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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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Appellate Case No. 2022-001385
Berkeley County Case No. 2017-CP-08-02238

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Matthew Zetz, Appellant,

v.

Daniel Island Company, Inc., Respondent.

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# INITIAL REPLY BRIEF OF APPELLANT

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## ARGUMENT

**The Supreme Court's decision in *Walbeck v. I'On Co., LLC* supports the conclusion that Developer's control over Association was sufficient to render Developer liable for Association's negligent groundskeeping.**

Appellant's opening brief is sufficient to withstand Respondent's arguments. However, in further support of that brief, Appellant directs this Court's attention to the Supreme Court's recent decision in *Walbeck v. I'On Co., LLC*, Op. No. 28134 (S.C. Sup. Ct. filed February 8, 2023) (Davis Adv. Sh. No. 6 at 23). In that decision,[1] the Supreme Court affirmed in relevant part this Court's 2019 decision, *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 503, 827 S.E.2d 348, 352 (Ct. App. 2019).

Appellant, in his initial brief, cited the 2019 opinion for the following proposition: if a developer has either superior voting power over a property owners' association or the right to appoint association board members and veto association action, the developer's control over the association may be sufficient to create a fiduciary relationship. Appell. In. Brief pp. 12-13.

The Supreme Court's decision reinforces Appellant's interpretation. In that decision, the Court explained that "[d]evelopers owe fiduciary duties to homeowners and homeowners' associations regarding common areas" and that a fiduciary relationship is not necessarily "extinguished" "when a Developer turns over control of the HOA to its members by relinquishing its superior voting power."[2] *See Walbeck*, Op. No. 28134 at 34–35 n.11 (citing *Goddard*, 310 S.C. at 414–15, 426 S.E.2d at 832). Instead, developers' fiduciary duties "stem from developer control

[1] Discussed in Appellant's February 14, 2023 supplemental citation.

[2] The Court also suggested that superior voting power—which Developer had here, as explained below—is usually enough to establish a fiduciary relationship. *See Walbeck*, Op. No. 28134 at 34–35 n.11 (citing *Goddard v. Fairways Dev. Gen. Partn.*, 310 S.C. 408, 414–15, 426 S.E.2d 828, 832 (Ct. App. 1993)).

of the entity."[3] *Id.* at 35 n.11 (citing *Concerned Dunes*, 349 S.C. at 260, 562 S.E.2d at 638). According to the Supreme Court, even possessing "consistent veto authority over the board" (an authority the developers in *Walbeck* had, but did not actually use, *Walbeck*, 426 S.C. at 516–17, 827 S.E.2d at 359) is enough to establish "developer control."[4] *Walbeck*, Op. No. 28134 at 35 n.11.

In the present case, Developer had consistent veto authority over Association, Association's board, and any related committees. By-laws & Decl. p. 10. In addition, due to Developer's right to appoint Association's board, it possessed superior—indeed, supreme—voting power. By-laws & Decl. p. 10, Sloan Depo p. 50:9–11. Developer also had the right to unilaterally amend Association's bylaws and declaration. By-laws & Decl. pp. 15–16, 47, 69–70. In the words of Matthew Sloan, president of both Developer and Association in 2016, these rights gave Developer the power "to control what is built and how it is managed." Sloan Depo p. 19:9–19.

The Supreme Court's decision in *Walbeck* suggests that control granted by veto authority weighs heavily in favor of a fiduciary relationship. If so, Developer's control over Association—encompassing veto authority, superior voting power, and the right to unliterally amend Association's founding documents—is truly substantial. This control, combined with the fact that Association had the right and duty to maintain common areas, *see* By-laws & Decl. pp. 9, 37, provides more than a scintilla of evidence that Developer had enough control of the Premises to be liable for Association's negligent groundskeeping and Appellant's resulting injuries. And

[3] They also stem from "the ongoing nature of construction[] and the transfer of common areas," factors which have little bearing on this case. *Id.* at 35 n.11 (citing *Concerned Dunes West Residents, Inc. v. Georgia–Pacific Corp.*, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002)).

[4] In fact, for derivative-suit purposes, any attempt to make a formal demand of an HOA's directors is "futile" where the developers retain "control of the HOA through [the] veto power." *Walbeck*, Op. No. 28134 at 38.

because there is more than a scintilla of evidence, justice demands that this Court let the jury consider the matter.

## CONCLUSION

For the foregoing reasons, the reasons discussed in Appellant's opening brief, and any other reason that may be evident from the record, the trial court's decision granting summary judgment to Developer must be reversed and the case remanded for trial.

Respectfully submitted,

February 22, 2023

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PROOF OF SERVICE

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Pursuant to Rule 262(c), SCACR, I certify that I have served Appellant's Initial Reply Brief on Respondent by Electronic Mail and deposited a copy in the U.S. mail (postage prepaid) on February 22, 2023, addressed to Respondent's attorneys of record, Kenneth Michael Barfield and Diane Summers Clarke, II, of Barnwell Whaley Patterson & Helms, LLC, 211 King Street, Suite 300, P.O. Drawer H, Charleston, SC 29402.

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February 22, 2023

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RE: *Matthew Zetz v. Daniel Island Community Foundation, et al.*
*Case No.: 2022-001385*

Dear Ms. Kitchings:

Attached for filing, please find Appellant's Initial Reply Brief and the associated proof of service. Please let us know if you need any additional information.

Sincerely,

s/Angeline M. Larrivee



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