THE STATE OF SOUTH CAROLINA
In The Supreme Court

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May 27 2020

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2020-000670
Lower Court Case No. 2011-CP-07-3322

Opinion No. 5696 (S.C. Ct. App. filed Dec. 18, 2019)

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

v.

Ronnie D. Dennis and Jeanette Dennis ..... Petitioners-Respondent.

PETITIONERS-RESPONDENTS' RETURN TO RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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

Attorneys for Petitioners-Respondents
Ronnie D. Dennis and Jeanette Dennis

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COUNTER-STATEMENT OF CASE

The Dennises refer to and incorporate their Statement of the Case submitted in their Petition for a Writ of Certiorari, filed April 27, 2020, at pages 2–7.

Petitioners-Respondents Ronnie D. Dennis and Jeanette Dennis (the "Dennises") respectfully submit this Return to the Petition for Writ of Certiorari of The Callawassie Island Members Club, filed April 27, 2020. The Court of Appeals correctly remanded this case for trial on whether the Club treats members such as the Dennises disparately, in violation of the Nonprofit Corporation Act.

I. On remand, the Court of Appeals correctly followed this Court's instruction to rule upon the Dennises' remaining issues on appeal.

The Club plucks a single sentence from within the introductory paragraph of this Court's lengthy *Dennis I* opinion and attempts to imbue it with meaning that it simply does not have. The one-line reinstatement of "the summary judgment for all unpaid dues, fees and other charges"—which the Club would like to bloat into a comprehensive ruling in the Club's favor on *all* possible issues—must be read in the context of the opinion as a whole, and particularly in light of the procedural posture of the case. Eager to re-write history more favorably to itself, the Club leaves out important details from the Statement of the Case in its petition for certiorari . . . details, such as the procedural posture of this case.

The Procedural Posture of This Case

This matter is before this Court for the second time, with petitions for certiorari filed by all parties. The petitions seek review of various holdings made by the Court of Appeals in its second opinion in this case, upon remand from this Court pursuant to *Dennis I*. The Court of Appeals based its first decision to reverse summary judgment on only two of the Dennises' many issues on appeal, thus leaving unresolved many other questions before it for review.[1] In its Statement of the Case here, the Club forgets to mention that this Court remanded the case to the Court of Appeals **with the specific direction that the Court of Appeals should decide the remaining issues on appeal**.[2]

In its original brief to the Court of Appeals, the Dennises had argued that the circuit court's summary judgment grant was in error for numerous reasons, any one of which compelled reversal. The Court of Appeals' first opinion did not decide all of those issues, because it found that the questions pertaining to S.C. Code § 33-31-620 provided it with sufficient grounds for reversal of the circuit court. The Club then petitioned for certiorari, isolating and identifying the two specific issues for which it sought this Court's

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

[2] Remand occurred after the Dennises requested rehearing by this Court of its *Dennis I* decision. One of the Dennises' grounds for rehearing was that this Court's decision—which affirmed the circuit court's summary judgment grant and remanded directly to the circuit court—deprived them of appellate review of several issues that were before the Court of Appeals but never decided.

review.[3] Based on that, in *Dennis I* this Court decided the two discrete issues before it for certiorari review.[4] But the Club incorrectly would have us believe that this Court somehow "resolved all substantive issues in favor of CIMC," including those that were not even before it, and which had not ever been reviewed by the Court of Appeals. The Club misapprehends that such a sweeping edict would be, procedurally, impossible.

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[3] The Club asked this Court to answer only two questions:

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

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

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

1. Payment after resignation: "[Section 5.11 of the 2008 Plan] unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued."
2. Parol evidence: "First, because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning."
3. Nonprofit Corporation Act: "The dues, fees, and other charges the Dennises owe fall into the 'commitments made' category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises resigned—both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges 'until his or her equity membership is reissued by the Club.' When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. Therefore, we find the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620."

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

In *Dennis I*, this Court repeatedly recognized that significant procedural limitation, and it delineated the scope on remand to the Court of Appeals:

- However, we did overlook the procedural fact that the court of appeals found it unnecessary to address all issues raised before it, so we substitute the attached revised opinion remanding this case to the court of appeals **to address the other issues**.

  821 S.E.2d at 667 (emphasis added).

- Because [the Dennises] raised other issues to the court of appeals that have not yet been addressed, we remand to the court of appeals for further proceedings consistent with this opinion.

  Id.

- The court of appeals found there was "some ambiguity in the governing documents as to whether club members are liable for dues accruing after resignation." In addition, the court of appeals found the provisions of the documents that require the Dennises to continue to pay their membership dues after resignation violate section 33-31-620 of the Nonprofit Corporation Act. **The court of appeals found it unnecessary to address the other issues raised on appeal** and remanded to the circuit court for trial.

  Id. at 669 (emphasis added).

- We remand to the court of appeals **to address the remaining issues**.

  Id. at 674 (emphasis added).

Each and every one of the above excerpts is a mindful acknowledgment by this Court that its opinion was limited to the <u>two</u> precise issues before it on appeal, which the Club itself identified and raised in its 2016 petition for certiorari. This Court's *Dennis I* decision reinstates summary judgment based only on its analysis of those two issues; this Court remanded to the Court of Appeals for the express purpose of addressing the remaining issues.

From a procedural standpoint, the Supreme Court is limited on certiorari to the review of a **final** decision of the Court of Appeals, pursuant to Rule 242, SCACR. As this Court acknowledged in *Dennis I*, the Court of Appeals had not rendered a final decision (nor any decision at all) as to the Dennises' remaining questions on appeal.

On remand, as it was directed to do, the Court of Appeals considered and rendered a decision on the Dennises' remaining issues, one of which was whether there was evidence that the Club violated the Nonprofit Corporation Act by treating its similarly situated members differently. For the Club now to suggest that the Court of Appeals "exceeded its authority on remand" (by doing precisely what this Court instructed) is wrong. There is no real question that the Court of Appeals has the authority to review and correct error on the part of the circuit court; that, as it happens, is its *raison d'être*.

In sum, this Court does not need to grant the Club's petition so that the Club can teach this Court what its *Dennis I* decision meant. Because the Court of Appeals correctly found that the circuit court erred, this Court should deny the Club's petition for certiorari so that the case can be remanded for trial on the issue of disparate treatment.

II. The Club's disparate treatment of its members is against public policy, and the Court of Appeals correctly remanded for trial on the issue.

In this section of its petition, the Club argues that this Court should grant certiorari in order to find that the public policy of this State empowers the Club to settle disputes without the restraints of contract or statute, which the Club finds cumbersome. Beyond its lofty, generalized quotations explaining to this Court how courts favor the settlement of disputes, the Club offers no citation or rationalization for how or why such favor could

override the clear public policy of this State, as established by the Legislature in the South Carolina Nonprofit Corporation Act. This Court should not even humor such a possibility by granting certiorari.

The Club chose to organize itself under the Nonprofit Corporation Act, and its governing documents implicitly incorporate the Act's provisions. The Act requires that all members of the same class must have the same rights with regard to transfer and redemption (*inter alia*). The Club's governing documents, particularly those provisions going to the process for the transfer and redemption of membership certificates, clearly outline the mechanisms for exiting the Club for each class of members. However, the Court of Appeals correctly found that the Club invented a back-door, extra-contractual method of divesting oneself of membership: Concession. This method involved certain, select members filling out a form called the "CALLAWASSIE ISLAND MEMBERS CLUB, INC. MEMBERSHIP CONCESSION FORM." (R. p. 95). **There is no evidence that this form applied solely to those members who were engaged in litigation with the Club.** Instead, the form allowed particular, favored members—those "more equal than others," in the Club board's view—to walk away from their memberships in a manner that was not contemplated or allowed by the governing documents. The Record shows that the terms of concession, as invented by the Club, involved transfer of membership and redemption by the Club, for the extraordinarily valuable consideration of emancipation from perpetual dues and fees.

The Club's argument is that, despite the governing document's plain and careful delineation of the set mechanism for divestiture by its members of their membership in

the corporation, the Club is nevertheless empowered—by public policy, no less—to act outside of that contract in favoring some members. In so arguing, the Club disregards that it is a nonprofit corporation, and that the purpose behind its governing documents is compliance with a statute which regulates the relationship between entities such as itself and their members. The Nonprofit Corporation Act is clear that **all members of the same class must be treated equally**, having "the same rights and obligations with respect to voting, dissolution, redemption, and transfer . . . ." S.C. Code § 33-31-610.

The Act embodies the public policy of this State with regard to the relationship between a nonprofit corporation and its members. The Act makes clear that members' "rights are considered the same if they are determined by a formula applied uniformly." S.C. Code § 33-31-140(5) (emphasis added). In this case, the "formula" is contained in the Club's governing documents, and the evidence demonstrates that the Club has not applied its formula uniformly. This Court does not need to grant certiorari to rule on the public policy already established by the Legislature through the Act.

The Court of Appeals correctly concluded, "the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed material issue of fact as to the claim that the Club violated the Nonprofit Corporation Act." Op. No. 5696, p. 5. Certiorari review of this particular ruling is not warranted, and this Court should deny the Club's petition and remand for trial on the issue.

III. The Court of Appeals correctly remanded the case on "disparate treatment" of members under the Nonprofit Corporation Act.

The Club asserts 4½ reasons that this Court should grant its petition on the disparate treatment ruling of the Court of Appeals. Each of those reasons fails to meet the requirement of Rule 242, SCACR.

The ½ reason is the Club's pronouncement that "Two wrongs do not make a right." (Pet. p. 10). That is a nonsense argument that is easily invalidated by the (similarly-nonsensical) response that "Three wrongs do not make a right, either." This Court should not grant the Club's petition based on a colloquialism that sheds no light on the complexity of the Club's self-created factual and legal morass—in which the Club itself perpetrated one of the very wrongs that it now protests does not make a right. The Club's past unlawful acts should not be overlooked simply because the Club claims it has gotten itself in too deep.

The Club's first full reason is that the Dennises' defenses should have been brought as a derivative action under S.C. Code § 33-31-304. This case has proceeded in South Carolina's appellate courts since 2014, and only *now* the Club decides that violations of the Nonprofit Corporation Act must be asserted as a derivative action. The argument has been waived and it should be disregarded.

In addition to being untimely and unpreserved, this argument is wrong. The Dennises raised the unlawfulness of the Club's disparate treatment as a *defense* to the Club's claims[5]—the Club is violating the Nonprofit Corporation Act in its demand of

[5] *See, e.g.*, Final Brief of Appellants, filed Jan. 26, 2015, at pp. 36–39; *see also* R. pp. 297, 311, 320, 387.

perpetual liability by the Dennises but not from other members (*inter alia*). South Carolina law (including the Nonprofit Corporation Act) is implied into the *contract* alleged by the Club, and that law must be considered in evaluating the legality of that alleged contract and the causes of action under the contract. A separate derivative claim is not required to evaluate the law, nor to defend against a contract.

Moreover, the courts (including this Court) already have considered the provisions of the Nonprofit Corporation Act in evaluating the claims and defenses here. For example, this Court considered and ruled upon S.C. Code § 33-31-620 previously in this case. Now the Club incorrectly claims that the courts may not consider the same statute (specifically, §§ 33-31-610 and -611) without a derivative lawsuit filed by the defendants. It would be absurd, and legally incorrect, to require a defendant to file a derivative case to assert a defense, when the defendant is pursued by a nonprofit corporation on a contract that is unlawful under the Nonprofit Corporation Act. The Club's argument should be discarded and the Petition denied.

Second, the Club states (p. 13) that a "concession" of a membership is not a "transfer" under S.C. Code §§ 33-31-610 and –611(c). The Club cites no law. The Club cites no facts. The Club cites no governing documents. The argument is a riddle, wrapped in a mystery, inside an enigma.[6] While riddles and mysteries can be fun, this one is not. The Club's bald statement does not meet the standard for this Court's discretionary review under Rule 242, SCACR, and it should be denied.

[6] Winston Churchill, Oct. 1939.

Third, the Club argues (p. 13) that there is no evidence of "actionable disparate treatment." The Petition then completely departs from the Nonprofit Corporation Act's precise framework and attempts to land on a constitutional law pseudo-analysis of "equal protection" and similarly-situated persons. The Club's syllogism seems to unfold in this way: statutory language → constitutional law equal protection → "rational relationship to a legitimate government purpose" → "no genuine issue of material fact" over treatment of different members. This is less than a logical fallacy, it is magical thinking. Among other reasons, (1) there is no governmental entity here; (2) there is no state action at issue here; (3) the statutory language governs here; (4) the case involves a private corporation's affirmative breach of contract claims; (5) in a civil lawsuit filed by the nonprofit corporation. The Court should not spend its time and resources sifting through syllogistic fallacies.

Finally, the Club argues (p. 14)—without any legal citation—that under the business judgment rule the Club is immune from the requirements of the Nonprofit Corporation Act and from a jury trial.[7] The Court of Appeals properly reversed the circuit court's finding that the business judgment rule insulates the Club from the requirements of the Nonprofit Corporation Act. *See, e.g.*, *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 781 S.E.2d 903, 911 (S.C. 2016) ("the business judgment rule is not a cloak that

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

protects a corporation from a violation of its own bylaws" and does not protect *ultra vires* acts). A nonprofit corporation's board cannot avoid the requirements of the Nonprofit Corporation Act simply by claiming it is exercising "business judgment." Similarly, the business judgment rule does not free a nonprofit corporation of its legal obligations to its members.[8] No novel, or even colorable, question of law is presented here, and the petition should be denied as to this issue.

In sum, not one of the Club's 4 ½ issues under its third question presented merits the exercise of this Court's discretion. Because, as the Court of Appeals correctly found, there is evidence in the Record that the Club applied its governing documents disparately, the Club's petition should be denied and the matter remanded for trial.

CONCLUSION

The Club has not identified any special or important reason that warrants this Court's discretionary review of the Court of Appeals' well-reasoned decision on the issue of disparate treatment. This Court should deny the Club's petition and remand for trial, so that a factfinder can examine the evidence of unequal treatment by the Club of its members. Further, the Dennises respectfully request that this Court would grant their own petition for certiorari, so that the lower court will have this Court's guidance when it tries this case.

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

Respectfully submitted,

FORD WALLACE THOMSON LLC

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

Attorneys for Petitioners-Respondents
Ronnie D. Dennis and Jeanette Dennis

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