RECEIVED
Apr 19 2021
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

---

Court of Appeals 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Withdrawn, Substituted and Refiled December 18, 2019

---

Appellate Case No. 2020-000667

---

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.

---

**BRIEF OF PETITIONERS**

---

Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
FORD WALLACE THOMSON LLC
715 King St., Charleston, SC 29403
(843) 277-2011
www.FordWallace.com

*Attorneys for Petitioners,*
*Gregory L. Martin and Michael J. Frey*

**TABLE OF CONTENTS**

Table of Authorities .......... iii

Statement of the Issues on Appeal .......... vii

Statement of the Case .......... 1

I. Factual Background .......... 1

A. Membership and Expulsion .......... 3

B. Massaging the documents: "shall" to "may" .......... 5

II. Procedural history .......... 6

A. Circuit court proceedings .......... 6

B. Court of Appeals proceedings, round 1 .......... 8

C. *Dennis* — Resignation from the Club .......... 8

D. Court of Appeals proceedings, round 2 .......... 10

E. *Dennis* .......... 11

Standard of Review .......... 12

Argument .......... 15

I. The lower courts erred when they upheld a contract that has been unilaterally modified such that it effectively binds Petitioners in perpetuity .......... 15

II. The Court of Appeals mistook the law and the contract when it allowed one party to unilaterally change material terms of the contract .......... 19

A. The lower courts failed to construe the contract in light of the Nonprofit Corporation Act .......... 22

B. The lower courts disregarded basic contract interpretation law when they failed to find that the Rules' amendments were in violation of superior provisions which should have operated to prevent them .......... 24

III. The Court of Appeals misconstrued precedent when it applied *Dennis's* determinations on resignation to the expulsions at issue here ........ 28

IV. The Court of Appeals erred in affirming the circuit court's damages award ........ 33

A. The question of damages is inextricably linked to the question of amendment ........ 34

B. Any amount of damages awarded should be capped at, or offset by, the amount of the Petitioners' membership contribution ........ 36

V. The Court of Appeals erred in upholding the Club's disparate treatment of its members of the same class ........ 38

VI. The Court of Appeals' errors on the foregoing issues invalidated its determinations as to Appellants' counterclaims ........ 40

A. Breach of Contract ........ 41

B. Negligent Misrepresentation ........ 41

C. Section 33-31-621(d) Statute of Limitation Issue ........ 43

VII. The Court of Appeals improperly deprived Petitioners of appellate review on the question of attorney's fees ........ 44

A. The question of attorney's fees was preserved for appellate review ........ 44

B. The circuit court erred in awarding attorney's fees to the Club ........ 47

Conclusion ........ 50

## TABLE OF AUTHORITIES

### CASES

*Atl. Coast Builders & Contractors, LLC v. Lewis*,
398 S.C. 323, 730 S.E.2d 282 (2012) .......................................................... 43, 46

*Batchelor v. American Health Ins. Co.*,
234 S.C. 103, 107 S.E.2d 36 (1959) .......................................................... 18

*Bennett v. Auto Owners Ins. Co.*,
405 S.C. 1, 747 S.E.2d 426 (S.C. 2013) .......................................................... 37

*Berkebile v. Outen*,
311 S.C. 50, 426 S.E.2d 760 (1993) .......................................................... 18

*Breedin v. Smith*,
126 S.C. 346, 120 S.E. 64 (1923) .......................................................... 42

*Carolina Cable Network v. Alert Cable TV, Inc.*,
316 S.C. 98, 447 S.E.2d 199 (1994) .......................................................... 18

*Catawba Indian Tribe v. State*,
372 S.C. 519, 642 S.E.2d 751 (2007) .......................................................... 22

*Childs v. City of D.C.*,
87 S.C. 506, 70 S.E. 296 (1911) .......................................................... 18

*Coastal States Bank v. Hanover Homes of S. Carolina, LLC*,
408 S.C. 510, 759 S.E.2d 152 (Ct. App. 2014) .......................................................... 47

*Florence City-County Airport Comm'n v. Air Terminal Parking Co.*,
283 S.C. 337, 322 S.E.2d 471 (Ct. App. 1984) .......................................................... 28

*Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n of S. Carolina*,
317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995) .......................................................... 47

*Hancock v. Mid-South Mgmt. Co.*,
381 S.C. 326, 673 S.E.2d 801 (2009) .......................................................... 14, 20

*I'On, LLC v. Town of Mt. Pleasant*,
338 S.C. 406, 526 S.E.2d 716 (2000) .......................................................... 46

*Johnson v. Roberts*,
812 S.E.2d 207, 422 S.C. 406 (Ct. App. 2018),
*aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019) ............................................................44, 46

*Jordan v. Sec. Grp., Inc.*,
311 S.C. 227, 428 S.E.2d 705 (1993) .......................................................................37

*Lee v. Univ. of S.C.*,
407 S.C. 512, 757 S.E.2d 394 (2014) .......................................................................27

*McMullen v. Hoffman*,
174 U.S. 639, 19 S. Ct. 839, 43 L. Ed. 1117 (1899) .................................................18

*Mcpherson v. J. E. Sirrine & Co*,
206 S.C. 183, 33 S.E.2d. 501 (1945) ........................................................................21

*Midland Mutual Life Ins. Co. v. Harrell*,
331 S.C. 394, 503 S.E.2d 189 (Ct. App. 1998) .......................................................42

*Pye v. Est. of Fox*,
336 S.C. 1, 633 S.E.2d 505 (S.C. 2006) ...................................................................43-44

*Roche v. S.C. Alcoholic Beverage Control Comm'n*,
263 S.C. 451, 211 S.E. 2d 243 (1975) ......................................................................46

*Rothrock v. Copeland*,
305 S.C. 402, 409 S.E.2d 366 (1991) .......................................................................13

*Sauner v. Public Serv. Auth.*,
354 S.C. 397, 581 S.E.2d 161 (2003) .......................................................................27, 41

*Seabrook Island Prop. Owners' Ass'n v. Berger*,
365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005) .......................................................47

*Sedar v. Reston Town Ctr. Prop., LLC*,
No. 19-1972 (4th Cir., Feb. 22, 2021) ....................................................................14

*Spencer v. Miller*,
259 S.C. 453, 192 S.E.2d 863 (1972) .......................................................................13

*The Callawassie Island Members Club, Inc. v. Dennis*,
425 S.C. 193, 821 S.E.2d 667 (2018) .......................................................... *passim*

*The Callawassie Island Members Club, Inc. v. Dennis*,
Op. No. 5696 (Ct. App. 2019) .......................................................... 11, 39

*The Callawassie Island Members Club, Inc. v. Frey*,
Op. No. 2018-UP-179 (May 2, 2018) .......................................................... 8, 20, 24

*The Callawassie Island Members Club, Inc. v. Martin*,
Op. No. 2018-UP-178 (May 2, 2018) .......................................................... 8, 20, 24

*The Callawassie Island Members Club, Inc. v. Martin & Frey*,
Op. No. 2019-UP-393 (Dec. 18, 2019) .......................................................... 11

*Tupper v. Dorchester County*,
326 S.C. 318, 487 S.E.2d 187 (1997) .......................................................... 13

*Ward v. West Oil Co.*,
387 S.C. 268, 692 S.E.2d 516 (2010) .......................................................... 17

*White v. JM Brown Amusement Co., Inc.*,
360 S.C. 366, 601 S.E.2d 342 (2004) .......................................................... 18

**STATUTES**

S.C. Code Ann. § 33-31-140 .......................................................... 22, 40

S.C. Code Ann. § 33-31-610 .......................................................... 38-40

S.C. Code Ann. § 33-31-611 .......................................................... 23

S.C. Code Ann. § 33-31-620 .......................................................... 6, 9, 11, 21

S.C. Code Ann. § 33-31-621 .......................................................... 6, 43

S.C. Code Ann. § 33-31-1021 .......................................................... 23, 34-35

**RULES**

S.C. R. Civ. P. 56 .......................................................... 13, 43-45

## MISCELLANEOUS

*American Heritage College Dictionary* (3rd ed. 1997)....................................................30

17A Am.Jur.2d, Contracts § 507 ..................................................................................27

*Black's Law Dictionary* (6th ed. 1990) ......................................................................30

## STATEMENT OF ISSUES ON APPEAL

I. Did the Court of Appeals err when it upheld a contract that has been unilaterally modified such that it effectively binds Petitioners in perpetuity?

II. Did the Court of Appeals mistake the law and the contract when it allowed one party to unilaterally change material terms of the contract?

III. Did the Court of Appeals misconstrue precedent when it applied *Dennis's* determinations on *resignation* to the *expulsions* at issue here?

IV. Did the Court of Appeals err in affirming the circuit court's damages award?

V. Did the Court of Appeals err in upholding the Club's disparate treatment of its members of the same class?

VI. Did the Court of Appeals' errors on the foregoing issues invalidate its determinations as to Petitioners' counterclaims?

VII. Did the Court of Appeals improperly deprive Petitioners of appellate review on the question of attorney's fees?

## STATEMENT OF THE CASE

This Court granted a writ of certiorari to review the Court of Appeals' decision in this case, which affirmed the circuit court's orders granting summary judgment in favor of Respondent, Callawassie Island Members Club, Inc. The orders on appeal[1] disregard evidence in the record; moreover, the lower courts' rulings are in conflict with the terms of the documents that bind the parties, as well as with this Court's precedent, statutory law, and the public policy of this State. This Court should reverse and remand for trial.

### I. Factual Background

Although the Court may be familiar with some of the characters, it should not assume that it knows the tale. These cases involve a social club on Callawassie Island, located outside of Beaufort. The social club—Respondent Callawassie Island Members Club, Inc. (the "Club")—is ravenously pursuing dozens of its former members in the South Carolina courts. The Club insists that its former members are indentured to keep paying dues and fees, for years after those members depart the Club. Petitioners Greg Martin and Michael Frey are two of the Club's former members.

The Club is not the homeowners' association in the Callawassie development, which is a separate entity not involved in this lawsuit. Instead, the Club exists only for socialization and recreation—croquet, mah-jongg, swimming, tennis, bridge, bunco,

---

[1] There are four orders on appeal: *Order[s] Granting Summary Judgment in Favor of Plaintiff Against [Petitioners]* and *Order[s] Denying Defendants' Motion for Reconsideration and Affirming Summary Judgment against [Petitioners]* (A. pp. 8, 11, 1589, 1599).

wine, golf, etc. Many Callawassie residents are not members of the Club. Petitioners' Club membership is a contractual relationship, and it does not touch and concern their property on Callawassie Island.

Martin and Frey applied for their membership in the Club, and they paid large initial capital contributions to become equity members ($31,000 for Martin, $22,000 for Frey). (A. pp. 333, 2268, 2394, 2473). As Equity Members, the Petitioners acquired a stake in the Club's governance and regulation; they acquired legal rights under the governing documents; they acquired authority to vote on the Club's affairs. Club dues are significant. Back in 2011, monthly dues were about $705/month, and they have only increased in the past decade. (A. p. 30).

The Club and its members are bound by the Club's governing documents, as well as by the Nonprofit Corporation Act under which the Club was formed. The Club's governing documents and the Nonprofit Corporation Act provide rights to the Club's members, and they impose mutual obligations on the Club and its members alike. *However*, in practice the Club perceives itself to be omnipotent regarding membership. In practice, sometimes the Club allows <u>certain</u> members to depart. In practice, sometimes the Club keeps billing <u>certain</u> former members long after they have sold their property on Callawassie. Consistency is certainly no hobgoblin of the Club's mind.

In practice, if the Club comes to dislike the confines of its governing documents, it simply changes the terms, or ignores them. Indeed, the Club has a practice of secretly changing its governing documents, without notice to or a vote of its Equity Members.

Those secret changes are what have trapped dozens of Equity Members, such as Martin and Frey, in what amounts to a contract with perpetual obligations.

Martin and Frey do not live on Callawassie Island, and they have not used the Club amenities for years. Martin and Frey severed ties with the Club years ago. Yet the Club has demanded that Martin and Frey continue paying dues for golf and other amenities—past, present, future—until the Club deigns to release them, which it may never do. As the Court of Appeals stated, "Regardless of what term is used, it appears this is an obligation which could last forever." (A. p. 2070).

Today, the Club claims it is owed hundreds of thousands of dollars. That amount increases monthly, with no end in sight.

**A. Membership and Expulsion**

At the time that Petitioners joined the Club, it was well-established that a member could exit the Club without selling his property on Callawassie. Martin and Frey did *not* join a social club which would require them to abandon their homes in order to escape it—who would? That, obviously, is too steep a price to pay for croquet and mah-jongg. Instead, there were various methods to end one's membership in the Club: a member could resign his membership, terminate his membership, concede his membership, or, under certain circumstances, suspend his membership and be automatically expelled by the Club. Each exit path had different procedures and consequences, explained in the Club's governing documents.

One exit path involved mandatory expulsion from the Club after four months of non-payment. As penalty, the Club would keep the member's large capital contribution while the Club obtained a new member. The capital contribution was *plenty* of money to cover the Club's cost while it acquired a new member. This agreed-upon exit path was based on the Club's governing documents, and on the practice and representations of the Club. The Club routinely published a delinquent member list, identifying by name its suspended members.

The expulsion rubric within the Club's governing documents was straightforward. First, a member who was sixty days delinquent on dues was "suspended." **There is no dispute that Martin and Frey each were suspended**. (A. pp. 145, 1743). Next, after four months of non-payment, the member was automatically "expelled." (A. p. 506). An expelled member forfeited his equity contribution to the Club (often as much as $45,000) and had no further financial obligation to the Club. An expelled member could never again be admitted to the Club facilities "under any circumstances" and was not eligible for Club membership again—the person was *verboten*. (A. pp. 1335–36, 217–19, 336–37).

The evidence and testimony in the record shows that the Club has a history of expelling members, as provided in the governing documents.[2]

[2] *See, e.g.* A. p. 1556; pp. 1570–71; p. 466, line 19–p. 466, line 24; p. 473, lines 10–11; R. 475, lines 6–18; p. 487, lines 2–17; pp. 506–08; p. 609, line 9–p. 612, line 18; p. 622, lines 1–14; p. 660, line 7–p. 661, line 12; p. 664, lines 16–20; p. 677, line 16–p. 678, line 8; p. 687, lines 8–9; p. 714, lines 3–13; p. 874, lines 5–19; p. 900, lines 2–17; p. 924, lines 9–25; p. 943, lines 22–24; p. 1102, lines 1–13; p. 1104, lines 3–8.

Based on the documents' clear formula, Martin should have been expelled in early 2012, and Frey should have been expelled in January of 2010, if not sooner. (A. pp. 30–31, 146–150, 1627–1631, 1744–1750).

**B. Massaging the documents: "shall" to "may"**

Over time, the Club apparently became dissatisfied with the number of people choosing the expulsion option. Therefore, in or about 2007–2008,[3] the Club quietly massaged the governing documents. The Club Rules were amended without notice to, or vote by, the members. Among other things, the Club furtively changed the word "shall" to "may" with regard to expulsion. There were enormous, material ramifications to this deceivingly small word swap. Instantly, the Club claims it could simply decline to expel a member, thereby binding the member to the Club for as long as the Club so chose. *The evidence shows that the Club did not get members' approval for, or even notify them of, this drastic change.* The Club just did it.

Martin and Frey were never notified of the amendments. They were not aware their rights had been changed, until they attempted to leave the Club . . . and found that the Club would not let them go. (A. pp. 424, 2023). The Club continues to doggedly claim them as its members, although it long ago banned them from the badminton courts.

[3] Because it was done in secret, the precise date of the change is not clear, although it appears to have been around the time of global financial crisis of 2007–2008 and the Great Recession. (A. p. 1439: 2007 Rules § 13.3.1).

## II. Procedural history

This is an appeal of summary judgment orders by the circuit court. Despite voluminous factual evidence in favor of Martin and Frey, the circuit court granted summary judgment to the Club.

### A. Circuit court proceedings

In September 2012, the Club filed Complaints in the Court of Common Pleas for Beaufort County, alleging claims of breach of contract and quantum meruit against defendants Gregory L. Martin and Rebecca L. Martin (the "Martins") and defendants Michael J. Frey and Grace I. Frey (the "Freys"). On November 21, 2012, the Martins and Freys each filed Answers and Counterclaims, alleging counterclaims of breach of contract, violations of South Carolina Code § 33-31-620, -621 *et seq.*, "Failure to allow Members to approve fundamental changes," misrepresentation, and breach of fiduciary duty. In December 2012, the Martins and Freys each filed an Amended Answer and Counterclaims, to which the Club responded on January 18, 2013, with its Reply to Defendants' Amended Answer and Counterclaims.

In July and August, 2013, the Club filed Motions to Dismiss, alleging that the Martins' and Freys' second, third, fifth, and sixth causes of action failed to state a claim. In particular, the Club argued that the breach of fiduciary duty claim must be pled as a derivative action. On November 6, 2013, the Martins and Freys each filed oppositions to those motions to dismiss, arguing that they were seeking redress for their individual losses, which did not need to be filed derivatively.

On March 7, 2014, the Club filed a Motion for Summary Judgment against each the Martins and the Freys, seeking judgment as a matter of law in favor of the Club on all of the Club's claims, and seeking judgment as a matter of law dismissing all of the Martins' and Freys' counterclaims.

On April 10, 2014, the Circuit Court granted in part the Club's Motions to Dismiss, holding that the breach of fiduciary duty counterclaims, and certain other counterclaims, must be plead as derivative claims. On May 7, 2014, the Martins and Freys each filed a Second Amended Answer and Counterclaim, alleging counterclaims for breach of contract, violation of South Carolina Code §§ 33-31-620, -621 *et seq.*, violation of South Carolina Code § 33-31-611, misrepresentation, and South Carolina Code § 33-31-610 *et seq.*, in addition to numerous affirmative defenses. The Club filed its response to those pleadings on May 16, 2014.

On May 19, 2014, the Martins and Freys each filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. On May 19, 2014, a hearing was held in Beaufort before The Honorable J. Ernest Kinard, Jr., Circuit Court Judge, on the Club's Motions for Summary Judgment. On June 27, 2014, Judge Kinard issued two orders granting the Club's Motions for Summary Judgment on all claims and counterclaims as to Gregory L. Martin and Michael Frey, but denying the claims as to Rebecca Martin and Grace Frey.

On July 7, 2014, Petitioners each filed a Motion to Reconsider Order Granting Summary Judgment. Supporting memoranda and attachments were filed on July 16,

2014. The Club filed a Memorandum in Opposition to Petitioners' Motion to Reconsider on October 28, 2014. On November 3, 2014, Judge Kinard heard oral arguments on the Motions to Reconsider. On November 17, 2014, Petitioners each filed—at Judge Kinard's direction—a Supplemental Brief in Opposition to Plaintiff's Motion for Summary Judgment Demanding Attorneys' Fees. On December 22, 2014, Judge Kinard issued two Orders Denying Defendants' Motion for Reconsideration and Affirming Summary Judgment against each Appellant.

Petitioners each filed a timely Notice of Appeal on January 2, 2015.

**B. Court of Appeals proceedings, round 1**

The appeals were briefed to the South Carolina Court of Appeals, which filed Opinions No. 2018-UP-178 and 2018-UP-179 on May 2, 2018. (A. pp. 2165, 2368). In those opinions, the Court of Appeals affirmed in part, reversed in part, and remanded to the trial court. The Court of Appeals held, *inter alia*, that ambiguity exists in the governing documents, and that evidence exists as to whether the governing documents were improperly changed. The Court of Appeals also found that sufficient evidence exists to support Petitioners' counterclaims, and therefore summary judgment should not have been granted on the counterclaims. In May 2018, both the Club and Petitioners filed Petitions for Rehearing on certain parts of the Court of Appeals' opinions.

**C. *Dennis* — Resignation from the Club**

In the meantime, this Court ruled upon another of the many Callawassie cases proceeding through South Carolina's courts: *The Callawassie Island Members Club, Inc. v.*

*Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018) ("*Dennis*"). *Dennis* is a case about *resignation* from the Club, *not* expulsion by the Club. As this Court recognized, resignation is a different legal beast from expulsion, under the governing documents, the statute, and the Club's practices.

In *Dennis*, this Court ruled on three precise issues that were specific to the *Dennis* record and to the specific statutory provision at issue in that case: S.C. Code § 33-31-620 ("A member may resign at any time."). This Court held:

1. Payment after **resignation**: "[Section 5.11 of the 2008 Plan] unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after **resignation** until their membership is reissued."[4]

2. Parol evidence: "First, because we find the terms of the membership documents [at issue in *Dennis*] are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning."[5]

3. Nonprofit Corporation Act: "The dues, fees, and other charges the Dennises owe fall into the 'commitments made' category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises **resigned**—both provide that a member who **resigns** from the Club must continue to pay membership dues, fees, and other charges 'until his or her equity membership is reissued by the Club.' When the Dennises joined the club, they made a commitment to continue to pay dues, fees, and other charges during the period of time after **resignation** and before reissuance of the membership. Therefore, we find the requirement that members continue to pay dues, fees, and other charges after **resignation** until their membership is reissued is not prohibited by section 33-31-620."[6]

---

[4] *Dennis*, 425 S.C. at 200, 821 S.E.2d at 670 (emphasis added).

[5] *Id.* at 203, 821 S.E.2d at 672.

[6] *Id.* at 206, 821 S.E.2d at 673 (emphasis added).

This Court expressly recognized that expulsion was not at issue in *Dennis*. The Court's majority specified that the expulsion provisions were not invoked in *Dennis*:

> This provision makes it clear that **mandatory expulsion** arises only after the board has suspended a member, which is discretionary with the board. Here, no suspension ever occurred; the Dennises resigned. **Therefore, the four-month suspension period that leads to expulsion was never triggered**.

*Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 (emphasis added). The dissent in *Dennis* recognized that expulsion ends membership in the Club:

> Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. Any member who fails to do so "**shall be expelled from the Club**," **ending their liability for future dues**. . . .

*Id.* at 213, 821 S.E.2d at 677 (emphasis added).

In *Dennis*, this Court acknowledged that the Dennises raised other issues to this Court, which this Court did not rule upon. On November 14, 2018, this Court remanded *Dennis* to the Court of Appeals to address the other issues.

### D. Court of Appeals proceedings, round 2

Back in the Court of Appeals, on November 30, 2018, the court granted both sides' petitions for rehearing in the *Martin* and *Frey* cases. The Court of Appeals requested that the parties file supplemental briefs in light of this Court's decision in *Dennis*.

Both sides filed supplemental briefs. Summarized, the Club argued that the *Dennis* opinion categorically decided all legal and factual issues, of any sort, in favor of the Club, be they fish or fowl. The Club's favored word on this topic was "subsumed," as in "*Dennis* subsumes all things Callawassie." In contrast, Petitioners argued that

*Dennis* applies to the specific facts and issues in the *Dennis* case: resignation and the resignation provision of the Nonprofit Corporation Act (S.C. Code § 33-31-620).

The Court of Appeals held oral argument on each *Dennis* and *Martin*/*Frey* on May 7, 2019. The Court of Appeals questioned counsel extensively on the scope and meaning of this Court's *Dennis* ruling—specifically, whether *Dennis* is confined to the specific facts in *Dennis*, as the opinion stated? Or does it have the broader, all-encompassing scope that the Club claims?

On December 19, 2019, the Court of Appeals withdrew its previous opinions in *Martin* and *Frey* (now consolidated), and substituted a new opinion, 2019-UP-393. In that ruling, the Court of Appeals subscribed to the Club's subsumption argument and interpreted *Dennis* to categorically decide all things Callawassie, regardless of whether or not the issues or facts were within the scope of *Dennis*. Believing it was entirely bound by this Court's ruling, the Court of Appeals quietly observed:

> As noted, the supreme court declined to call this obligation without a foreseeable end a "perpetual liability." Regardless of what term is used, it appears this is an obligation which could last forever.

(A. p. 2070).

After their petition for rehearing was denied by the Court of Appeals, Martin and Frey petitioned this Court for a writ of certiorari, on April 27, 2020.

**E. *Dennis***

In addition to *Martin* and *Frey*, the Court of Appeals also issued a ruling on the remanded *Dennis* case. (Opinion No. 5696, filed Dec. 18, 2019). In that ruling, the Court

of Appeals affirmed in part, reversed in part, and remanded to the trial court. Among other things, the Court of Appeals held that a question of fact exists as to whether the Club disparately treated members, in violation of S.C. Code § 33-31-611(c). Summarized, the Court of Appeals noted that the Club allowed some members to depart the Club but denied that right to others (like the Dennises). The Court of Appeals held that discrimination among members would violate the requirements of the Nonprofit Corporation Act. The Court of Appeals remanded *Dennis* to the trial court.

In *Dennis*, both sides moved for rehearing on various issues, which the Court of Appeals denied. Both sides then petitioned this Court for a writ certiorari, which this Court declined on January 22, 2021, as to *Dennis*.

On March 9, 2021, this Court granted certiorari to review the Court of Appeals' opinion in *Martin* and *Frey*.

**STANDARD OF REVIEW**

The standard of review *matters* in this case. Importantly, there is more than one standard that applies: (1) de novo as to legal and contractual text issues, and (2) mere scintilla of evidence as to factual issues.

The first applicable standard is de novo, and it goes to the question of the ambiguity of the contract, which is a question of law for the court, as well as to the interpretation of a statute—also a question of law. *See Dennis*, 425 S.C. at 198, 821 S.E.2d at 669 ("We review questions of law de novo.").

However (and this is where the lower courts erred), even if the court in its de novo review finds the contract to be unambiguous and the terms of the statute clear, **the procedural posture of this case is nonetheless one of summary judgment**. Thus, like the lower court, the reviewing court is to apply the standard dictated by Rule 56 of the South Carolina Rules of Civil Procedure. Summary judgment is proper only where there exists no dispute of fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP.

Rule 56 makes a distinction between factual disputes, which are for the jury, versus questions of law—for decision by the court. In this case, that dichotomy has become muddled by the lower courts, which have mistakenly felt that the presence of questions of law transforms the court into factfinder. This is error. Instead, if triable issues of fact exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991) ("In determining whether summary judgment is appropriate, a court must not try issues of fact, but must discern whether genuine issues of fact exist to be tried.") *citing Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972). Moreover, summary judgment is not proper where further inquiry into the facts is desirable to clarify the application of the law. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997).

On summary judgment, all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Rothrock*, 409

S.E.2d at 367–368. Thus, where there exists even a scintilla[7] of evidence giving rise to a question of fact, summary judgment is not proper. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 673 S.E.2d 801, 803 (2009).[8]

It was in the misapplication of the standard of review that the circuit court and the Court of Appeals erred. The lower courts incorrectly hastened to find the contract at issue to be unambiguous, rendering the contract's construction a question of law. They similarly interpreted the statute. These question of law, however, **did not negate the need to apply the *facts* to the contract and the statute**, nor magically render the facts themselves undisputed. Because there were disputed facts, material to Martin's and Frey's defenses and counterclaims (and to the Club's claims against them), summary judgment was not proper. Moreover, because there were questions as to the application of the disputed facts to the contract and law at issue, the circuit court erred when it removed those factual questions from the province of the jury.

This Court should make findings of law and remand for trial on the facts.

---

[7] *Cf. Sedar v. Reston Town Ctr. Prop., LLC*, No. 19-1972 (4th Cir., Feb. 22, 2021) ("Recognizing this difficulty, current South Carolina Supreme Court Justice John C. Few once remarked, in jest, that 'scintilla is Latin for "whatever a judge wants it to mean."'" ).

[8] "Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock*, 673 S.E.2d at 803.

## ARGUMENT

This Court must reverse the lower court's rulings, which animate a perpetual contract, endorse unilateral modification of a mutual agreement, disregard the terms of the contract and governing law, and deprive Petitioners of trial on the disputed facts.

### I. The lower courts erred when they upheld a contract that has been unilaterally modified such that it effectively binds Petitioners in perpetuity.

As it stands, the lower courts' decision has condemned the Petitioners, and many others, to an inescapable bondage in which they are to be held captive indefinitely by a social club. The idea of being a slave to a social club seems almost comical . . . except that it's not. Because of the decisions on appeal, the Petitioners (and many others like them) are facing **hundreds of thousands of dollars** of ever-accumulating dues and fees,[9] without any end in sight. Resignation is meaningless. Selling their property is useless.[10] No one in their right mind will step in to take their place; but that is exactly what seems to be required.[11]

---

[9] For context, the Club claims that Greg Martin owes it hundreds of thousands of dollars. That includes ongoing monthly fees for golf, tennis, swimming, and other amenities that the Martins are prohibited from ever using, given that they have been expelled: "Any Member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club Facilities under any circumstances." (A. p. 1476, § 14.1.5).

[10] This Court, in *Dennis*—based on the specific record before it in that case—misapprehended the critical fact that membership in the Club does not touch and concern the land. Because Club membership is a distinct contractual agreement between the member and the Club, sale of a member's property does not automatically divest a member of his Club membership.

[11] And, of course—even if a such a martyr *were* to try to step in, like a *Hunger Games* volunteer tribute—the Club has the exclusive right to determine the qualifications for membership, and it reserves the sole authority to approve applications and to reject whom it pleases. (*See, e.g.*, A. pp. 1281, 1303, 1368, 1370, 1376, 1444, 1448, 1449, 1450, 1519, 1525).

When the Club first began to file its legion of lawsuits against its members, no one would have imagined this outcome of perpetual, inescapable liability. We know it is not what the hapless members of the Club signed up for—for who would? But the circuit court's grant of summary judgment, in which it found that the Club had legitimately modified its governing documents, and that expulsion could not in any way diminish a member's ongoing liability to the Club, had the practical effect of rendering the Club's contract a perpetual obligation. This Court should find that this was error by the circuit court, contrary to the law and policy of this State.

In *Dennis*, this Court deliberately left open the question of perpetual liability for future determination. Justice Few made clear that the majority opinion was "*not* deciding" the question of perpetual liability. *Dennis*, 425 S.C. at 202, 821 S.E.2d at 672 (emphasis in original). The dissent cautioned against the very result at which the Court of Appeals has arrived. The Court of Appeals, too, recognized the injustice of its decision; its footnote 2 frets about the prospect of perpetual liability, stating "Regardless of what term is used, it appears this is an obligation which could last forever." Op. p. 13 n.2. (A. p. 2070). After that remarkable acknowledgement by a three-judge panel, the footnote ends with a shrug, as if to sigh: "but what can be done?"

Something **must** be done. The judiciary is not an agent of injustice. The members of the Club should be afforded relief on the simple grounds that the Club's practices and governing documents are unlawful:

- They are unlawful because they have been unilaterally changed without notice to the members in order to create an inescapable servitude.

- They are unlawful because their unbargained-for terms are unconscionable and against public policy.

- They are unlawful because they are disparately applied and enforced.

- They are unlawful because the circuit court and the Court of Appeals have mistakenly construed their terms in a way that permits the Club to circumvent the law.

It is important that this Court grasp that the Petitioners neither bargained for nor signed a perpetual contract. **They joined a social club**, believing—as any rational person would—that they would not be bound to pay for golf and other games for all eternity. It is similarly unlikely that the Club, at the time, perceived itself to be offering membership into the afterlife. The membership contract was specifically drafted to contemplate various exit paths, which the drafter did not intend to be illusory.

Troublingly***, it is the courts*** that have helped to transform the Club's contract into a perpetual liability. By holding that the Club could unilaterally alter the contract's terms, and by finding that the Nonprofit Corporation Act supports (un-bargained for) ongoing liability, and by permitting the Club to disparately enforce its exit provisions, *inter alia*, the circuit court and Court of Appeals have endorsed an inescapable, perpetual obligation for the Petitioners. A court should "not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." *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). "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance **in any way** towards

carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract." *McMullen v. Hoffman*, 174 U.S. 639, 654, 19 S. Ct. 839, 43 L. Ed. 1117 (1899) (emphasis added); *see also White v. JM Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004) ("courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."), *citing Berkebile v. Outen*, 311 S.C. 50, 53–54, 426 S.E.2d 760, 762 (1993) (stating "[a]n illegal contract has always been unenforceable") *and Batchelor v. American Health Ins. Co.*, 234 S.C. 103, 107 S.E.2d 36 (1959) (noting that contracts violating public policy—as expressed in constitutional provisions, statutes, or judicial decisions—are void).

Perpetual contracts are against public policy. *See, e.g., Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994) ("Historically, perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract."); *see also Childs v. City of D.C.*, 87 S.C. 506, 70 S.E. 296 (1911) (holding "it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually" and noting "courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other.").

This Court must reverse the circuit court's and Court of Appeals' decisions, because they give life to a perpetual obligation. For public policy reasons, as well as for the reasons set forth below, this Court should hold outright that the Club's contract is (or has wrongfully become) unlawful. Alternatively, this Court should remand the case for trial on the question of whether the Club's contract is (or has wrongfully become) perpetual and therefore unenforceable.

## II. The Court of Appeals mistook the law and the contract when it allowed one party to unilaterally change material terms of the contract.

There is no question that the Club changed its documents in secret, without member approval, and without board approval. Throughout the years of these lawsuits, the Club has never denied that it did so. For example, Club president Karen Norwood testified that the Club changed language in the governing documents (from "shall be expelled" to "may be expelled") without discussion among the Club's board and without presentation to the members of the Club. (A. p. 544 (trans. p. 84, lines 3–5); p. 1046, lines 7–11; p. 1068, line 23–p. 1069, line 3). The affidavits of Martin and Frey confirm this—they attest that:

> I have never voted to change the requirement that a member must be expelled after 4 months of suspension and have never been made aware of any vote to do so, nor have I voted to restrict my right to transfer my property or membership.

(A. p. 241, ¶ 8; p. 244, ¶ 8).

At the heart of these Callawassie appeals, therefore, is a question of whether the Club improperly amended its governing documents to change material provisions on the

fundamental legal rights and obligations of its members. Importantly, this question underlies the lower courts' rulings on the contract, on the Club's damages, and on the Petitioners' defenses and counterclaims. The Petitioners did not sign a perpetual contract with indefinite liability. The membership agreement 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. The contract **became illegal over time** because the Club unilaterally amended its provisions. The Petitioners seek either an outright ruling from this Court that those amendments were invalid as a matter of law, or (at a minimum) remand for trial by jury on the questions of fact that exist as to whether the amendments were made in compliance with the law and in conformance with the contract.

Significantly, the Court of Appeals originally found that there **was** evidence in the Record that the Club had improperly amended the governing documents. (*See* A. pp. 2170, 2373: Op. Nos. 2018-UP-178, -179, at p. 6).[12] **That evidence has not changed**.

---

[12] The Court of Appeals found, in its first opinion, that:

> [Petitioner] contends the governing documents were improperly changed by CIMC to prohibit people from exiting the club . . . [Petitioner] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Petitioner], there is a genuine issue of material fact regarding whether the governing documents were improperly changed and whether the mandatory expulsion provision was still in effect at the time of [Petitioner's] suspension from the club.

(A. pp. 2170, 2373: 2018-UP-178, -179, at p. 6) (citing *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (stating the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof)).

However, on rehearing—for no reason apart from its misunderstanding of the scope of this Court's opinion in *Dennis*—the Court of Appeals reversed itself on this issue. Although *Dennis* contains dictum speculating that the Club's governing documents were amended properly, this Court did not actually decide the question, which was not before it for certiorari review.[13] **It was error for the Court of Appeals to find that dictum—in a different case, with a different record—somehow required withdrawal of its factual findings on Martin's and Frey's Records.**

Wrongly, the lower courts' decisions on amendment rely on a single provision from within the lowliest of the Club's governing documents (the Rules, as opposed to the Plan and the Bylaws) to support unbridled amendment power on the part of only one party to the contract. This was error. First, because the documents should be construed in light of the Nonprofit Corporation Act, which expressly prevents the Club from making the changes that it did without a vote of the members. Second, the lower courts' decisions are in conflict with this Court's precedent on contract construction, which requires that a contract's meaning be taken from the four corners of the document. *See, e.g., Mcpherson v. J. E. Sirrine & Co*, 206 S.C. 183, 33 S.E.2d. 501 (1945). In this instance, the four corners include the Club's governing documents in their entirety—the Plan, the Bylaws, and the Rules—<u>and</u> the law in existence at the time and place of its making.

---

[13] The *Dennis* Court was ruling only on the question of whether certain provisions of the governing documents were ambiguous, and on the Nonprofit Act's provision on resignation in S.C. Code § 33-31-620.

### A. The lower courts failed to construe the contract in light of the Nonprofit Corporation Act.

The Club organized itself as a Nonprofit Corporation, and its members are entitled to the protections of that statute. In their analysis of whether the Rules were properly changed by the Club (which relied on a single provision found within the Rules themselves), the lower courts failed to take into account that all of the governing documents are subservient to the law, which eclipses the documents' own hierarchy and which is incorporated into the contract. *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751, 756 (2007) ("[I]t is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract."). The Nonprofit Corporation Act expressly prevents the Club from making the changes that it did, without a vote of the members.

Importantly, regardless of the moniker that the Club attaches to them, be it "Plan," or "Rules," or "Terms of Indenture," all of the Club's governing documents are actually "Bylaws" as defined by the law of South Carolina. The Nonprofit Corporation Act clearly sets forth in its Definitions:

> (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 Ann. § 33-31-140 (emphasis added). Thus, the Club's "Rules" are truly corporation "Bylaws," and they are bound by the law's explicit requirements for their amendment.

The Nonprofit Corporation Act puts limitations on the amendment of a nonprofit corporation's governing documents (*i.e.*, bylaws), and it requires membership notice and approval for material changes:

- "Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction **unless the restriction is approved by the members and the affected member**." S.C. Code Ann. § 33-31-611 (emphasis added).

- "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." S.C. Code Ann. § 33-31-1021.

- "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 Ann. § 33-31-1021 (emphasis added).

The lower courts improperly ignored that the Club violated the law when it amended its Rules, in secret, to change language that affected the rights of its members, including members' legal and financial obligations to the Club.

As the Petitioners have contended throughout the years of this litigation, a question of fact exists as to whether the Club ever provided the required notice, or sought the required membership approval, prior to stealthily amending the Rules (which are actually "bylaws") to affect the substantive rights and obligations of certain members of the Club. There is no evidence whatsoever within the Appendix of such notice or vote;

in fact, there is evidence to the contrary.[14] Tellingly, even after years of litigation, the Club has produced no evidence contradicting Petitioners' evidence.

As a matter of law under the Nonprofit Corporation Act, the lower courts erred in finding that the Club could have unilaterally amended the documents to affect the substantive rights, the transfer rights, or the financial liability of members. Further, because (*inter alia*) Petitioners attested that they never voted on the Club's material changes to the governing documents, nor did they receive notice of the same, a question of fact exists as to whether the secretive process by which the Club changed the Rules violated the law. It was error for the lower courts to uphold summary judgment against the Petitioners, the very parties who produced evidence supporting their claim.

**B. The lower courts disregarded basic contract interpretation law when they failed to find that the Rules' amendments were in violation of superior provisions which should have operated to prevent them.**

The Club's governing documents themselves expressly prohibit the Club from secretly changing the substantive rights and obligations of its members. The documents are intended to operate together to require a vote by members on material matters. The Court of Appeals ignored the limitation on amendment in the Club's 2007 and 2009 Rules:

---

[14] As discussed below at Section III and acknowledged by the Court of Appeals, Petitioners each stated in affidavits that they never voted upon nor agreed to any changes affecting their liability for dues, the mechanism for exiting Club membership, restrictions on the transfer of their memberships, nor the scope of their liability. (A. p. 2170, 2373: 2018-UP-178, -179 at p. 6): "[Petitioner] stated in an affidavit that he never voted to change the requirement that a member must be expelled after four months of suspension and stated he was not aware of any vote to do so. Viewing this evidence in the light most favorable to [Petitioner], there is a genuine issue of material fact regarding whether the governing documents were improperly changed."); *see also* Section III, *infra.*

> [t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. **Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships.**

Op. p. 10 (A. p. 2443) (emphasis added). While the first sentence of this provision seems to permit certain amendment of the Rules by the Club board, the second sentence unequivocally operates to restrict the Club board's authority, by expressly subjecting any such modification to the requirements of the higher governing documents.

The hierarchy of the Club's governing documents is that the Plan is supreme, the Bylaws are next, and the Rules are the lowliest.[15] As an initial matter—and importantly—the Club's "Rules" are for "**use**"[16] of the amenities (hours of operation, dress code, conduct of visitors, etc.). The "Rules" are **not** for fundamental changes to membership rights, which are governed by the provisions in the higher-level Bylaws and Plan. The provisions of the Club Rules that the board is entitled to modify are those that pertain to day-to-day items such as hours of operation, pets in the pool area, golf tee times, dining room reservations, and "bona fide swimming attire." (*See, e.g.*, A. pp. 1317, 1320–1324). These standard operational issues within the Rules do not require a full vote of membership, which would be cumbersome to affect (from a practical standpoint) each

---

15 As this Court observed: "[t]he three documents reference each other and are intended to operate together." *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670.

16 *See, e.g.*, A. p. 1342, § VI.3.e: "the General Club Rules governing **use** of the Club and all its facilities by members and their families and guests . . . . (emphasis added).

time the Board experienced a change of heart on "cutoffs, dungarees, and bermudas." (A. p. 1323, ¶ 8).

But the higher-level Bylaws and Plan (to which the Rules are subject) <u>mandate</u> a vote of the membership for any amendment or modification which "materially and adversely affects the rights" of equity members; this is in conformance with the law of this State. The Plan has always required a vote of members for important issues:

> **Any** amendment or **modification** which **materially and adversely affects the rights of the equity members <u>must be approved</u> by a majority** of the votes held by the equity members so affected.

(A. p. 1272) (emphasis added). The Bylaws explicitly state that *the Plan* applies to "Membership transfer provisions," which are at issue here (*inter alia*). (A. p. 1496, § 10.1(e)). Similarly, the Bylaws may only be amended by a vote of the members.[17] (A. p. 1307: Bylaws Art. XIV, § 3, "Suspension"; § 5, "Expulsion").

The issues in this lawsuit—and the dozens of other similar lawsuits the Club is insatiably pursuing against its members—involve modifications to the fundamental legal rights and obligations of equity members, for which the governing documents expressly <u>require members' approval</u>. Modifications to the exit rights of equity members certainly "materially and adversely affect[ ] the rights of the equity members" and require a vote of the members, as do modifications to the provisions governing a member's financial

[17] "[T]hese By-Laws may be altered, amended, or repealed by a majority vote of all of the members of the Board of Directors and a majority of the votes cast by the equity members of the Club entitled to vote . . . A proposed amendment must be set forth in the notice of the meeting." (A. p. 1309, Art. XVIII, § 1).

liability to the Club upon disassociation. Such substantive terms cannot be unilaterally changed by the Club's board at its pleasure; instead, those provisions are expressly subject to and must follow the amendment process of the controlling governing documents, such as the Plan and the Bylaws. That the Club's board has tucked certain provisions in the Rules—and quietly massaged them over the years into something grotesque—does not change the fact that the process for modification of members' legal rights is "**subject to and controlled by**" the amendment provisions of the higher-level documents (Plan and Bylaws).

In contract terms, the lower courts' ruling on this point allows one party (the Club) to unilaterally change material terms of a contract (the membership agreement, bylaws, and rules) without consent of, or consultation with, the other party to the contract (the Petitioners, and scores of other members). Such a "contract" is no contract at all—it is inescapable bondage. But contract law is clear that material terms of an agreement can only be altered by *both* parties to the contract, not by one party alone. *See Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014) (noting that once a contractual bargain is formed, and the obligations are set, that the contract can only be altered by mutual agreement and for further consideration), *citing* 17A Am.Jur.2d Contracts § 507 ("[O]ne party to a contract may not unilaterally alter its terms."); *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 405, 581 S.E.2d 161 (2003) ("We cannot find anything in *Fleming* or elsewhere that allows a party to alter the terms of a bilateral contract by unilateral modification. It is well established that '[a] written contract may be modified by a subsequent agreement of the

parties, provided the subsequent agreement contains all the requisites of a valid contract,'" *quoting Florence City-County Airport Comm'n v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)). The Club's unlawful, unilateral amendments have created a never-ending servitude, in defiance of the law and the mutual benefit membership arrangement that once existed.

As a matter of law, this Court should find that the Club could not unilaterally alter its governing documents. A question of fact exists as to whether such unilateral amendment occurred. Particularly in light of the evidence in the Record to the contrary, the lower courts wrongly found that summary judgment was appropriate on the question of whether the governing documents were properly changed by the Club.

## III. The Court of Appeals misconstrued precedent when it applied *Dennis*'s determinations on resignation to the expulsions at issue here.

Martin and Frey were suspended from the Club.[18] From the outset, the Martin and Frey cases have been about the Club's obligation to *expel* members from the Club following suspension (after which the Club would retain Petitioners' large capital contributions). Based on the terms of the governing documents at the time that they became members, Martin and Frey understood and expected that they would be

---

18 The Court of Appeals recognized the suspension of Petitioners: "There is also evidence Appellants had been suspended by the Club before the initiation of the Club's action against them and thus, should have been expelled under the 2001 Rules. The record contains a November 2011 list of suspended members that includes both Frey and Quinn. Additionally, the Club's General Manager, Jeff Spencer, stated in an affidavit that the Club had 'been forced, owing to non-payment, to suspend' the membership rights and privileges of the Martins, the Freys, and the Quinns." (A. pp. 2066, 2169, 2372; *see also* A. pp. 145, 401, 2002, 1575).

automatically expelled by the Club subsequent to their suspension. This is because—until the Club secretly amended the documents—expulsion was mandatory ("shall"). But, without notice to the members, the Club unilaterally altered the terms to give itself the power of discretion ("may"). This seemingly tiny word change was of <u>enormous</u> significance: abruptly, the Club believed itself to have absolute discretion to keep certain members captive indefinitely.

Expulsion is different from resignation under the Club's governing documents. This Court recognized this fact in *Dennis*, both in the majority opinion and in the dissent:

> This provision makes it clear that **mandatory expulsion arises only after the board has suspended a member**, which is discretionary with the board. Here, no suspension ever occurred; the Dennises resigned. **Therefore, the four-month suspension period that leads to expulsion was never triggered** [in *Dennis*].

*Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 (emphasis added).

> Suspended members have four months to pay all indebtedness, including dues that accrue during suspension. **Any member who fails to do so "shall be expelled from the Club," ending their liability for future dues**. . . .

*Id.* at 213, 821 S.E.2d at 677 (emphasis added).

Here, the Court of Appeals erred when it construed the Martin and Frey cases as resignation cases, under *Dennis*. The Court of Appeals summarized Petitioners' argument as "Appellants argue the Club 'cannot *expel* someone, bar them from all Club facilities, keep their equity contribution—and still demand that they pay dues, fees, assessments, and other charges for years to come.'" But the court then improperly leapt to a resignation analysis, under *Dennis*: "In light of the supreme court's holding in *Dennis*,

we have no choice but to hold the requirement that members continue to pay dues, fees, and other charges after *resignation* until their membership is reissued is not prohibited by the Act." (A. p. 2069 (emphasis added)).

The Club governing documents have distinct provisions for expulsion,[19] separate from those on resignation:

> 13.3.1 Any member whose account is delinquent for sixty (60) days from the statement date may be suspended by the Board of Directors. Suspended members may not use any Club facilities, participate in any Club activities, or vote on any Club matters. Suspended members may be reinstated by the Board of Directors within four (4) months of their suspension upon payment of all indebtedness plus all dues, fees, assessments and charges (including any food and beverage minimums) accrued since the initial time of delinquency, plus interest calculated at the rate of one and one half percent (1.5%) monthly. Any member whose account is not settled within the four (4) months' period following suspension **shall be expelled from the Club**.[20]
>
> 14.1.5 **Expulsion**. Any Member of the Club who has been expelled **shall not again be eligible for membership nor admitted to Club Facilities under any circumstances**. An expelled member shall be so notified by registered mail and **shall have the obligation to surrender his or her membership certificate for reissuance by the Club to a new member.**

(A. pp. 1358–58 (emphasis added)). As this Court recognized in *Dennis*, the clear language establishes that expulsion ends a membership, and ends future obligation to

[19] The common definition of "expel" is "To force to leave; deprive of membership." A synonym is "eject." *Am. Heritage College Dictionary* p. 482 (3rd ed. 1997). *Black's Law Dictionary* defines "expulsion" as "A putting or driving out. Ejectment; banishment; a cutting off from the privileges of an institution or society permanently. . . ." *Black's Law Dictionary* p. 582 (6th ed. 1990).

[20] This provision stated "shall" until roughly 2007–2008, when the Club secretly changed the Rules to read "may." *See* footnote 3, *supra.*

the Club. This conclusion is supported by testimony, by Club documents, and by sworn affidavits.[21]

For example, the Club's 30(b)(6) designee (Harmon Switzer) and past Club president (Karen Norwood) testified that the suspension was automatic after a delinquency of several months, and Richard Carling (Club president and treasurer) confirmed that members who do not bring their accounts current within four months are expelled: "Following suspension they're expelled from the club, yes." (A. p. 473, lines 10–11; p. 537 (trans. p. 56, line 24–p.57, line 1); p. 1040 lines 21–24). The Club's former president also testified that:

> Q. Would you agree that the—the rule at that time was that a member would—would be expelled from the club if they were suspended for more than four months and did not settle their accounts?
>
> A. Yes.

(A. p. 475, lines 6–11). Club President Carling also stated that an expelled member would not again be eligible to be a member (unlike, for example, a "resigned" member, who could reapply for membership). (A. p. 475, lines 12–18). Norwood testified that § 13.3.1

---

21 Petitioners are mindful of this Court's ruling in *Dennis* that Ellen Padgett's testimony is, in certain instances, parol evidence. For completeness in this discussion, Petitioners note that the Appendix contains testimony of Padgett, who was membership secretary for the Club, among numerous other positions. For example, she testified that after four months of non-payment, members would be expelled and were then no longer members. (A. p. 956, line 8–p. 957, line 19; pp. 221–226; pp. 335–336). She testified that § 13.3.1 of the Club Rules is reasonably understood by her to mean that after four months of delinquency the member would lose their membership. (A. p. 956, line 8–p. 957, line 19; p. 897, line 25–p. 898, line 2; *see also* A. p. 687, lines 8–9; p. 713, line 22–p. 714, line 7; p. 220; p. 609, line 19–p. 610, line 22). In addition, other members testified that they were told they could end membership at any time.

of the Club Rules meant that a member would "absolutely have to be expelled." (A. p. 544, (trans. p. 84, lines 15–19 (emphasis added)). She also testified that, disturbingly, in later years the mandatory expulsion wording was changed from "shall be expelled" to "may be expelled" <u>without</u> discussion among the board and <u>without</u> presentation to the members of the Club. (A. p. 544 (trans. p. 84, lines 3–5); p. 1046, lines 7–11; p. 1068, line 23–p. 1069, line 3). The only plausible explanation for these hidden changes is that they were an egregious attempt to try to force expelled members to continue to pay dues far into the unforeseeable future.

Evidence shows that the Club expelled certain members after suspension. (A. pp. 1552–53, showing at least 15 expelled members). Although not consistent in its procedures, the Club would send letters to some members who had not paid dues for four months, declare them "expelled, " and tell them to "surrender your membership certificate to the club to the attention of the Membership Director Ellen Padgett . . . ." (A. pp. 1570–71, expulsion letters from Club). But the Club treated other members—like Martin and Frey—differently, choosing to hold them as members and to continue to bill them for ongoing dues, into infinity and beyond.

As the *Dennis* dissent recognized, under the governing documents "expulsion" <u>ended</u> 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. (A. p. 1303, § 8.b). Martin's and Frey's affidavits each state that their understanding from the Club, and from the Club

documents on which they relied, was that they would ("shall") be expelled after four months of delinquency and have no obligation going forward. (A. pp. 240–41; pp. 243–244).

The documents were, in part, **designed to protect the Club upon expulsion**. The penalty for expulsion is that the Club gets to keep the person's equity contribution. The forfeited equity contribution is intended to cover any purported dues and charges accrued during the four-month suspension period leading up to expulsion, as well as during the time that the Club seeks a new member. As an example of how the documents are meant to work: Martin's $31,000 equity contribution would be sufficient to cover dues at $705/month for a period of 43 months. In other words, upon expelling Martin, the Club had—by its own design—financial cushioning **for more than three years of dues**, which should be amply sufficient time for it to find a new member to take Martin's place.

Taking all inferences in the light most favorable to Petitioners, there is more than a "mere scintilla" of evidence supporting their arguments that they should have been expelled and any future obligation ended. And there are issues of fact as to whether Martin and Frey were properly expelled, when they were expelled, and as to the amount of money they owe, if any. This Court should remand for trial.

## IV. The Court of Appeals erred in affirming the circuit court's damages award.

Summary judgment was not appropriate on damages, neither on the facts or the law. The evidence shows that the Club unilaterally changed its contract to alter its members' liability—including on damages. That factual evidence should have compelled

remand by the Court of Appeals to the trial court for a jury determination of whether the amendments were made with the requisite notice and vote.

Further, the plain language of the Club's governing documents (a) precludes a damages award in excess of the Petitioners' equity contribution or, in the alternative, (b) unambiguously allows for a setoff for the amount of Petitioners' equity contribution. The lower courts erred as a matter of law by failing to apply the contract's clear limit of damages to the amount of equity contribution.

**A. The question of damages is inextricably linked to the question of amendment.**

The Court of Appeals failed to take into account that a question of fact exists as to whether the governing documents were improperly changed by the Club to make damages unlimited and eternal. The opinion states that the documents seemingly "neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership." (A. p. 2070) (Op. p. 13 fn. 2). The Court of Appeals goes on to describe this lack of clarity as an "apparent ambiguity" which "could require club members to pay dues in perpetuity." *Id*. One reason that the documents appear ambiguous **is because they have been improperly changed over time**. Given that the Club drafted the documents, and subsequently modified them, South Carolina law requires that they be construed against the Club and in favor of a trial on the issue.

As set forth above, the Nonprofit Corporation Act forbids amendment to bylaws affecting the computation of dues without membership approval. S.C. Code Ann. § 33-31-1021. The Act also requires notice to members in advance of the amendment of

bylaws. S.C. Code Ann. § 33-31-1021. The governing documents themselves prohibit amendments which "materially and adversely affect the rights of the equity members" without their approval. (A. p. 1272). The Petitioners submitted considerable evidence—certainly more than a scintilla—in support of their argument that the Club illegitimately amended the documents in a manner which materially affected the damages claimed by the Club. (*See, e.g.*, A. pp. 240–244).[22] It was error to deny Petitioners a jury trial on the issue of damages.

---

[22] There can be no dispute that the provisions governing damages ***have*** been changed through the years. Compare these sections, for example, and note the intentional removal of material terms like "accrue against":

- "An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club. **These dues <u>will</u> accrue against and be deducted from** the amount to be paid to the resigned member upon reissuance of his or her resigned membership." (A. p. 1264 (emphasis added) (1994 Plan)).
- "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. Any unpaid dues, fees, and other Charges . . . will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership." (A. pp. 1452–53 (2008 Plan, § 5.11) (removing the material term "accrue against," *inter alia*)).
- "Any equity member may resign from the Club by giving written notice to the Secretary. **Dues, fees and charges <u>shall</u> accrue against a resigned equity membership** until the resigned equity membership is reissued by the Club." (A. p. 1303 (1994 Bylaws, § 9) (emphasis added)).

  **Note that this entire provision has improperly been removed from the 2009 Amended and Restated Bylaws**. (A. pp. 1490–1497).

### B. Any amount of damages awarded at trial should be capped at, or offset by, the amount of the Petitioners' membership contribution.

In addition to the question of amendment, the lower courts wrongly disregarded the Petitioners' argument that the plain language of the contract confines a member's ultimate responsibility for damages due to the Club to the membership contribution.

The governing documents make the following statements, which clearly define a member's expectations as to the amount of damages due to the Club:

- "An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club. **These dues <u>will</u> accrue against and be deducted from the amount to be paid to the resigned member upon reissuance of his or her resigned membership."**

  (A. p. 1264 (emphasis added) (1994 Plan)).

- "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. **Any unpaid dues, fees, and other Charges . . . <u>will</u> be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.**"

  (A. pp. 1452–53 (2008 Plan) (emphasis added)).

- "Any equity member may resign from the Club by giving written notice to the Secretary. **Dues, fees and charges <u>shall</u> accrue against a resigned equity membership** until the resigned equity membership is reissued by the Club."

  (A. p. 1303 (1994 Bylaws) (emphasis added)).

- "The Club shall have a lien **against each member<u>ship</u>** for any unpaid dues, fees, and other Charges . . . ."

  (A. p. 1454 (2008 Plan) (emphasis added)).

- Article XI, Delinquencies, "The Club shall have a **lien against each membership** for any unpaid assessments, fees, annual dues, or other charges . . . ."

  (A. p. 1486 (2009 Bylaws) (emphasis added)).

These provisions are unmistakable in their effect: dues, fees, and charges accrue against the equity **membership**—and not against the member personally. In fact, the plain language of the documents evidences an intent by the Club to seek recourse for unpaid dues against the **value of the membership**. Ultimately, the Club may reclaim the **membership** through foreclosure, and recoup its lost dues from the membership contribution when it is reissued. (A. p. 1486 ("Delinquencies")). It is clear that, in the end, a member only may be liable up to the amount of his or her already-paid equity contribution ($31,000 and $22,000 for Petitioners here).

Pursuant to the express terms of the Club's governing documents, the circuit court erred in ordering damages in excess of the Petitioners' equity contribution, and in not providing for a setoff for their equity contributions. This Court is free to construe the force and effect of unambiguous contracts, and to hold that the plain language of the governing documents operates to restrict any recovery by the Club to an amount not greater than Petitioners' already-paid equity contribution. *Dennis* at 203, 821 S.E.2d at 672, *citing Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect."); *see also Bennett v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013).

Troublingly, if the circuit court's damages award is allowed to stand without a set-off for Petitioners' equity contribution, the Club will be afforded a windfall and the Petitioners will be improperly stripped of their equity contribution. More troublingly, unless the terms of the documents are construed to limit damages to the amount of a membership contribution, the result is perpetual, unfettered obligation. The governing documents expressly do ***not*** support perpetual damages. As a matter of law, they confine damages to a finite amount. Petitioners respectfully request that this Court hold the maximum damages the Club may claim must be confined to the amount of the member's equity contribution (here, the $31,000 for Martin, $22,000 for Frey, already paid).

This Court should reverse the lower courts' incorrect analysis on damages, which overlooks the question of amendment, allows the Club an unjust windfall, unlawfully strips the Petitioners of tens of thousands of dollars, and allows unlimited and unending damages.

**V. The Court of Appeals erred in upholding the Club's disparate treatment of its members of the same class.**

The Club has an unlawful practice of treating its members differently. This practice violates the Nonprofit Corporation Act § 33-31-610, which provides that members of the same class must have the same rights and obligations:

> SECTION 33-31-610. Differences in rights and obligations of members.
>
> All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

S.C. Code Ann § 33-31-610. Upon remand in *Dennis*, the Court of Appeals correctly held that the Club's disparate treatment of members of the same class raised a question of fact under the Nonprofit Corporation Act:

> 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 violated the Nonprofit Corporation Act.

(Op. No. 5696 at p. 5). The Club requested that this Court grant certiorari to consider the Court of Appeals' ruling, and this Court declined. As such, the ruling stands.

The same disputed material issue of fact exists in Martin's and Frey's cases. The Appendix here includes examples of the Club allowing some members to depart the Club (by concession[23] and expulsion ) thereby ending all financial obligations to the Club. The evidence includes:

> (1) Concession letters from the Club, which show the Club letting certain, favored members out of their membership without penalty (A. pp. 1558–72; 507–08);
>
> (2) The Club's resale list, which identifies members who conceded their memberships, as well as members who were expelled, thus freeing them from obligation to the Club (A. pp. 507–506, 1556–1557); and
>
> (3) Deposition testimony that other members were allowed to concede, or were expelled for non-payment (A. pp. 467, lines 3–5).[24]

---

[23] "Concession" is an extra-contractual arrangement between the Club and certain of its members, in which the Club apparently invented an exit path not contemplated by the documents and not allowed to all members.

[24] Subject to the limits set forth by this Court in *Dennis*, Petitioners note that Ellen Padgett testified that concession meant giving the membership back to the Club: "Q. And what would that mean, to concede it? A. That would mean that they would give up any ownership in that membership and that the club would take it over." (A. p 898, lines 15–19).

Yet, the Petitioners were not permitted to concede their memberships, and, although Petitioners were suspended, the Club apparently did not expel Petitioners.

Under S.C. Code § 33-31-610, the Club must apply rights and obligations consistently to its members. The evidence in the Appendix of disparate treatment defies the mutuality of the parties' contract, and it flies in the face of the Nonprofit Corporation Act's definition that members' "rights are considered the same if they are determined by a formula **applied uniformly**." S.C. Code Ann. § 33-31-140 (emphasis added). In its ruling in *Dennis* on remand, the Court of Appeals relied upon similar evidence of the Club's unequal application of its rules to its members, and it properly remanded for trial on the question. Under the law of South Carolina, the same facts compel the same disposition here; accordingly, this Court should remand Petitioners' cases for a trial on the Club's breach of contract and Nonprofit Corporation Act counterclaims.

## VI. The Court of Appeals' errors on the foregoing issues invalidated its determinations as to Appellants' counterclaims.

The Court of Appeals' errors set forth above contaminated its ruling on Petitioners' counterclaims. The Court of Appeals based its decision to uphold the circuit court's grant of summary judgment to the Club 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." (A. p. 2071). Thus, the Court of Appeals' errors on the facts, contract, and law carried forward for an erroneous ruling on Petitioners' counterclaims.

### A. Breach of Contract

The Court of Appeals was wrong to affirm the Circuit Court's grant of summary judgment to the Club on Petitioners' breach of contract counterclaims. First, the Club's unilateral amendment of the contract—which amendment was unlawful, contractually void, and procedurally invalid—itself constituted a breach of contract. Second, the questions of fact about the validity of the amendments (and the resulting uncertainty as to what terms apply) pertain as equally to the Petitioners' counterclaims as they do to the Club's underlying breach of contract claim. Third, the evidence in the Appendix of the Club's disparate application of the terms of the governing documents to different members raises questions as to whether the Club breached the contract by applying it unequally to its members—who were all to be treated the same under the terms of the contract and the umbrella of the Nonprofit Corporation Act. For these reasons, the Court of Appeals' ruling should be reversed and this Court should remand to the circuit court for trial on Petitioners' breach of contract counterclaims.

### B. Negligent Misrepresentation

The Court of Appeals is also mistaken in its analysis of the Petitioners' misrepresentation claim. The opinion correctly quotes the law, which is that "the plaintiff must show 'the defendant made a *false* representation *to the plaintiff*,'" but it goes on to misconstrue the law's application to the facts in the record. (A. p. 2072: Op. pp. 14–15, *citing Sauner v. Pub. Serv. Auth of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003) (emphasis added by Court of Appeals in its opinion)).

Here, the Petitioners are claiming that the Club's representations were the provisions of its governing documents, including the Rules, which supplied clear terms for various exit paths from membership (which governing documents should have been provided *to the Petitioners*), together with the reassurances of its membership director *to the Petitioners*, coupled with the Club's practice of publishing *to its membership* (including *to the Petitioners*) its list of suspended, conceded, and expelled members. These representations by the Club to Petitioners assured that they would be afforded the same rights as other members—to end their membership by expulsion, or by concession, or by the myriad other ways the Club let favored members depart. Clearly, those representations by the Club were as false as this brief is long. If the Club's documents, and its broadcast practice of allowing members to conclude their liability by concession/termination/suspension/expulsion were actually true, then there would be no need for the dozens of Callawassie cases the Club is pursuing through the courts at this moment.

At the very least (which is all that is required to deny summary judgment), the Court of Appeals overlooked that Petitioners raised a scintilla of evidence as to the falsity of the Club's statements regarding concession, termination, suspension, and expulsion, which evidence should have defeated summary judgment on the misrepresentation counterclaim. *See Breedin v. Smith*, 126 S.C. 346, 120 S.E. 64 (1923) ("the falsity of the alleged representations upon which they acted, was a question of fact for determination by the triors of fact under proper instructions of the court"); *Midland Mutual Life Ins. Co.*

*v. Harrell*, 331 S.C. 394, 503 S.E.2d 189 (Ct. App. 1998) (stating that the truth or falsity of the representation is a question of fact for trial where evidence is presented to that effect).

**C. Section 33-31-621(d) Statute of Limitation Issue**

Petitioner Frey argued that the Club's claims were barred by S.C. Code § 33-31-621(d), which provides:

> A proceeding challenging an expulsion, suspension, or termination, including a proceeding in which defective notice is alleged, must be commenced within one year after the effective date of the expulsion, suspension, or termination.

The Official Comment to § 33-31-621(d) indicates this time limitation is to "provide finality" with regard to a challenge involving a termination, suspension or expulsion from a non-profit entity.

The Court of Appeals, however, ruled that the statute of limitation issue was not preserved. (A. p. 2072: Op. p. 15). The law is clear that "where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012).

Here, Petitioner repeatedly plead both statute of limitations and § 33-31-621 in his pleadings. (*See, e.g.*, A. pp. 1637, 1638, 1644, 1684, 1685, 1689). When the circuit court did not explicitly address the statute of limitations issue in its order, Petitioner properly requested a ruling in his Motion to Reconsider under Rule 59.[25] (A. p. 1946: "In its Order

[25] "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the

the Court fails to rule on the Defendant's statute of limitations argument and the limitations on damages argument and rulings thereon are requested."). In his Brief of Appellant, Petitioner argued that the Club's claim was time-barred, including under § 33-31-621. (*See, e.g.*, A. p. 2507–08 (Br. of App. pp. 40–41: "The trial court erred by dismissing the [Freys'] statutory violation claim (S.C. Code § 33-31-621) because the Club is time-barred from challenging the [Freys'] mandatory expulsion.")). Mindful that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants,"[26] Petitioner respectfully submits that this issue was preserved, that the Club's claims are time-barred, and that the Court of Appeals should be reversed.

## VII. The Court of Appeals improperly deprived Petitioners of appellate review on the question of attorney's fees.

As an initial matter, because this Court should remand for trial, it should reverse the circuit court's award of attorney's fees as inapplicable. Alternatively, the Court should hold the Court of Appeals erred in finding the issue unpreserved and reverse the circuit court's error in awarding fees to which the Club is not entitled.

### A. The question of attorney's fees was preserved for appellate review.

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

---

issue so raised." *Pye v. Est. of Fox*, 336 S.C. 1, 4, 633 S.E.2d 505, 510 (S.C. 2006) (internal quotations and citations omitted).

26 *Johnson*, 422 S.C. at 412, 812 S.E.2d at 207 (internal quotations and citations omitted).

first raised by Petitioners in their Answer, where they denied that the Club was entitled to the relief it sought. (*See, e.g.*, A. pp. 34, 45, 1634, 1645). The Club's argument for summary judgment stemmed from its contention that it was entitled to relief based on the contract between the parties. On summary judgment, the Club never actually cited nor argued any 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 Petitioners 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 cite <u>any</u> provision within the governing documents in support of its award of attorney's fees. (A. pp. 4–11). The purpose of a Rule 59 motion is to obtain a ruling from the circuit court when it has failed to make one.

At the hearing on Petitioners' Motion to Reconsider, Judge Kinard was particularly interested in the question of attorney's fees. (*See, e.g.*, A. p. 1243: 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. . . ."). Judge Kinard *instructed* that the parties provide supplemental briefing on the issue, which the Petitioners submitted—and to which the Club did not object. (A. pp. 262–65). After considering the supplemental briefing, the circuit court made a ruling on the question of attorney's fees. (A. pp. 8–10). That particular ruling is now properly before the Court on appeal.

The procedural fact that the circuit court indeed made a ruling on the question sufficiently establishes this Court's jurisdiction to review the judge's decision. *See Roche v. S.C. Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975) (explaining that the purpose of an appeal is to determine whether the trial judge acted erroneously); *see also I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (noting that "the long-established preservation requirement [is that] the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments . . . [which] enable[s] the lower court to rule properly after it has considered all relevant facts, law, and arguments."). This Court "has cautioned that issue preservation 'is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants.'" *Johnson v. Roberts*, 812 S.E.2d 207, 422 S.C. 406, 412 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019), *quoting Atl. Coast Builders & Contractors*, 398 S.C. at 329, 730 S.E.2d at 285 . Further, "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Atl. Coast Builders & Contractors*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part).

To apply issue preservation rules to preclude review of a circuit court's decision on a Rule 59 motion would be nonsensical. Such a holding would permit circuit courts to inject erroneous holdings into their orders on motions to reconsider, which would be immune from all review. Because Petitioners asked for a ruling on attorney's fees, and the circuit court provided one, the issue is preserved for appellate review.

**B. The circuit court erred in awarding attorney's fees to the Club**.

In this action for a money judgment, the circuit court erred in ruling that the Club has the right to recover its attorneys' fees from Petitioners. "In South Carolina, the authority to award attorneys' fees can come only from a statute or be provided for in the language of a contract." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238–39, 616 S.E.2d 431, 434 (Ct. App. 2005). "There is no common law right to recover attorney's fees." *Id*.

The Club did not claim a statutory source of authority for recovering its attorneys' fees. The Club relied solely on the terms of the Club Plan, Bylaws, and Rules as a contractual source of authority for its claim for attorneys' fees. "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n of S. Carolina*, 317 S.C. 452, 457, 454 S.E.2d 901, 905 (Ct. App. 1995). "[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement." *Coastal States Bank v. Hanover Homes of S. Carolina, LLC*, 408 S.C. 510, 519, 759 S.E.2d 152, 157 (Ct. App. 2014).

By its plain terms, the Plan provides two alternative remedies to the Club in the event that a member fails to pay membership dues: (1) foreclose its lien against the membership; or (2) sue to recover a money judgment. The Plan contains the following provision concerning attorney's fees:

> CIMC [the Club] shall have a **lien against each membership** for any unpaid dues, fees and other Charges made by that member, which **<u>lien</u> shall also**

> **accrue reasonable attorneys' fees** incurred by the Club incident to the collection of such dues, fees and other Charges, or enforcement of such lien, whether or not legal proceedings are initiated. . . . **All such liens may be foreclosed by the Club**, in any action at law or in equity, with or without five (5) days prior written notice of the intended foreclosure, as may be deemed appropriate by the Club. **The Club may also, at its option, sue to recover a money judgment for unpaid dues, fees and other Charges**[27] **without thereby waving the lien securing the same**. . . .

(A. p. 289, emphasis added). The Plan is silent as to the recovery of attorney's fees in the event that the Club elects to sue for a money judgment, which it elected to do in the Petitioners' case. Clearly, attorney's fees incurred in collection efforts accrue only to the membership lien, and recovery of attorney's fees is only available in the event the Club elects to foreclose its lien on the membership.

The Bylaws contain language concerning attorney's fees that is virtually identical to the language in the Plan:

> The Club shall have a **lien against each membership** for any unpaid assessments, fees, annual dues or other charges made by that member of the Club, which **lien shall also accrue reasonable attorneys' fees** incurred by the Club incident to the collection of such annual dues or other charges, or enforcement of such lien, whether or not legal proceedings are initiated. . . . Upon full payment, the member making payment shall be entitled to be reinstated as a member in good standing of the Club and **all such liens may be foreclosed by the Club**, in any action at law or in equity, with or without five (5) days prior written notice of the intended foreclosure, as may be deemed appropriate by the Club. **The Club may also, at its option, sue to recover a money judgment for unpaid annual dues or other charges without thereby waiving the lien securing the same**. Any other liens placed against such equity membership shall be junior to Club's lien.

---

[27] The Plan defines "charges" as "dues, fees, food and beverage minimums, assessments, charges, state taxes, service charges and other charges that the Club may establish from time to time . . . ." (A. p. 287). It does not include attorneys' fees.

(A. p. 303, emphasis added). Like the Plan, the Bylaws provide that attorneys' fees are recoverable only when the Club elects to foreclose its lien on the membership. Like the Plan, the Bylaws are silent as to the recovery of attorney's fees in the event that the Club elects to sue for a money judgment.

Finally, the Rules contain the following provisions concerning attorneys' fees:

> In accordance with the Bylaws, the Club shall have a lien against each membership for any unpaid dues or other charges made by that member of the Club, which lien shall also accrue reasonable attorneys' fees incurred by the Club incident to the collection of such dues or other charges, or enforcement of such lien, whether or not legal proceedings are initiated. . .
>
> If the Club commences any legal action to collect any amount owed, or to enforce any liability of a member to the Club, the member shall also be liable for all costs and expenses of the legal action and **reasonable attorneys' fees required in connection with appellate proceedings.**

(A. p. 318, emphasis added). Under the Rules, the Club can only recover attorney's fees incurred in connection with any "appellate proceedings" when it elects to sue for a money judgment.

The plain terms of the applicable Plan and the Bylaws only entitle the Club to attorney's fees if it elects to foreclose its lien for unpaid assessments against a membership. Here, the Club elected to sue the Petitioners for a money judgment instead, in which case the Plan and the Bylaws do not provide for the recovery of attorney's fees. The Rules only provide for recovery of attorney's fees "in connection with appellate proceedings," which was not the situation before the circuit court. The circuit court's order accordingly erred as a matter of law when it awarded attorneys' fees in favor of the Club.

In incorrectly awarding attorneys' fees to the Club, the circuit court relied upon generalized statements in the Bylaws and other documents about the board's authority to interpret the Bylaws. (*See, e.g.*, A. pp. 9, 13–14, 1590, 1592). However, those general statements do not allow the board to circumvent clear limitations in the documents which limit attorneys' fees to situations when the Club attempts to recover on a lien. The circuit court's order to the contrary effectively disregarded specific provisions in the documents, and it improperly revised the rules mid-litigation. At the least, a genuine issue of material fact existed as to whether later-enacted versions of the Club's Rules (i) were properly enacted, (ii) override other documents such as the bylaws, etc., and (iii) are appropriate authority for the Club to attempt to foist attorney's fees on the Petitioners and others.

## CONCLUSION

For the above reasons, Petitioners respectfully request that this Court reverse the lower courts' decisions and remand these cases for trial.

Respectfully submitted,

FORD WALLACE THOMSON LLC

s/ Ian S. Ford
Ian S. Ford
Neil D. Thomson
Ainsley F. Tillman
715 King St., Charleston, SC 29403
(843) 277-2011
*Attorneys for Petitioners*