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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2020-000667
Case No. 2012-CP-07-3218

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,

and

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

v.

Mark K. Quinn and Sherry B. Quinn,..... Defendants,

Of Whom, Gregory L. Martin and Michael J. Frey are ..... Petitioners.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This action is on appeal from the entry of summary judgment in favor of the Respondent Callawassie Island Members Club, Inc. ("CIMC"). CIMC, a member-owned amenities club on Callawassie Island, Beaufort County, South Carolina, filed these lawsuits to enforce its contractual rights. CIMC's central purpose is to provide amenities (such as a world-class Tom Fazio golf course, clubhouse, tennis facilities and swimming pools) to Callawassie residents, rather than having the separate property owners' association provide them.

CIMC filed an action seeking to recover dues and other amounts from Michael J. Frey and Grace I. Frey, who are equity members of CIMC. (App. 1610-1631). CIMC also filed a similar action against Gregory L. Martin and Rebecca L. Martin, who were also equity members of CIMC. (App. 21-31). In those lawsuits, CIMC alleged that, under the governing documents, the Freys and the Martins are obligated to continue to meet their financial obligations until CIMC reissues their memberships to new members. Reissuance can occur either by transfer in connection with the sale of the parties' property on Callawassie Island or sale via the membership resale list. The Club has operated in that fashion for more than 22 years.

CIMC has a finite number of members – and, consequently, a finite funding source -- because it is organized within the Callawassie Island real estate community that it serves. CIMC's survival depends on *all* of its members paying their share of operating costs until a new member takes over their membership. This is what every member agrees to when he or she purchases a membership in CIMC. Several controlling documents, which have been amended and revised over the years, have governed membership in CIMC. Those documents include, in descending order of primacy, CIMC's By-Laws, Membership Plans, and General Club Rules. The Freys and the Martins have asserted counterclaims and argued, for various reasons and

notwithstanding their contractual promises, that they are not obligated to remain members of CIMC and can abandon their financial responsibilities to their fellow members whenever they want. In their Second Amended Answer and Counterclaims, they asserted counterclaims for breach of contract and negligent misrepresentation. (App. 78-96, 1679-1691).

The trial court correctly granted CIMC summary judgment as to Petitioner Michael J. Frey and Petitioner Gregory L. Martin (collectively "Petitioners") because the unambiguous documents provide that CIMC is entitled to the relief demanded. The trial court denied summary judgment as to the Petitioners' spouses pending the completion of further discovery. (App. 11, 1589). The Petitioners appealed the entry of summary judgment against them to the South Carolina Court of Appeals. The Court of Appeals initially affirmed in part and reversed in part.

However, during the pendency of their appeal in the Court of Appeals, this Court filed its Opinion reinstating summary judgment in favor of CIMC in another lawsuit, *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). The Court resolved all substantive issues in favor of CIMC. It found that CIMC had not violated the South Carolina Nonprofit Corporation Act and that the Dennises remain obligated to continue to pay dues, fees, and other charges. This Court thoroughly analyzed CIMC's governing documents, recognizing that the Bylaws, the Plan, and the Rules "govern the membership" and that "[t]he three documents reference each other and are intended to operate together." *Dennis*, 821 S.E.2d at 670. This Court rejected all arguments that those governing documents are ambiguous. It concluded that the language of those documents "unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued." *Id*. This Court also found "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place

at the time of the amendments." *Id.* This Court rejected the Dennises' "mandatory expulsion" argument, noting that the claimed mandatory expulsion language was removed from the 2009 Rules which applied at the time of the Dennises' resignation from the Club.

After this Court issued its ruling in *Dennis,* the parties filed Petitions for Rehearing in these appeals before the Court of Appeals. The appeals were subsequently consolidated. On December 18, 2019, the Court of Appeals — relying on this Court's *Dennis* opinion — affirmed the trial court's entry of summary judgment in favor of CIMC in both cases. The Petitioners sought rehearing, and the Court of Appeals denied that request. (App. 2074-2075). The Petitioners thereafter sought certiorari review in this Court, which was granted.[1]

[1] Mark K. Quinn was also an Appellant as part of the consolidated appeals in the Court of Appeals. Quinn and CIMC reached a settlement during the pendency of the appeal, and that appeal was dismissed by order of the Court of Appeals filed August 6, 2020.

ARGUMENTS

I. The Court of Appeals did not err in addressing the issues as presented and in refusing to address any unpreserved claim that the governing documents are illegal, unconscionable, or otherwise create perpetual liability.

The Petitioners initially make an exaggerated argument that they have been "condemned" to "inescapable bondage" and are "held captive." They claim that "trying to sell their property is useless." Such commentary is not only unsupported by the record, but it is also inaccurate in that hundreds of properties on Callawassie Island have been sold. They are claiming "perpetual, inescapable liability," and are pleading that the Court intercede to find the Club's documents and practices to be "illegal" and "unenforceable." Remarkably, the Petitioners did not even seek this relief in the trial court below.[2]

The Petitioners' claims of illegality, unconscionability, unenforceability, and "perpetual liability" were never raised in the trial court and are not properly preserved for appellate review. The trial court orders on appeal do not address those arguments. The Petitioners did not ask the

[2] Repeatedly throughout their opening brief, the Petitioners make factual allegations that are just that – mere allegations unsupported by any evidence. This is well illustrated by the "Factual Background" in the Petitioners' Opening Brief which lacks appropriate citations to admissible evidence. Most allegations include no citation to the record, and others include citations to previous legal briefs or filings. The Court is urged to closely review the Petitioners' factual assertions because there is a clear absence of admissible evidence to support most of those points. In essence, what the Petitioners repeatedly assert as fact is really argument of counsel. It is, however, well established that the assertions or arguments of counsel are not evidence. *See, McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E.2d 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered"); *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ... not evidence"); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986). The Petitioners also frequently make inflammatory references to other litigation pending between CIMC and other members. However, with the exception of the *Dennis* litigation, as adjudicated by this Court previously, any litigation involving other members is immaterial to this appeal and, in fact, the pleadings and orders pertaining to such litigation are not included in the Appendix or the lower court record.

trial court to declare that the governing documents are "perpetual contracts" that are contrary to public policy or that they are illegal, unconscionable, or otherwise unenforceable. These are arguments made for the first time on appeal. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). Additionally, these arguments reflect an impermissible change of theory on appeal. *See also, Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (litigant is prohibited from "chang[ing] his theory on appeal").

The Petitioners' Amended Answers and Counterclaims reflect that the Petitioners never affirmatively pled illegality, unconscionability, and unenforceability based on public policy as counterclaims or defenses. In *H.G. Hall Construction Co., Inc. v. J.E.P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (1984), this Court held that illegality of contract is an affirmative defense that must be pled. 321 S.E.2d at 271. This Court declined a request to set aside a verdict because a contract was illegal where the illegality of the contract was not raised as an affirmative defense in the answer. *See also*, Rule 8(c), SCRCP (specifically listing "illegality" as affirmative defense). Likewise, in *D&D Leasing v. David Lipson, Ph.D. P.A.*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991), the Court of Appeals ruled that unenforceability of a contractual provision is an affirmative defense. As mentioned, the prayers in the Petitioners' Amended Answers and Counterclaims did not seek rescission nor any declaration that the governing documents are illegal, unconscionable, or unenforceable as a "perpetual contract" that is against public policy. Those are issues that the trial court was not asked to decide. Accordingly, the Petitioners should be precluded from now making such arguments for the first time on appeal.

That is particularly true because these arguments were made for the first time *in a*

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

Additionally, and perhaps most importantly, these arguments are in direct contravention of this Court's decision in the related case of *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018). In *Dennis*, this Court analyzed the very same "membership arrangement and the membership documents that govern that arrangement" as are at issue in these cases. 821 S.E.2d at 670. This Court recognized that three documents -- the Bylaws, the Plan, and the Rules -- "govern the membership" and that "[t]he three documents reference each other and are intended to operate together." *Id*. This Court determined that "[w]hen the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules." *Id*. This Court also found "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments." *Id*. In reinstating summary judgment in favor of CIMC, this Court concluded that the Dennises made a commitment to pay dues, fees, and other charges until the reissuance of their membership and that this contractual obligation was binding and legal under the South Carolina Nonprofit Corporation Act.

Additionally, in *Dennis*, this Court rejected the argument of "perpetual liability." In

responding to the dissent's claim of a "harsh result," the Court pointed out that:

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

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

> First, the Dennises' membership in the Club -- and thus their obligation to pay membership dues, fees, and other charges -- is tied to their ownership of a lot and house on Callawassie Island. If the Dennises truly wish to avoid paying membership dues, they may sell their house. In addition, Callawassie Island is a private resort community developed around the property owners' use of the amenities paid for by these dues. The Dennises purchased their exclusive home there in 1999 for $590,000. They have chosen not to sell, but are instead attempting to keep their home on this resort island without having to pay a property owner's share of the amenities.
>
> When reading unambiguous contracts, we should not normally concern ourselves with the fairness of the result required by the terms of the contract. The Dennises have not asked the circuit court, the court of appeals, nor this Court to decide the case based on any alleged harshness of having to pay dues. Because the dissent has made it an issue, however, we note our decision by no means renders a harsh result. Rather, this is precisely the result to which these sophisticated purchasers of a resort home agreed when they decided to purchase the property and abide by the terms of the governing documents.

821 S.E.2d at 672. These same principles and observations are equally applicable to the Petitioners' cases. The summary judgments cover a finite period of time. Additionally, as indicated, the Petitioners did not raise and preserve any issue about the "harshness" of the result. Therefore, as in *Dennis*, these cases will be adjudicated based on the issues presented, and that has been done with the Court of Appeals' affirmance of the summary judgments.

The Petitioners, however, are asking this Court, in essence, to disregard its previous decision in *Dennis* which, as the Court of Appeals correctly recognized in its opinion, is controlling and dispositive. They now insist that this Court's decision in *Dennis* is mere dictum, which it clearly is not.[3] In sum, the first issue raised by the Petitioners is not timely raised, is not preserved, and is entirely lacking in merit. This Court's controlling rulings from *Dennis* are not dicta and are dispositive of the identical issues raised in these cases.

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

The Petitioners argue that CIMC improperly amended the governing documents to change material terms. They insist that there exists a genuine issue of material fact to preclude summary judgment. The Court of Appeals correctly rejected that argument: "The Rules do not contain any provisions requiring a vote of the full membership to amend. Thus, the evidence does not raise a genuine issue of material fact regarding whether the governing documents were properly changed." (App. 2067). That ruling is consistent with this Court's decision in *Dennis* where this Court ruled that "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the

[3] *See, Drummond v. Beasley*, 331 S.C. 559, 503 S.E.2d 455 (1998) (characterizing as dicta certain language in a case concerning a subject not within the question before the court); *Hampton v. Richland County*, 296 S.C. 72, 370 S.E.2d 714, 714 (1988) (concluding discussion of a legal principle in an opinion was dicta where it was "clearly unnecessary to a resolution of the issue before the court"); *Dennis v. South Carolina National Bank*, 299 S.C. 34, 382 S.E.2d 237, 240 (Ct. App. 1988) (construing language in a case as dicta because it was "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof").

amendments." *Dennis*, 821 S.E.2d at 670. By footnote, this Court cited the provisions in those documents that authorized such amendments:

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

Id., n.1.

Nevertheless, the Petitioners now try to make a new argument for the first time on appeal. The Petitioners did not raise this argument as an issue in their previous briefs or at oral argument in the Court of Appeals; instead, they raised it for the first time in their request for a rehearing. In continuing to press their debunked "mandatory expulsion" argument,[4] the Petitioners argue that the Nonprofit Corporation Act prevented the CIMC Board from amending the General Club Rules in 2007 without a vote of the members.[5] As a new theory, the Petitioners claim that the General Club Rules should also be considered "bylaws" based on the definition in S.C. Code Ann. § 33-31-140(4), and as "bylaws," the Rules could not be amended except by a vote of the members. This new issue should be rejected on several procedural and substantive bases.

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[4] The Petitioners rely on language in the 2001 Rules stating: "Any member whose account is not settled within the four (4) months period following suspension *shall* be expelled from the Club." (App. 1358). (Emphasis added). However, in 2007, the Rules were properly amended, and the "mandatory expulsion" language was removed. The 2007 Rules state: "Any member whose account is not settled within the four (4) month period following suspension *may* be expelled from the Club." (App. 1439). (Emphasis added). The 2009 Rules continued to use the same "may be expelled" language. (App. 1475). Citing that same language, this Court in *Dennis* explained that "the 2009 Rules, which were in effect when the Dennises resigned, do not make expulsion mandatory under any condition." *Dennis*, 821 S.E.2d at 673. Those same 2009 Rules, as applied to the Petitioners, show that expulsion was likewise not mandatory in the 2009-2010 time frame applicable here.

[5] The Petitioners also allege repeatedly that the amendment of the Rules was done "in secret." There is no evidence in the record supporting that claim.

First, as mentioned, the Petitioners raised this issue to the Court of Appeals for the first time in a petition for rehearing, which is improper. *See*, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review).

Second, this issue was never raised to the trial court and, as a result, cannot be made for the first time on appeal. *See, Wilder Corp. v. Wilkie,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). In fact, a review of the record shows that S.C. Code Ann. § 33-31-140(4) and its definition of "bylaws" were never cited in the trial court record nor in any appellate brief previously filed in the Court of Appeals.

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

> (a) A corporation's board of directors may amend or repeal the corporation's bylaws unless:
>
> (1) the articles of incorporation or this chapter reserves this power exclusively to the members in whole or part or requires the consent of someone pursuant to Section 33-31-1030; or

> (2) the members in adopting, amending, or repealing a particular bylaw provide expressly that the board of directors may not adopt, amend, or repeal that bylaw or any bylaw on that subject.

S.C. Code Ann. § 33-31-1021(a). Thus, absent a reservation of the power to amend bylaws to the members, the board may amend the bylaws without a vote by the members. As this Court has already held in *Dennis*, the Bylaws granted the Board with the authority to "[a]dopt, alter, amend, or repeal the Rules governing use of the Club." *Dennis*, 821 S.E.2d at 670, n.1. The power to amend the General Club Rules was *not* reserved exclusively to the members. In effect, whether considered "bylaws" or not, the Rules could be adopted and amended by the Board without a vote of the members. Accordingly, this new argument offered by the Petitioners does not impact or change this Court's prior ruling in *Dennis*, based on the same evidentiary record as in these cases, that "[t]here is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments." *Dennis*, 821 S.E.2d at 670. It also does not impact or change the Court of Appeals' ruling that "the evidence does not raise a genuine issue of material fact regarding whether the governing documents were properly changed." (App. 2067).

In sum, this new theory, which the Petitioners did not raise or argue in the trial court and did not raise on appeal until the rehearing stage, does not support the reversal of the Court of Appeals' decision.

III. The Court of Appeals correctly ruled that whether the Petitioners resigned or were terminated in some other manner such as expulsion is immaterial because, as the Supreme Court ruled in *Dennis*, whether a member resigns his membership or is terminated in some other way, the member remains liable for unpaid dues, fees, and charges until the membership is re-issued.

The Petitioners claim that the Court of Appeals failed to properly distinguish between resignation and expulsion. The Dennises resigned from the Club, and as a result, the Petitioners attempt to distinguish the *Dennis* decision by claiming that they were expelled. However, there is absolutely no evidence that CIMC Board expelled the Petitioners from the Club.

In actuality, each Petitioner alleged that he resigned or otherwise tried to force his expulsion from CIMC by non-payment. In his Amended Answer and Counterclaims, Martin sought "a finding that the Defendants obligations to the Club terminated at the time of [his] resignation in November 2011." (App. 60). In his Second Amended Answer and Counterclaims, Martin again pled that "the Defendants have resigned that membership and/or terminated their membership with the Club pursuant to South Carolina Code of Laws." (App. 83). In later filings, Martin concedes that he "resigned from CIMC." (App. 262). Similarly, in his Second Amended Answer and Counterclaims, Frey alleged that his "membership was terminated as of January 2010 (4 months after delinquency) or in the alternative was resigned as of May 2010." (App. 1686). In later filings, Frey also concedes that he "resigned from CIMC." (App. 1866). Notably, in their affidavits, neither Petitioner attests that he was expelled by the CIMC Board. (App. 423-424, 2028-2029). The Petitioners are judicially bound by the allegations made in their pleadings and cannot depart from those admissions on appeal.[6]

[6] In *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322 (Ct. App. 1992), the Court of Appeals held that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." 418 S.E.2d at 323. "The allegations, statements or admissions contained in a pleading are conclusive as against the pleader and a party cannot

Therefore, based on the Petitioners' own representations, they were no different from the Dennises in that they resigned their memberships. Nonetheless, it is immaterial whether the Petitioners formally resigned or simply stopped making payments to try to force their expulsion -- which is critical to recognize when analyzing the Petitioners' arguments. As explained below, the same result would occur regardless of whether the Petitioners resigned or were expelled. It is clear that each Petitioner attempted to end or terminate their membership by non-payment. As this Court explained in *Dennis*, whether a member resigns his membership or is terminated in some other way, the member remains liable for unpaid dues, fees, and charges until the membership is re-issued. This Court stated that "even if we were to treat the 'termination' provision and the 'resignation' provision as governing the same event, there is no ambiguity." *Dennis*, 821 S.E.2d at 671. Focusing on the 2009 Rules which applied not only to the Dennises' resignation but also to each of the Petitioners' resignations or terminations, this Court explained as follows: "Any member may terminate membership in the Club. ... Notwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including any food and beverage minimums) until the membership is sold." *Id.*[7]

The Nonprofit Corporation Act fully supports that conclusion. Relying on S.C. Code Ann. § 33-31-620(b), this Court ruled in *Dennis* that "the requirement that members continue to

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subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." *Id. See also, Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697, 700 (2015); *Kitchen Planner, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020).

[7] Despite this analysis in *Dennis*, the Petitioners argue that this Court "recognized" that expulsion "ends future obligation to the Club." *See*, Petitioners' Brief, pp. 30-31. This Court made no such ruling. To the contrary, this Court recognized that a member remains responsible for obligations incurred or commitments made after any "termination," regardless of whether it results from a resignation or expulsion. That is consistent with the foregoing provisions from the Nonprofit Corporation Act.

pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620." *Dennis*, 821 S.E.2d at 673. S.C. Code Ann. § 33-31-620(b) states: "The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation." S.C. Code Ann. § 33-31-620(b). That language is virtually identical to S.C. Code Ann. § 33-31-621(e), which provides: "A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension." S.C. Code Ann. § 33-31-621(e). S.C. Code Ann. § 33-31-621(e) should be interpreted consistently with the similar language in S.C. Code Ann. § 33-31-620(b) per this Court's decision in *Dennis*. As a result, a member who is suspended or expelled is still held contractually obligated to pay dues, fees, and other charges after the suspension or expulsion. Hence, there is no material difference based upon the type of termination -- the member remains responsible for obligations incurred or commitments made until reissuance of his membership.[8]

This Court in *Dennis* explains the importance and necessity for provisions such as S.C. Code Ann. § 33-31-620(b) and § 33-31-621(e):

> The provisions of the membership documents that require members to continue to pay their membership dues until their membership is reissued are necessary to ensure the Club will remain viable in the future. When the Dennises entered into this membership agreement, they accepted the obligation to continue to pay their membership dues even under difficult circumstances, such as a financial downturn, a health crisis, or a sudden disinterest in being members in the Club. In doing so, however, they also

[8] The trial court likewise recognized that S.C. Code Ann. § 33-31-621(e) preserves the same liability as S.C. Code Ann. § 33-31-620(b). (App. 15, 1593) ("Likewise, § 33-31-621 reinforces the notion that members who are terminated or expelled remain liable for obligations, even beyond resignation").

> received the benefit of knowing that if other members experienced those circumstances, the other members would likewise be obligated to continue to make their payments. Without these provisions, members could default on their payments whenever it became convenient to do so, and the non-defaulting members would be forced to absorb the costs. Therefore, these provisions are not "unfair" or "unreasonable," but rather are the very feature of the membership documents that enables the Dennises and other members to sustain a viable Members' Club on Callawassie Island, which in turn increases the value of their membership and their property.

Dennis, 821 S.E.2d at 673.

The Petitioners, nonetheless, continue to try to draw a distinction between a resignation and some other type of "termination," but it is a classic distinction without a difference. They argue that S.C. Code Ann. § 33-31-620(b) only applies to a resignation. However, they ignore that S.C. Code Ann. § 33-31-621(e) creates the same liability to pay dues, fees, and other charges after a suspension or expulsion. Additionally, the Petitioners try to argue that they did not tender their resignations and thus S.C. Code Ann. § 33-31-620(b) does not apply to them (unlike the Dennises). However, their pleadings defy them. Both Petitioners cite to S.C. Code Ann. § 33-31-620 in their Amended Answers and Counterclaims. But they also cite to S.C. Code Ann. § 33-31-621 in the alternative. (App. 83-84, 1684-1685).

Further, the Petitioners revert to prior unsuccessful attempts to rely on extrinsic evidence, including the deposition testimony of prior CIMC officials, to argue to push their "mandatory expulsion" argument.[9] However, this Court in *Dennis* rejected reliance on extrinsic evidence to argue that the governing documents are ambiguous. This Court explained "because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning." *Dennis*, 821 S.E.2d at

[9] Notably, this reliance on parol evidence was not raised in the Petition for Writ of Certiorari but has now been re-asserted after the writ of certiorari was granted.

672. In effect, this Court applied the parol evidence rule to bar consideration of testimony that contradicts or varies the terms of the membership documents, including testimony of what the members were allegedly told by Ellen Padgett, a former membership coordinator, about the expulsion process. That same analysis requires that parol evidence based on other persons' testimony regarding the governing documents be rejected as well.

In sum, there is absolutely no evidence that CIMC Board expelled the Petitioners from the Club. Even if "suspended" from the Club for non-payment, they did not have the right to automatically "expel" themselves by simply remaining delinquent for four additional months. Therefore, regardless of whether the Petitioners submitted their resignations or attempted to force their own expulsion by non-payment, they remain obligated to pay the dues, fees, and other charges until such time as their memberships are reissued. Contrary to the Petitioners' position, it is truly immaterial whether the Petitioners resigned or were terminated in some other manner. This Court in *Dennis*, based on the language cited above, reached that very conclusion. The Court of Appeals clearly and correctly followed this Court's analysis in *Dennis* and should be affirmed.

IV. The Court of Appeals correctly affirmed the trial court's damages award.

The Petitioners contend that the Court of Appeals erred in rejecting their argument that damages should be capped at the amount of their equity contribution or alternatively that the equity contribution should be applied as a set-off. The Court of Appeals correctly ruled that the language of the governing documents does not create a cap on a resigned member's liability for unpaid dues and fees. (App. 2070). The Court further explained that "the governing documents do not contain any provisions that preclude the Club from collecting by other means the amounts in excess of the value of the equity membership." (App. 2070).

As this Court previously ruled in *Dennis*, the interpretation of the CIMC governing documents presents an issue of law, not an issue of fact. In arguing that liability for unpaid dues and fees should be capped at the amount of their equity contribution, the Petitioners appear to rely on language from the 1994 Plan which is different from the 2008 Plan.[10] This Court in *Dennis* already determined, however, that the 2008 Plan superseded the 1994 Plan. *See*, *Dennis*, 821 S.E.2d at 670 ("[w]hen the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules"). The same is true for the Petitioners for the 2009-2010 time frame, as the Court of Appeals correctly determined. The 2008 Plan provides as follows:

> 5.11 PAYMENT OF DUES AND OTHER CHARGES BY RESIGNING MEMBERS
>
> 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 plus interest accrued under the then prevailing terms of the General Club Rules will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership*. A resigned member will be entitled to use the Club Facilities so long as the resigned member is obligated and continues to pay all dues, fees

[10] By a short, conclusory statement, the Petitioners interjects another new issue. They claim to have "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 and adversely affected the damages claimed by the Club." *See*, Petitioners' Brief, p. 35. In a footnote, the Petitioners proceed to point out provisions in the Plan and Bylaws that were amended over the years. While the Petitioners have argued that the General Club Rules were improperly amended in 2007 to change "shall" to "may" in the expulsion provision, they have *never argued* in the trial court nor in the Court of Appeals that any versions of the Plan or Bylaws were improperly amended. Additionally, there is no evidence in the record supporting such allegations, even if they had been timely and properly raised. This is yet another example of the Petitioners disregarding basic rules of appellate procedure governing preservation of issues for appeal.

> and other Charges associated with the resigned Equity Membership.

(App. 1452-1453). (Emphasis added).[11] The highlighted language demonstrates that there is no cap on the resigned member's liability for unpaid dues and fees. Instead, the indebtedness will be deducted from the amount to be paid upon reissuance of the membership. There is no provision, however, precluding CIMC from collecting by other means the amounts in excess of the value of the equity membership.

Even relying on the 1994 Plan, as the Petitioners do, the result is the same. The 1994 Plan states that "[t]hese dues will accrue against and be deducted from the amount to be paid to the resigned member upon reissuance of his or her resigned membership." (App. 1264). That language does not cap a resigned member's liability for unpaid dues and fees. Thus, the Court of Appeals' ruling is correct and should be affirmed.

In a footnote, the Court of Appeals stated that "[t]he governing documents neither authorize nor preclude the collection of dues and fees above the amount paid for an equity club membership" and describes this as an "apparent ambiguity." (App. 2070). Seizing on that footnote, the Petitioners suggest that this is an *actual* ambiguity, which it is not. As our appellate courts have routinely held, an actual ambiguity exists only when a contract "is inconsistent on its face or is reasonably susceptible of more than one interpretation." *Abu-Shawareb v. South Carolina State University*, 364 S.C. 358, 613 S.E.2d 757, 760 (Ct. App. 2005). Silence alone does not create an ambiguity. *Id. See also, Jordan v. Security Group, Inc.*, 311 S.C. 227, 428 S.E.2d 705, 707 (1993). Thus, the absence of language in the governing documents that actually

[11] In *Dennis*, this Court cited to and relied on Section 5.11 of the 2008 Plan. *See, Dennis*, 821 S.E.2d at 670.

negates a cap or expressly states that there is no cap on unpaid dues and fees does not render the documents ambiguous on that point.

Additionally, the Court of Appeals includes the following language: "[w]hile this provision provides unpaid dues will be deducted from the amount paid for the equity membership…" (App. 2070). The Petitioners seize on that language to suggest that the Court of Appeals recognized that a "set-off" must be applied to the damages awarded by the trial court. As set forth above, the operative language from the 2008 Plan is as follows: "Any unpaid dues, fees and other Charges plus interest accrued under the then prevailing terms of the General Club Rules *will be deducted* from the amount to be paid to the resigned member *upon the reissuance* of his/her resigned Equity Membership." (App. 1452-1453). (Emphasis added). The Petitioners, however, misread this provision as requiring a set-off. Under this provision, if the dues and fees remain unpaid when the membership is reissued, then they will be paid first from the proceeds of the reissued membership. No deduction occurs until the reissuance of the membership. Contrary to the Petitioners' argument, there is no set-off.[12]

Additionally, the Petitioners' "set-off" argument was untimely asserted for the first time on rehearing in the Court of Appeals. The Petitioners did not previously claim a set-off in the trial court or on appeal. In fact, such a set-off was not pled as an affirmative defense in their

[12] The Petitioners also make the assertion that they will be "improperly stripped of their equity membership." *See*, Petitioners' Brief, p. 38. There is no basis for that unfounded claim. Section 5.6 of the 2008 Plan allows for the member who purchased before March 15, 2006, to receive at a minimum "the membership contribution which the resigned member previously paid for his/her membership." (App. 1451). However, Section 5.6 does state: "The Club is entitled to deduct from the amount to be paid to a resigned member any amount (including dues, fees, assessments, other Charges and membership contributions) that such resigned member owes to the Club." (App. 1451). That is consistent with Section 5.11, as discussed above. If the resigned member has unpaid dues and fees when the membership is reissued, those unpaid dues and fees may be deducted from the equity contribution to be re-paid to the member.

Second Amended Answers and Counterclaims. South Carolina law recognizes that a non-statutory set-off is an affirmative defense that must be pled. *See, Gambrell v. South Carolina National Bank*, 250 S.C. 380, 158 S.E.2d 200 (1967); *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939). *See also, Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) (statutory right to set-off not an affirmative defense falling within residuary clause of Rule 8(c), SCRCP, because set-off was required by statute).

For each of these reasons, the decision of the Court of Appeals on the damages issues should be affirmed.

V. The Court of Appeals correctly disposed of the Petitioners' disparate treatment claims where those counterclaims were dismissed by an order of trial court that was never appealed, and to the extent the issue was raised as a statutory defense, the Petitioners cannot pursue that defense in a direct action, they never presented evidence of a similarly situated comparator, and the defense was not even argued at the summary judgment hearing or on appeal.

The Petitioners claim that there is a genuine issue of material fact as to whether they were disparately treated in violation of the Nonprofit Corporation Act. They request that "this Court should remand Petitioners' cases for a trial on the Club's breach of contract and Nonprofit Corporation Act counterclaims." *See*, Petitioners' Brief, p. 40. They point to the Court of Appeals' recent decision in the *Dennis* case (after remand from this Court) where the Court ruled that "the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed issue of fact as to the claim that the Club violated the Nonprofit Corporation Act." *Callawassie Island Members Club, Inc v. Dennis*, 429 S.C. 493, 839 S.E.2d 101, 104 (Ct. App. 2019). The Court of Appeals in *Dennis* cited to S.C. Code Ann. §§ 33-31-610 and 33-31-611(c) of the Act.

In its opinion in the Petitioners' cases, the Court of Appeals did not address the counterclaims or defenses based on disparate treatment, and correctly so. As the record reflects, *the Petitioners have not brought any such counterclaims*. The Petitioners attempted to bring such counterclaims initially, but those counterclaims were dismissed by Judge Carmen T. Mullen in her orders filed April 10, 2014. (App. 1605). Judge Mullen dismissed four counterclaims "because the Non-Profit Corporations Act explicitly limits challenges to corporate authority to claims which are asserted derivatively" and "the claims the Defendants attempt to make must be asserted derivatively." (App. 6-7, 1604). That included a counterclaim based on S.C. Code Ann. §§ 33-31-610 and 33-31-611(c). Importantly, the Petitioners *have not appealed Judge Mullen's orders*. The Notices of Appeal filed by the Petitioners do not identify Judge Mullen's orders as being appealed. Thus, the dismissal of those counterclaims represents the law of the case. *See*, *First Union National Bank v. Soden*, 333 S.C. 554, 511 S.E.2d 372, 378 (Ct. App. 1998) ("an unchallenged ruling, right or wrong, is the law of the case").

The Petitioners, nonetheless, amended to plead a "statutory defense" based on S.C. Code Ann. §§ 33-31-610 and 33-31-611(c). Yet, that "statutory defense" was never even argued to Judge Ernest Kinard when he heard the motions for summary judgment. (App. 1185-1215). Likewise, Judge Kinard's orders in the cases do not address the "statutory defense." (App. 11-18, 1589-1596). Therefore, the defense is not properly preserved for appellate review.

Moreover, in their opening and reply briefs filed in the Court of Appeals, the Petitioners did not argue the "statutory defense." There is no mention of the "statutory defense" in the Statement of Issues on Appeal.[13] There is no specific reference to or discussion of S.C. Code

[13] Rule 208(b)(1)(B), SCACR, requires the statement of issues on appeal to be "concise and direct." In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), this Court reaffirmed the well-established rule of appellate law that "[o]rdinarily, no point will be

Ann. §§ 33-31-610 and 33-31-611(c) in the Argument sections of those briefs. There is no analysis of those Code sections with applicable case law or other authorities. At most, there may be an isolated reference to some members being allowed to concede their memberships back to CIMC in settlement of a fees dispute. Tellingly, the Court of Appeals did not address the "statutory defense" in its first opinion filed May 2, 2018 (now withdrawn) nor in its current re-filed opinion. That was not an oversight but rather a recognition that the "statutory defense" was not asserted as an issue on appeal. Nonetheless, even if the issue was raised, the Petitioners have certainly abandoned it. *See, Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993) ("an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority"); *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (same).

Further, the disparate treatment issue, whether brought as a counterclaim or a "defense," was alleged in violation of the Nonprofit Corporation Act which prescribes the *exclusive* means by which a nonprofit corporation's action may be challenged on the ground that the corporation lacks or lacked power to act. S.C. Code Ann. § 33-31-304 states:

> (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or *by a member or members in a derivative proceeding.*

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considered which is not set forth in the statement of the issues on appeal." 692 S.E.2d at 903. Likewise, this Court reiterated that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Id.*

S.C. Code Ann. § 33-31-304. (Emphasis added). Thus, the Act expressly prohibits a challenge to a nonprofit corporation's allegedly illegal or *ultra vires* actions in a direct action which is precisely the type of action that the Petitioners brought. Clearly, S.C. Code Ann. § 33-31-304 allows for the issue to be raised *only in a derivative proceeding*.[14]

The Petitioners will likely argue that a "defense" need not be asserted by derivative action, but that is an unsupported premise. Not surprisingly, the Petitioners cannot cite any authority that even suggests, let alone holds, that the "disparate treatment" claim may be asserted as a "defense" without running afoul of S.C. Code Ann. § 33-31-304. In short, to assert a "disparate treatment" counterclaim or "defense," the Petitioners are required to bring a derivative proceeding and to satisfy the pleading requirements of Rule 23(b)(1), SCRCP. That has not been done. That effectively bars any "disparate treatment" claim or "defense."

Nonetheless, even if this Court finds that a disparate treatment counterclaim or "defense" is not procedurally barred for the numerous reasons stated, the Petitioners have cited no record evidence supporting actionable disparate treatment. The concept of "unequal treatment" under S.C. Code Ann. § 33-31-610 is akin to an equal protection violation under the United States and South Carolina Constitutions. In *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E.2d 161 (2013), this Court explained that "[t]he *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." 744 S.E.2d at 168. "[A] claimant

[14] The South Carolina Reporters' Comments to S.C. Code Ann. § 33-31-304 provide: "Under this section of the Nonprofit Act, a member of a nonprofit corporation has no right to bring a direct attack against a proposed action. *The claim may only be brought derivatively*. If an action has been accomplished and the members believe that the directors or others in charge have done something wrong, have acted 'ultra vires,' the members may bring a derivative action against the alleged wrongdoers." *See*, S.C. Code Ann. § 33-31-304, South Carolina Reporters' Comments. (Emphasis added).

must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." *Id*. Thus, to prevail in an equal protection analysis, the plaintiff must show that he was treated differently than what this Court has termed a "similarly situated comparator." 744 S.E.2d at 169. The plaintiff must show that there are no "material differences" between himself and the comparator who was treated differently. *Id*.

In the present case, as in *Town of Hollywood*, the Petitioners present no evidence that a similarly situated comparator was treated differently from them. At a minimum, the Petitioners are required to point to at least a scintilla of evidence in the record that other members who reached settlements with CIMC and abandoned their memberships are "similarly situated comparators" to them. However, the record reflects that settlements where members conceded their memberships as a term of settlement were only with *non-property owners*. James Carling, a former CIMC Board member, testified that the offers to concede memberships as part of settlement negotiations involved "individuals who no longer owned property that were given the opportunity to make payment to the club and concede their memberships." (App. 462-463). That distinction was understood. Subsequent questions from defense counsel referenced "those members who were not property owners" (App. 463) and "members who didn't own property." (App. 464). In other words, none of those settlements involved CIMC members in the position of the Petitioners, that is, members who sought to resign their membership while *continuing to own property* on Callawassie Island. True comparators to the Petitioners would be those members who owned property and remained similarly obligated to pay dues and assessments *until the re-issuance of their memberships* -- as this Court in *Dennis* confirmed the governing

documents unambiguously require. There is, however, no evidence that such a comparator exists who was treated differently than the Petitioners.

Finally, the Petitioners' "disparate treatment" defense contravenes the strong public policy in favor of settlements of disputes, which has been emphasized in many decisions by both this Court and the Court of Appeals.[15] Indeed, the CIMC Board enjoys broad powers under S.C. Code Ann. § 31-33-302, including the power to resolve disputes over fees and assessments owed by defaulting members. There are a myriad of legitimate reasons why parties to a collection action might, and often should, agree to a compromise, and there should be flexibility in how a settlement may be crafted by the parties to the dispute. The decision to settle a collection claim against a defaulting member falls squarely within the CIMC Board's discretion and business judgment. However, to hold that past settlements with defaulting members could violate the concept of "unequal treatment" under S.C. Code Ann. § 33-31-610 will effectively preclude nonprofit corporations from exercising their business judgment in settling disputes with defaulting members. S.C. Code Ann. § 33-31-610 should not be interpreted or applied in such a manner that violates the clear public policy of this State.

In sum, for the various reasons discussed, both procedural and substantive, the Petitioners' claims or defenses relying on unsupported allegations of "disparate treatment" should be rejected.

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[15] In *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014), this Court reaffirmed that "[o]ur courts have a long standing policy favoring settlements." 754 S.E.2d at 490. Likewise, in *Chester v. South Carolina Dept. of Public Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010), this Court emphasized that statutes should be interpreted to avoid "thwart[ing] our strong public policy favoring the settlement of disputes." 698 S.E.2d at 560. *See, Darden v. Witham*, 258 S.C. 380, 188 S.E.2d 776, 778 (1972) ("The courts favor settlements and agreements amongst litigants"); *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824, 830 (2015) (applying "South Carolina's strong public policy favoring the settlement of disputes"); *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888, 890 (1987) ("litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law").

VI. The Court of Appeals correctly affirmed the dismissal of the Petitioners' counterclaims for breach of contract and negligent misrepresentation.

A. Breach of Contract

The Petitioners argue that this Court of Appeals' affirmance of the summary judgment on the breach of contract counterclaims is in error in three respects. Their position is without merit.[16]

First, the Petitioners point to the alleged unlawful amendments of the governing documents. The Court of Appeals correctly ruled on that issue for the reasons discussed above.

Second, the Petitioners claim that there exist "questions of fact about the validity of the amendments." *See*, Petitioners' Brief, p. 41. This appears to be a restatement of the first point.

Third, the Petitioners argue that "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 Club breached the contract by applying it unequally to its members." *See*, Petitioners' Brief, p. 41. This argument has already been debunked. Contrary to the Petitioners' apparent understanding, their "disparate treatment" counterclaims under the Nonprofit Corporation Act were dismissed by an unappealed order issued by Judge Carmen Mullen. The trial court dismissed those counterclaims because they were impermissibly brought as a direct claim rather than derivatively. (App. 6-7, 1604). Because Judge Mullen's orders were not appealed, those

[16] The Petitioners' arguments on the purported breach of contract counterclaims are brief, conclusory, and without supporting authority, and, as a result, should be deemed abandoned. In *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993), the Court of Appeals explained that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." 439 S.E.2d at 285, n.3.

orders are the law of the case, and the Petitioners cannot now challenge the dismissal of those counterclaims.

B. Negligent Misrepresentation

The Court of Appeals' analysis of the negligent misrepresentation claim is correct. The Petitioners' explanation of this cause of action is continually evolving. In their petition for rehearing filed May 29, 2018, the Petitioners argued that the expulsion language as contained in Section 13.3.1 of the 2001 Rules constitutes a representation that "members must be expelled after nonpayment." *See*, Petitioners' Petitions for Rehearing, dated May 29, 2018, p. 3. However, as discussed above and as determined by this Court in *Dennis*, that expulsion provision was amended in the 2007 and 2009 Rules to be discretionary rather than mandatory. As a result, the Petitioners have not shown that any false representation was made by the 2001 Rules. Instead, that representation was no longer in effect in the 2009-2010 time frame because the Rules had been amended in the interim.

Then, in the latest petition for rehearing, the Petitioners contended more generally that false representations are "the provisions of the governing documents … together with the reassurances of its membership director to the Petitioners." The Petitioners then make up some non-existent dialogue that has no support in the record. *See*, Petitioners' Petitions for Rehearing, pp. 24-25. (App. 2105-2106). That clearly cannot serve as a basis for reversing summary judgment on this claim.

Now, before this Court, the Petitioners expand their list of "representations." Nonetheless, it remains that the Court of Appeals' analysis is correct: "allowing certain members to leave the Club is not a *false* representation and it was not a representation made to Appellants." (App. 2072) (Emphasis in original).

In sum, the Court of Appeals' disposition of this continually changing counterclaim is correct and should be affirmed.

C. Preservation of Section 33-31-621(d) Statute of Limitations Defense

The Court of Appeals ruled that the Petitioner Frey's statute of limitations defense based on S.C. Code Ann. § 33-31-621(d) was not preserved for appellate review because it was not addressed by the trial court in its order granting summary judgment and was not raised in Frey's subsequent motion to reconsider. (App. 2072).[17] Frey now argues that the issue was raised in the trial court and properly preserved. However, the record reflects that this issue was *not* raised by Frey in his Petition for Writ of Certiorari. Section VI of the Petition for Writ of Certiorari raises only the issues related to the breach of contract and negligent misrepresentation counterclaims. Likewise, question VII of the "Questions Presented" raises only issues as to "counterclaims" and not as to any statute of limitations defense. In short, the S.C. Code Ann. § 33-31-621(d) statute of limitations issue was improperly inserted in the Petitioners' brief after the writ of certiorari was issued. That issue is not properly before this Court and should not be considered.

Additionally, the Court of Appeals is correct that the Petitioner Frey did not raise this issue in his motion to reconsider in the trial court. Frey references page 1946 of the Appendix as the portion of the motion to reconsider where the issue was raised, but he deliberately excludes a description of the statute of limitations defense that was *actually* raised in that motion to reconsider. The argument *in its entirety* states:

> In its Order the Court fails to rule on the Defendant's statute of limitations argument and the limitations on damages argument and

[17] This defense was not asserted by the Petitioner Martin.

> rulings thereon are requested. In this case, the damages requested by the Plaintiff are not available because they go back more than three years from the date of the filing the action and are subject to the statute of limitations. Exhibit A to the Affidavit of Jeff Spencer claims to set forth the accumulation of charges asserted against the Defendants but references charges claimed as far back as July 2009, more than 3 years prior to the current litigation and subject to the defense raised of the statute of limitations.

(App. 1946). As this excerpt makes clear, the motion to reconsider did not raise a statute of limitations defense based on S.C. Code Ann. § 33-31-621(d), which is not explicitly referenced and is actually one-year in duration, but rather raised a defense based on a three-year statute of limitations.

Nonetheless, even if this Court were to consider the merits, there is no basis for a remand. S.C. Code Ann. § 33-31-621(d) states: "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." S.C. Code Ann. § 33-31-621(d). CIMC is not challenging the expulsion, suspension, or termination of the Petitioner Frey, and accordingly, this limitations provision is not applicable to CIMC's claims against Frey.

VII. The Court of Appeals correctly affirmed the award of attorney's fees.

The Petitioners contend that the governing documents do not authorize CIMC to recover attorney's fees. As Court of Appeals correctly found, that is an issue raised for the first time in the Petitioners' Rule 59(e) motions, which makes the argument untimely. The trial court, in fact, recognized that "CIMC's authority to collect its attorney's fees … was raised for the first time at the hearing for reconsideration." (App. 9, 1600). It is, however, well settled that "a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior

to judgment, but did not." *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693, 695 (2014). Here, the issue was not even raised in the Rule 59(e) motion; rather, it was raised for the first time *at the hearing* on the Rule 59(e) motion, which is obviously not timely. (App. 333-334, 1937-1938).

Nonetheless, even if the Court were to address the merits, the decision of the trial court was correct. The governing documents are properly construed to allow CIMC to recover "all costs and expenses," including reasonable attorney's fees, if it commences a legal action "to collect any amount owed" or "to enforce any liability of a member to the Club." (App. 1475). This presents no valid basis for a reversal of the Court of Appeals.

CONCLUSION

Based on the foregoing discussion, the Respondent Callawassie Island Members Club, Inc. respectfully requests that this Court affirm the decision of the South Carolina Court of Appeals and affirm the summary judgments entered in the trial court.

Respectfully submitted,

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June 8, 2021