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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carmen T. Mullen, Circuit Court Judge

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

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

v.

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

REPLY TO DENNISES' RETURN TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT-PETITIONER CALLAWASSIE ISLAND MEMBERS CLUB, INC.

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ARGUMENTS

I. The Court of Appeals erred in reversing the summary judgment reinstated by the Supreme Court based on provisions of the Nonprofit Corporation Act that could not be asserted in a direct action -- a ruling by the Circuit Court never challenged on appeal and thus is the law of the case.

In 2018, the South Carolina Supreme Court filed an Opinion reversing the Court of Appeals and reinstating the Circuit Court's grant of summary judgment to the Respondent-Petitioner Callawassie Island Members Club, Inc. ("CIMC"). *See, The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 673 (2018) ("*Dennis I*"). In its Opinion, this Court resolved all substantive issues in favor of CIMC and expressly "reinstate[d] the summary judgment for all unpaid dues, fees, and other charges." 821 S.E.2d at 668.

In response to a petition for rehearing filed by the Petitioners-Respondents Ronnie D. Dennis and Jeanette Dennis ("Dennises"), this Court substituted a new opinion that was identical to the original opinion, except for the following addition: "[b]ecause Respondents [the Dennises] raised other issues to the court of appeals that have not yet been addressed, we remand to the court of appeals *for further proceedings consistent with this opinion*." *Dennis*, 821 S.E.2d at 668. (Emphasis added). This Court did not, however, identify the "other issues" that were being remanded for the Court of Appeals' further consideration.

Consequently, the Court of Appeals on remand was required initially to identify those issues that have been remanded for further consideration by this Court. Not surprisingly, the parties had a very different view of the issues remaining for adjudication by the Court of Appeals. The Dennises sought, in essence, to re-litigate this appeal *in toto* and attempted to re-argue issues that this Court had rejected, directly and by inference, in *Dennis I* in reinstating the

summary judgment entered by the Circuit Court. Those issues include challenges to the Circuit Court's application of the Nonprofit Corporation Act, which was the principal focus of this Court's rulings in *Dennis I*.

Nonetheless, in reversing the summary judgment that had been reinstated by this Court in *Dennis I*, the Court of Appeals entertained consideration on remand of the Dennises' claim that CIMC violated Sections 33-31-610 and 33-31-611(c) of the Act by allowing certain club members, but not others, to concede their memberships. The Court of Appeals found that "the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed material issue of fact as the claim the Club violation of the Nonprofit Corporation Act." (Supp. App. 5). The Court of Appeals, however, failed to recognize that the Dennises, in their original appellants' brief filed in that Court, raised and addressed this issue in a single, conclusory paragraph citing no supporting authority. Thus, this issue was not even presented initially for appropriate appellate review. In their return, the Dennises not surprisingly disregard this preservation issue.

More importantly, the Court of Appeals failed to recognize that the Dennises' "disparate treatment" claim on which summary judgment was reversed is actually *barred by the law of the case*. *See, Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case"); *Normandy Corp. v. South Carolina Dept. of Transportation*, 386 S.C. 393, 688 S.E.2d 136, 149 (Ct. App. 2009) (unappealed ruling "is the law of the case regardless of its correctness"). In response, the Dennises make several arguments, each of which is unavailing.

First, the Dennises insist that this argument by CIMC is somehow unpreserved. They assert that "[t]his case has proceeded in South Carolina appellate courts since 2014, and only

now the Club decides that violation of the Nonprofit Corporation Act must be asserted as a derivative action." *See*, Return to CIMC's Petition for Writ of Certiorari, p. 9. That is incorrect. In their original Respondent's Brief filed in the Court of Appeals, CIMC addressed the breach of fiduciary duty claim, including the "disparate treatment" allegations, by pointing out that "[t]he trial court disposed of the breach of fiduciary duty claim on procedural grounds as the claim was not brought as a derivative action; failed to meet the specific pleading requirements of Rule 23, SCRCP; and was not set forth in a verified pleading." (App. 121). That argument was never refuted by the Dennises then or now. Thus, the issue was clearly raised in the trial court, was a significant part of the trial court's grant of summary judgment, and was reasserted by CIMC on appeal even though it was never challenged by the Dennises.

The Dennises also attempt to support the Court of Appeals' reversal of the summary judgment reinstated by this Court by suggesting that the "disparate treatment" claim has been actually raised as a "defense" to CIMC's claims and that a "defense" need not be raised by derivative action. Not surprisingly, the Dennises are unable to cite *any authority* that even suggests let alone holds that the "disparate treatment" claim may be asserted as a "defense" without running afoul of Section 33-31-304. The reason for that is obvious. Section 33-31-304 expressly prohibits a challenge to a nonprofit corporation's allegedly illegal or *ultra vires* actions in a direct action -- which is precisely the type of action that the Dennises brought. In order to assert the "disparate treatment" claim the Court of Appeals has now remanded for trial, the Dennises were required to bring a derivative action and to satisfy the pleading requirements of Rule 23. That has not been done. That bars any "disparate treatment" claim or "defense," and compels the reinstatement of summary judgment once again by this Court.

Moreover, the Dennises are incorrect in even now asserting that a "defense" based on

Sections 33-31-610 or 33-31-611(c) was raised in their Answer and Counterclaims. Those Code sections are not cited in their Answer and Counterclaims. At best, the issue was pled *only* as part of the breach of a fiduciary duty counterclaim. The Dennises pled a breach of fiduciary duty by CIMC, in part, "in failing to treat similarly situated members uniformly, including but not limited to, in the termination or release from obligation of membership, and in concealing and misrepresenting such actions to the detriment of the Defendants and/or other members herein." *See*, Answer, Counterclaims, and Third Party Complaint, ¶ 55.I.c (R. 50).[1] As indicated, the Circuit Court granted summary judgment on the breach of fiduciary duty counterclaim because the Dennises failed to bring that claim as a derivative action. (R. 23-24). The Circuit Court cited Section 33-31-304 as "mandat[ing] that any action premised upon the contention that a nonprofit corporation was pursuing actions outside its authority must be brought as a derivative action." (R. 23). The Circuit Court then correctly recognized that the Dennises did not bring a derivative action and had not complied with the pleading requirements of Rule 23(b)(1), SCRCP, for a derivative action, including the filing of a verified pleading. (R. 23-24). Indisputably, the Dennises never appealed or disputed those rulings in their original brief to the Court of Appeals, and accordingly, the dismissal of the "disparate treatment" claim or "defense" is the law of the case and should never have been reviewed on appeal -- either originally or on remand from this Court.

Quite simply, that unpled claim that was never brought by derivative action should not have been used by the Court of Appeals to reverse the summary judgment that this Court had reinstated. That issue alone merits the grant of a writ of certiorari. This case should not be

[1] The Dennises raised a similar claim in the Third-Party Complaint alleged against the CIMC Board, but that Third-Party Complaint was dismissed by consent, and was no longer viable when the Circuit Court granted summary judgment to CIMC. (R. 51).

returning to the Circuit Court in this procedural posture.

Moreover, as the CIMC has previously pointed out, Section 33-31-304 has not been interpreted or applied in a published appellate decision. The statute has been addressed in two unpublished decisions: *Williamson v. Bermuda Run Investor Development Group, Inc.*, 2006 WL 7286063 (Ct. App. 2006), and *Anchorage Plantation Homeowners Asso. v. Walpole*, 2018 WL 3575397 (Ct. App. 2018). Both of those decisions fully support CIMC's position that *only* a derivative action may be brought to challenge the ultra vires acts of a nonprofit corporation. Thus, the bench and bar will ultimately benefit from the issuance of a writ of certiorari to provide guidance regarding the proper application of Section 33-31-304.

II. In their return, the Dennises fail to provide any meaningful discussion as to what is required to prove a "disparate treatment" claim under Section 33-31-610 and likewise fail to present any evidentiary support for such a claim in the record.

In addition, in its Petition, CIMC argued that there is no evidence in the record to support the "disparate treatment" claim under Section 33-31-610. There is no case law or other authorities interpreting that statute or addressing how such a claim is proven or the defenses available. The Court of Appeals' decision is the first and only case to address that Code section. The Court of Appeals' decision, however, lacks any discussion of the elements of such a claim or specifically what must be proven by the Dennises to prevail. That alone also merits the issuance of a writ of certiorari to address that novel issue. In only a conclusory fashion did the Court of Appeals find there to be "an issue to be determined by a factfinder." (Supp. App. 6).

Given the absence of any analysis, CIMC proposed that the framework for such a claim should be similar to what is required to prove an equal protection violation under the United States and South Carolina Constitutions. As CIMC points out, "[t]he *sine qua non* of an equal

protection claim is a showing that similarly situated persons received disparate treatment." 744 S.E.2d at 168. *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E.2d 161, 168 (2013). The requirement of proof of what this Court has termed a "similarly situated comparator" seems to also be a necessary element of a "disparate treatment" claim under Section 33-31-610.

This discussion was ridiculed by the Dennises by way of a frivolous "analysis." CIMC is not proposing "syllogistic fallacies" or "magical thinking." CIMC is attempting to address a real issue that was left unresolved by the Court of Appeals: if the "disparate treatment" claim is to be remanded, what must be proven for a plaintiff to prevail? The Dennises, needless to say, fail to offer any constructive alternative to the CIMC's discussion of a credible and novel question. Section 33-31-610 does not provide a "precise framework" as the Dennises assert without further explanation.

And certainly, the Dennises offer no response to CIMC's point that there is no evidence presented -- not even a mere scintilla -- that a similarly situated comparator to the Dennises was treated differently. The Dennises should be required to present evidence that other members who reached settlements with CIMC and abandoned their memberships are "similarly situated comparators" to them. However, the record reflects that settlements where members conceded their memberships as a term of settlement were only with *non-property owners*.[2] In other words, none of those settlements involved CIMC members in the position of the Dennises, that is, members who sought to resign their membership while *continuing to own property* on

[2] As CIMC pointed out in their Petition, James Carling, a former CIMC Board member, testified that the offers to concede memberships as part of settlement negotiations involved "individuals who no longer owned property that were given the opportunity to make payment to the club and concede their memberships." (R. 133-134). That distinction was understood. Subsequent questions from the Dennises' counsel referenced "those members who were not property owners" (R. 134) and "members who didn't own property." (R. 135). In their return, the Dennises have not refuted this evidence.

Callawassie Island. Tellingly, in their return, the Dennises do not refute this point or the absence of evidence to survive summary judgment. They do not point to any "similarly situated comparator" which would be a member who owned property like the Dennises and remained similarly obligated to pay dues and assessments until the re-issuance of their memberships.

In sum, other than their insistence that CIMC is proposing "syllogistic fallacies," whatever that may be, the Dennises have not pointed to any evidence of an appropriate comparator who was treated differently than the Dennises, as is needed to reverse summary judgment and proceed to trial on a "disparate treatment" claim. Certainly, this issue warrants a writ of certiorari, if for no other reason than to provide the necessary framework for a "disparate treatment" claim under Section 33-31-610 -- something the Court of Appeals has failed to provide in its opinion.

CONCLUSION

Based on the foregoing discussion, the Respondent-Petitioner Callawassie Island Members Club respectfully renews its request that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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