, which would defeat the Club's claims.]

The *Dennis* Opinion also did not reach Appellant's arguments in Part II.B (pp. 25–27) regarding the evidence Appellant presented in support of his defenses, each of which also precludes summary judgment. However, arguments relating to certain statements of Club membership director Ellen Padgett about the contract terms likely have been obviated by the Supreme Court's ruling on parol evidence, to the extent that Padgett's statements pertained to the termination and resignation provisions discussed in the *Dennis* Opinion (but not as to expulsion provisions, which were not reached, as discussed above).

[III. The trial court erred in its award of damages to the Club.]

Appellant's numerous arguments as to the Circuit Court's improper award of damages are set forth in pages 19–20, and again on pages 25–40, of Appellant's brief, and they were not reached by the *Dennis* Opinion. Appellant contends (among other arguments) that it was error for the Circuit Court to award damages to the Club in the amount of $41,930.24, because—properly—the Club's recovery must be limited to the amount of Appellant's membership contribution. Based on the arguments contained in the *Brief of Appellant* and *Reply of Appellant*, as well as the *Dennis* Opinion, Appellant seeks from this Court a specific ruling on this issue, as set forth above.

[IV. The trial court erred when it granted summary judgment in favor of the Club on Appellant's counterclaims.]

As set forth *infra*, this Court should reverse its previous decision as to the Appellant's counterclaim against the Club for negligent misrepresentation, because of evidence that it overlooked in the Record.

Further, this Court has already held that it was improper for the Circuit Court to grant summary judgment as to the Appellant's counterclaim for breach of contract, including his allegation that the Club improperly amended the governing documents. This holding stands unaffected by the *Dennis* Opinion and the case should be remanded for trial on the issue.

[V. The trial court erred when it granted summary judgment prematurely, because the Appellant did not have a full and fair opportunity to complete discovery.]

Appellant's argument as to the trial court's erroneous failure to allow him a full and fair opportunity to complete discovery may be found in his brief at pages 43-44. These arguments remain untouched by the Supreme Court's decision in *Dennis* and constitute additional grounds for reversal of the summary judgment order.

VI. This Court overlooked evidence in the Record that the Club made false statements to the Appellant, which made summary judgment improper.

This Court previously ruled that the Circuit Court did not err in granting summary judgment to the Club on Appellant's negligent misrepresentation counterclaim. This Court has since granted Appellant's *Petition for Rehearing* on this issue, and the following further supports why a summary judgment dismissal of Appellant's counterclaim is not appropriate.

In its prior ruling, this Court found that "allowing certain members to leave the club is not a *false* representation, and it was not made to [Appellant]." Unpublished Op. 2018-UP-178, at 8 (Ct. App. May 2, 2018) (emphasis in original). In so holding, the Court misapprehended evidence in the Record that demonstrates that: (1) the Club had a practice of **publicly posting** a suspended member list; (2) the Club allowed some suspended members, but not others, to exit their memberships via expulsion; and (3) the provisions within the Club's governing documents, which delineate the procedure for mandatory expulsion following suspension, are false as they pertain to Appellant.

The Record contains more than a scintilla of evidence of the Club's false statements, expressly made to the Appellant, concerning expulsion. Importantly, the Club's false statements were received and relied upon by the Appellant:

A. False statements made by the Club.

The false statements are contained within the four corners of the Club's governing documents applicable to the Appellant, and directed to the Appellant:

> 13.3.1 Any member whose account is not settled within the four (4) months' period following suspension **shall be expelled from the Club.**

> 14.1.5 **Expulsion**. Any Member of the Club who had been expelled **shall not again be eligible for membership nor admitted to Club Facilities under any circumstances**. An expelled member shall be so notified by registered mail and **shall have the obligation to surrender his or her membership certificate for reissuance by the Club to a member**.

(R. pp. 1354, 1355; emphasis added).[11] By failing to expel the Appellant, and by continuing to charge him after he surrendered his membership, the Club rendered its above-statements false.

B. False statements were received and relied upon by Appellant.

Appellant received and relied upon these false statements to his detriment:

> 3. The Membership Purchase Agreement I signed in February 2001 does NOT indicate that I was agreeing to amendments or changes to the Plan For the Offering of Memberships dated April 1, 1994 referenced in that document and that any other amendments to that document would have to be in compliance with the provisions contained in that Plan.
>
> 4. That the Plan for Offering of Membership and Club Rules did NOT obligate members to continue to pay dues, fees and assessments and other charges after 4 months of delinquency (at which point they were required to be expelled) and in no case was the liability ever greater than the value of the equity in the membership.

(R. p. 422, Aff. of Gregory Martin).

C. The South Carolina Supreme Court's majority opinion in *Dennis* supports Appellant's right to maintain a negligent misrepresentation counterclaim.

The *Dennis* Opinion lends credence to the proposition that the Club Rule governing mandatory expulsion is false, if that rule is not applied by the Club. The *Dennis* Opinion refers to the "mandatory expulsion" provision that the Rules contain, and it

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[11] *See also Brief of Appellant*, pp. 41-43, for its reference to additional evidence in the Record of false statements made to Appellant by the Club.

notes that it "arises only after the board has suspended a member, which is discretionary with the board. 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 facts of the Appellant's case are different from those in *Dennis*, and the mandatory expulsion period should have been triggered. In the subject case, this Court has already recognized that Appellant had been suspended. Unpublished Op. 2018-UP-178, at p. 5 ("There is evidence in the record that Martin had been suspended by CIMC before the initiation of CIMC's action against him.") Therefore, even the *Dennis* majority would acknowledge that the Rules' requirement of expulsion should have been triggered in Appellant's case. Thus, it is appropriate for Appellant to maintain a negligent misrepresentation counterclaim upon remand at trial, given his reliance on the Club's statements on expulsion, and the four-month cap on liability.

Appellant has demonstrated evidence establishing that the Club (1) made false representations, and that (2) those representations were made to him. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003). Therefore, Appellant respectfully requests this Court to reverse its prior ruling, based on evidence overlooked in the Record, and allow Appellant to assert both negligent misrepresentation and breach of contract counterclaims before a fact-finder.

CONCLUSION

South Carolina law recognizes that summary judgment is a drastic remedy. Thus, if there is even a scintilla of evidence that tips the scale in favor of the opposing party, it is error for a trial court to grant a motion for summary judgment. Moreover, on summary judgment, any question as to contract *or* fact must be construed against the Club. If this is a "hard case," it is because the documents and facts at issue are a mess of the Club's own making.

Appellant respectfully requests that this Court reverse the Circuit Court's erroneous grant of summary judgment and remand this case for trial before a fact-finder. Further, Appellant asks that this Court would reverse its previous decision and allow the Appellant to proceed at trial with his counterclaim for negligent misrepresentation.

Finally, Appellant requests 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,

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