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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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Withdrawn, Substituted and Refiled December 18, 2019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.

REPLY BRIEF OF PETITIONERS

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MISCELLANEOUS

Throughout its *Brief of Respondent*, the Club repeats its two primary arguments—both of which this Court should take with a hefty fistful of salt. The Club's first argument is that this Court's *Dennis* Opinion has subsumed every issue of any sort related to Callawassie, like a boundless black hole. The Club's second argument is that practically nothing has been preserved for this Court's review.

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

As to the Club's second argument, the Club's boilerplate issue preservation argument does not apply: (1) for the individual reasons discussed in separate sections below; (2) because Petitioners have **not** raised new issues, they have simply argued existing issues using existing authority; but also, in the alternative (3) because issue preservation rules are not absolute, they are not jurisdictional, and this Court has the discretion to decide the issues put before it.[1]

When it turns to the merits, the Club misstates the evidence. For example, the Club denies

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

- When to strictly apply issue preservation rules would have the effect of upholding a contract that is otherwise void as against public policy or statutory law. *Ward v. West Oil Co*., 387 S.C. 268, 692 S.E.2d 516 (2010).
- In the interest of judicial economy, particularly where the question is likely to arise on remand for trial. *Jeter v. South Carolina Dept. of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 147 n.6 (2006).
- In order to avert manifest injustice. *State v. Johnson*, 416 P.3d 443, 453–54 (Utah 2017).

that there is evidence of disparate treatment, when the record is replete with indicia of the Club's improper favoritism—*e.g.*, the Club's "MEMBERSHIP CONCESSION FORM" whereby it allows select members out of their memberships (A. p. 1560); the Club's letters allowing certain members to be expelled or to concede their memberships, and to be free of Club. (A. pp. 1568-1572).

Critical is what the Club does not deny: The Club does not deny that it secretly changed the governing documents, without notice to or vote of its members. The Club does not deny that its secret changes to the governing documents trapped members—including Petitioners—in potential perpetual liability. 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).

COUNTERSTATEMENT OF THE CASE

In its Statement of the Case, the Club makes a number of misleading or incorrect assertions, which the Court should discard from its analysis.

First, the Club claims that reissuance of a Club membership occurs either via transfer by sale of a property, or via the resale list. (*Br. of Resp*., p. 1). This representation manages to be both misleading and incorrect simultaneously. It is misleading because the resale list is defunct and non-functional; it is basically a fiction. Memberships have little to no chance of moving off the resale list. (A. p. 748). Additionally, the representation is incorrect; simply because a person sells their

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- Where a party presents a new argument or authority in support of a previously-raised question. *Kerbs v. California Eastern Airways*, 33 Del. Ch. 69, 90 A.2d 652, 34 A.L.R.2d 839 (Del. 1952).
- Where there is no prejudice to the responding party. *Blumberg Associates Worldwide, Inc. v. Brown and Brown of Connecticut*, 84 A.3d 840, 879 (Conn. 2014).

This is *not* to imply that any of Petitioners' issues are not preserved—they are, as discussed herein—it is instead to note that the Club's flagship argument on issue preservation is leaky.

property on Callawassie does not mean that they are automatically free of their Club membership. Instead, the Club holds the sole power to transfer a membership, and it can simply refuse to transfer that membership to the new property owner, leaving the current member stuck with it. (A. pp. 800, 1303, 1370). As this Court considers the Club's self-created situation, **it should not assume that a person simply needs to sell their property to escape this social club.** [2]

Next, the Club states that it has a "finite funding source": its members only. (*Br. of Resp*., p. 1). This is both incorrect and not supported by the record. This Club, like most social clubs and other businesses, has *plenty* of other funding sources. The representation that "CIMC's survival depends" on indenturing the Martins and Freys is, respectfully, sheer nonsense.

Moving on, the Club misleadingly states that, in *Dennis*, "[t]his Court rejected all arguments that those governing documents were ambiguous." (*Br. of Resp*., p. 2). As this Court's *Dennis* opinion states, that ruling was confined to the specific issues in that case—*resignation* of the Dennises under *specific* sections of *certain* governing documents. This Court did not crawl through and audit each and every provision of the governing documents and hold that every provision is unambiguous. The Club continues to try to distend the *Dennis* ruling to "subsume" all things Callawassie, which this Court specified should not be done.

Finally, the Club states that, in *Dennis*, this Court "rejected" the "mandatory expulsion" argument. (*Br. of Resp*., p. 3). This is inaccurate. In *Dennis*, this Court expressly recognized that expulsion was not at issue in that case. *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673 (2018). In sum, each of the Club's misstatements should be ignored as the Court reviews this case.

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[2] *See, e.g.*, *Motion to Strike Material Misrepresentation* (filed Aug. 27, 2020), and *Reply in Support of Motion to Strike Material* Misrepresentation (filed Sept. 21, 2020), in *The Callawassie Island Members Club, Inc. v. Ronnie D. Dennis and Jeanette Dennis,* Appellate Case No. 2020-000670.

ARGUMENT

I. The prospect of being trapped in a perpetual contract is indeed dramatic, and the peril results from a misreading of *Dennis*.

Petitioners' first issue for review is that the Court of Appeals erred when it upheld a contract that had been unilaterally changed by the Club to bind its members in perpetuity. The Club discounts this argument as "exaggerated." Perhaps the Club's corporate heart cannot fathom the real human distress borne by its members, who have felt powerless as the Club unilaterally stripped them of their rights, imposed upon them unbargained-for obligations, and grimly pursued them for hundreds of thousands of dollars in dues that will accumulate until the end of time.[3] Because of the Club's actions, and the courts' endorsement of them, Petitioners are perpetually bound.

The Club misleads this Court when it states—without support in the Appendix—that "hundreds of properties on Callawassie Island have been sold," thereby perpetuating the fallacy that Club membership is bound to the land. (*Br. of Resp*., p. 4). Critically, membership in the Club is not an appurtenance to Petitioners' property. Club membership is an entirely separate contractual agreement that does not run with the land. Ever since the *Dennis* appeal, the Club has been incorrectly representing to the Court that Club members need "only sell their property" to be free of their membership. This falsely equates the Club in the Court's mind with a property owners' association whose amenities touch and concern the land.[4]

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[3] (Except for those select members whom the Club has permitted to concede their memberships, or those the Club has gifted with expulsion.)

[4] The *Dennis* opinion incorrectly speculated: "First, the Dennises' membership in the Club—and thus their obligation to pay membership dues, fees, and other charges—is tied to their ownership of a lot and house on Callawassie Island. If the Dennises truly wish to avoid paying membership dues, they may sell their house." *Dennis*, 425 S.C. 193, 203, 821 S.E.2d 667 (2018). Respectfully, this statement is incorrect as a matter of law and fact. The Club's governing documents are not recorded; they contain no property description or derivation clause; they are neither sealed nor witnessed nor notarized; they do not run with or bind the land. *See*, *e.g.*, S.C. Code § 30-5-30 "Prerequisites to Recording" (requiring affidavit of subscribing witness, signature of notary, seal, etc.); S.C. Code § 30-5-35 (derivation clause required in instrument conveying an interest in real property); S.C. Code § 30-7-10 ("Recordation Essential to

The Club's first argument in opposition to the perpetual contract issue is issue preservation. The Club wrongly accuses Petitioners of failing to raise defenses of illegality and unenforceability. To the contrary, the Petitioners brought—as affirmative defenses and counterclaims—causes of action against the Club for breach of contract, violation of the Nonprofit Corporation Act, failure to allow members to approve fundamental changes, misrepresentation, and disparate treatment, *inter alia*. (A. pp. 37–44, 83–90). Petitioners have been arguing on appeal that summary judgment was improper because questions of fact exist that should have precluded summary judgment, including on their defenses and counterclaims. Either a jury should be given the opportunity to determine whether the Club's documents and practices are illegal, or the Court should do so outright—that has been Petitioners' theory on appeal from the moment they filed their initial briefs, and that is an issue before this Court today.

That question of perpetual liability is properly before this Court, which has granted the petition for certiorari to decide it. Certainly, this Court has the power to hear the question and to correct the Court of Appeals' error when it misconstrued *Dennis* and knowingly endorsed a perpetual contract:

> 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.

Callawassie Island Members Club v. Martin (Ct. App. 2019) (A. p. 2070, fn. 2). This was error of law by the Court of Appeals, which this Court exists to correct.[5]

Validity") ("All . . . instruments in writing . . . encumbering [an estate in real property] . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds").

[5] *See White v. JM Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004); *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994).

It should be of particular concern to this Court that the Club's only substantive argument on this issue is based on its misinterpretation of this Court's *Dennis* opinion. The Club improperly flaunts *Dennis* as a universal mandate in the Club's own favor, steamrolling over important differences in the facts and the Record that exist in Petitioners' cases. *See, e.g., Br. of Resp*., p. 6. What the Club would really like is for this Court to ignore the clear confines of its decision in *Dennis* and conflate dictum with the law.

When it seeks to evaluate the impact of *Dennis* on the merits of Martin's and Frey's appeal, this Court should be mindful of the self-imposed constraints in *Dennis*. That decision was necessarily restricted to the questions that were before the Court on certiorari in that case. As has often been quoted, "appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions that they are not asked." *Kennedy v. Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322 (2001). The Court in *Dennis* had before it two specific issues, having to do with (1) whether specific portions of certain documents before it in that case were ambiguous, and (2) the application of one section of the South Carolina Nonprofit Corporation Act to the resignation at issue in *Dennis*. The Court decided only those questions.

The Club's supposed broad mandate in favor of itself is nothing more than dictum. "**Dictum is not the law**"; when a court's opinion contains "expansive terms that [are] completely unnecessary to resolve the narrow dispute before the Court in [a] case," those terms are not binding precedent. *Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 177–178 (2018) (emphasis added) (Few, J., concurring) (noting "because the Court's expansive statement was not necessary to the decision of the case, the statement is dictum."), *citing Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining "dictum 'is a statement on a matter not necessarily involved in

the case, . . . is not binding as authority . . . , [and] is not the court's decision.'" (*quoting* 21 C.J.S. Courts § 227 (2006)).

Indeed, the Club's M.O. in this appeal is to pluck dicta from *Dennis* and metastasize it to consume all things Callawassie, regardless of the facts. *See, e.g., Br. of Resp., quoting Dennis dicta* at p. 7 ("the Dennises' membership in the Club . . . is tied to their ownership of the lot and house on Callawassie Island."); p. 7 ("Callawassie Island is a private resort community developed around the property owners' use of the amenities paid for by these dues.")[6]; p. 9 ("this Court cited the provisions in those documents that authorized such amendments . . . [quote]"); p. 14 ("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."). The Club proclaims that the foregoing statements are not dicta, but it does not explain how the *Dennis* Court's musings on matters that were not before the Court for appellate review, and which were not in the *Dennis* record on appeal, could be anything <u>other</u> than dicta.[7] The Club is doing exactly what this Court said *not to do*—attempting to expand the specific, narrow facts and holding in *Dennis* so that they engulf all other situations involving Callawassie. Different legal issues and numerous factual distinctions make the *Dennis* holdings inapplicable here.

Significantly, the question of whether the lower courts' errors have improperly sanctified a perpetual contract is directly before the Court in Petitioner's appeal, whereas it was not a question in *Dennis*. This Court should find that the lower courts have, by their errors of law and fact,

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[6] Not only is this sentence dictum, but the factual record in this case reveals it to be inaccurate and untrue. Membership in the Club is contractual; it is not tied to the property. "Property owners" do not have a "share of the amenities"—instead, members (who may live anywhere in the United States) have an interest in the Club and its facilities. *See* A. pp. 1251–1255 (1994 Plan); 1361–1363 (2001 Plan).

[7] *See, Drummond v. Beasley*, 331 S.C. 559, 503 S.E.2d 455 (1988) (characterizing dicta as certain language in a case concerning a subject not within the question before the court).

improperly assisted in transforming the contract into an inescapable bondage. Components of those errors are discussed below.

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

The Petitioners' second issue for certiorari review is the question of whether the contract and the law allow the Club—unilaterally—to change material terms of the contract. In this portion of its Brief, the Club trots out its familiar refrain, first claiming that this Court has decided this issue in *Dennis* and, next, harping on issue preservation. Importantly, the Court of Appeals first rendered a decision on this issue in *favor* of Martin and Frey, and later *reversed* itself on rehearing based on its mis-understanding of this Court's ruling in *Dennis*. Those procedural facts make the Club's issue preservation argument inapplicable.

The Court of Appeals erred when it approved the Club's unilateral changes, because the terms of the contract itself, as well as the Nonprofit Corporation Act, require that the Club obtain the approval of its members before making substantive changes to the governing documents. Evidence in the record shows that the Club failed to do so, and this question is properly one of fact for the jury. Indeed, in its Brief, the Club does not deny—and appears to concede—that (a) the Club changed the contract terms without notice to, or vote of, members,[8] and (b) those changes were material to the contract.[9]

The Club wrongly attempts to paint this issue as one decided by this Court in *Dennis*. However, the question of whether the Club's unilateral, secret modifications to the material rights

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[8] *Br. of Resp.* at 11: "the board may amend the bylaws **without a vote by the members**" (emphasis added).

[9] *Br. of Resp.* at 9 n.4: "However, in 2007, the Rules were properly amended, and **the 'mandatory expulsion' language was removed**." (emphasis added).

of its members were unlawful or in violation of the contract was **not** before this Court in *Dennis*. The "ruling" that the Club touts on page 8, and again on page 11, of its Brief is simply dictum taken from what the opinion itself describes as "a general discussion of the membership arrangement and the membership documents that govern that arrangement," in which the Court comments that "there is no evidence [in the *Dennis* Record] 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*, 425 S.C. at 198, 821 S.E.2d at 670. This "general discussion" by the Court is not a finding or a ruling on a substantive issue with the weight of precedent. Further, that "general discussion" certainly should not control in **these Petitioners'** appeals, since this Court in *Dennis* was careful to confine its holding to the record before it in that case—which was a markedly different record than that of these Petitioners.

A question of fact exists as to whether the Club's unilateral, material modifications to its governing documents were improper. This is so because the governing documents themselves prevent substantive amendment affecting the rights and obligations of members without a vote of the members.[10] That argument alone—which the Club completely fails to address in its Brief—is sufficient to compel remand for a jury determination of whether the Club followed the amendment procedures **contained within its own contract.** If the Club neglected to do so, as the evidence shows, then those material modifications are invalid. (*See Petitioner's Brief*, pp. 24–28). Again, the Club makes no argument in opposition to Petitioner's contractual argument, and thus concedes the issue.

[10] "[A]ny such amendment or modification [of the Rules] shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (A. p. 513). "***Any*** amendment or modification which **materially and adversely affects the rights of the equity members must be approved** by a majority of the votes held by the equity members so affected." (A. p. 1272) (emphasis added).

Next, the Club also appears shocked—shocked!—to learn[11] that the Nonprofit Corporation Act might apply to its attempted unilateral change of its governing documents. Petitioners have been arguing for years that the Club's actions and practices violate the Act, and that the Club secretly amended its documents to restrict the rights of members without a vote of the members. This is not a different "issue," but rather an argument on a longstanding issue (*i.e.*, the amendment of the governing documents) that has always been at the heart of this appeal. In their argument on that issue, Petitioners have simply cited the Definitions section of a statute that has always controlled the actions of the Club, ever since it elected to organize itself as a nonprofit corporation.[12]

The Club is not improperly prejudiced by an argument that its governing documents and its board's actions must conform to the Act. Presumably, its governing documents were drafted in an attempt to comply with the Act—which is precisely why, by the documents' own terms, the board's ability to modify the Rules "**is subject to and controlled by** the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (A. p. 513) (emphasis added). The Club, in organizing itself under the Act, was of course aware that the Act's definition of "bylaws" included the Club's Rules.[13] It was to comply with the Act that the Plan was drafted to require:

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

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

[12] *See, e.g.*, A. pp. 83–88, 111–113, 179, 211, 304, 327–343, 1221–1222, 1229, 1236, 1247.

[13] "'Bylaws' means the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated." S.C. Code § 33-31-140, Definitions.

(A. pp. 1272, 1373) (emphasis added). The Club and its documents are servants to the Act, and not its master. Where the Act requires that changes in "bylaws" be approved by affected members, it is implicit that the governing documents are drafted in compliance with that requirement.

Next, the Club is wrong that the Nonprofit Corporation Act unreservedly allows amendment to the bylaws without a vote of the members. (*Br. of Resp.*, pp. 10–11) (quoting a select portion of S.C. Code § 33-31-1021). The very section of the Act that appears as a block quote in the Club's *Brief* goes on to put the following **limits** on the board's purported freedom—including mandatory notice to members, and mandatory approval by members:

> (c) A notice of a meeting for members at which bylaws are to be adopted, amended, or repealed shall state that the purpose, or one of the purposes, of the meeting is to consider the adoption, amendment, or repeal of bylaws and contain or be accompanied by a copy or summary of the proposal.
>
> (d) Unless otherwise provided in the articles, an amendment to the bylaws which relates solely to the dues required for membership and which establishes or changes an amount for, or method of computation of, dues, must be approved by the members.

S.C. Code § 33-31-1021 (emphasis added). The evidence in the record shows (and the Club appears to concede) that the Club did not provide the required notice for its secret changes. The evidence also shows (and the Club appears to concede) that the Club did not seek or receive members' approval of changes in the method of computation of dues—including but not limited to the documents' provisions relating to suspension and expulsion (which limited a member's obligation to pay dues to four months following suspension), and liability (which contemplated dues would accrue against a membership until it was reissued).

The issue before this Court on appeal is whether the circuit court improperly disregarded evidence that the Club had modified its governing documents without notice to or a vote of the members. The Court of Appeals found this evidence existed, and it was wrong to change its opinion

when the evidence had not changed. (*Compare* A. p. 2170 *with* A. p. 2067). Troublingly, the Club attempts to mislead this Court on the evidence in this Appendix, versus that in *Dennis*:

> 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."

Br. of Resp., p. 11 (emphasis added; citation omitted). This is wrong—there **is** evidence in Petitioners' Record of the Club's practice of making unilateral, secret, material changes to provisions affecting the rights and obligations of its members, without approval of the members, as required by the Act and the contract itself. (A. pp. 240–241, 243–244, 544, 1068–1069). This Court should therefore reverse the Court of Appeals and remand for a jury to consider, as a question of fact, whether the Club violated notice and vote requirements, rendering its amendments void.

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

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

First, in this Court's *Dennis* opinion, both the majority and dissent were clear that expulsion was different from resignation, with different procedures and consequences. The majority and dissent each acknowledged that expulsion ends a person's obligations to the Club, although the

majority ruled that the expulsion process was not invoked with regard to the Dennises and therefore was not relevant under the Dennises' particular facts.[14]

Second, the governing documents are clear that expulsion is different from resignation—each exit path is addressed in different parts of the governing documents, with different procedures and consequences. Under the governing documents, "expulsion" severs a member's relationship with the Club, and it ends a person's obligations to the Club. The bylaws state that "expulsion" causes a person to "cease to be an equity member," meaning they no longer have member responsibilities such as dues and other charges.[15]

Third, the evidence is clear that when a member is expelled, their membership ends forever, along with future obligations. Expelled members are required to surrender their membership certificates. (*See, e.g.*, A. pp. 506–508, 1570–1572). The Club's Resale List shows that those memberships now belong to the Club (the Club's "Membership Pool"), not to the former member. (A. p. 1556, 1557; *see also* A. p. 897 line 25–p. 898 line 14). Moreover, "[a]ny Member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club Facilities under any circumstances." (A. p. 319, § 14.1.5). The record shows that expulsion ends a person's future membership obligations in the same way that it ends their membership rights: forever.

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[14] This is discussed in *Brief of Petitioners* at pages 10 and 28–33. This Court's majority discussed that expulsion—unlike resignation—would arise only after a specific process involving suspension and then expulsion, which the majority held did not take place with regard to Mr. and Mrs. Dennis. This Court's dissent explicitly discussed how expulsion would end a member's liability for future dues. *Dennis*, 425 S.C. at 204, 213, 821 S.E.2d at 673, 677 (2018).

[15] A. p. 1303 (B-11, § 8(b)); *see also* A. p. 1449 (2008 Plan, § 3.4(b), identifying "expulsion" as a way in which a "person shall cease to be an Equity Member."); s*ee also, e.g.*, *Brief of Petitioners* (April 19, 2021), at pp. 30–33; *see also* Appellants' *Petition for Rehearing* (filed Jan. 31, 2020), at pp. 7–9; *Brief of Appellant* (filed August 27, 2015), at pp. 3–6, 13–18, 29–32; *Reply Brief of Appellant*, filed Aug. 27, 2015, at pp. 1, 6–8.

The Club also argues that this is a resignation case only and does not involve expulsion.[16] This sidesteps the inconvenient fact that for years (in the trial court and in this appeal) the Club and the Petitioners have been fighting about whether or not Petitioners were, or should have been, expelled under the governing documents. Petitioners' Second Amended Answer and Counterclaim asserts that "according to the governing documents, the Defendant(s) have been expelled from membership since approximately 2012 or earlier." (A. p. 81). Petitioners stated in their initial appeal brief back in 2015, "This [*i.e.*, expulsion] is the exit method that applies to Gregory Martin." *Brief of Appellant* (filed Aug. 27, 2015), p. 5; *see also id.* at 6 ("Under these terms and circumstances, Gregory Martin was expelled in or about May of 2010, if not earlier.").[17] This case is, and always has been, very much about expulsion of Petitioners.

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[16] The Club asserts that the Petitioners should be "judicially bound by the allegations made in their pleadings" . . . and then the Club sneakily cherry-picks language from alternative pleadings and suggestively points to the absence of an affirmative allegation as constituting an "admission." *Br. of Resp.* at p. 12. This argument is disingenuous, and it's wrong. From at least their Second Amended Complaint, Petitioners have been affirmatively pleading that the governing documents mandated their expulsion, pursuant to their suspension and period of delinquency. (*See, e.g.* A. pp. 80–81). That Petitioners alternatively plead resignation as a defense, and alternatively sought harbor in the resignation provisions of the Nonprofit Corporation Act, does **not** amount to a binding admission under South Carolina law. Indeed, this Court recently rejected this same sort of argument. *Skydive Myrtle Beach, Inc. v. Horry Cnty*., 426 S.C. 175, 826 S.E.2d 585 (2019) ("We find it is entirely appropriate for Skydive to allege that some of an individual's actions were within the scope of their official duties, and some were not, or even to plead alternative theories of liability depending on whether an individual's actions were within the scope of their duties."), *citing* Rule 8(a), SCRCP ("Relief in the alternative or of several different types may be demanded.").

[17] Way back in November 2014, Petitioners' counsel was arguing the expulsion issue to the trial court: "It is a little bit like being expelled from school but still having to pay tuition [for years and decades to come]. We think that that is a misreading of the statute. We also respectfully assert we should be at least be allowed a trial on those issues." (A. p. 1224).

While Petitioners salute the sheer chutzpa it takes for the Club now to pivot and argue that this is only a resignation (or termination) case, Petitioners would respectfully point to the following pages in the Appendix that show otherwise: 12, 13, 36–38, 53, 56, 65–69, 82–86, 93–97, 113, 131, 133, 135, 165, 184, 202, 204, 206, 216, 218–219, 221–232, 237–238, 251, 277, 282, 319, 329–336, 339, 341, 342, 349–350, 358–360, 392, 430, 466, 488, 521, 533, 543, 545, 612, 671, 675–677, 896, 951, 1035–1036, 1046–1048, 1102–1105, 1141, 1204, 1209, 1210, 1213, 1221, 1224, 1226, 1227–1243, 1303, 1336, 1359, 1367, 1370, 1440, 1445, 1449, 1476, 1512, 1521, 1546, 1580, 1590, 1591, 1634, 1636, 1638, 1649, 1651, 1653, 1656, 1665–1669, 1681–1687, 1694–1698, 1715, 1733, 1735, 1737, 1771, 1790, 1808, 1810, 1812, 1822–1826, 1830–1837, 1843–1844, 1855, 1881, 1886, 1923, 1934, 1938–1940, 1944, 1950–1951, 1959–1961, 1992–1993, 2041, 2052, 2061–2067, 2072, 2085–2093, 2097, 2099, 2106, 2107, 2123–2127, 2150–2153, 2156, 2160, 2166, 2168–2171, 2184, 2187–2188, 2195–2201, 2210, 2212–2215, 2219–2200, 2225, 2234, 2239–2244, 2265–2271, 2275–2283, 2287–2296, 2304, 2306, 2316, 2320, 2322, 2329–2332, 2335, 2348, 2352–2362, 2369, 2371–2375, 2387, 2390–2391, 2398–2404, 2411, 2413–2419, 2422–2423, 2428, 2437, 2442–2448, 2471–2501, 2507, 2510, 2513, 2524,

Next, the Club makes an unpreserved argument that expulsion should be treated the same as resignation, pursuant to S.C. Code § 33-31-621. This Court did not rule on, or even consider, § 33-31-621 in *Dennis*.[18] The *Dennis* opinion has no applicability to a different section of the statute with drastically different terms. For example, § 33-31-621 requires that expulsion procedures be "fair and reasonable" and "carried out in good faith" and "tak[e] into consideration all of the relevant facts and circumstances." Section 33-31-621(e) specifies that an expelled member "*may* be liable to the corporation" for certain obligations, which is <u>different</u> from the verbiage of § 33-21-620, with different ramifications. (emphasis added). Indeed, the statute's use of the word "may" in this context clearly indicates that the question of whether an expelled member is liable to the corporation depends upon the agreement between member and corporation. As discussed herein, the governing documents provide that expulsion ends a member's liability to the Club, following the penalty of the member's forfeiture of his membership contribution. The Club's telling failure to address, or even acknowledge, these important points of statutory interpretation speaks volumes.

In sum, this has always been a case about the expulsion of the Petitioners, and that expulsion ended their membership obligations.

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

The fourth issue before this Court for review is the Court of Appeals' error in affirming the trial court's damages award. Among other errors, the Court of Appeals failed to consider that the question of liability is linked to the improper changes to the governing documents. The Club itself drives this argument home, by pointing out in its Brief: "In arguing that liability for unpaid dues and

2526, 2528, 2534–2540, 2558–2579, 2583–2588, 2594–2600.

[18] The Club's Brief (p. 14) sets forth a block quote from *Dennis* and appears to claim, or imply, that *Dennis* applies to § 33-31-621. To be clear, this Court's *Dennis* ruling did not address § -621, and § -621 is not mentioned or referenced anywhere in the *Dennis* opinion.

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." (*Br. of Resp.*, p. 17). As discussed above, and in Petitioner's brief, the Club improperly changed those governing documents, both under the amendment procedures and under the Nonprofit Corporation Act. At the least, there is question of fact for the jury on those issues.

Moreover, the governing documents clearly link a member's financial stake in the Club to the value of their membership contribution. In this respect, the Club has a type of stock (membership certificates) held by shareholders (members holding membership certificates). (*See, e.g.*, A. p. 800). Thus, the Petitioners are invested in a business (the Club), although it is not for profit, it is solely for socializing. The contemplated cap on their investment, once they sever ties with the Club, is the amount of their membership contribution, which the Club gets to keep. Meanwhile, the Club can reissue the membership certificate to the next willing member. Contrary to its fretting, the Club's survival does not depend on Martin and Frey paying dues for eternity; instead, its survival depends on the Club's own ability to attract new members. In its Statement of the Case, and elsewhere, the Club falsely tries to link its "finite number of members" to the Callawassie real estate community. But this is wrong: (1) the Club's plan itself limits the number of memberships in an attempt to generate exclusivity; (2) that membership number is not tied to the land; (3) and membership in the Club is available to folks who do not own property on Callawassie Island. (*e.g.,* A. pp. 1257–1260).

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

entitled to a have any amount deemed to be owed to the Club offset by, or limited to, their membership contribution.[19]

Regarding the Petitioners' equity contribution, the Club is attempting to triple-dip by (1) taking the membership, (2) keeping the equity contribution, and (3) charging the ex-members *personally* for all alleged dues, fees, costs, etc. into the future. As the dissent in *Dennis* recognized, dues and costs accrue against the membership, not against the member. *Dennis*, 821 S.E.2d at 675 ("These provisions unequivocally state that any liability for unpaid dues and fees accrues against membership equity only, rather than on an ongoing basis against the member personally."). The documents are clear that unpaid dues accrue against the membership. (A. pp. 1264, 1303, 1454). In the alternative—at the least—the member should get credit (a set-off) for the equity contribution on the amount allegedly owned to the Club. Instead, the Club gobbles it all up, and demands more.

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

Petitioners' argument about the improper disparate treatment of Club members has been validated by the Court of Appeals' ruling on this issue in *Dennis* (which this Court declined to review). *See Callawassie Island Members Club, Inc. v. Dennis*, 429 S.C. 493, 499, 839 S.E.2d 101, 104 (S.C. App. 2019) ("We find the Dennises have presented at least a mere scintilla of evidence that some club members were permitted to concede their memberships, thus creating a disputed material issue of fact as to the claim that the Club violated the Nonprofit Corporation Act."). The same disputed material issue of fact exists here and is a fundamental part of Petitioners' defenses and counterclaims.[20]

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[19] *See, e.g.*, A. pp. 233, 237, 2275, 2279–2280, 2303, 2355–2356, 2362–2363, 2379.

[20] *See also* Section VI, *infra*.

The Club incorrectly argues that this issue was not preserved for appeal. As in *Dennis*, this issue has been preserved and argued in this case for almost a decade, ever since the pleadings phase in the trial court in 2012.[21] The question of whether a non-profit corporation such as the Club may treat certain members like the Petitioners differently is well-preserved and is ripe for review by this Court.

Next, the Club argues that, back in 2012, any disparate treatment argument should have been made as an affirmative derivative lawsuit under S.C. Code § 33-31-304. These cases have proceeded in South Carolina's appellate courts since 2014, and only *now* the Club decides that violations of the Nonprofit Corporation Act must be asserted as a derivative action. The argument has been waived and it should be disregarded.

In addition to being untimely and unpreserved, this argument by the Club is wrong. Petitioners raised the unlawfulness of the Club's disparate treatment as a *defense* to the Club's claims—the Club is seeking to enforce a contract that, as the Club interprets it, violates the Nonprofit Corporation Act in its demand of perpetual liability by the Petitioners but not other members (*inter alia*). (*See, e.g.*, A. pp. 43, 59, 87–88, 1643, 1659, 1688–1689). South Carolina law (including the Act) is implied into the contract alleged by the Club, and that law must be considered in evaluating the legality of that contract and the causes of action under the contract. A separate derivative claim is not required to evaluate the law, nor to defend against a contract claim.

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[21] For example: (1) disparate treatment is a specific allegation of the Second Amended Answer and Counterclaim and an inherent component of Petitioners' breach of contract claim (A. p. 81, ¶ 23); (2) disparate treatment is an itemized component of Petitioners' counterclaim/defense of misrepresentation (A. pp. 85–86); (3) Petitioners pled disparate treatment as an affirmative defense (A. pp. 43, 59, 87–88, 1643, 1659, 1688–1689); (4) Petitioners argued the issue in motions before the trial court (A. pp. 220, 221, 238, 339, 337); (5) Petitioners pled and argued disparate treatment in their affidavits (A. pp. 241, 244 ¶ 9); (6) Petitioners argued disparate treatment in each Brief of Appellant (A. pp. 2264, 2469, 2267, 2472, 2279, 2492, 2288, 2493, 2288, 2493, 2302, 2507, 2304, 2509, 2306, 2512; (7) Petitioners argued the issue in each Reply Brief of Appellant (A. pp. 2359, 2565).

Moreover, the courts already have considered the provisions of the Nonprofit Corporation Act in evaluating the claims and defenses in the Callawassie cases, including Petitioners' cases. For example, the Court of Appeals considered and ruled upon S.C. Code § 33-31-610 in *Dennis*, 429 S.C. at 499, 839 S.E.2d at 104. Now the Club incorrectly claims that the courts may not consider the same statute without a derivative lawsuit filed by the defendants. It would be absurd, and legally incorrect, to require a defendant to file an affirmative derivative case to assert a defense, when the defendant is sued by a nonprofit corporation on an unlawful contract. The Club's new derivative claim argument should be discarded.

Next, the Club tries to foist an "equal protection" constitutional law analysis onto the Petitioners' disparate treatment claim under the Nonprofit Corporation Act. This shoe does not fit. First, the proper analysis is found within the statutory framework of the Act itself; second, the Club's argument fails even under its posited equal protection rubric.

The Club elected to organize under the Nonprofit Corporation Act, which defines the relationship between a nonprofit organization and its members. Arguably, the Act does allow members to be differently situated, because there can be different **classes** of memberships, with different rights and obligations. Petitioners belonged to the Golf Membership class of membership in the Club. (A. pp. 33, 1366, 1633). The Act is unequivocal that **all members *of the same class* must be treated equally**, having "the same rights and obligations with respect to voting, dissolution, redemption, and transfer . . . ." S.C. Code § 33-31-610.

In its quasi-constitutional law argument, the Club attempts to create yet another class of memberships entirely. It now baldly claims—without support in the Appendix—that the Club justifiably settled with members who are differently situated than the Petitioners, because those particular members supposedly do not own property on the island. This new argument is an attempt

to circumvent the governing documents and the clear language of Nonprofit Corporation Act. The documents and the statute unambiguously define the Petitioners' "similarly situated comparators" as those who belong to the class of members holding Golf Memberships, like the Petitioners. The Club's documents specifically contemplate that some holders of equity Golf Memberships might not own property in Callawassie, and yet the Club did not give those members their own class nor otherwise differentiate them from the other categories of equity members.

PERSONS WHO DO NOT OWN PROPERTY IN CALLAWASSIE	The Club may offer equity memberships to such other persons who do not own property in Callawassie as the Partnership or the Club determines appropriate from time to time.

(A. p. 1259). Under the Club's theoretical equal protection analysis, Petitioners are entitled to the same treatment as other members of the same membership category, regardless of where those members might own real estate.

The Nonprofit Corporation Act is clear that members of the same class (*i.e.*, Golf Membership holders) must be treated equally and have the same rights and obligations. Lest the Club fret that it does not really understand what it means to "have the same rights," the Act provides the definition. It states that "rights are considered the same *if they are determined by a formula applied uniformly*." S.C. Code § 33-31-140(5) (emphasis added). Therein lie the questions of fact as to whether the Club has failed in its necessary equal treatment of its members. Evidence exists that—not only did the Club not really have a formula, given that its "formula" consisted of a mishmash of decidedly unformulaic, ever-shifting governing documents and informal practices—but that it also took whatever iteration of the "formula" happened to be applicable at that particular moment in time and applied it disparately to its similarly-situated members. And the evidence shows that the Club then defied any supposed "formula" by inventing an extra-contractual

"Membership Concession Form." (A. p. 1560). A question of fact thus exists as to what "formula" the Club might have been following as to its treatment of its members (*inter alia*).

Further, the membership certificate itself sets forth a member's rights as to redemption and transfer, stating: "CONSIDERATION FOR THE TRANSFER OF THIS CERTIFICATE WILL BE PAYABLE TO THE HOLDER **ONLY** WHEN AN INDIVIDUAL WHO IS ACCEPTABLE TO THE CLUB ACQUIRES THIS CERTIFICATE AND PAYS THE REQUIRED PURCHASE PRICE FOR MEMBERSHIP . . . ." (A. p. 800) (emphasis added). But at least a scintilla of evidence shows that the Club redeemed the membership certificates of many members, giving them the right to transfer their membership back to the Club in exchange for the valuable consideration of the absolution of their debts and the release from bondage of future payments. (*See, e.g.*, A. pp. 506–509, 1556–1562).

Finally, regardless of whether it had a formula, a question of fact exists as to whether the Club failed to apply that formula uniformly. The evidence shows that the Club liberated at its whim certain lucky members, accepting their concessions or expelling them to release them from future payment obligations. (*See, e.g.*, A. pp. 506–509, 1556–1562). But it treated the Petitioners differently (*res ipsa loquitur*, these lengthy lawsuits). The Court of Appeals in *Dennis* correctly found that the evidence in the Club's record of disparate treatment warrants a trial on the question, and the same reasoning and evidence applies here.

As its final argument in this section, the Club seeks to rebrand its disparate treatment of members as "public policy." The Club argues that public policy favors settlements generally, which trumps the Legislature's specific requirements in the Nonprofit Corporation Act. To support this startling assertion, the Club's Brief cites to a hodgepodge of cases on different points, none of which

is remotely analogous to the situation here.[22] The Club's argument basically references a generalized statement (settlements can be good) and then leaps to the unsupported conclusion that the Club's desired outcome is legally mandated here (settlements can be good, so the Club is allowed to do whatever it wants, whenever it wants, with whomever it wants).

The Club's argument also is based on the incorrect implication—without any support in the Appendix—that the dozens of other members unshackled from their memberships were all negotiated settlements. Instead, the Appendix shows that the Club allowed at least 36 members to "concede"—or simply walk away from—their memberships. (A. p. 1557). Indeed, the Club has a form for those it allows to depart, called the "CALLAWASSIE ISLAND MEMBERS CLUB, INC. MEMBERSHIP CONCESSION FORM." (A. p. 1560). As the Court of Appeals correctly pointed out in *Dennis*, "The governing documents do not contain any provision governing the concession of a club membership." *Dennis*, 429 S.C. at 499, 839 S.E.2d at 104. In other words, *favors* were given to some members, but not to others. *Important favors*, involving the transfer and redemption of some memberships, emancipating some fortunate members from thousands upon thousands of dollars of future dues, costs, and assessments that often extend in perpetuity.

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[22] None of the Club's cited cases involve facts, statutes, challenges, or rulings that are relevant to the specific issues in this appeal. *See, e.g.*, *Hudson ex rel. Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014) (workers compensation case, in which it was argued that it was error to grant an award in lump-sum in the Workers Compensation Commission); *Chester v. South Carolina Dept. of Public Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010) (Tort Claims Act case involving smoke on Interstate 95, focusing on to whether other tortfeasors could be joined under S.C. R. Civ. P. 19); *Darden v. Witham*, 258 S.C. 380, 188 S.E.2d 776 (1972) (divorce case in which court refused to modify husband's agreed-upon payments based on the remarriage of his former wife); *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015) (automobile accident involving the appeal of a jury award and a challenge to allocation of a previous settlement for purposes of set-off against the jury award); *Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) (automobile accident involving a covenant not to execute or proceed and whether it can be disclosed to the jury; the South Carolina Supreme Court noted that "**settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process**") (emphasis added).

The Appendix also shows that at least 15 other members were allowed, to their great relief, to be expelled. (A. pp. 507, 1557). The Appendix shows that often there was no negotiated settlement of any sort—the Club simply told certain, select members that they were free. (A. pp. 1570, 1571). The Nonprofit Corporation Act is designed to prevent a board of directors from inconsistently interpreting its governing documents in a manner that rewards its cool friends and slights the unpopular crowd.

In addition to being a logical fallacy, and based on an incorrect premise, the Club's argument is a red herring. Petitioners are not challenging other purported "settlements" with persons not parties to this lawsuit. Instead, Petitioners are asking for a trial on whether the Club violated the Nonprofit Corporation Act by discriminating against certain members such as these Petitioners (*inter alia*). As the Court of Appeals correctly concluded in *Dennis*, there is "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." *Dennis,* 429 S.C. at 499, 839 S.E.2d at 104.

VI. The Court of Appeals' errors on the foregoing issues invalidate its determinations as to Petitioners' counterclaims and defenses.

The Court of Appeals' determinations on Petitioners' counterclaims flow from its misinterpretation of this Court's *Dennis* opinion and the Nonprofit Corporation Act. The Court of Appeals' holding is vague and generalized:

> Our decision is based on the interrelated nature between Appellants' breach of contract counterclaims and the Club's breach of contract claim and, as stated above, the fact that our supreme court found the relevant provisions of the governing documents are unambiguous.

(A. p. 2071). This Court should find that the interrelated nature of the Club's and the Petitioners' claims requires remand to a jury, for the same reasons urged above and in Petitioner's Brief.

A. Jury questions exist on Petitioners' breach of contract counterclaim.

The Club argues that Judge Mullen's dismissal of Petitioners' counterclaim for disparate treatment under the Nonprofit Corporation Act somehow bleeds over to bar Petitioners' breach of contract counterclaim. To be clear, Judge Mullen's order did ***not*** dismiss Appellants' ***defenses*** under the Nonprofit Corporation Act.[23] Further, Judge Mullen's order did ***not*** dismiss Appellants' ***counterclaims*** for breach of contract nor for misrepresentation. The Club is simply wrong in this portion of its Brief. (*Br. Resp.*, pp. 26–27).

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

Questions of fact render summary judgment improper on misrepresentation. The false statements at issue have to do with severing ties with the Club, and the Club's disparate treatment of its members.[24] The Court of Appeals wrongly found that the Club's practice of "allowing certain members to leave the Club is not a *false* representation," when evidence shows Petitioners were (falsely) led to believe they could leave the Club the same way. (A. pp. 2072, 240–241, 243–244).

C. Petitioner should be permitted to defend at trial based on the applicable Statute of Limitations.

The Club makes a preservation argument on the § 33-31-621(d) statute of limitations defense. But the trial court was wrong to grant summary judgment to the Club without due consideration of the defenses and counterclaims, including this statute of limitations argument. This is particularly so, because the application of statute of limitations is a question of fact. *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993).

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[23] Petitioners urge this Court to read the Order, which only found that Petitioners could not bring certain counterclaims against the Club because the court held those specific claims needed to be asserted as a derivative action. (A. pp. 4–7).

[24] The representations by the Club were contained in the (ever-secretly-shifting) governing documents, and in statements by the Club's membership director, and by the Club to its members.

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

The Court of Appeals erred in finding that an issue, which was raised to and ruled on by the trial court, was nonetheless somehow unpreserved for appellate review. The Club contends that because this issue was briefed during a Rule 59 motion, it was untimely. While that contention may *sometimes* be correct, here the judge asked for additional briefing on this particular issue, and it then went on to expressly rule on it. (*See, e.g.*, A. pp. 262–268, 1866–1872; pp. 1243 line 12–1242 line 3; pp. 8–9, 1599–1560). Appellate review of the issue is therefore necessary to correct the trial court's erroneous ruling.[25]

CONCLUSION

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

Respectfully submitted,

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[25] The Court of Appeals' determination on issue preservation mistakenly assumes that the question of attorney's fees was raised for the first time in Petitioners' motion to reconsider. In fact, the question of the validity of the Club's claim for attorney's fees was first raised by Petitioners in their Answer, where they denied that the Club was entitled to the relief it sought. The Club never actually cited nor argued the particular contractual provisions pursuant to which it claimed to be entitled to attorney's fees. 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. The purpose of a Rule 59 motion to reconsider is to obtain a ruling from the circuit court when it has failed to make one.