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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Withdrawn, Substituted and Refiled December 18, 2019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 Michael J. Frey is the Petitioner.

OPPOSITION TO
RESPONDENT'S MOTION FOR LEAVE OF COURT
TO SUBMIT SUPPLEMENTAL BRIEFING

Petitioner Michael J. Frey ("Frey") respectfully opposes the Club's *Motion for Leave of Court to Submit Supplemental Briefing*. This Court should deny the Club's Motion because it is procedurally improper, not credible, and absolutely irrelevant—except insofar as it actually bolsters Frey's arguments.

Filed more than a month after final oral argument, the Club's Motion is an inappropriate "Hail Mary," which attempts to sidetrack the Court with a new, superficially shiny narrative and purported new "facts" and "evidence" about property sales that have nothing to do with the issues on appeal. The relevant issues on appeal include the Club's improper amendment of the governing documents (*n.b.*: the Club still does not deny this), the Club's breaches of its governing documents, the Club's disparate treatment of its members, and the Club's material misrepresentations to its members, including Petitioner Frey.

The Club's Motion boasts about the purported number of property sales on Callawassie Island . . . as if those purported property sales *matter*. But the Club's new alleged "facts" are entirely beside the point, even if this Court were inclined to conduct factfinding on appeal of a summary judgment order.[1] It is extraordinarily significant that the Club's new filings are silent on the number of <u>membership certificate transfers</u> over the years. **Spoiler alert: the membership certificate transfer numbers do not match up with the Club's (purported) property transfer numbers.**

The reason for the dissonance between membership certificate transfer numbers and property transfer numbers? Club membership does not run with the land.

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1 The credibility of the Club's "facts" is discussed in Section II, below.

Conveniently, there is no need for this Court to spend time on factual and legal analysis about why the Club membership does not touch and concern the land,[2] because the Club's *Affidavit of Jeff Spencer* makes this reality patently clear. In Paragraph 5, Jeff Spencer attests:

"Callawassie Island is a private community of 712 lots."

But the Club's Membership Plan issued a total of 890 equity memberships. (Appendix p. 1366). Obviously, there are 178 more equity club memberships than there are lots in the community.[3] Moreover, numerous property owners at Callawassie <u>are not members of the Club</u>. This means that at least 178 members have no means whatsoever of divesting themselves of their memberships, because there is no market for those memberships due to the Club's own poor business and development plans. This is a mess of the Club's own making.

This Court should deny the Club's motion and grant to Petitioner the relief requested in his brief and reply brief.

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[2] Although the Court could note that the Club's governing documents were not recorded, do not refer to any bound property, have no derivation clause, and they otherwise lack legal power to affect real property.

[3] Frey's membership in the Club is not tied to his property; it is strictly contractual. (*E.g.*, A. pp. 27-29, para. 2: "I understand that the Club is a privately owned club and that ownership of property at Callawassie does not entitle me to membership in or use of the Club Facilities."). Even <u>if</u> Frey sold his lot, Frey's membership certificate would not automatically run with the land to the new lot owner. *See also* Mark Quinn's Motion to Supplement the Record, filed in the Court of Appeals on May 1, 2019, in Appellate Case No. 2015-0003 (which was eventually consolidated with Frey's appeal) (Quinn attempted to supplement the record with the deed demonstrating that his property had been sold but the Club continued to bill him for ongoing dues. This Court can view the deed and see that the property description does not include the conveyance of Quinn's membership certificate, which did not run with the land.).

I. This Court should deny the Club's motion because it is procedurally improper.

This Court should deny the Club's motion because it is procedurally improper and exceedingly tardy. In requesting to file a supplemental brief more than a month after final oral argument—with new "evidence" not in the Appendix—the Club points to one of the issues that was before the Court for certiorari review (*i.e.,* unconscionability), and asks for permission *now* to make arguments that it could have made, long ago. Nothing has changed, except the Club's perception of the strength of its previous position in this appeal.[4]

The issue of unconscionability was briefed at length by Petitioner in the following filings with this Court:

(a) Frey's Petition for a Writ of Certiorari,

(b) Frey's Reply in Support of Petition for a Writ of Certiorari,

(c) Frey's Memorandum in Opposition to Club's Motion to Strike Petition for Certiorari (*see* fn. 7),

(d) Frey's Brief, and

(e) Frey's Reply Brief.

On each of these occasions, the Club made the calculated tactical decision to respond by arguing that the issue was not preserved and that it was "subsumed" by the *Dennis* opinion. On each of these occasions, the Club made the calculated tactical decision **not** to engage in an argument on the merits of the question of unconscionability. But now,

[4] Incredibly, the Club intimates that at oral argument this Court *asked* the Club to submit supplemental materials not in the record. This is yet another false narrative, as a review of the oral argument video makes clear.

for the first time, long after final oral argument, the Club seeks permission to re-argue an issue it fears it may have lost.

In demanding to belatedly re-brief an issue that has always been at the forefront of this appeal, the Club cites no precedent or rule that permits supplemental briefing long after final oral argument—for none exists. Instead, the Club acts surprised that the Justices were interested in the question (which was before the Court for certiorari review) and maintains that the circuit court's orders do not address perpetual liability. Importantly, this is wrong. The circuit court's order absolutely pins perpetual liability on Mr. Frey by holding that both the documents and the Nonprofit Corporation Act manifest an *ongoing* obligation by Frey to pay continually-accruing dues, until his membership is reissued, even after he exited the Club. (A. pp. 11-15).[5]

Second, the Club should not be surprised that the Court wished to discuss at oral argument the merits of an issue on appeal, even if the Club incorrectly argued that the issue was unpreserved.

Finally, the Club could have made the arguments contained in its proposed Supplemental Brief *months* ago—it now seeks a second bite of the briefing apple only because it fears that it may have lost on the issue under its previous strategy.[6] Interestingly, the Club once urged this Court to hear the *Dennis* case on certiorari because

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[5] The circuit court found, for example, that the "obligation to remain a member in good standing and pay dues, fees, assessments, and other charges continues until the membership is re-issued to a new member." (emphasis added) (*i.e.*, forever) and "This continuing obligation is consistent with S.C. Code Ann. § 33-31-621(e) . . . ." (emphasis added) (A. p. 1590).

[6] This Court should note that the Club's Supplemental Brief cites to unvetted "facts" purportedly from years ago, which are not in the Appendix, and not to anything "new" that occurred in the 38 days between oral argument and its motion.

the Court of Appeals' decision "Poses an Existential Threat" to the Club—insisting that the Club's very "survival" depends on indenturing its members[7] . . . but now the Club tells this Court that it actually was doing just great.

It is also worth noting that Frey and other Petitioners in these Callawassie appeals attempted on several occasions to supplement the record in this appeal. The Club adamantly, and successfully, opposed those motions to supplement. The Club argued, for example, that:

> [Frey] seek[s] to supplement the Record on appeal with the transcript of [the deposition of Jeff Spencer] that was taken after these appeals were initiated and thus, obviously, was not before the lower court when it made its rulings . . . This motion should be denied because it violates the fundamental premise of appellate review by asking this Court to consider evidence that the lower court did not consider.
>
> . . .
>
> To supplement the Record on Appeal with evidence that the lower court never had the opportunity to consider would violate the fundamental premise of appellate review, and therefore cannot be allowed.

(Exhibit 1 at pp. 4, 6: Club's *Return to Appellant's Motion to Supplement Record on Appeal*, filed on Feb. 29, 2016 in Ct. App. Cases Nos. 2014-01524, 2015-00001, 2015-00002, 2015-00003) (*see also* Club's *Return to Appellant's Motion to Supplement Record on Appeal*, filed on May 6, 2019 in Ct. App. Case No. 2015-0003) ("The Court is urged to soundly reject and repudiate these appellate tactics and to deny the request to supplement the record on

[7] The Callawassie Island Members' Club, Inc.'s *Petition for a Writ of Certiorari*, Appellate Case No. 2014-00154, *The Callawassie Island Members Club, Inc. v. Ronnie D. Dennis and Jeanette Dennis* p. 4 (filed Oct. 26, 2016).

appeal in this manner."). Thus, for the same reasons that the Club argued against Frey's prior motion to supplement the record, this Court should deny the Club's current motion.

Final oral argument is not a starting place for arguing issues on appeal. The Club had ample time, in the years prior to oral argument, to counter the issues discussed at length by Frey in his brief and other filings to this Court. This Court should deny the Club's Motion because it is procedurally too late.

II. The Club's submission is false and misleading.

If the Court allows the Club to submit its untimely and procedurally improper supplemental brief and new evidence, Frey requests (a) the opportunity to conduct discovery into the newly-submitted evidence and affidavit, and (b) leave to file a response which includes that discovery. In addition to what discovery will reveal, Frey's supplemental response would delve into the numerous misrepresentations and material omissions from the Club's supplemental brief and evidence. Below are some of the issues that would need to be addressed in detail.

First, the Club's new filing improperly leaves out critical information. As one example, the Club and the Callawassie Island Property Owners' Association ("CIPOA") have been quietly acquiring Callawassie properties, at basement-bottom prices (or for free) (or, in some instances, because the owners actually paid the Club to take the property). Those transactions are not listed in, or factored into, the Club's newly-submitted affidavits or attachments. However, the Club's affiant Jeff Spencer informed the membership of these acquisitions by email dated July 13, 2021. (Exhibit 2). Later,

CIPOA's Board of Directors sent the members an updated list of those properties. (Exhibit 3). Here is a list of some of those acquired properties:

1. 8 Bent Tree Lane
2. 240 Callawassie Drive
3. 4 Chechesse Circle
4. 2 Cracked Crab Court
5. 4 Cracked Crab Court
6. 5 Cracked Crab Court
7. 19 Dolphin Lane
8. 6 island Creek Drive
9. 13 Island Creek Drive
10. 11 Links Drive
11. 12 Links Drive
12. 19 Links Drive
13. 7 Longwood Court
14. 2 Longwood Drive
15. 3 Longwood Drive
16. 5 North Oak Forest Drive
17. 2 Osprey Circle
18. 7 Osprey Circle
19. 12 Osprey Circle
20. 14 Osprey Circle
21. 24 Osprey Circle
22. 36 Osprey Circle
23. 42 Osprey Circle
24. 44 Osprey Circle

31. 4 River Bend
32. 5 River Club Court
33. 8 River Marsh Court
34. 14 River Marsh Court
35. 16 River Marsh Court
36. 17 River Marsh Court
37. 18 River Marsh Court
38. 20 River Marsh Court
39. 20 River Marsh Court
40. 22 River Marsh Court
41. 21 River Marsh Lane
42. 25 River Marsh Lane
43. 5 South Oak Forest Drive
44. 6 Sequoia Court
45. 60 Spring Island Drive
46. 25 Spring Island Drive
47. 64 Spring Island Drive
48. 2 Sugar Mill Drive
49. 3 Wild Magnolia Court
50. 6 Wild Magnolia Court
51. 1 Winding Oak Court
52. 4 Winding Oak Court
53. 21 Winding Oak Drive
54. 51 Winding Oak Drive

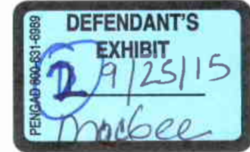
25. 54 Osprey Circle
26. 56 Osprey Circle
27. 96 Osprey Circle
28. 97 Osprey Circle
29. 1 Oyster Court
30. 2 River Bend

55. 59 Winding Oak Drive
56. 102 Winding Oak Drive
57. 111 Winding Oak Drive
58. 116 Winding Oak Drive
59. 116 Winding Oak Drive
60. 4 Woodstork Landing
61. 12 Woodstork Landing

(Ex. 3). By omitting those transactions, the Club artificially, and improperly, inflates the financial numbers (such as the "averages") that the Club touts to this Court. Further, it is self-evident that a healthy, well-run organization does not re-acquire more than sixty properties for pennies on the dollar—and then hide that fact from this Court. Rather, a healthy, well-run organization would want these properties sold on the open market, for market rates (which is not possible because of the Club's unlawful practices). When these transactions are factored into the numbers the Club submitted to this Court, the Club's figures plummet to fiduciary-breaching depths.

Second, the Club's new "data" omits comparative analysis—how did this Club do compared to other communities in its area? An internal analysis by the Club (from the deposition of Club President Mike McGee, on Sept. 25, 2015, exhibit 2) shows that the Club was dead last, by far:

AMENITIES PROPOSAL UPDATE



Fellow Members

2014 SALES DATA

	Closed Sales	Lots	Houses	Days Closed Houses Were on Market	Days Closed Lots Were on Market
Oldfield	56	41	15	121	268
Moss Creek	62	8	54	165	275
Hampton Hall	72	28	44	137	192
Dataw	77	10	67	424	937
Belfair	55	18	37	200	391
Callawassie Island	27	6	21	501	571

Moreover, the Club's board knew the reason for the abysmal performance—it is described in an internal memorandum among the Club board members from January 2008. Tellingly, that is the same time-period as the Club's secret, unlawful changes to its governing documents. In that memo, Club President Harmon Switzer summarizes that the Club simply has too many memberships compared to the number of properties on Callawassie Island, and there too little demand for the memberships. Not only do people *not want* to be members of this Club, but the Club has set itself up (and budgeted) with

too many memberships anyway.[8] As CIPOA president Joe Tatarski wrote in another internal memo:

> **"Our membership plan might withstand the legal challenge, but it borders on the immoral if we insist on bleeding nonresident members dry**. "

(emphasis added). Michael Frey was one of those nonresident members being "bled dry." But we digress. This is just one of the issues that the Club has opened up with its demand that it be permitted to submit supplemental briefing and new evidence.

Third, the Club's new argument misses a key point—the issue is the marketability of *memberships*, and not properties. At the hearing, the Justices repeatedly questioned the Club about the market for *memberships*. Several Justices expressed frustration at CIMC's refusal to address the lack of market for *memberships*, which is at the core of this appeal.[9] In its new materials, the Club continues to avoid that key issue—the new materials instead focus only on properties, not on memberships. Nor does the Club address Chief Justice Beatty's and Justice Kittredge's concern expressed at the hearing regarding **the Club's fifty-nine (59) other pending lawsuits**[10]—if things are so rosy with the Club, why is this social club in the unique position of pursing more than fifty lawsuits against its

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[8] According to the Club's internal memo, although the Club's spending is based on a "budgeted" number of memberships, in reality, "Regardless of any real estate marketing program, **the market potential to sell all of the outstanding memberships just doesn't exist**" because (among other things) "the total number of golf and social memberships exceeded the total properties on Callawassie." (emphasis added). The memo states: "**But, the most important 'unanticipated' reality is that all of the 595 golf memberships will NEVER sell, and BOTH CIC and CIMC have a problem.**" (capitalization emphasis in original, bolding added).

[9] Video of Oral Argument at 33:28–33:55 (Justice Kittredge: "the Club ain't working").

[10] *Id*. at 33:28–33:55.

members who cannot divest themselves of the albatross memberships? The Club's new filings are silent.

Fourth, the Club is being untruthful when it states that Frey, or any other member, simply needs to sell his property to be free of the Club. This point has been briefed at length previously[11] and is false. In *Dennis*, the Petitioner submitted a *Motion to Strike Material Misrepresentation* by the Club on this misrepresentation, arguing that:

> For example, the Club at times continues to bill former Callawassie property owners after they have sold their property, for continuing Club dues and fees. **That is because the Club will sometimes, at its pleasure, transfer a *different* membership to the new buyer, leaving the former property owner *stuck* with their current membership**.
>
> The point is critical to this Court's consideration because the Court should not be under the wrong impression that a person "just needs to sell their property" to be free of the Club. In the Club's view and practice, there is another mandatory step: approval by the Club for transfer of the membership, which the Club sometimes malevolently refuses to allow (depending on the person). It is a very real practice for the Club to continue to invoice, and pursue, some former property owners for ongoing "unlimited golf" and other charges for years after property ownership has ended, apparently going into perpetuity. That apparently is a power the Club has decided it has and will exercise when it so wishes.

Exhibit 4, at pp. 2–3: *Motion to Strike Material Misrepresentation*, filed August 27, 2020, Appellate Case No. 2020-000670. If the Club is permitted to file its supplemental brief,

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[11] *See, e.g.*, *Brief of Petitioners* at pp. 1–2, 15 n.10, (filed Apr. 19, 2021) ("In practice, sometimes the Club allows certain members to depart. In practice, sometimes the Club keeps billing certain former members long after they have sold their property on Callawassie. Consistency is certainly no hobgoblin of the Club's mind."); *Reply Brief of Petitioners* at pp. 2, 4 ("Additionally, the representation is incorrect; simply because a person sells their 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.**")

Frey requests leave to file evidence of numerous members that the Club refused to allow out—even after their properties were sold—and who the Club continued to bill for *ongoing* dues, assessments, charges, etc. *after* the property was sold. In addition to specific examples, Frey's supplementation will include the Club's 30(b)(6) witness Harmon Switzer's testimony on July 19, 2016, which confirms the Club's practice:

> Q. So what about today; say somebody sells their property on Callawassie and they can't sell their membership with it. Would the club let them out of their obligation?
>
> A. **No. They're still obligated**. I think it's specific in the membership.

(emphasis added).

Finally, the Club's affiant witness, Jeff Spencer, is uncredible and discredited. Frey previously sought to supplement the Record on Appeal with Spencer's deposition from September 3, 2015. The Club adamantly opposed that supplementation, and the Court of Appeals denied Frey's motion to supplement. A copy of Frey's motion regarding Spencer's deposition is attached hereto as Exhibit 5, and it summarizes some of Spencer's failings as a reliable and competent witness.

Among other things, Spencer's transcript showed that Mr. Spencer had previously submitted affidavits of which he had little to no knowledge—he apparently just signed what he was told to sign, without sufficient knowledge of the content. This is not a witness that the Court should rely on, particularly under these unusual circumstances. Nor should the Court give credence to Spencer's self-serving, incorrect, and non-admissible characterizations of settlement discussions with Frey. At the least, Frey

should be given the opportunity to depose Spencer to test the many vagaries and obfuscations in his new affidavit.

CONCLUSION

After a decade of litigation, the Club wants to change its previous tactical decisions and start over again. The Court should deny the Club's attempt, and it should deny the Club's motion. If the Court grants the motion, Frey requests leave to conduct discovery on the submitted materials and to submit supplemental briefing once that discovery is concluded.

Respectfully submitted,

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