THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001

Opinion No. 2019-UP-393
Originally Filed as 2018-UP-178, 2018-UP-179 and 2018-UP-180
Withdrawn, Substituted and Refiled December 18, 2019

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

Of Whom Gregory L. Martin and Michael J. Frey are the Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Pursuant to South Carolina Rule of Appellate Practice 242(d)(1), the undersigned counsel for Petitioners certify that a petition for rehearing was made and finally ruled on by the Court of Appeals on March 27, 2020.

QUESTIONS PRESENTED

I. Did the Court of Appeals err when it upheld a contract that has been unilaterally modified such that it effectively binds Petitioners in perpetuity?

II. Did the Court of Appeals mistake the law and the contract when it allowed one party to unilaterally change material terms of the contract?

III. Did the Court of Appeals misconstrue precedent when it applied *Dennis I*'s determinations on *resignation* to the *expulsions* at issue here?

IV. Did the Court of Appeals err in affirming the trial court's damages award?

V. Did the Court of Appeals err in upholding the Club's disparate treatment of its members of the same class?

VI. Did the Court of Appeals improperly deprive Petitioners of appellate review on the question of attorney's fees?

VII. Did the Court of Appeals' errors on the foregoing issues invalidate its determinations as to Petitioners' counterclaims?

STATEMENT OF THE CASE

Petitioners Gregory Martin and Michael Frey ("Petitioners") ask that this Court issue a writ of certiorari to review the Court of Appeals' final decision in this case, because that opinion and the circuit court's orders[1] are in conflict with this Court's precedent, statutory law, and the public policy of this State.

A. Factual background

This case takes place against the backdrop of Callawassie Island and its social club, the Callawassie Island Members Club.[2] This Court previously visited with the Club and some of its members in *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (S.C. 2018) ("*Dennis I*").[3]

Petitioners' cases are different from *Dennis I* in critical ways, which the Court of Appeals improperly disregarded.[4] This Court should heed the facts of their tale:

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[1] There are two orders on appeal: *Order Granting Summary Judgment in Favor of Plaintiff Against [Petitioner]* and *Order Denying Defendants' Motion for Reconsideration and Affirming Summary Judgment against [Petitioner]* (Record on Appeal, pp. 4-11, 12-20). (In light of the Supreme Court's Order Regarding Operation of the Appellate Courts During the Coronavirus Emergency, dated March 20, 2020, all citations herein are to the Record on Appeal in Appellate Case No. 2015-000001, which was filed with the Court of Appeals on August 27, 2015).

[2] The Club is not the property owners' association. Callawassie has a separate property owners association called the Callawassie Island Property Owners Association (CIPOA). Membership in the Club is a contractual relationship; it does not touch and concern the property.

[3] The *Dennis* case is currently pending before this Court again, separately, in the form of petitions for certiorari filed by all parties to that case.

[4] The orders on appeal in Petitioners' cases were written by a different judge, who made different rulings than those made in the *Dennis* order on appeal. The Record on Appeal in this case is one thousand pages longer than that in *Dennis*.

Long ago, Petitioners applied for and were granted membership in the Callawassie Island Members Club, paying a large equity contribution in order to obtain their membership. They understood that they were becoming members of a nonprofit corporation, governed by bylaws that set forth the intended operation of the corporate body, under the authority of South Carolina's Nonprofit Corporation Act. The Petitioners opted to become "Equity" members of the Club. They had a stake in its governance and regulation; they had legal rights under the governing documents; they could vote on its affairs.

The Petitioners understood that, when the time came, there were various methods to end one's membership in the Club: a member could resign his membership, terminate his membership, concede his membership, or, under certain circumstances, suspend his membership and be automatically expelled by the Club. Each exit path had different procedures and consequences. Petitioners' understanding was based on representations made by the Club's membership director, as well as the Club's governing documents, and the Club's practices, including its routine publication of a delinquent member list.

Unlike the Dennises,[5] there is no dispute that Petitioners were suspended from the Club. According to the Club's practices and the mechanism contemplated by the governing documents, this triggered their automatic expulsion.

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[5] The circuit court's orders in Petitioners' cases were written by a different circuit court judge from *Dennis*, at a different time, and involving different factual and contractual issues. They also did not bear upon the Petitioners' wives, against whom summary judgment was not granted. Troublingly, the Court of Appeals nonetheless made factual findings pertaining to Petitioners' wives, Mmes. Martin and Frey; this Court should correct this procedural error when it reviews the decision.

Unfortunately for Petitioners, there is also no real dispute that the Club had a practice of secretly changing its governing documents, without notice to or a vote of its Equity Members. Those secret changes are what have trapped dozens of Equity Members, such as Petitioners, in what amounts to a contract with perpetual obligations.

There also is no real dispute that the Club had a practice of ignoring the governing provisions of its own (constantly shifting) documents. For example, it selectively expelled some members; it occasionally allowed some members to terminate their memberships; it invented an extra-contractual method of abandoning membership by "concession," a privilege which it only conferred upon certain favored members. The Club granted no such kindnesses to the Petitioners.

Finally, there is no real dispute that the Club's practices have given rise to a perpetual contract, which binds Petitioners (and many others) without end, at the pleasure of the Club alone.[6] As the Court of Appeals noted, "**it appears this is an obligation which could last forever**." Op. p. 13 n.2 (emphasis added).

B. Procedural background

The Club filed suit against Petitioners in 2012. The litigation proceeded as set forth in more detail in the Statement of the Case contained in Appellant's Final Brief, filed with the Court of Appeals on August 27, 2015, and incorporated herein. The circuit court

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[6] *See The "Hotel California" of the Lowcountry*, Hilton Head Island Packet, March 15, 2020 (Exhibit 1); *see also Members of a Beaufort County gated community tried to leave club. So the club sued*, Hilton Head Island Packet, May 21, 2018; *Callawassie Club lawsuit continues 'musical arguments' on way to SC Supreme Court*, Hilton Head Island Packet, August 31, 2016; *Callawassie Club ruling: Court sides with members, cites Eagles song*, Hilton Head Island Packet, August 22, 2016; *More luxury lots available for just $1 today than during recession*, Hilton Head Island Packet, June 8, 2015.

issued two orders granting summary judgment to the Club. (R. pp. 8-10; pp. 11-18). Petitioners appealed them both.

On May 2, 2018, the Court of Appeals filed its first opinion, reversing the circuit court and remanding for trial. On December 18, 2019, the Court of Appeals withdrew its first decision and substituted it with the Opinion for which Petitioners now seek certiorari review by this Court.

ARGUMENTS

Petitioners hereby petition for certiorari as to the Court of Appeals' Unpublished Opinion No. 2019-UP-393, filed December 18, 2019 (the "Opinion"). Several years ago, this Court granted certiorari to the Club, in *Dennis I*, based on the Club's impassioned plea that the Court of Appeals' ruling in that case "Poses an Existential Threat to Nonprofit Corporations."[7] But what about their ***members***? What impact do these appellate rulings have on the thousands of *members* of social clubs organized as nonprofits in South Carolina?

Among other things, the Opinion incorrectly allows a nonprofit corporation to radically alter its members' obligations—without notice or vote—based on a single, isolated sentence buried within its lowliest provisions. The Opinion looks the other way while a nonprofit corporation treats its members of the same class differently. It strips members of their defenses against such actions.

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[7] **"[A]n Existential Threat to Nonprofit Corporations,"** The Callawassie Island Members Club, Inc.'s *Petition for a Writ of Certiorari*, Appellate Case No. 2014-00154, *The Callawassie Island Members Club, Inc. v. Ronnie D. Dennis and Jeanette Dennis* pp. i, 4 (filed Oct. 26, 2016) (bolding in original).

The Court of Appeals' Opinion will be looked to by lower courts, both state and federal, which are seeking to rule upon the multitude of pending lawsuits filed by the Club against its members. The Court of Appeals' erroneous decision therefore has broad-reaching ramifications that merit the exercise of discretionary review by this Court.

For the following reasons, the Opinion is in conflict with this Court's fundamental decisions on contract law, and it raises novel questions about the application of the Nonprofit Corporation Act. Further, the injustice that it does warrants reversal by this Court.

I. The Court of Appeals should not have upheld a contract that was unilaterally modified such that it effectively binds Petitioners in perpetuity.

As it stands, the Court of Appeals' Opinion has condemned the Petitioners, and many others, to an inescapable bondage, in which they are to be held captive indefinitely by a golf and social club. The idea of being a slave to a golf club seems almost comical . . . except that it's not. Because of the Opinion, the Petitioners (and many others like them) are facing **hundreds of thousands of dollars** of ever-accumulating dues and fees,[8] without any end in sight. Resignation is meaningless. Trying to sell their property is useless. No one in their right mind will step in to take their place; but that is exactly what seems to be required.[9]

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[8] For context, the Club's most recent invoice to Greg Martin, dated February 29, 2020, lists his unpaid amounts as $276,870.90. That includes ongoing monthly fees for golf, tennis, swimming, and other amenities that the Martins are prohibited from ever using, given that they have been expelled: "Any Member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club Facilities under any circumstances." (R. p. 1472).

[9] And, of course—even if a such a martyr *were* to try to step in, like a *Hunger Games* volunteer tribute—the Club has the exclusive right to determine the qualifications for

When the Club first began to file its legion of lawsuits against its members, no one would have imagined this outcome of perpetual, inescapable liability. We know it is not what the hapless members of the Club signed up for – for who would?

In *Dennis I*, this Court deliberately left open the question of perpetual liability for future determination. Justice Few made clear that the majority opinion was "*not* deciding" the question of perpetual liability. *Dennis I*, 425 S.C. at 202, 821 S.E.2d at 672 (emphasis in original). Justice Hearn cautioned against the very result at which the Court of Appeals has arrived. The Court of Appeals, too, recognized the injustice of its decision; its footnote 2 frets about the prospect of perpetual liability, stating "Regardless of what term is used, it appears this is an obligation which could last forever." Op. p. 13 n.2. After that remarkable acknowledgement by a three-judge panel, the footnote ends with a shrug, as if to sigh: "but what can be done?"

Something **must** be done. The judiciary is not an agent of injustice. The members of the Club should be afforded relief on the simple grounds that the Club's practices and governing documents are unlawful:

- They are unlawful because they have been unilaterally changed without notice to the members in order to create an inescapable servitude.
- They are unlawful because their unbargained-for terms are unconscionable and against public policy.
- They are unlawful because they are disparately applied and enforced.
- They are unlawful because the Opinion has mistakenly construed their terms in a way that permits the Club to circumvent the law.

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membership, and it reserves the sole authority to approve applications and to reject whom it pleases. (R. p. 1446).

This Court should "not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." *Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010). Perpetual contracts are against public policy. *See, e.g., Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994) ("Historically, perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract.").

There also are specific, tangible reasons for this Court to grant certiorari, reverse the Court of Appeals, and remand the case for trial on the question of whether the Club's contract is (or has wrongfully become) perpetual and therefore unenforceable. Those reasons are discussed below.

II. The Court of Appeals mistook the law and the contract when it allowed one party to unilaterally change material terms of the contract.

At the heart of these Callawassie appeals is a question of whether the Club improperly amended its governing documents to change material provisions of the fundamental legal rights and obligations of its members. Importantly, this question undermines the trial court's rulings on the contract, on the Club's damages, and on the Petitioners' defenses and counterclaims. Because a question of fact exists as to whether the amendments were improper, calling into question the validity of the underlying contract, **the circuit court's grant of summary judgment should be reversed**.

Significantly, the Court of Appeals originally found that there was evidence in the Record that the Club had improperly amended the governing documents. (*See* Op. No. 2018-UP-180 at p. 6). That evidence has not changed. However, on rehearing—for no

reason apart from its misunderstanding of the scope of *Dennis I*—the Court of Appeals reversed itself on this issue. In so doing, the Court of Appeals wrongly relied on a single provision from within the most lowly of the Club's governing documents to support unbridled amendment power on the part of one party to the contract. Not only does its decision on this question misapprehend *Dennis I*, but it also ignores this Court's precedent which requires that contracts be construed in light of the law.[10] The law—specifically the Nonprofit Corporation Act—expressly prevents the Club from making the changes that it did, without a vote of the members.

Furthermore, the Court of Appeals' Opinion is in conflict with this Court's precedent on contract construction, which requires that a contract's meaning be taken from the four corners of the document. *See, e.g., Mcpherson v. J. E. Sirrine & Co*, 206 S.C. 183, 33 S.E.2d. 501 (1945). In this instance, the four corners include the Club's governing documents in their entirety—the Plan, the Bylaws, and the Rules. The Court of Appeals erroneously disregarded this Court's directive: "[t]he three documents reference each other and are intended to operate together." *Dennis I*, 425 S.C. at 199, 821 S.E.2d at 670.

A. The Court of Appeals failed to construe the contract in light of the law.

The Club organized itself as a Nonprofit Corporation, and its members are entitled to the protections of that statute. The statute defines the Club's governing documents as "Bylaws," regardless of the moniker by which the Club calls them:

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10 *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751, 756 (2007) ("It 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.")

> (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 the law of this state, the Club's "Rules" are truly corporation "Bylaws," and they are bound by the law's explicit requirements for their amendment.

The Court of Appeals improperly ignored that the Club violated the law when it amended its Rules, in secret, to change language that affected the rights of its members, including members' legal and financial obligations to the Club. The Nonprofit Corporation Act requires **membership notice and approval for material changes**:

- "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 (emphasis added).

- "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 (emphasis added).

The evidence in the Record shows there was no such notice or vote.[11] Tellingly, even after years of litigation, the Club has produced no evidence contradicting Petitioners'

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[11] Petitioners each stated in affidavits that they never voted upon nor agreed to any changes affecting their liability for dues, the mechanism for exiting Club membership, restrictions on the transfer of their memberships, nor the scope of their liability. (R. p. 240-244); (*See* Op. No. 2018-UP-180 at p. 6) ("[Petitioner] stated in an affidavit that he never voted to change the requirement

evidence. Despite this, the Opinion improperly upholds summary judgment against the Petitioners, the very parties who have produced evidence supporting their claim. Critically, if the amendments were invalid, it follows that the Petitioners did not make a commitment to pay dues and fees in perpetuity.

B. The Court of Appeals disregarded basic contract interpretation law when it failed to find that the Rules' amendments were in violation of superior provisions which should have operated to prevent them.

The Club's documents are intended to operate together to require a vote by members on substantive matters. The Club's 2007 and 2009 Rules, which the Court of Appeals misconstrued, state:

> [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.**

Op. p. 10 (emphasis added). While the first quoted sentence seems to permit certain amendment of the Rules by the Club board, it is clear that the Club board's authority is restricted by the second sentence, which indisputably subjects any such modification to the requirements of the higher governing documents.

As an initial matter, the Club's "Rules" are confined to "**use**"[12] of the amenities (hours of operation, dress code, conduct of visitors, etc.). The "Rules" are **not** for

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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 [Petitioner], there is a genuine issue of material fact regarding whether the governing documents were improperly changed.")

[12] *See, e.g.*, R. p. 1338: "the General Club Rules governing **use** of the Club and all its facilities by members and their families and guests . . .) (emphasis added).

fundamental changes to membership rights. Fundamental membership rights are governed by the provisions in the higher-level Bylaws and Plan.

The higher-level Bylaws and Plan require a vote of membership for "[a]ny amendment or modification" which materially and adversely affects the rights of the equity members—as they must under the Nonprofit Corporation Act. The Plan, to which the Rules are subject, governs the documents' provisions regarding the fundamental legal rights of members and the transfer of memberships. The Plan has always required 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. 1268) (emphasis added). Similarly, the suspension and expulsion of members is governed by the Bylaws, which may also only be amended by a vote of the members.[13] (R. p. 1303: Bylaws Art. XIV, § 3, "Suspension"; § 5, "Expulsion").

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" and require a vote of the members, as do modifications to the provisions governing a

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[13] "[T]hese 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 . . . A proposed amendment must be set forth in the notice of the meeting." (R. p. 1305, Art. XVIII, § 1).

member's liability to the Club upon disassociation. Such fundamental terms cannot be simply changed by the Club's board at its pleasure.

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, bylaws, and rules) without consent of, or consultation with, the other party to the contract (the Petitioners, and scores of other members). Such a "contract" is no contract at all—it is servitude. As the facts of Petitioners' and many other Callawassie cases show, that servitude has become never-ending if the Club's interpretation is allowed.

Particularly in light of the evidence in the Record to the contrary, the Court of Appeals wrongly found that no question of fact exists as to whether the governing documents were properly changed. This Court should grant certiorari to correct the Court of Appeals' error in its construction of the contract at issue.

III. The Court of Appeals misconstrued precedent when it applied *Dennis I*'s determinations on *resignation* to the *expulsions* at issue here.

The Opinion improperly disregards the key fact that, with regard to exit paths, Petitioners' cases are different from *Dennis I*. In *Dennis I*, the issue before the Court was the scope of the Dennises' obligations under the **resignation** provisions of the Club documents. Here, the issue is the scope of the Petitioners' obligations under the distinctly different suspension and **expulsion** provisions. Yet the Opinion's section on the "Governing Documents" (§ I.B) improperly analyzed the Petitioners' cases under the resignation provisions, rather than the expulsion provisions. In so doing, the Opinion

misreads and fails to give meaning to the plain terms of the Club's governing documents, and it conflicts with this Court's decision in *Dennis I*.

A. Resignation is different from expulsion at issue here.

The Club's governing documents are clear that expulsion is different from resignation, with different procedures and legal ramifications. Under the governing documents, "expulsion" severs a member's relationship with the Club, and it ends a person's obligations to the Club. (*See* R. p. 1299, § 8(b); *see also* R. p. 1445, § 3.4(b), in which "expulsion" means a "person shall cease to be an Equity Member."). In contrast, under the resignation provisions, a membership endures, and the resigned person may use the facilities until the membership is reissued to a new member of the Club's choice. *See* R. pp. 1448-49 (2008 Plan, p. 12, § 5.11).

Therefore, the Opinion's error in focusing on resignation rather than expulsion carries significant weight, under the terms of the contract itself. There are issues of fact for a jury as to whether Petitioners were expelled, when they were expelled, and the amount of money owed at expulsion, if any.[14]

B. The Court of Appeals erred when it applied *Dennis I's* conclusion on *resignation* to the *expulsion* at issue here.

In *Dennis I*, this Court admonished that:

> In response to the "logical end" argument [by the dissent], we point out that—as in all cases before this Court—we decide only the issues before us

[14] This Court's *Dennis I* Opinion rules that parol evidence cannot be admitted with regard to certain unambiguous provisions of the governing documents (specifically, § 5.11). However, that Opinion does not appear to prohibit referring to testimony relating to the Club's other practices, which raise questions of fact, particularly as to the Club's disparate application of the documents' provisions to its members and its amendment practices.

> 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; bolding added). This Court was clear that the *Dennis* facts and Opinion do not reach the expulsion issue:

> 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.

Id., 425 S.C. at 673, 821 S.E.2d at 204 (emphasis added). However, the Court of Appeals mistakenly addressed a purported "resignation" of Petitioners, and it mistakenly concluded that "Because the governing documents at issue in *Dennis* are the same documents at issue in the instant cases, we affirm the grant of summary judgment to the Club on its claims against Appellants." Op. p. 8. This reasoning mixes legal apples (resignation) and oranges (expulsion), and it defies the direct instruction of this Court.

C. S.C. Code § 33-31-620 applies only to resignation, not to expulsion at issue here.

Further, the Opinion erroneously relies on portions of the Nonprofit Corporation Act that apply only to resignation (not to expulsion). A large part of the *Dennis I* decision focuses on statutory language that "A member may **resign** at any time," which the Court of Appeals mistakenly applies to **expulsion**. S.C. Code § 33-31-620(a) (2006) (emphasis added). Based on its mistaken understanding, the Court of Appeals concluded that it had "no choice but to hold the requirement that members continue to pay dues, fees, and other charges **after resignation** until their membership is reissued is not prohibited by the Act [§ 33-31-620]." Op. p. 12 (emphasis added). But, again, this is not a resignation

case; it involves Petitioners' suspension (which is undisputed)[15] and their expulsion, which the documents state should have followed automatically, after four months' suspension. This is a different exit path from resignation, governed by different document provisions and law.

D. Because the Club's amendments were procedurally improper, its changes to the expulsion provisions were invalid.

Finally, the Court of Appeals erred when it disregarded the impact of the Club's unlawful changes to the expulsion provisions at issue. Having concluded that the Club could secretly change its documents at will, the Court of Appeals mistakenly took the next step in deciding that those unlawful changes made expulsion evidence immaterial. Op. pp. 9–10. A jury trial on this issue is appropriate because questions exist as to whether the 2007 Rules were invalidly amended.[16]

In sum, the Court of Appeals' entire analysis of "resignation" of Petitioners is legally and factually incorrect—these are expulsion cases, not resignation cases. The Court of Appeals has misinterpreted this Court's ruling in *Dennis I*, and the Petition should be granted to correct that significant error.

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15 *See, e.g.*, R. pp. 145, 146, 400, 401, 408 (suspension evidence examples).

16 Importantly, the circuit court's order (which is before this Court on appeal) erroneously and inappropriately cites Club Rules from 2014 in support of its holding that an expelled member would be liable to the Club for ongoing dues. (*E.g.*, R. pp. 9, 13). As previously argued, this Court should reverse the circuit court's holding because the provision cited by the order: (1) appeared for the first time in the rules *after the Club filed its lawsuits against Petitioners*, (2) was not applicable to the Petitioners, and (3) was the product of an invalid unilateral amendment procedure by the Club. *See* App. Br. pp. 31-32.

IV. The Court of Appeals erred in affirming the trial court's damages award.

The evidence shows that the Club unilaterally changed its contract to alter its members' liability. That evidence should have compelled remand to the trial court for a jury determination of whether the amendments were made with the requisite notice and vote. Further, the plain language of the Club's governing documents (a) precludes a damages award in excess of the Petitioners' equity contribution or, in the alternative, (b) unambiguously allows for a setoff for the amount of Petitioners' equity contribution.

A. The question of liability is inextricably linked to the question of amendment.

The Court of Appeals failed to take into account that a question of fact exists as to whether the governing documents were improperly changed by the Club to affect a member's ultimate liability. The Opinion notes that the documents seemingly "neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership." Op. p. 13 fn. 2. The Court goes on to describe this lack of clarity as an "apparent ambiguity." *Id.* One reason that the documents appear ambiguous **is because they have been improperly amended over time**. Given that the Club drafted the documents, and subsequently modified them, South Carolina law requires that they be construed against the Club and in favor of a trial on the issue.

As set forth above, the Nonprofit Corporation Act forbids amendment to bylaws affecting the computation of dues without membership approval. S.C. Code § 33-31-1021. The Act also requires notice to members in advance of the amendment of bylaws. S.C.

Code § 33-31-1021. The governing documents themselves prohibit amendments which "materially and adversely affect the rights of the equity members" without their approval. (R. p. 1268). The Petitioners submitted considerable evidence—certainly more than a scintilla—in support of their argument that the Club illegitimately amended the documents in a manner which materially and adversely affected their obligations to the Club. *See, e.g.*, R. pp. 240–244.[17] It was error to deny Petitioners a jury trial on the issue of liability.

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[17] There can be no dispute that the provisions governing liability *have* been changed through the years. Compare these sections, for example, and note the intentional removal of material terms like "accrue against":

- 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. pp. 1448–1449 (2008 Plan, § 5.11) (removing the material term "accrue against," *inter alia*).
- 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, § 9) (emphasis added)

  Note that this entire provision has improperly been removed from the 2009 Amended and Restated Bylaws. (R. pp. 1486–1493).

B. Any amount of damages awarded at trial should be capped at, or offset by, the amount of the Petitioners' membership contribution.

In addition to the question of amendment, the Court of Appeals wrongly disregarded the Petitioners' argument that the plain language of the contract (a) caps liability at the amount of their equity contribution or, in the alternative, (b) entitles them to a set-off as against any damages awarded. For example, the Opinion cites the 2008 Plan and observes that "this provision provides unpaid dues **will be deducted from** the amount paid for the equity membership . . . ." Op. p. 13 (emphasis added); *see also* fn. 17, *supra* (unambiguous document provisions that unpaid dues accrue against Petitioners' *membership*, not against the Petitioners personally). Moreover, if the trial court's damages award is allowed to stand without a set-off for Petitioners' equity contribution, the Club will be afforded a windfall and the Petitioners will be improperly stripped of their equity contribution.

This Court should grant certiorari to review (and reverse) the Court of Appeals' incorrect analysis on damages, which overlooks the question of amendment, allows the Club an unjust windfall, and unlawfully strips the Petitioners of tens of thousands of dollars.

V. The Court of Appeals erred in upholding the Club's disparate treatment of its members of the same class.

In the circuit court, Petitioners defended against the Club's lawsuit by showing that the Club breached its contract with them and violated the Nonprofit Corporation Act. Specifically, Petitioners brought counterclaims against the Club for breach of contract and misrepresentation, and they raised affirmative defenses under the Nonprofit

Corporation Act, including S.C. Code §§ 33-31-610, -611, -620, -621[18] *et seq.* In support of their counterclaims and defenses, the Petitioners presented evidence that the Club (a) selectively expelled only certain, lucky members, and (b) routinely allowed only select, favored members to concede their memberships back to the Club.[19]

Those defenses are supported by the Nonprofit Corporation Act, under which the Club chose to organize and which is implicit in the contract. That statute requires, *inter alia*, that the Club apply its governing documents **uniformly** to its members. S.C. Code § 33-31-140 (members' "rights are considered the same if they are determined by a formula **applied uniformly**"). It further requires that all members must have the same rights and obligations, including but not limited to with respect to redemption and

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[18] The Court of Appeals wrongly found that the § 33-31-621 issue was not preserved. This decision overlooks that Petitioners properly requested a ruling in their Motion to Reconsider under Rule 59. (R. p. 342: "In its Order the Court fails to rule on the Defendant's statute of limitations argument and the limitations on damages argument and rulings thereon are requested."). Petitioners further argued the issue in their appellate brief. *See, e.g.*, Br. of App. pp. 40–41.

[19] The Petitioners' argued that summary judgment was premature because of ongoing discovery, particularly on this issue of disparate treatment. *See* Brief of Appellant, pp. 44–46 ("The furtherance and completion of discovery is essential to the [Petitioners'] defense of the Club's claims, and in support of the [Petitioners'] prosecution of their counterclaims. For example, the Club has not provided adequate bases for its differential treatment in conceding and expelling some members without further financial obligation, but not others (such as the [Petitioners]) . . . ."). The Court of Appeals mistakenly based its decision on discovery on its finding that the governing documents are unambiguous. However, this analysis wrongly overlooked questions of fact raised by Petitioners, including the question of whether the Club failed to uniformly apply its governing documents (ambiguous or not) to its members, in practice. The depositions that the Appellants sought to take pertained to factual issues **outside of** the terms of the documents, such as the Club's differential treatment in conceding and expelling some members without further financial obligation, but not others (such as the Petitioners) (without any heed to what the documents might have to say on the matter), as well as the question of what procedure (if any) that the Board might have used when it amended the Rules to alter the rights and obligations of its members.

transfer. S.C. Code § 33-31-610. The evidence in the Record of the Club's differential treatment of its members violates the mutuality of the parties' contract, and it violates the Nonprofit Corporation Act's protections. This issue also presents a novel question for this Court on certiorari, as to whether a nonprofit corporation may circumvent the law, the constraints of its documents, and its duty to its members to enforce them uniformly, merely because it is engaged in litigation.

VI. Petitioners are entitled to appellate review on the question of attorney's fees.

The Court of Appeals erred when it declined to address Petitioners' arguments on the issue of attorney's fees, which was raised to and ruled upon by the circuit court. The Opinion's decision was based on issue preservation, along with its mistaken assumption that the question of attorney's fees was raised for the first time in Appellants' motion to reconsider. This was error. The Record shows that circuit court made a ruling on the question of attorney's fees, which the Petitioners appealed, and on which the Petitioners are entitled to appellate review. (*See, e.g.*, R. p. 9-10); *see also Roche v. S.C. Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E. 2d 243 (1975) (explaining that the purpose of an appeal is to determine whether the trial judge acted erroneously). Petitioners accordingly Petition for a review of, and reversal of, the trial court's ruling granting attorney's fees and costs.

VI. The Court of Appeals' errors on the foregoing issues tainted its determination as to Petitioners' counterclaims.

Because the Court of Appeals mistook this Court's *Dennis I* precedent and the directives of the legislature in the Nonprofit Corporation Act, it incorrectly upheld the circuit court's dismissal of Petitioners' counterclaims.

A. Breach of Contract

For reasons including those detailed above, the Court of Appeals wrongly affirmed the circuit court's grant of summary judgment to the Club on Petitioners' breach of contract counterclaims. First, the Club's unilateral amendment of the contract—which was unlawful, contractually void, and procedurally invalid—would itself constitute a breach of contract. Second, the questions of fact about the validity of the amendments (and the resulting uncertainty as to what terms apply) pertain as equally to the Petitioners' counterclaims as they do to the Club's underlying breach of contract claim. Third, the evidence in the Record of the Club's disparate application of the terms of the governing documents to different members raises questions as to whether the Club breached the contract by applying it unequally to its members—who all were to be treated the same under the terms of the contract and the umbrella of the Nonprofit Corporations Act. For these reasons, this Court should review and reverse the Opinion and remand to circuit court for trial on Petitioners' breach of contract counterclaims.

B. Negligent Misrepresentation

To sustain a claim for misrepresentation, "the plaintiff must show 'the defendant made a *false* representation *to the plaintiff*." *Sauner v. Pub. Serv. Auth of S.C.*, 354 S.C. 397,

407, 581 S.E.2d 161, 166 (2003) (emphasis added in Op. pp. 14–15). The Court of Appeals' analysis reveals that it misconstrues the law's application to the facts in the Record.

Here, the Petitioners are claiming that the Club's representations were the provisions of its governing documents, which supplied clear terms for various exit paths from membership (which governing documents were directed *to the Petitioners*), along with the reassurances of its membership director *to the Petitioners*, coupled with the Club's practice of publishing *to its membership* (including *to the Petitioners*) its list of suspended, conceded, and expelled members. Taken together, these representations conveyed to Petitioners the promise that the Club would let them out of their membership, treating them the same as it had any number of other members it had expelled or allowed to concede. Clearly, these representations were as false as this Petition is long. If the Club's documents, and its broadcast practice of allowing members to conclude their liability by concession/termination/suspension/expulsion were actually true, then we all could have gone home and put our feet up, years ago.

Given that there is no question that the Club made these statements to the Petitioners, the Court of Appeals' Opinion is in conflict with this Court's decision which holds that the truth or falsity of the Club's representation is properly a question of fact for the jury. *Breedin v. Smith*, 126 S.C. 346, 120 S.E. 64 (1923) ("the falsity of the alleged representations upon which they acted, was a question of fact for determination by the triors of fact under proper instructions of the court"); *see also Midland Mutual Life Ins. Co. v. Harrell*, 331 S.C. 394, 503 S.E.2d 189 (Ct. App. 1998) (stating that the truth or falsity of the representation is a question of fact for trial where evidence is presented to that effect).

The Court should review and correct the Court of Appeals' misapprehension of the law, as it applies to the Club's statements, which it made to the Petitioners, regarding concession, termination, suspension, and expulsion.

CONCLUSION

The Court of Appeals' misinterpretation and erroneous application of this Court's *Dennis I* decision does grave injustice to these Petitioners and to the dozens of other members this social club is pursuing through the courts. Its mistaken Opinion also threatens to warp lower courts' rulings under the Nonprofit Corporation Act for years to come. For the reasons set forth above, this Court should grant the Petition and set the law straight.

Respectfully submitted,

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Attorneys for Petitioners

The "Hotel California" of the Lowcountry

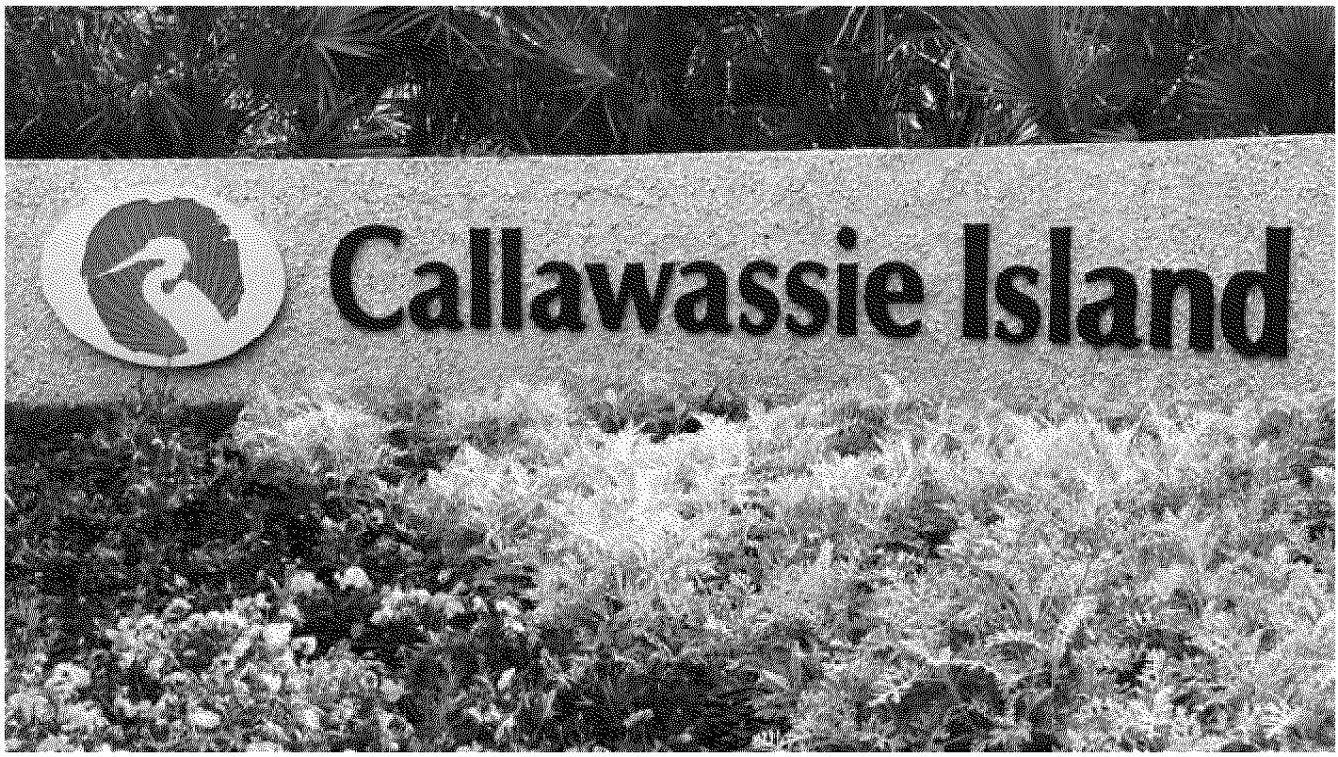
March 15, 2020 07:00 AM

Pat Symons has not set foot on Callawassie Island since 2014, yet she and her husband are locked in litigation over more than $203,000 in membership dues to the island's golf and social club.

Symons' case is one of 38 ongoing lawsuits originally brought by the Callawassie Island Members Club, seeking former residents of the luxurious island community tucked between Bluffton and Beaufort to continue to pay for their lapsed club memberships. Upheld in a 2018 S.C. Supreme Court ruling, club rules dictate that members must be able to offload their membership to someone else or continue to pay indefinitely.

The few legitimate ways to exit the club: sell your property and membership as a bundle to someone else, stop paying so you get kicked out or, in some instances, work out a way to leave with the CIMC management after resigning.

Exhibit 1



However, many members said the club kept them from leaving. They argue they've been unable to get anyone to buy their $16,253 yearly Callawassie Island club membership (not including an $18,000 first-year payment) along with their property. They say the club unilaterally made complex rule changes and, in many cases, was unwilling to negotiate.

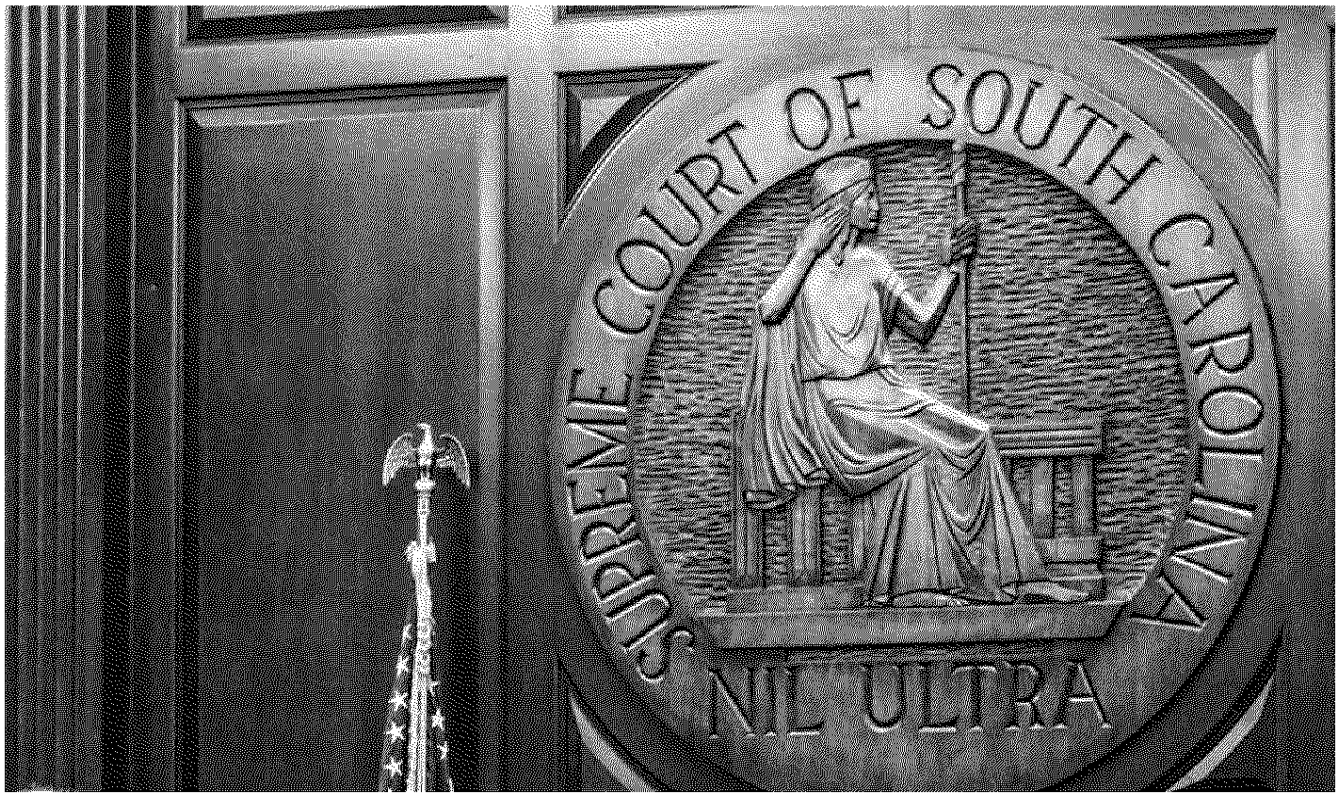
The first option members typically try is to sell their property. But many members whom the club has sued said it was difficult to persuade others to pick up their membership.

"Over and over again people would ask us to sell our property without the membership. We kind of realized it was hopeless. We sold [our house] for the same amount we bought it for," said Symons.

Club membership is required upon buying property on Callawassie Island. The couple was forced to sell their property — after 10 years and more than $100,000 spent in renovations — at its original price of $410,000.

They remained paying members of the social club, which offers unlimited golf and a host of facilities, but the club sued the Symonses in 2014 for refusing to pay dues after they had submitted a letter of resignation the year before. The letter earned the Symonses suspension of club privileges but no exit from the club. The lawsuit against them is ongoing six years later and bundled with dozens of others represented by attorney Ian Ford of Ford Wallace Thomson LLC.

The club's general manager said the organization has abided by the law and notes that a South Carolina Supreme Court case upheld its rules as legal.



South Carolina Supreme Court Matt Walsh *mwalsh@thestate.com*

Can a golf club legally do that?

The state Supreme Court case in 2018 involving another Callawassie couple ruled for the members club, overturning a 2016 appeals court decision and

requiring members to pay dues even if they resign.

The 2016 Court of Appeals decision determined that the club's practices violated state law. The decision was well publicized because it compared trapped club members to proverbial guests in the Eagles' hit song "Hotel California" — "You can check out any time you like, but you can never leave."

The state Supreme Court case has been appealed, and lawyers are watching another lawsuit involving the members' club. Until a final ruling is issued in both cases, the other 36 lawsuits are in limbo.

According to Ford, the main legal issues to be answered are whether the club inequitably let some people leave while forcing others to remain members, and whether the club, as a nonprofit, improperly changed its rules to keep members in the organization.

Ford argues the state Supreme Court erred because it missed evidence that "the Club had modified its governing documents without notice to or a vote of the members," which would violate the state's Nonprofit Corporation Act.

Former Callawassie residents said they were enraged to discover the club had changed its rules governing when it would kick out a member for non-payment — a consequence the residents were seeking because it was one of the few ways to exit the club. The CIMC's 2001 governing documents state "any member whose account is not settled within the four (4) months' period following suspension *shall* be expelled from the Club."

Members unable to transfer their membership by selling their property sought to leave the club's financial hold the old-fashioned way: by not paying. They would be suspended after 60 days and then kicked out after four months of not paying.

The club's board of directors changed the governing documents in 2008, unpublicized and without a vote of members, to reflect the following: "any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the club."

The simple change from "shall" to "may" kept some members who wanted to leave on the hook for club dues.

Ford argues that the change in words also violates South Carolina's Nonprofit Corporation Act because the club treated members unequally, kicking members out prior to the change and forcing others to stay after. The club, Ford said, significantly changed its "bylaws" without approval of its members.

Lawyers for the club argue they were in compliance and "whether considered 'bylaws' or not, the Rules could be adopted and amended by the Board without a vote of the members," according to Andrew F. Lindemann of Lindemann, Davis & Hughes P.A.

"We're not in any position to pay them back"

One member, who has not been on Callawassie Island in a decade and was sued by the club in 2011, said he was suspended for not paying but could never leave the organization.

"The Club would not let us leave. They just kept billing us and billing us. We were supposed to be expelled after four months of non-payment," said the member, who did not want his name in this story out of fear of retribution. "They've taken us all the way to the Supreme Court. I can't think of another club in the Lowcountry that would go to these lengths."

His bill is over $264,000. Like Symons, the member said the biggest blow

was selling his Callawassie property at a major loss. He bought a lot on the island in 2005 for $31,000 with plans to build a retirement home. He signed up for the club and invested $45,000 in equity in the organization, with promises it would pay dividends.

The investment has not offset any of his remaining dues and, by 2017, the member was forced to sell his lot for $1,000 while also paying a broker $4,000 to find a buyer.

Executives for the club maintain that these issues were settled with the 2018 S.C. Supreme Court decision.

"It's disappointing there continues to be a question as to whether or not people who want to participate in life on the island need to pay for the expense," said Jeff Spencer, the club's general manager. "We are taking this through the courts and trusting that they will come to the right decision."

Spencer said those who are still members of the club but do not own property on Callawassie Island can "settle that with the Club."

According to a 2017 financial statement of the club, required of all nonprofits, over 60% of the organization's $9.3 million revenue came from the dues the club imposes on members. Over $3 million of its funds went to salaries and $2.5 million to its debt load.

The club currently has 640 members and has constructed a new restaurant and fitness center in the past three years, according to Spencer.

Another member sued by the club, Homer Knearl, now lives in Colorado and sold his home on Callawassie Island in 2016. He originally bought his island property for $950,000 but was forced to sell below $500,000. The club said he currently owes more than $140,000 in unpaid monthly dues. Knearl, 80,

worries what will happen with the 2015 litigation after he passes away.

"They will probably go after my heirs," said Knearl. "It's just stress at this point. We're not in any position to pay them back because it's so much money. So we just keep fighting."

By: Jake Shore
https://www.islandpacket.com/news/local/article241103111.html

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001

Opinion No. 2019-UP-393
Originally Filed as 2018-UP-178, 2018-UP-179 and 2018-UP-180
Withdrawn, Substituted and Refiled December 18, 2019

The Callawassie Island Members Club, Inc., Respondent,

v.

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

and

The Callawassie Island Members Club, Inc., Respondent,

v.

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

Of Whom Gregory L. Martin and Michael J. Frey are the Petitioners.

PROOF OF SERVICE

I certify that on April 27, 2020, I have served the Petition For A Writ Of Certiorari on the counsel listed below by complying with the Supreme Court's order regarding Operation of the Appellate Courts During the Coronavirus Emergency, issued March 20, 2020, which states:

> During this emergency, this Court authorizes a lawyer admitted to practice law in this state to serve a document on another lawyer admitted to practice law in this state using the lawyer's primary e-mail address listed in the Attorney Information System (AIS). . . . For documents that are served by e-mail, a copy of the sent e-mail shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. . . .

I have e-mailed each counsel of record at each lawyer's primary e-mail address listed in the AIS, listed below:

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Attorneys for Respondent The Callawassie Island Members Club, Inc.

A copy of the sent e-mail is enclosed with this Proof of Service.

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From: **Ian Ford** ian.ford@fordwallace.com
Subject: Petitions -- Dennis + Martin/Frey
Date: April 27, 2020 at 9:17 AM
To: Dawes Cooke mdc@barnwell-whaley.com, John Fletcher jfletcher@barnwell-whaley.com, Stephen Hughes sphughes@hghpa.com, andrew@ldh-law.com
Cc: Neil Thomson Neil.Thomson@FordWallace.com, Ainsley Tillman Ainsley.tillman@fordwallace.com
Bcc: Ian Ford Ian.Ford@FordWallace.com

Dawes, John, Andrew & Steve,

Good morning. Attached for service please find:

1. Petition For A Writ Of Certiorari in Dennis; and

2. Petition For A Writ Of Certiorari Martin & Frey.

Under the Supreme Court's Order Re: Operation of the Appellate Courts During the Coronavirus Emergency, service by email is sufficient. However, please let us know if you would like a copies by US Mail, and we'll be happy to mail you copies.

Regards,
Ian

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* FINAL Dennis petitio...nts.pdf

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ATTORNEYS AT LAW

26 April 2020

By fax 803-734-1499
and first class mail

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29221

Re: Petition for a Writ of Certiorari
The Callawassie Island Members Club, Inc. v. Gregory L. Martin and Rebecca L. Martin
The Callawassie Island Members Club, Inc. v. Michael J. Frey and Grace I. Frey
Appellate Case No. 2015-000001

Dear Mr. Shearouse:

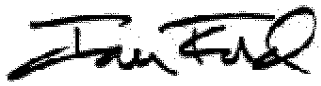
On behalf of Petitioners Gregory L. Martin and Michael J. Frey, enclosed for filing please find (a) Petition for a Writ of Certiorari, (b) Proof of Service, and (c) filing fee check.

It is our understanding from the Supreme Court's Order regarding Operation of the Appellate Courts During the Coronavirus Emergency, dated March 20, 2020, that (a) filing by fax alone is sufficient; (b) no copies of the Appendix are required at this time; and (c) service on other counsel by email to their AIS email addresses is sufficient. Please let us know if those understandings are not correct, or if you require anything else from us.

In accordance with the Supreme Court's order, the filing fee check will be mailed to the Court within five days.

With kind regards, I am,

Very truly yours,



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cc: South Carolina Court of Appeals (by fax: 803-734-1839)
All counsel of record (by e-mail to AIS addresses)