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S.C. SUPREME COURT

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Withdrawn, Substituted and Refiled December 18, 2019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.

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' REPLY

Throughout its *Return to Petition for a Writ of Certiorari*, the Club repeats two primary arguments—both of which this Court should take with a hefty fistful of salt. The Club's first argument is that this Court's *Dennis I* Opinion has subsumed every issue in its path, like a boundless black hole. The Club's second argument is that practically nothing has been preserved for this Court's review.

As to the Club's first argument, Petitioners' cases should not be conflated with that of *Dennis I*. This Court expressly limited its holding in *Dennis I* to the issues in that case, the documents in the Record of that case, and the facts of that case. *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 202, 821 S.E.2d 667, 672 (2018) ("*Dennis I*"). The **issues in this case are different** from those in *Dennis I*, the **documents in this Record are different** from those in *Dennis I*,[1] and the **facts of this case are different** from those in *Dennis I*. The Club vastly exaggerates the decision's reach.

As to the Club's second argument, the Club's boilerplate issue preservation argument does not apply: (1) for the individual reasons discussed in separate sections below; (2) because Petitioners have **not** raised new issues, they have simply argued existing issues using existing authority; but also, in the alternative (3) because issue

[1] Among other things, the Record on Appeal in Petitioners' case is 1,000 pages longer than that in *Dennis I*; it contains complete versions of governing documents (whereas *Dennis I* has only piecemeal excerpts).

preservation rules are not absolute, they are not jurisdictional, and this Court has the discretion to decide the issues put before it.[2]

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[2] There are numerous exceptions to issue preservation rules that could apply here, if this Court deems them necessary, both in South Carolina and nationwide; here is a short list of some of them:

- When to strictly apply issue preservation rules would have the effect of upholding a contract that is otherwise void as against public policy or statutory law. *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).

- In the interest of judicial economy, particularly where the question is likely to arise on remand for trial. *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.").

- In order to avert manifest injustice. *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.") (internal citations omitted).

- Where a party presents a new argument or authority in support of a previously raised question. *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.").

- Where there is no prejudice to the responding party. *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.").

I. This Court should issue a writ of certiorari on the issues identified in Martin and Frey's Petition.

There is no question that this Court should issue a writ of certiorari as to the Court of Appeals' decision in this case, notwithstanding the Club's pat and soulless rendition of the general factors for such review. The Club asks this Court to discount the importance of Petitioners' appeal, as if the Club has not sued dozens of other members in circumstances similar to the Petitioners', and as if those legion cases were not currently stayed, waiting for the ultimate outcome of this very litigation. Despite the unpublished nature of the Court of Appeals' decision, the effect of its erroneous holdings will indubitably ripple through numerous cases in state and federal court—which are currently pending and waiting for this Court's guidance. (At this time, the undersigned counsel themselves have more than thirty (30) Callawassie cases that have been stayed, in both the state and federal courts, in which this social Club has sued past members on issues similar to those here.) This Court should exercise its discretion for the sake of judicial economy alone, and to bring finality to issues that have plagued Callawassie litigants for many years now.

In certain respects, these Petitioners' appeal is a superior vehicle for this Court to render an opinion on the Club's practices than is the *Dennis I* case. This is because the Record on Appeal in this case contains complete versions of applicable governing documents, which have been materially changed throughout the years by the Club. Further, issues in the Petitioners' appeal are different from those in *Dennis I*, as set forth

below and in their Petition, and the Court of Appeals' errors on those distinct issues should not be left intact, to sway the trial courts below.

For the reasons set forth herein, and in Petitioners' *Petition for a Writ of Certiorari*, this case is worthy of the exercise of this Court's discretionary review, and Petitioners respectfully ask that it would be granted to them.

II. The prospect of being trapped in a perpetual contract is indeed dramatic, and the peril results from a misreading of *Dennis I* that this Court must correct.

Petitioners' first issue for review is that the Court of Appeals erred when it upheld a contract that had been unilaterally modified by the Club to bind its members in perpetuity. The Club discounts this argument by Petitioners as exaggerated and melodramatic. Perhaps the Club's corporate heart cannot fathom the very real human distress borne by its members, who have watched and felt powerless as the Club unilaterally stripped them of their rights, imposed upon them unbargained-for obligations, and grimly pursued them for hundreds of thousands of dollars in dues that will accumulate until the end of time.

In particular, this Court must understand that the Club's blithe suggestion that Petitioners could sell their property and thereby automatically divest themselves of their membership obligations is misleading, AND IT IS DOWNRIGHT WRONG.[3] Critically, membership in the Club is not an appurtenance to Petitioners' property. Club membership is an entirely separate contractual agreement that does not run with

[3] Yes. We are shouting. This is just so important.

the land.[4] Thus, while the contract *might* allow a membership transfer in connection with a sale of property, in the Club's view and practice that transfer is neither guaranteed nor automatic. It is subject to contractual conditions, which the Club can and does use to thwart transfer, at its pleasure. Unfortunately, under the Record before it in that case—and based on inaccurate statements by the Club—the *Dennis I* Court misunderstood this reality.[5] Petitioners' Record is far more complete. The *Dennis I* dictum on selling property must be corrected, and this case presents an appropriate platform for this Court to do so.

Further, the Club is wrong to characterize Petitioners' arguments in this regard as new and unpreserved, and the Club is wrong to accuse Petitioners of having failed to raise defenses of illegality and unenforceability. To the contrary, the Petitioners brought—as affirmative defenses and counterclaims—causes of action against the Club for: breach of contract, violation of the Nonprofit Corporation Act, failure to allow members to approve fundamental changes, misrepresentation, and disparate treatment,

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[4] It appears that the Club's Plan, Bylaws, and Rules were recorded for the first time on January 10, 2019.

[5] The *Dennis I* Court wrongly speculated: "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." *Dennis I*, 425 S.C. 193, 203, 821 S.E.2d 667 (2018). Respectfully, this statement is incorrect as a matter of law and should be corrected by this Court when it grants certiorari.

inter alia. (R. pp. 37–44, 82–90).[6] Petitioners have been arguing on appeal that summary judgment was improper because questions of fact exist that should have precluded summary judgment, including on their defenses and counterclaims. Either a jury should be given the opportunity to determine whether the Club's documents and practices are illegal, or the Court should do so outright; that has been the essence of Petitioners' issues on appeal from the moment they filed their initial briefs.

It should be of particular concern to this Court that the Club's stance on this issue is derived from its incorrect interpretation of this Court's *Dennis I* opinion. The Club inaccurately wields *Dennis I* as a mandate in its own favor, steamrolling over distinctions in the facts and the Record of Petitioners' cases. This Court should take note, for example, of pages 6-8 of the Club's *Return*, in which the Club plucks dicta from *Dennis I* and practically wills it into law. The Club will wrongly continue to do this in the legion of cases stayed and waiting below, unless this Court exercises its discretion to correct the Club and give finality to the litigants it pursues, including the Petitioners.

The Petitioners respectfully request that this Court would grant certiorari to review this issue.

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[6] As in Appellants' initial brief, citations to the Record on Appeal in this brief are to the *Martin* Record on Appeal. The same documents are in the Record on Appeal in *Frey*. Appellants would be glad to provide parallel citations to the Record in *Frey*, if the Court so wishes.

III. The Court of Appeals erred in reversing itself on the issue of the Club's improper amendment of the governing documents.

The Petitioners' second issue for certiorari review is the question of whether the contract and the law allow the Club—unilaterally—to change material terms of the contract. In this portion of its *Return*, the Club trots out its familiar refrain, first claiming that this Court has decided this issue in *Dennis I* and, next, harping on issue preservation. Importantly, the Court of Appeals rendered a decision on this issue, and then reversed itself on rehearing—a procedural fact that makes the Club's issue preservation argument inapplicable. The Court of Appeals erred when it approved the Club's unilateral changes, because the terms of the contract itself, as well as the statutory limitations within the Nonprofit Act, require that the Club obtain the approval of its members before making substantive changes to the governing documents. Evidence in the Record indicates that the Club failed to do so, and this question is properly one of fact for the jury.

The Club wrongly attempts to paint this issue as one decided by this Court in *Dennis I*. However, the question of whether the Club's unilateral, secret modifications to the material rights of its members were unlawful or in violation of the contract was **not** before this Court in *Dennis I*. The words that the Club quotes are nothing more than dictum taken from what the opinion itself 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 precedence. Further,

that "general discussion" certainly should not control in **these Petitioners'** appeals, since this Court in *Dennis I* was careful to confine its holding to the record before it in that case—which was a markedly different record than that of these Petitioners.

The Club also appears shocked—shocked!—to learn[7] that the Nonprofit Corporation Act might apply to its attempted unilateral amendment of its governing documents. But this is not a new issue, as the Club paints it, nor a surprise ambush. The Petitioners 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 restrict the rights of members without a vote of the members. This is not a new "issue," but rather an additional argument on a longstanding issue (i.e., the amendment of the governing documents) that has always been at the heart of this appeal. In their argument on that issue, Petitioners have simply cited 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. 83-88, 111-113, 179, 211, 304, 327-343, 1221–1222, 1229, 1236, 1343, 1385, 1483, 1493 (identifying, *inter alia*, the Club's requirement to comply with the Nonprofit Corporation Act)).

Certiorari review is appropriate on this issue because a question of fact exists as to whether the Club's unilateral, material modifications to its governing documents were improper. This is so because the governing documents **themselves** prevent substantive

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[7] *Casablanca* (Warner Bros., 1942) (Captain Renault: "I'm shocked, shocked to find that gambling is going on in here!").

changes affecting the rights and obligations of members without a vote of the members.[8] That argument alone—which the Club does not address in its *Return*—is sufficient to compel remand for a jury determination of whether the Club followed the amendment procedures contained within its own contract, as the Court of Appeals originally ruled.

Petitioners respectfully ask this Court to grant certiorari review on the question of whether the Club improperly amended its governing documents.

IV. Distinctions do actually matter in the interpretation of law and contract.

Petitioners' third issue for review is the question of whether the Court of Appeals misconstrued precedent, when it applied *Dennis I*'s determinations on resignation to the expulsions at issue in Petitioners' cases. The Club argues that this is a "classic distinction without a difference." However—as this Court well knows—when the drafter of a contract, or a statute, or the *Dennis I* Opinion (*e.g.*) goes to the effort to **make** distinctions, then we must assume that those distinctions actually matter.

First, in this Court's *Dennis I* Opinion, both the majority and dissent were clear that expulsion was different from resignation, with different procedures and consequences. The majority and dissent each made clear that expulsion ends a person's obligations to the Club, although the majority ruled that the expulsion process was not

[8] "[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. 1347).

invoked with regard to the Dennises and therefore was not relevant under the Dennises' particular facts.[9]

Second, the governing documents are clear that expulsion is different from resignation—each exit path is addressed in different parts of the governing documents, with different procedures and consequences. Under the governing documents, "expulsion" severs a member's relationship with the Club, and it ends a person's obligations to the Club. The bylaws state that "expulsion" causes a person to "cease to be an equity member," meaning they no longer have member responsibilities such as dues and other charges. (R. p. 1299 (B-11, § 8(b)); *see also* R. p. 1445 (2008 Plan, § 3.4(b), identifying "expulsion" as a way in which a "person shall cease to be an Equity Member.")).[10]

Third, the documentary evidence is clear that when a member is expelled, their membership ends forever, along with future obligations. Expelled members are required to surrender their membership certificates. (*See, e.g.*, R. pp. 505, 1566, 1567, 1568). The Club's Resale List shows that such memberships belong to the Club (the Club's "Membership Pool"), not to the former member. (R. p. 1552, 1552; *see also* R. p. 895 line

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[9] The Supreme Court majority discussed that that expulsion—unlike resignation—would arise only after a specific process involving suspension and then expulsion, which the majority held did not take place with regard to Mr. and Mrs. Dennis. The dissent explicitly discussed how expulsion would end a member's liability for future dues. *Dennis I*, 425 S.C. at 204, 213, 821 S.E.2d at 673, 677 (2018).

[10] *See, e.g.*, *Appellants' Petition for Rehearing*, filed Jan. 31, 2020, at pp. 7–9; *see also Brief of Appellant*, filed August 27, 2015, at pp. 3–6, 13–18, 29–32; *Reply Brief of Appellant*, filed Aug. 27, 2015, at pp. 1, 6–8.

25 – p. 896 line 14). Moreover, "[a]ny 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. 319). The Record shows that expulsion ends a person's future membership obligations in the same way that it ends their membership rights, forever.

The Club also argues that this is a resignation case only and does not involve expulsion. This sidesteps the inconvenient fact that—for years—the Club and the Petitioners have been fighting about whether or not Petitioners were, or should have been, expelled under the governing documents. As stated in Petitioners' initial appeal brief, "This [i.e., expulsion] is the exit method that applies to Gregory Martin." *Brief of Appellant*, filed Aug. 27, 2015, p. 5;[11] *see also id.* at 6 ("Under these terms and circumstances, Gregory Martin was expelled in or about May of 2010, if not earlier."). While Petitioners salute the sheer *chutzpa* it takes for the Club now to argue that this is only a resignation case, Petitioners would respectfully point to the following pages in the Record on Appeal that show otherwise: 11, 12, 14, 35–40, 48–60, 78- 89, 113, 134–138, 202, 204, 218–239, 240–241, 243–245, 251, 328–330, 334–341, 348–350, 352, 358–359, 391–392, 394, 422–423, 429, 434–435, 437–440, 465–466, 471–472, 474, 484, 486–487, 505, 532–534, 536–537, 541–544, 621, 625, 670, 673–674, 676, 893–896, 898–899, 922–924, 937, 940–942, 955, 1034, 1038, 1045, 1100, 1101–1103, 1108, 1112–1113, 1115, 1154, 1158–1162, 1165, 1191, 1199, 1202–1203,

[11] The same argument was made in the brief of Frey, on the same page.

1207–1212, 1219, 1221–1222,[12] 1225–1227, 1230, 1231, 1568. This case is, and always has been, very much about expulsion of Petitioners.

Finally, the Club makes an unpreserved argument that expulsion should be treated the same as resignation, pursuant to S.C. Code § 33-31-621. This Court did not rule on § 33-31-621 in *Dennis I*, and the opinion has no applicability to a different section of the statute with drastically different terms. For example, § 33-31-621 requires that expulsion procedures be "fair and reasonable" and "carried out in good faith" and "tak[e] into consideration all of the relevant facts and circumstances." Section 33-31-621 also specifies that an expelled member "*may* be liable to the corporation" for certain obligations, which is different from the verbiage of § 33-21-620. (emphasis added). The Club's telling failure to address, or even acknowledge, these important points of statutory interpretation speaks volumes.

This Court should grant certiorari to review this issue, for clarity below and in other cases where the distinction between resignation and expulsion is at issue.

V. The question of the extent of damages is a key issue in this appeal and the pending Callawassie cases.

The fourth issue on which the Petitioners seek this Court's review is the Court of Appeals' error in affirming the trial court's damages award. Among other errors, the Court of Appeals failed to consider that the question of liability is inextricably tied up in

[12] "It is a little bit like being expelled from school but still having to pay tuition [for years and decades to come]. We think that that is a misreading of the statute. We also respectfully assert we should be at least be allowed a trial on those issues." (R. p. 1222).

the issue of improper changes to the governing documents. The Club itself drives this argument home, by pointing out in its *Return*: "In arguing that liability for unpaid dues and fees should be capped at the amount of their equity contribution, the Petitioners appear to rely on language from the 1994 Plan, which is different from the 2008 Plan." (*Return to Petition for Writ of Certiorari*, p. 15). As discussed above, this Court should grant certiorari to consider whether the Club followed the amendment procedures within its own governing documents, as well as under the Nonprofit Corporation Act. The Court of Appeals originally determined that a question of fact exists on the amendment issue; it erred in reversing itself, when the facts have not changed. *Compare Callawassie Island Members Club, Inc. v. Martin,* Op. No. 2018-UP-178 at p. 6 (Ct. App. 2018) ("Viewing this evidence in the light most favorable to Martin, there is a genuine issue of material fact regarding whether the governing documents were improperly changed . . . ") *with Callawassie Island Members Club v. Martin*, 2019-UP-393 at p. 10 (Ct. App. 2019) (misconstruing *Dennis I,* as well as the express language of the documents, to find that "Appellants rely on language in the Plan rather than the amendment provision in the Rules . . . The Rules do not contain any provisions requiring a vote of the full membership to amend.").

The Club also contends that the Petitioners' argument on set-off was not preserved, and that it was raised for the first time on rehearing in the Court of Appeals. This is inaccurate. Petitioners have been arguing since their opposition to the Club's motion for summary judgment that they are entitled to a have any amount deemed to be

owed to the Club offset by their membership contribution.[13] For the moment setting aside, for the sake of argument, the evidence that the Club unauthorizedly modified the governing documents to affect the computation of its members' dues and liability, the contractual language entitling Petitioners to have their judgment reduced by the amount of their membership contributions is unambiguous and should have been construed by the Court of Appeals to allow such a set-off.

Petitioners respectfully ask that this Court would grant certiorari to correct the Court of Appeals' errors on the issues of damages.

VI. This Court should consider disparate treatment in violation of South Carolina law.

Petitioners seek certiorari review on the issue of the Club's disparate treatment of its members, particularly in light of the Court of Appeals' ruling on this issue in *Dennis I* (which the Club has asked this Court to review). *See The Callawassie Members Club, Inc. v. Dennis*, Op. No. 5696 at p. 5 (Ct. App. 2019) ("We find 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

[13] *See, e.g.*, R. pp. 233, 237 ("As to damages, taking the [Petitioner's] allegations as true, the [Petitioner] overpaid on dues and fees and is seeking return of the overpayment. In addition, the [Petitioner] is owed for the amount of equity he still holds in the membership or for which he was never paid when he should have been rightly expelled."); *Brief of Appellant* at pp. 13, 17–20, p. 20 n.9 ("Alternatively, the Order incorrectly failed to allow [Petitioner] a credit of $26,000 for his equity contribution, toward the judgment amount [because the] documents specify that unpaid dues are to be 'deducted from' a member's equity in the Club."), p. 41; *Reply Brief of Appellant* at pp. 8–9, pp. 15–16; *Supplemental Brief of Appellant* at p. 10.

violated the Nonprofit Corporation Act."). The same disputed material issue of fact exists here.

The Club's *Return* argues only that this issue was not preserved for appeal. This issue was preserved and argued by Petitioners, including pleading it as an affirmative defense (R. pp. 86–87, violation of S.C. Code § 33-31-610 *et seq.*); in their motions before the trial court (R. p. 338-339: "The Defendant was denied the opportunity to concede his membership offered to other similarly situated members."), R. p. 337 ("In addition, the Defendant presented evidence that concessions were allowed in numerous circumstances which clearly violate the rights of the Defendant who has not been 'allowed' to concede his membership where others of the same class of membership have been."); in their *Brief of Appellant* at p. 2 (citing § 33-31-610), p. 5 (discussing expulsion of other members, but not Petitioners), p. 17 (discussing expulsion of other members, but not Petitioners), p. 25 (discussing Club's practice of expelling other members, but not Petitioners), p. 26 (discussing testimony about the Club allowing other members to concede their memberships), p. 40 (citing § 33-31-610 "disparate treatment of members"), p. 42 (discussing the Club's roster of conceded members on which Petitioners relied), p. 45 (arguing "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]"); **and** in the *Reply Brief of Appellant*, at p. 12 (discussing the Club allowing other members to concede their memberships, but not Petitioners).

The question of whether a non-profit corporation such as the Club may treat certain members like the Petitioners differently is ripe for review by this Court. Petitioners respectfully request that this Court would grant a writ of certiorari to decide this issue.

VII. The trial court ruled on the issue of attorney's fees, which warrants appellate review.

The Court of Appeals erred in finding that an issue, which was raised to and ruled on by the trial court, was nonetheless somehow unpreserved for appellate review. The Club and the Court of Appeals mistakenly contend that because this issue was raised in a Rule 59 motion,[14] it was untimely. While that contention may *sometimes* be correct, the trial court nonetheless asked for additional briefing on this particular issue,[15] and it then went on to expressly rule on it. (*See, e.g.*, R. pp. 262-268, pp. 1241 line 12–1246, pp. 8-9).

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[14] The Court of Appeals' determination on issue preservation mistakenly assumes that the question of attorney's fees was raised for the first time in Petitioners' motion to reconsider. In fact, the question of the validity of the Club's claim for attorney's fees was first raised by Petitioners in their Answer, where they denied that the Club was entitled to the relief it sought. The Club's argument for summary judgment was grounded in its contention that it was entitled to relief based on the contract between the parties. The Club never actually cited nor argued the particular contractual provisions pursuant to which it claimed to be entitled to attorney's fees—it just made the broad claim that it was entitled to them. It is neither logical nor just that Appellants would have been required to argue *against* attorney's fees any more specifically that the Club was required to argue *in favor* of them. In fact, the circuit court's initial order granting summary judgment did not even cite any provision within the governing documents in support of its award of attorney's fees. (R. pp. 11–18). The purpose of a Rule 59 motion to reconsider is to obtain a ruling from the circuit court when it has failed to make one.

[15] At the hearing on the Rule 59 Motion, Judge Kinard was particularly interested in the question of attorney's fees. *See, e.g.*, R. p. 1241 (Judge Kinard: "So I don't know about that. So just draft me an order confirming what I ruled before **and address the attorney's fees**. . . . And I am not ruling on that because I haven't studied that issue. I haven't studied that issue. . . ."). He requested that the parties provide supplemental briefing on the issue, which the Petitioners submitted—and to which the Club did not object. (R. p. 262 (emphasis added)).

Appellate review of the issue is therefore not only justified, but it is **necessary** to correct the trial court's erroneous ruling.

Petitioners ask that this Court would issue a writ of certiorari to correct the Court of Appeals' procedural error, and to hear and decide the question of whether the trial court incorrectly awarded attorney's fees in contravention of the contract.

VIII. Petitioners should be allowed to present their counterclaims to a jury.

The Court of Appeals' determinations on the Petitioners' counterclaims hinged on its misinterpretation and misapplication of this Court's *Dennis I* opinion and the Nonprofit Corporation Act. The Court of Appeals simply stated, "Our decision is based on the interrelated nature between Appellants' breach of contract counterclaims and the Club's breach of contract claim and, as stated above, the fact that our supreme court found the relevant provisions of the governing documents are unambiguous." 2019-UP-393, at p. 14. This Court should grant certiorari to correct the mistaken application of *Dennis I*, and to prevent misunderstanding in the trial courts below.

A. Petitioners' breach of contract counterclaim merits consideration by this Court.

Petitioners' argument on their breach of contract counterclaim is that the Club's improper amendment of the governing documents was in breach of the contract, and that the improper amendment renders broad swathes of the contract void or invalid. Petitioners also contend that the Club's disparate treatment of its members was itself in breach of the contract.

The Club argues, utterly without basis, that Judge Mullen's dismissal of Petitioners' counterclaim for disparate treatment under the Nonprofit Corporation Act somehow bleeds over to preclude Petitioners' breach of contract counterclaim. This is a slight of hand game, and the Court should not be fooled. To be clear, Judge Mullen's order did ***not*** dismiss Appellants' ***defenses*** under the Nonprofit Corporation Act.[16] Further, Judge Mullen's order did ***not*** dismiss Appellants' ***counterclaims*** for breach of contract nor for misrepresentation.

Nothing in Judge Mullen's order prohibits Petitioners from arguing that the Club's improper amendment without membership approval, in violation of the terms of the governing documents, was a breach of contract. Nothing in Judge Mullen's order prohibits Petitioners from arguing that, because the Club was organized pursuant to the Nonprofit Corporation Act, its governing documents must comply (and remain compliant) with the Act's requirements. Nothing in Judge Mullen's order prohibits Petitioners from arguing that uniform treatment of members was an implicit term of the contract, which impliedly incorporates the requirements and protections of the Nonprofit Corporation Act by virtue of the Club's organization thereunder. And nothing in Judge Mullen's order precludes Petitioners from arguing that any violation of the Act by the Club constitutes a breach of contract. The Club is simply wrong in this portion of its *Return*. (*Return* at p. 21).

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[16] The Order found that Petitioners could not bring certain counterclaims against the Club because the court held those specific claims must necessarily be asserted as a derivative action. (R. pp. 6-7).

Because Petitioners' breach of contract counterclaim is bound up in the Court of Appeals' apparent misunderstanding of this Court's *Dennis I* decision, Petitioners respectfully request that this Court would grant certiorari to clarify the issue.

B. A jury question remains on Petitioners' counterclaim for misrepresentation.

Petitioners seek review of the Court of Appeals' erroneous disposition of their counterclaim against the Club for misrepresentation. Of course, the Club argues that the expulsion provision on which the Petitioners relied to their great detriment "was amended in the 2007 and 2009 Rules to be discretionary rather than mandatory." (*Return*, p. 22). This Court should not allow the Club to linger within that particular echo chamber. Petitioners respectfully request that this Court would grant certiorari to reverse the Court of Appeals on the amendment issue—on which so many other questions, including this one, depend—and remand so that a jury can decide the factual question of whether the Club's representations to Petitioners were false.

CONCLUSION

For the above reasons, and for those within their *Petition for a Writ of Certiorari*, Petitioners respectfully request that this Court would grant their Petition.

Respectfully submitted,

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