THE STATE OF SOUTH CAROLINA
In The 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)

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S.C. SUPREME COURT

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

v.

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

REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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This Court should grant the Dennises' *Petition for a Writ of Certiorari* for at least two reasons. First, to correct mistakes of law by the Court of Appeals, as discussed in the Dennises' Petition and below, which errors will result in injustice and poor precedent. Second, to clarify the scope and holding of this Court's ruling in *Dennis I*.

As this Court is aware, the *Dennis I* opinion does not exist in a vacuum. There are at least thirty (30) pending lawsuits, in state and federal courts below, that are stayed in anticipation of a final result in the *Dennis*, *Martin*, and *Frey* appeals. Those courts and litigants will derive guidance from this Court's decisions when they grapple with similar issues. When this Court looks at the Appendix, it will see the confusion over the *Dennis I* decision borne out in myriad filings—by all parties—attempting to interpret and impart different readings to this Court's previous holding.

That turbulence was demonstrated, for example, on remand to the Court of Appeals, where the oral argument was largely consumed with questioning by the Court of Appeals' three-judge panel on *what*, exactly, the *Dennis I* opinion means and how far its specific holdings extend. The Dennises contend that the opinion, by its own express terms, has a narrow application, limited to the Record and discrete issues before this Court in *Dennis I*. In contrast, as it does in its *Return to Dennises' Petition for Writ of Certiorari*, the Club persists in waving the *Dennis I* opinion as a victory banner in which "the Supreme Court resolved all substantive issues in favor of CIMC." (p. 1).

In addition to the arguments below, the Dennises are submitting a separate motion to address a material misrepresentation made by the Club to this Court, discussed in Part III, *infra*.

I. The Court of Appeals erred in interpreting this Court's ruling on specific questions of law in *Dennis I* to encompass the standard of review on questions of fact.

The first issue on which the Dennises seek certiorari review is the Court of Appeals' error in upholding the circuit court's improper application of the standard of review. The crux of the Dennises' argument on this issue is that the trial court—in its haste to dispense with this case based on contractual provisions—improperly disregarded evidence that implicated questions of fact, which should have been for the jury. The Court of Appeals wrongly found that it need not address this issue, erroneously reasoning that this Court had decided the question in *Dennis I* "when [it] cited the applicable standard of review." Op. No. 5696, p. 4 ("Accordingly, we need not address this issue.").

This determination by the Court of Appeals overlooked the plain language within *Dennis I*, which expressly excludes the question of the summary judgment standard from the decision. The *Dennis I* Court particularly delineated that "[t]he questions before us ***in this appeal*** **are questions of law**." *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018) ("*Dennis I*") (emphasis added). Because the *Dennis I* Court was deciding only (two) questions of law, based on contractual language that it found to be unambiguous, it did not and could not make any determination on the scintilla standard, which is designed to evaluate whether any question of fact exists that would properly be heard by a jury—preventing summary judgment by the Court.

The Dennises requested a jury trial on numerous issues, which were not solely contractual in nature, which were not before the Supreme Court in *Dennis I*, and which

the Court of Appeals failed to consider. The Dennises contend that the circuit court improperly shifted the burden of proof and failed to apply the "mere scintilla" standard in granting summary judgment on those issues. The Dennises respectfully request that this Court would grant certiorari, so as to more fully correct the error made by the trial court, when it disregarded material facts to grant summary judgment to the Club. *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.").

II. The Court of Appeals erred in interpreting *Dennis I* to allow the Club to unilaterally change material terms to the Club's governing documents without notice to, or a vote of, the members so affected.

In this section of its Return, the Club tries to confuse things by only addressing one of the Dennises' arguments, and characterizing it as a "new issue" that it then argues was not preserved. (*Return*, pp. 6–10). This Court should not be fooled. The issue on which the Dennises seek certiorari review is squarely preserved, and it was decided in error by the Court of Appeals based on a misunderstanding of the scope of *Dennis I*. The question is whether the Club's board had the right to change the governing documents without notice to—and vote by—the members.

Contrary to the Club's argument, in *Dennis I* this Court did not decide the question of whether the Club's unilateral, secret changes to the material rights of its members were proper. That question was not before this Court, and the words that the Club quotes (at

p. 7) are nothing more than dictum taken from what the *Dennis I* opinion describes as "a general discussion of the membership arrangement and the membership documents that govern that arrangement." *Dennis I*, 425 S.C. at 198, 821 S.E.2d at 670. This "general discussion" by the Court is not a ruling on a substantive issue with the weight of precedent. "Dictum is not the law."[1] In *Dennis I*, the questions for certiorari review did not include this one, which the Court of Appeals, having found other issues dispositive, had deliberately left undecided.

A question of fact exists as to whether the Club's unilateral, material changes to its governing documents were improper. This is so because the governing documents do not allow amendment affecting the rights and obligations of members without a vote of the members, and the Record indicates that no such vote was taken.[2] That argument alone should have been sufficient for the Court of Appeals to compel remand for jury determination of whether the Club followed the amendment procedures contained within its own contract. If the Club failed to do so, as the evidence shows, then those material changes are invalid. The Court of Appeals' decision was therefore erroneous, and it merits review and reversal by this Court.

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[1] *Gordon v. Lancaster*, 425 S.C. 386, 394, 823 S.E.2d 173, 177 (S.C. 2018) ("However, because the Court's expansive statement was not necessary to the decision of the case, the statement is dictum. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining "dictum 'is a statement on a matter not necessarily involved in the case, . . . is not binding as authority . . ., [and] is not the court's decision.'" (quoting 21 C.J.S. *Courts* § 227 (2006)). Dictum is not the law.").

[2] "[A]ny such amendment or modification [of the Rules] shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. p. 510, § 1.3).

In addition, the Dennises contend that not only did the Club's amendment practices violate its own contractual procedure—but that those practices also violate the Nonprofit Corporation Act's requirements. Enter the red herring: The Club incorrectly submits that arguments under the Nonprofit Corporation Act are a "new issue" argued for the first time to the Court of Appeals. To the contrary, the Dennises have been arguing for at least six years that the Club's actions and practices violate the Act, and that the Club secretly amended its documents to affect the rights of members without a vote of the members. This is not a new issue, as the Club attempts to characterize it. The Dennises have simply referred to the Definitions section of a statute that has always controlled the actions of the Club, ever since it elected to organize itself as a nonprofit, mutual benefit corporation. (*See, e.g.*, R. pp. 3, 4, 9, 12, 14–16, 21, 23–27, 38, 87, 187–188, 261, 268–270, 275, 277, 289, 291, 292, 297, 302, 311–312, 319, 362–363, 367, 386–387, 449, 478, 521) (discussing, *inter alia*, the requirement that the Club comply with the provisions of the Nonprofit Corporation Act).[3]

[3] In addition, the Court has discretion to hear issues it deems to be important. *See Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010) (disregarding issue preservation rules to find, *sua sponte*, that a contract was void for illegality); *Jeter v. South Carolina Dept. of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 147 n.6 (2006) ("Regardless of preservation problems, we address this issue in the interest of judicial economy."); *State v. Johnson*, 416 P.3d 443, 453–54 (Utah 2017) ("[T]here may be exceptional circumstances when errors not excepted to are so clearly erroneous and prejudicial to the fundamental rights of a defendant that an appellate court will of its own accord take notice thereof."); *Kerbs v. California Eastern Airways*, 33 Del. Ch. 69, 90 A.2d 652, 34 A.L.R.2d 839 (Del. 1952) ("While the plaintiffs did not urge this precise reason for the illegality of the directors' act upon the Chancellor, they did, however, argue its illegality. . . . when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered."); *Blumberg Associates Worldwide, Inc. v. Brown and Brown of Connecticut*, 84 A.3d 840, 879 (Conn. 2014) ("In summary, we conclude that, although the defendants did not preserve the claim that the plaintiff's claim under the prevention doctrine failed as a matter of law because the allegedly hindering conduct occurred before the contract existed, the Appellate Court properly raised that claim sua sponte.").

Presumably, the Club's governing documents were drafted in an attempt to comply with the Act—which is precisely why, by the documents' own terms, the board's ability to modify the Rules "**is subject to and controlled by** the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. p. 510, § 1.3 (emphasis added)). The Club, in organizing itself under the Act, was of course aware that the Act's definition of "bylaws" included the Club's Rules.[4] To comply with the Act, the Plan was drafted to require that:

> ***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. 470, 491) (emphasis added). The Club and its documents are servants to the Act, and not its master. Where the Act requires that changes in "bylaws" be approved by affected members, it is implicit that the governing documents are drafted in compliance with that requirement.

The Club is wrong that the Nonprofit Corporation Act unreservedly allows amendment to the bylaws without a vote of the members. The very section of the Act that appears as a block quote in the Club's *Return* (p. 9) goes on to put the following limits on the board's purported freedom:

> (c) 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**.

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[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, Definitions.

> (d) 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). In other words, the Act requires that members must be notified of, and approve, changes to bylaws. The evidence in the Record shows that the Dennises did not receive the required notice, and nor did they approve any change in the method of computation of dues—including but not limited to the documents' provisions relating to suspension and expulsion (which limited a member's obligation to pay dues to four months following suspension), nor to the amount of damages (which contemplated that dues would accrue against a membership, not against the member, until it was reissued).

A key issue on appeal is whether the circuit court (and, now, the Court of Appeals) improperly disregarded evidence that the Club had modified its governing documents without notice to or a vote of its members. There is evidence in the Record of the Club's practice of making unilateral, secret, material changes to provisions affecting the rights and obligations of its members, without notice to or approval of the members, as required by the Act and the contract itself. The Court of Appeals therefore should have remanded for a jury to consider, as a question of fact, whether the Club violated notice and vote requirements, rendering its amendments void.

The Dennises respectfully request that this Court would grant a writ of certiorari in order to review the question of whether the Club board had the authority (under its own documents and the law) to amend its governing documents without notice to or vote by its members.

III. The Court of Appeals erred in interpreting *Dennis I* to validate the enforcement of a perpetual, unlawful contract.

The Dennises have an obligation[5] to correct a material untruth in the Club's brief. The Club misrepresents (p. 13) to this Court that:

> 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."

This is false in the Club's practice, and it plays into the entirely inaccurate "narrative" that membership in the Club is an appurtenance to the property. In reality, Club membership is a separate contractual arrangement that does not touch and concern the land. A member who sells his property is not—in the Club's practice—automatically divested of membership in the Club. In fact, the Club sometimes continues to bill former Callawassie property owners long after they have conveyed their property (or lost it in a tax sale, or to foreclosure), for ongoing Club membership dues and fees. That is because the Club will sometimes, at its pleasure, transfer a *different membership* to the new buyer, leaving the former property owner stuck with their current membership, that did not run with the land.

The Club justifies this practice in part by a willful misreading of *Dennis I*—but the practice existed before *Dennis I* was decided. The Dennises are submitting a separate motion to this Court to strike the misrepresentation; unfortunately, the Club has necessitated such a motion by its false statement to this Court, which must not be allowed to stand uncorrected. The point is critical to this Court's consideration because the Court

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[5] *See, e.g.*, S.C. R. Prof'l. Cond. 3.3 (discussing necessity of taking reasonable measures to correct false statements to a tribunal).

should not be under the wrong impression that a person "just needs to sell their property" to be free of the Club's pursuit. It is a very real practice for the Club to continue to invoice, and pursue, former property owners for ongoing "unlimited golf" and other charges, for years after property ownership has ended, apparently going into perpetuity.

Indeed, the question of on-going, or perpetual, liability has been at issue in this case from the beginning. In *Dennis I*, this Court's majority and dissent discussed the possibility of perpetual liability, but did not at that time issue a ruling on that precise issue. *See Dennis I*, 821 S.E.2d at 676, 672 (dissent discussing "an obligation that could extend beyond a member's lifetime" and that "at some point courts are called upon to step in to alleviate a provision contrary to public policy," and the majority stating "We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts."). The issue of perpetual, or ongoing, obligations also was raised numerous times in the courts below. *See, e.g.,* R. pp. 10, 18, 21, 50, 85, 277, 289, 312, 390.[6] The issue has been discussed at length at each oral argument during these appeals (to counsel's recollection). The issue was discussed in the filings with the Court of Appeals, including in the Petition for Rehearing.[7] Perhaps most colorfully, the Club's

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[6] For example, in its *Final Brief of Respondent* to the Court of Appeals, filed December 9, 2014, (p. 10) the Club argued in its that "The Dennises' contention that the trial court's ruling creates a 'perpetual obligation' simply is not true. The Dennises need only sell their property along with their membership to terminate their contractual obligations." The issue has been a constant presence throughout the litigation.

[7] *See, e.g., Appellants' Petition for Rehearing*, filed with the Court of Appeals on January 31, 2020, at p. 7 ("At the outset, it is worth noting that the Dennises did not enter into a perpetual contract with indefinite liability. The contract by which they agreed to be bound had a finite term, mandatory provisions for exit by expulsion, and it clearly limited liability to the amount of equity contribution."); *id.* at p. 14 ("resulted in a perpetual, unconscionable contract (which is unlawful under South Carolina law)."); *see also id.* at p. 15. In addition, S.C.R.A.P. 242(d)(2) specifies that

perpetual, unconscionable demand was a source of the Court of Appeals' quote from *Hotel California*:

> To do so, we believe, would create an unreasonable situation in which clubs could refuse to allow a member to ever terminate their membership obligations. In essence, Appellants would be trapped like the proverbial guests in the Eagles' hit Hotel California, who are told "you can check-out anytime you like, but you can never leave."

Callawassie Island Members Club, Inc. v. Dennis, 417 S.C. 610, 618, 790 S.E.2d 435, 439 (S.C. App. 2016), *reversed*, *Dennis I*, 425 S.C. at 193, 821 S.E.2d at 667. In sum, the issue is preserved, it is ripe for consideration, and it merits certiorari review by this Court.

IV. The Court of Appeals erred in not following this Court's guidance in *Dennis I* as to interpretation of the governing documents, and in disregarding the governing documents' explicit limitation on the damages the Club can recover from the Dennises.

The Club incorrectly states (at p. 13) that the issue of whether "the damages awarded to CIMC should be capped at the amount of their equity contribution" is not preserved. In fact, the issue has been raised and argued throughout this appeal, including to the Court of Appeals and in the Petition for Rehearing. *See, e.g.*, *Appellants' Petition for Rehearing*, filed Jan. 31, 2020, at p. 7 ("it clearly limited liability to the amount of equity contribution"); *id*. at pp. 3, 15; *see also Supplemental Brief of Appellants*, Jan. 29, 2019, at pp. 9–14 ("The Dennises' liability must be strictly limited to their membership contribution. . . . The Dennises seek a ruling from this Court that it was error for the Circuit Court to award damages to the Club in the amount of $51,131.76, because,

"A question presented will be deemed to include every subsidiary question fairly comprised therein."

properly, the Club's recovery must be limited to (and offset by) the amount of the Dennises' membership contribution."); *see also* R. pp. 284, 336–337, 344, 350, 352, 407. Indeed, the issue was discussed by justices of this Court as a matter of concern, and it was remanded to the Court of Appeals for consideration. *Dennis I*, 425 S.C. at 210, 821 S.E.2d at 676. In sum, this important issue is preserved, and the Dennises ask that this Court would take it up for certiorari review.

CONCLUSION

For these reasons and those articulated in their *Petition for a Writ of Certiorari*, the Dennises respectfully request that this Court would grant certiorari review of the Court of Appeals' errors.

Respectfully submitted,

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