

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

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

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

v.

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

**RETURN TO DENNISES'
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT 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). In its Opinion, the Supreme Court resolved all substantive issues in favor of CIMC. Specifically, the Supreme Court found that CIMC had not violated the South Carolina Nonprofit Corporation Act. This Court held that "the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620." 821 S.E.2d at 673. This Court thus concluded that the Petitioners-Respondents Ronnie D. Dennis and Jeanette Dennis ("Dennises") remain obligated to continue to pay dues, fees, and other charges after their resignation from the Club. In fact, this Court expressly "reinstate[d] the summary judgment for all unpaid dues, fees, and other charges." 821 S.E.2d at 668.

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

Moreover, the Supreme Court rejected all arguments that those governing documents are ambiguous in any respect. First and foremost, this Court cited to Section 5.11 of the 2008 Plan, entitled "Payment of Dues and Other Charges by Resigning Members," which states: "An Equity Member who is on the waiting list to sell his/her membership *will be obligated to*

continue to pay to the Club all dues, fees and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club.” Dennis, 821 S.E.2d at 670. (Emphasis in original). This Court concluded that “[t]his language unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued.” Id. This Court recognized that “[t]here are no provisions in the 2009 Bylaws or 2009 Rules that contradict this.” Id.

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

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

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

The Supreme Court reversed the Court of Appeals’ finding of ambiguities in the contract language. First, this Court rejected the Court of Appeals’ reliance on differences in language

between the 1994 Bylaws and 1994 Plan as “not sufficient to create an ambiguity” and as “irrelevant.” *Dennis*, 821 S.E.2d at 671. Moreover, this Court explained that “even if we were to treat the ‘termination’ provision and the ‘resignation’ provision as governing the same event, there is no ambiguity.” *Id.* This Court focused on the 2009 Rules which state: “Any member may terminate membership in the Club. ... Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold.” *Id.* This Court similarly rejected the Court of Appeals’ determination that the term “unpaid” in the 2009 Rules was undefined and thus ambiguous.

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

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

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

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

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.

On remand, the Court of Appeals allowed supplemental briefing “to address the remaining, undecided issues on appeal” and also held oral argument on May 7, 2019. As a threshold consideration, the Court of Appeals was required to identify the “other issues” remanded by the Supreme Court. Not surprisingly, the Dennises sought to largely ignore the Supreme Court’s opinion and re-litigate the summary judgment granted to CIMC *in toto*. CIMC, in contrast, focused on the fact that the Supreme Court had explicitly reinstated summary judgment for CIMC and argued that only remedy-related issues asserted by the Dennises remained for adjudication on remand. Those issues were two-fold: (1) whether the Dennises’ monetary liability for post-resignation dues and fees should be capped at \$31,000, which was the amount paid for their equity membership in 1999, and (2) whether the circuit court erred in considering “late filed affidavits” of trial counsel in its award of attorney’s fees to CIMC.

Nonetheless, in its opinion filed on December 18, 2019, the Court of Appeals affirmed in part and reversed in part the summary judgment granted to CIMC. In reversing in part, the Court of Appeals found that “a genuine issue of fact exists as to whether the Club violated the

Nonprofit Corporation Act by allowing some club members to concede their memberships and not others.” Slip Op. at 8. Summary judgment was reversed as to that issue alone.

The Dennises filed a Petition for Rehearing which was summarily denied by order issued on March 27, 2020. CIMC also filed a Petition for Rehearing on the “disparate treatment” claim. That petition was likewise denied, and CIMC has filed a Petition for Writ of Certiorari on that claim.¹

¹ The Dennises attached to their Petition for Writ of Certiorari a newspaper article from the *Hilton Head Island Packet* titled “The ‘Hotel California’ of the Lowcountry.” In addition, they cite to four other newspaper articles from the *Hilton Head Island Packet*. CIMC objects to any materials that are outside of the appellate record and were not presented to the Circuit Court prior to the entry of the orders on appeal. *See*, Rule 210(c), SCACR (“[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal”); *Whisonant v. Belue*, 7 S.C. 483, 121 S.E. 360, 362 (1924) (“certiorari is heard on the record below”).

ARGUMENTS

I. The Court of Appeals correctly ruled that the Dennises' challenge based on the standard of review applied in the trial court was resolved in *Dennis I*.

In their Petition for Writ of Certiorari, the Dennises argue that the trial court failed to apply the “mere scintilla” standard as applicable to summary judgment motions. As the Court of Appeals correctly ruled, this issue had been decided by this Court or, at the very least, is subsumed in this Court’s adjudication in *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 669 (2018) (“*Dennis I*”). This Court included in its Opinion a brief explanation of the applicable standard of review, which is the same standard as applied by the trial court. This Court found no error in the legal standard applied by the trial court. Thus, the Court of Appeals correctly refused to re-litigate that issue on remand. It is likewise unnecessary for this Court to re-litigate that issue by granting a writ of certiorari.

II. The Court of Appeals correctly ruled that there is no genuine issue of material fact to dispute, as determined in *Dennis I*, that the General Club Rules were properly amended in 2007.

The Dennises claim that the Court of Appeals interpreted *Dennis I* “as ratifying secret, unlawful changes by the Club to its governing documents even though the question of the validity of those changes was not before this Court in *Dennis I*.” *See*, Dennises’ Petition, p. 10.² That is, of course, the Dennises’ own spin on the Court of Appeals’ ruling, but it is inaccurate. As the Court of Appeals explained, the Dennises “contend the Club changed language in section 13.3.1 of the Rules from ‘shall be expelled’ to ‘may be expelled’ without discussion among the

² The Dennises also allege that the amendment of the Rules was done “in secret.” There is no evidence in the record to support that claim.

board and without presentation to club members.” Slip Op. at 6. The Court of Appeals ruled that there is no genuine issue of material fact to preclude summary judgment as to whether the governing documents were properly amended.

In actuality, this Court decided this issue in *Dennis I*. Specifically, this Court ruled that “[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments.” *Dennis*, 821 S.E.2d at 670. By footnote, this Court cited the provisions in those documents that authorized such amendments:

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

Id., n.1. Thus, this issue was decided by this Court with finality, and the issue was not subject to re-litigation on remand and should not be subject to re-litigation by way of a writ of certiorari.

Nevertheless, the Dennises now proffer a new argument made for the first time on rehearing to the Court of Appeals -- an argument that they did not even make in their previous briefs, at oral argument, or on rehearing to the Supreme Court in *Dennis I*. The Dennises argue that the General Club Rules should also be considered “bylaws” based on the definition contained in S.C. Code Ann. § 33-31-140(4), and as “bylaws,” the Rules could not be amended except by a vote of the members. This new issue should be rejected on several procedural and substantive bases.

First, as mentioned, the issue of the amendment of governing documents was already decided with finality by this Court and is not subject to re-litigation even based on a new legal argument or theory.

Second, this issue was presented to the Court of Appeals as a new issue raised for the first time in a petition for rehearing. The appellate courts, however, have consistently ruled that “[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322, 322 (2001). *See also, Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

Third, this issue was never raised to the trial court and, as a result, cannot be made for the first time on appeal. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review”). In fact, a review of the record shows that S.C. Code Ann. § 33-31-140(4) and its definition of “bylaws” were never cited in either the trial court record or in any appellate brief previously filed in the Court of Appeals.

Fourth, the Dennises are arguing that the amendment of the governing documents made the contract “become illegal over time.” *See, Dennises’ Petition*, p. 12. However, a review of the Dennises’ Answer and Counterclaim shows that they never pled that the contract or the governing documents were illegal or unconscionable. In *H.G. Hall Construction Co., Inc. v. J.E.P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (1984), this Court held that illegality of contract is an affirmative defense. 321 S.E.2d at 271. This Court declined a request to set aside a verdict because a contract was illegal because the illegality of the contract was not raised as an

affirmative defense in the answer. *See also*, Rule 8(c), SCRCP (specifically listing “illegality” as affirmative defense). Likewise, in *D&D Leasing v. David Lipson, Ph.D. P.A.*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991), the Court of Appeals ruled that unenforceability of a contractual provision is an affirmative defense. Therefore, the Dennises should be precluded from now arguing illegality or unconscionability for the first time on appeal and particularly where it was first raised on rehearing.

Finally, even if the Court considers the merits, the Dennises’ new theory fails. Even if the Rules are treated as “bylaws,” as they now assert, the South Carolina Nonprofit Corporation Act does not preclude an amendment of the Rules without a vote of the members. Under South Carolina law, “[a] corporation can only exercise the powers granted to it by law, its charter or articles of incorporation, and any by-laws made pursuant thereto.” *Baumann v. Long Cove Club Owners Assn.*, 380 S.C. 131, 668 S.E.2d 420, 424 (Ct. App. 2008). South Carolina law permits the board of directors of a nonprofit corporation to amend the bylaws without a vote by the members in most cases. The Nonprofit Corporation Act provides that:

- (a) A corporation’s board of directors may amend or repeal the corporation’s bylaws unless:
 - (1) the articles of incorporation or this chapter reserves this power exclusively to the members in whole or part or requires the consent of someone pursuant to Section 33-31-1030; or
 - (2) the members in adopting, amending, or repealing a particular bylaw provide expressly that the board of directors may not adopt, amend, or repeal that bylaw or any bylaw on that subject.

S.C. Code Ann. § 33-31-1021(a). Thus, absent a reservation of the power to amend bylaws to the members, the board may amend the bylaws without a vote by the members. In this case, as this Court has already held, the Bylaws granted the CIMC Board with the authority to “[a]dopt,

alter, amend, or repeal the Rules governing use of the Club.” *Dennis*, 821 S.E.2d at 670, n.1. The power to amend the General Club Rules was *not* reserved exclusively to the members. In effect, whether considered “bylaws” or not, the Rules could be adopted and amended by the Board without a vote of the members. Accordingly, this new argument offered by the Dennises does not impact or change this Court’s determinative and final ruling that “[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments.” *Dennis*, 821 S.E.2d at 670. The new argument thus presents no valid basis for the issuance of a writ of certiorari.³

III. The Dennises’ third issue for review is not preserved in that it was not raised in the Petition for Rehearing in contravention of Rule 242(d)(2), SCACR. Yet, even if the merits are considered, the issue of “perpetual liability” was addressed and rejected in *Dennis I*.

As their third issue presented, the Dennises contend that the Court of Appeals erred “in interpreting *Dennis I* to validate the enforcement of a perpetual, unlawful contract.” *See*, Dennises’ Petition, p. 1. This issue presents a myriad of preservation problems and has already been addressed by this Court in *Dennis I*.

Quite clearly, any claim or defense based on illegality or “perpetual liability” was never

³ In footnote 11 of their Petition, the Dennises reference the Court of Appeals’ ruling on the “membership swap” issue. The Dennises do not address the merits of that claim and seek to incorporate by reference their Petition for Rehearing filed in the Court of Appeals. The “membership swap” issue is not mentioned in the “Questions Presented.” *See*, Dennises’ Petition, p. 1. Rule 242(d)(2), SCACR, requires the petition to include “the questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail.” Rule 242(d)(2), SCACR. Because the “membership swap” issue is not raised in the “Questions Presented” and is not addressed in the Petition other than by an “incorporation by reference” to the Petition for Rehearing, CIMC believes that the issue has been waived and should not be subject to a writ of certiorari. If the issue is so unimportant to not even warrant any discussion by the Dennises, it is obviously not an issue worthy of a writ of certiorari.

raised in the trial court and is not properly preserved for appellate review. The trial court orders on appeal do not address such a claim or defense. The Dennises did not ask the trial court to declare that the governing documents are “perpetual contracts” contrary to public policy or that they are illegal, unconscionable, or otherwise unenforceable. These are arguments made for the first time on appeal. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“[I]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review”).

This is clear from a review of the Dennises’ Answer, Counterclaims, and Third Party Complaint where defenses of illegality, unconscionability, and unenforceability based on public policy were never affirmatively pled as counterclaims or defenses. *See, H.G. Hall Construction Co., Inc. v. J.E.P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (1984); *D&D Leasing v. David Lipson, Ph.D. P.A.*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991); Rule 8(c), SCRCF (as discussed above). Additionally, the prayer in the Dennises’ Answer, Counterclaims, and Third Party Complaint did not seek rescission nor any declaration that the governing documents are illegal, unconscionable, or unenforceable as a “perpetual contract” against public policy. Those are issues that the trial court was not asked to decide. Accordingly, the Dennises should be precluded from now asking this Court to decide those issues for the first time on appeal.

That is particularly true because these issues were also not even raised in the Petition for Rehearing filed with the Court of Appeals. Rule 242(d)(2), SCACR, governs the issues that may properly be raised in a petition for writ of certiorari. Rule 242(d)(2) provides that “[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(2), SCACR. Clearly, the issues of illegality and “perpetual liability” now raised in the Petition for

Writ of Certiorari *were not raised* in the Dennises' Petition for Rehearing. Thus, the Court of Appeals was denied the ability to act on these arguments and potentially to make revisions to its opinion, as appellate courts are apt to do on occasion. That is contrary to the literal language and intent of Rule 242(d)(2), SCACR, and the rehearing and certiorari processes that have been in place for years.

Notwithstanding the preservation issues, this Court already refused in *Dennis I* to address the dissent's assertion of "perpetual liability." In responding to the dissent's claim of a "harsh result," this Court pointed out that:

[A]s in all cases before this Court—we decide only the issues before us in *this* case. The "logical end" of our analysis goes no further than required by the four corners of the governing documents in this case when applied to the facts of this case. The Dennises resigned on November 1, 2010, and the summary judgment order was filed on June 10, 2014. Therefore, the summary judgment we affirm is for less than four years of unpaid dues. We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts.

Dennis, 821 S.E.2d at 671-672. (Emphasis in original). This Court further explained:

First, the Dennises' membership in the Club -- and thus their obligation to pay membership dues, fees, and other charges -- is tied to their ownership of a lot and house on Callawassie Island. If the Dennises truly wish to avoid paying membership dues, they may sell their house. In addition, Callawassie Island is a private resort community developed around the property owners' use of the amenities paid for by these dues. The Dennises purchased their exclusive home there in 1999 for \$590,000. They have chosen not to sell, but are instead attempting to keep their home on this resort island without having to pay a property owner's share of the amenities.

When reading unambiguous contracts, we should not normally concern ourselves with the fairness of the result required by the terms of the contract. The Dennises have not asked the circuit court, the court of appeals, nor this Court to decide the case based on any alleged harshness of having to pay dues. Because the dissent has made it an issue, however, we note our decision by no

means renders a harsh result. Rather, this is precisely the result to which these sophisticated purchasers of a resort home agreed when they decided to purchase the property and abide by the terms of the governing documents.

821 S.E.2d at 672. Clearly, by arguing perpetual liability, the Dennises are improperly attempting to re-litigate an issue conclusively addressed in *Dennis I*.⁴

IV. The Dennises' fourth issue for review is not preserved in that it was not raised in the Petition for Rehearing in contravention of Rule 242(d)(2), SCACR.

As their fourth issue presented, the Dennises contend that the Court of Appeals erred “in not following this Court’s guidance in *Dennis I* as to the interpretation of the governing documents and in disregarding the governing document’s explicit limitation on the damages the Club can recover from the Dennises.” *See*, Dennises’ Petition, p. 1. In essence, the Dennises argue that the damages awarded to CIMC should be capped at the amount of their equity contribution. This is another issue, however, that is not preserved because it was not raised in the Petition for Rehearing filed with the Court of Appeals. *See*, Rule 242(d)(2), SCACR. Importantly, it was an issue raised in the Petition for Rehearing filed by the Dennises with this Court in *Dennis I*, and this Court denied that Petition for Rehearing. This Court did not address the issue in the substituted opinion which was re-filed on November 14, 2018. In short, the issue

⁴ Additionally, this issue of “perpetual liability” is moot. In their Petition, the Dennises state that the Court “may take judicial notice that the Dennises no longer own the property alleged in the Club’s lawsuit: 16 Spring Island Drive.” *See*, Dennises’ Petition, p. 19, n. 17. As this Court already recognized, “[i]f the Dennises truly wish to avoid paying membership dues, they may sell their house.” *Dennis*, 821 S.E.2d at 672. Because the Dennises no longer own the property, they are no longer continuing to accrue dues and fees for the membership tied to their property. Hence, they cannot claim to be subjected to “perpetual liability.” The Dennises remain liable, however, for past indebtedness that accrued before they no longer owned the property.

is not preserved for review on certiorari.

CONCLUSION

Based on the foregoing discussion, the Respondent-Petitioner Callawassie Island Members Club, Inc. respectfully requests that this Court deny the Petitioners-Respondents Dennises' Petition for Writ of Certiorari.

Respectfully submitted,

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