

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Feb 23 2023**

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Stephanie P. McDonald, Circuit Court Judge

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Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019)

Case No. 2010-CP-10-10490  
Appellate Case No. 2019-000968

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Brad J. Walbeck and Lea Ann Adkins, Both Individually and Derivatively  
on Behalf of The I'On Assembly, Inc.; and I'On Assembly, Inc.,

Petitioners-Respondents,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a  
Civitas, LLC, and I'On Realty, LLC,

Respondents-Petitioners.

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**PETITION FOR REHEARING**

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Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, Respondents-Petitioners The I’On Company, LLC, The I’On Club, LLC, The I’On Group, LLC f/k/a Civitas, LLC, and I’On Realty, LLC (collectively, the “I’On Defendants”), hereby file this petition for rehearing as to this Court’s opinion issued on February 8, 2023, which reversed in part the Court of Appeals’ opinion and reinstated the jury verdicts from trial. *See Walbeck v. I’On Co., LLC*, No. 2019-000968, 2023 WL 1809318 (S.C. Feb. 8, 2023) (the “Opinion”).

**I. The Court overlooked or misapprehended facts demonstrating that Plaintiffs’ claims are barred by the statute of limitations as a matter of law.**

This Court held that the trial court properly submitted the statute of limitations issue to the jury because of conflicting evidence as to when Plaintiffs knew or should have known through the exercise of reasonable diligence that their claims had accrued. This was error. In its Brief, the I’On Defendants identify several specific events from the trial record that, as a matter of law, were sufficient to start the statute of limitations more than three years before Plaintiffs filed suit (*i.e.*, before December 22, 2007). Even construing the facts and circumstances in the light most favorable to the Plaintiffs, the only reasonable inference is that each of these events—and at least one of these events—was sufficient to start the statute of limitations before December 22, 2007.

In its Opinion, this Court does not discuss these events, nor does the Court explain how the facts and circumstances could support a reasonable inference that these events were insufficient to start the statute of limitations under the discovery rule. Instead, the Court concludes that “ample evidence was presented supporting the jury’s determination” that the statute began to run on August 5, 2009, which is the date the I’On Defendants conveyed the subject property to Mike Russo. But, for the evidence

to support a reasonable inference that the statute of limitations *began* to run on August 5, 2009, the evidence necessarily must support a reasonable inference that the statute of limitations did *not* start to run upon any of the earlier events identified by the I'On Defendants. In other words, even if a more recent event, such as the sale to Russo in 2009, would have been sufficient to start the statute of limitations *in the absence of the earlier events*, the Court cannot ignore the earlier events when reviewing the trial court's denial of the I'On Defendants' motion for directed verdict. Because it is undisputed that these earlier events did occur, and because the only reasonable inference is that one or more of these events started the statute of limitations under South Carolina's discovery rule, the Court should grant this petition for rehearing and reverse the trial court's denial of the I'On Defendants' motion for directed verdict on the statute of limitations defense.

Moreover, the Court states that one interpretation of the evidence is that the I'On Defendants "continued to change their position with regard to the disputed property in an apparent effort to pacify the HOA, thereby lulling the homeowners into believing that the property would eventually be theirs as promised." Opinion, p. 6. But even if this interpretation of the evidence were correct—which the I'On Defendants dispute—each such change in the I'On Defendants' position would provide additional notice to Plaintiffs that they had a claim based on the failure to convey the property when and as originally promised.

Notably, the Court does not find that the I'On Defendants were equitably estopped from asserting the statute of limitations (or even mention the doctrine of equitable estoppel), nor is there any basis to apply the doctrine of equitable estoppel

for the reasons explained in the I’On Defendants’ Brief, *see* Brief, pp. 39-40, and for the reasons explained in the Court of Appeals’ opinion. *See Walbeck v. I’On Co., LLC*, 426 S.C. 494, 523–24, 827 S.E.2d 348, 363 (Ct. App. 2019) (“Here, Walbeck has not presented evidence showing that he reasonably relied on the words or conduct of any representative of [the I’On Defendants] in allowing the limitations period for [Plaintiffs’] negligent misrepresentation claims to expire in early November 2007.”). Instead, the Court mentions an assortment of events that occurred over the course of more than a decade without attempting to connect those events to the law governing the statute of limitations, and then concludes without explanation that there was conflicting evidence to support the jury’s determination. This analysis overlooks the single reasonable conclusion from viewing the developments in a linear fashion, thus defeating the very purpose of the legislature enacting a limitations period. *See Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 490 (2016) (“Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.”).

Further, and as explained in more detail below, the cases cited in the Opinion for the proposition that the statute of limitations should be submitted to the jury where conflicting evidence exists are distinguishable and, in fact, support directing a verdict for the I’On Defendants based on the statute of limitations.

### A. Applicable legal standards

Under South Carolina’s discovery rule, the statute of limitations runs from “the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.” *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). This Court has “interpreted the ‘exercise of reasonable diligence’ to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party *might* exist.” *Id.* (emphasis added). The statute of limitations begins even if the plaintiff does not comprehend the full extent of the damage. *Id.*; *see also Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (“South Carolina’s statute of limitations requires ‘very little to start the clock.’”) (quoting *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994) (applying South Carolina law)).

When reviewing the denial of a motion for directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). This Court, however, should reverse the denial of a directed verdict motion where “the evidence as a whole is susceptible of only one reasonable inference.” *Id.* When applying this law in the context of reviewing a ruling on a motion for directed verdict based on the statute of limitations, this Court must determine whether the facts and circumstances support an inference that the statute of limitations did not start to run until during the statutory period. *See Dean v. Ruscon Corp.*, 321 S.C. 360, 366, 468 S.E.2d 645, 648 (1996). If the only reasonable inference is that an event occurring prior

to the statutory period put the plaintiff on notice that a claim might exist, the defendant is entitled to a directed verdict based on the statute of limitations. *See id.* (holding that the circuit court properly granted the defendants' directed verdict motion where "there was no question of fact for the jury to decide because the only reasonable conclusion supported by the evidence is that [plaintiff]'s lawsuit accrued" under the discovery rule prior to the statutory period).

**B. The I'On Defendants are entitled to a directed verdict based on the statute of limitations.**

As correctly recognized in this Court's Opinion: "At the heart of [Plaintiffs'] claims is the allegation that [the I'On Defendants] breached their promise to convey certain real property community amenities, *upon their completion*, to the HOA." Opinion, p. 1 (emphasis added); *see also* Pls. Br. p. 2 ("In 2014, a Charleston County jury returned a verdict on special interrogatories and awarded [Plaintiffs] damages for common areas the Developer refused to convey to the HOA."). Thus, the statute of limitations began to run on Plaintiffs' claims when Plaintiffs knew or should have known through the exercise of reasonable diligence that they *might* have a claim based on the I'On Defendants' failure to convey some or all of the promised amenities upon their completion.

It is undisputed that construction of the "Creekside Park" and "Community Dock" that Plaintiffs allege should have been conveyed to the Assembly upon completion of their construction was completed by April of 2001. (*See* R. p. 3190; R. p. 615, lines 8-25; R. p. 3190; R. p. 3604; R. p. 3605; R. p. 1132, lines 4-22; *see also* Opinion, p. 2 ("On Lot CV-6, the Creek Club and adjacent docks were completed in 2001."). Thus, as soon as the Plaintiffs knew or should have known that the I'On

Defendants had not conveyed the subject property after April 2001, the statute of limitations began to run.

Aside from the very basic and inescapable point that the amenities were completed and had not been given to the Assembly when homeowners took control of the Board in 2003, (a) the Assembly paid annually for the use of the amenities from 2003 on, (R. p. 615, lines 8-25); (b) the Assembly was provided the recorded Recreational Easement that made clear ownership rested elsewhere and which dictated terms of use for the Assembly for which the Assembly had to pay—terms that the parties operated pursuant to for nearly a decade before this dispute arose—and the Recreational Easement provided that such terms would govern for thirty years if not perpetually, (R. pp. 3131-3145; R. p. 677, lines 2-8; R. p. 1300, lines 9-21; R. p. 1329, lines 16-24; R. p. 1072, lines 8-24); and (c) the Assembly was unhappy with those circumstances and in 2004 engaged a lawyer to advise it about these very issues (R. p. 1073, line 22-p. 1074, line 12; R. p. 1074, lines 8-24; R. pp. 3436-40; R. p. 1075, lines 5-9; R. pp. 3436-3440; R. pp. 3600-01). There simply is no escaping the fact that the Assembly *knew* that the Defendants not only had not given them the property upon completion, but that they were not going to give them the property. A “should have known” inquiry is unnecessary; they in fact knew. The limitations period had to have started. The Court overlooked this entire analysis.

In holding that the trial court erred in denying the I’On Defendants’ motion for directed verdict, the Court of Appeals relied on the undisputed evidence that the derivative plaintiffs themselves also knew or should have known that they might have a claim. The HOA began paying a fee to use the subject property in 2005—four years

after the completion of construction—and the payment of this fee put Plaintiffs on notice that they might have a claim:

The listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA might not have title to the Community Dock or the other amenities listed in the 1998 Property Report, such as Creekside Park. He could have deduced from this budget item alone that the statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled.

*Walbeck*, 426 S.C. at 522, 827 S.E.2d at 362–63.

In reversing this holding, this Court simply brushes it aside without engaging. The Opinion offers only that “[w]hile the jury certainly could have accepted the 2005 date argued by Developers and ultimately embraced by the court of appeals, we believe the jury’s contrary finding is supported by the evidence.” Opinion, p. 5. This Court, however, does not explain *how* the facts in the record support a reasonable inference that the Assembly’s payment of a fee to use the subject property beginning in 2005 was insufficient to put Plaintiffs on notice that they did not own the subject property and therefore might have a claim. In fact, this Court’s Opinion does not discuss the Assembly’s payment of the usage fee at all.

Likewise, the Court’s Opinion does not explain how the other triggering events identified by the I’On Defendants (*see* I’On Defendants’ Brief, pp. 28-36) could be insufficient to start the statute of limitations, even viewing the facts and circumstances in the light most favorable to Plaintiffs. For example, by May 2004, a lawyer retained by the dissatisfied Assembly had completed a review of the Recreational Easement—a document that makes clear that the Assembly did not and would not own the Creek Club or the Creek Club docks. (R. pp. 3131-45; R. pp. 3146-51; R. pp. 3436-40; R. pp.

3600-01, R. p. 1073, line 22-p. 1074, line 12; R. p. 1074, lines 8-24; R. p. 1075, lines 5-9); *see also Dorman v. Campbell*, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998) (holding that notice to an attorney is imputed to a client for purposes of the statute of limitations). In its Opinion, this Court never mentions these facts, much less explains how a reasonable inference exists that these facts were insufficient to start the statute of limitations.

Moreover, Plaintiffs undeniably were on notice that they had a claim against the I'On Defendants for failing to convey the property as promised when the Assembly considered purchasing Lot CV-6, the Creek Club, and the boating facilities for \$700,000 in 2007. *See* I'On Defendants' Brief, p. 32 (citing to the Record). The Assembly held a meeting to gather input on this proposal, and approximately 200 people attended. (R. p. 1081, lines 4-17.) This Court's Opinion, however, does not explain how these facts, even construed in the light most favorable to Plaintiffs, could possibly be insufficient to put the Plaintiffs on notice that they might have a claim. The Court's Opinion also does not address the other events identified by the I'On Defendants, each of which was sufficient to trigger the statute of limitations prior to December 22, 2007. *See generally* I'On Defendants' Brief, pp. 28-36. Each of these events require this Court to affirm the Court of Appeals' decision to reverse the trial court's denial of the I'On Defendants' motion for directed verdict on statute of limitations grounds. *See* Rule 220(c) ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

Because the Court overlooked or misapprehended these facts when considering whether the trial court erred in denying the I'On Defendants' motion for directed, the

Court should grant this petition for rehearing and affirm the Court of Appeals' decision to reverse the trial court's denial of the I'On Defendants' motion for directed verdict on statute of limitations grounds.

**C. The facts that the Court held show the I'On Defendants changing their position regarding the subject property are, at best, irrelevant to the statute of limitations analysis and, in fact, provide additional grounds for finding that the statute of limitations began to run prior to December 22, 2007.**

In discussing the statute of limitations, this Court held that one interpretation of the evidence is that the I'On Defendants "continued to change their position with regard to the disputed property in an apparent effort to pacify the HOA, thereby lulling the homeowners into believing that the property would eventually be theirs as promised." Opinion, p. 6.

Many of the facts the Court cites in support of this finding are internal communications among the I'On Defendants and communications between the I'On Defendants and Russo. *See, e.g.*, Opinion, pp. 6-7 (describing communications between Chad Besenfelder and the Grahams and communications between Chad Besenfelder and Russo). Because these communications were not with Plaintiffs, they are, by definition, irrelevant to when Plaintiffs knew or should have known that they might have a claim.

Moreover, the communications cited by this Court that *were* with Plaintiffs are, at best, irrelevant to the statute of limitations analysis, and some of these communications provide further support for the I'On Defendants' statute of limitations defense. Notably, this Court's discussion of these communications does not explain how they possibly could impact the statute of limitations analysis. Instead, the Court

identifies various communications without ever attempting to connect them to the question before the Court—namely, whether the facts support a reasonable inference that the statute of limitations began after December 22, 2007. *See generally* Opinion, pp. 6-7.

For example, the Court cites a March 2009 email from Thomas Graham’s attorney, Jo Ann Stubblefield, explaining that the 2000 recreational easement was granted because “in early 2000 the decision was made to change course from the 1998 property report.” But this March 2009 email does not somehow change the fact that the statute of limitations started to run years earlier for the reasons explained above. To the extent the Court finds that the I’On Defendants, in early 2000, changed course from the promise made in the 1998 property report, this “changed course” provided a reason for the Plaintiffs to sue the I’On Defendants; it certainly did not provide a reason for the Plaintiffs to *delay* suing.

The Court also cites a March 2009 email from Besenfelder to the property manager, copying the Assembly Board members, promising that certain property would be conveyed and mentioning that the property would be subdivided to accomplish this transfer. Opinion, p. 6. As an initial matter, the Court does not attempt to explain how an email in 2009 presents conflicting evidence as to whether the statute had started to run five or more years earlier. Plaintiffs did not sue the I’On Defendants to enforce a promise made in this March 2009 email, nor would such a claim have had any merit. The Court also misapprehends the facts of that email. The Opinion says that the email “again promised that the property would be conveyed.” Opinion at 7. The email addresses conveyance of the docks, not all of the other property Plaintiffs contend

had been promised to the Assembly. (R. p. 2236.) Thus, even if a 2009 email were somehow relevant to the analysis, the email could not excuse the Assembly from failing to protect the rights it claims it had in the property that was unaddressed in the email.

After identifying the above-referenced communications without explaining how they might impact the statute of limitations analysis, the Court concludes:

As is clear from the recitation of the communications and events which transpired between the parties since the 1998 Property Report, when the HOA knew or should have known the Developers' promises were not going to be fulfilled was a question of fact for the jury, not one capable of being decided as a matter of law.

Opinion, p. 7. This conclusion, which is not explained, is in error. The recitation of the communications and events in the Court's Opinion does not mention the events identified by the I'On Defendants that, even construing all inferences in Plaintiffs' favor and regardless of the communications and events identified by the Court, triggered the statute of limitations prior to December 22, 2007. The Court should reconsider its ruling on the statute of limitations and should affirm the Court of Appeals' decision to reverse the trial court's denial of the I'On Defendants' motion for directed verdict on statute of limitations grounds.<sup>1</sup>

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<sup>1</sup> The fundamental flaw in this Court's statute of limitations analysis cannot be mended by the Court's expansion of a developer's fiduciary duty. Here there is no enforceable obligation to transfer what the Plaintiffs contend are the Community Dock and Creekside Park other than agreements and representations made before 2000. The suggestion that the Defendants' fiduciary relationship continued such that a sale in 2009 violated that duty within the statute of limitations is a dangerous expansion of the law that would eviscerate the statute of limitations for fiduciary breaches. If the Opinion stands, then a claim for breach of fiduciary duty would not expire three years after discovery of the claim; rather the claim would last as long as a fiduciary relationship continued and the purported breach had not been cured. If not corrected, the Opinion holds that an actionable failure of a fiduciary to do something in 2001 is still actionable in 2010 because the relationship is still a fiduciary one, even if the claim

**D. This Court did not hold that equitable estoppel applies, and the Court of Appeals correctly held that the doctrine does not apply here.**

Whether equitable estoppel applies in a case is “an *equitable* issue to be determined by the *judge* rather than the jury.” *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 62, 488 S.E.2d 327, 331 n.1 (1997). This Court did not hold that equitable estoppel applies here, and the Court of Appeals correctly held that the doctrine does not apply here:

Here, Walbeck has not presented evidence showing that he reasonably relied on the words or conduct of any representative of [the I’On Defendants] in allowing the limitations period for [Plaintiffs’] negligent misrepresentation claims to expire in early November 2007. Therefore, the doctrine of equitable estoppel is not availing to [Plaintiffs].

*Walbeck*, 426 S.C. at 523–24, 827 S.E.2d at 363.

As explained in more detail in the I’On Defendants’ Brief, no basis exists for finding equitable estoppel, particularly where the Plaintiffs failed to prove that they relied on any alleged misrepresentations by the I’On Defendants when delaying filing suit. *See* I’On Defendants’ Brief, pp. 39-40. Moreover, any claims of reliance for any extended period before the statute had already run would fall flat in the face of, among other things, the I’On Defendants’ attempt to sell the property to the Assembly over a several month period in 2007 and the Assembly’s extensive consideration of the

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is nine years old. Defendants submit that this is not consistent with the legislature’s directive and should not be the law of this State. *Cf. Dean v. Ruscon Corp.*, 321 S.C. 360, 364–65, 468 S.E.2d 645, 647–48 (1996) (holding that, where the plaintiff suffers multiple harms caused by the plaintiff’s tortious activity, the subsequent harm does not restart the statute of limitations if it is not “separate and distinguishable” from the earlier harm).

proposal, all of which occurred more than three years before Plaintiffs filed suit. (*See, e.g., R. p. 1081, lines 4-17.*) By considering whether to purchase the property in 2007, Plaintiffs made absolutely clear that they were not delaying filing suit because they were waiting on the I'On Defendants to convey the property to Plaintiffs for free. *See Maher v. Tietex Corp.*, 331 S.C. 371, 381–82, 500 S.E.2d 204, 209 (Ct. App. 1998) (“Accordingly, Maher did not rely on any misrepresentation or deception as to the financial information, and thus any claim of equitable estoppel based on this misconduct fails for lack of this essential element.”). Notably, this Court’s Opinion recognizes that, in July 2009, the Assembly’s then-president, Bruce Kenny, “was in the midst of negotiations with [the I’On Defendants] to correct the recreational easement and make it permanent.” Opinion, p. 4. Because the Assembly was negotiating to make the Assembly’s easement rights to the subject property permanent in July 2009, Plaintiffs plainly were not expecting the I’On Defendants to convey the property outright to the Assembly or delaying filing suit based on such an expectation.

In footnote 15 of the trial court order denying the I’On Defendants’ post-trial motions, the trial court concluded without explanation that equitable estoppel would apply here even if the statute of limitations had run. (*R. p. 43 n.15.*) The trial court’s unexplained conclusion suffers from the very same flaws addressed above—it completely overlooks years of facts and knowledge. The statements that the trial court was apparently relying upon in concluding that equitable estoppel would apply are statements arising from the negotiations between the I’On Defendants and Russo in 2008 and 2009. First, the statements cited were not made to the Plaintiffs and therefore could not possibly have been relied upon by Plaintiffs, as would be required for

equitable estoppel. Second, there is no explanation about how a statement in 2008 or 2009 could have induced Plaintiffs to miss the statute of limitations on claims that Plaintiffs knew they had upon completion of construction in 2001, or when hiring counsel to analyze issues regarding the property use and ownership in 2004, or when paying for use of the property annually and budgeting it and circulating budgets among all homeowners.

**E. The cases cited by this Court for the proposition that conflicting evidence requires submission of the statute of limitations issue to the jury do not support this Court’s holding and, in fact, support directing a verdict for the I’On Defendants based on the statute of limitations.**

In holding that the statute of limitations question was properly submitted to the jury, this Court states that this case is “similar in some respects” to *Stoneledge at Lake Keowee Owners’ Ass’n v. IMK Development Co., LLC*, 435 S.C. 176, 177, 866 S.E.2d 577, 578 (2021). In *Stoneledge*, which was a construction defect case, the trial court denied the defendants’ motion for directed verdict, sending the statute of limitations issue to the jury. The Court of Appeals and this Court affirmed the trial court’s decision. This Court’s opinion affirming the Court of Appeals is only a few paragraphs and does not discuss the facts of the case, but the Court of Appeals opinion addresses the key question presented by the defendants’ directed verdict motion—namely, whether a reasonable juror could have found that the events prior to the statutory period were insufficient to start the statute of limitations.

[W]e find there is some evidence these latent defects could not have been discovered through the exercise of reasonable diligence until 2009 at the earliest. These defects were hidden by stone veneers and exterior walls, and many could not be seen without destructive testing. Understandably, if there was very little rain, damages that only become

apparent due to water intrusion would not be discovered until there was sufficient precipitation to put the homeowners on notice.

. . . There was evidence these specific homeowners, whose homes were damaged because of water intrusion, were unable to appreciate their cause of action against Bostic because the area had very little rain, and their problems only began to appear in 2009.

*Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 268, 275–76, 821 S.E.2d 504, 508 (Ct. App. 2018) (internal citation omitted).

In stark contrast to the Court of Appeals' opinion in *Stoneledge* that this Court affirmed, this Court's Opinion in the present case contains no analysis of the events that occurred prior to December 22, 2007, that the I'On Defendants contend started the statute of limitations. Unlike the homeowners in *Stoneledge*, who may not have been able to appreciate that construction defects existed before the statutory period because of stone veneers, exterior walls, the small amount of rain, and the absence of problems, the Plaintiffs in this case were unquestionably aware for many years before the statutory period that construction of the subject amenities was completed but that the I'On Defendants had not conveyed title to the Plaintiffs, and this Court's Opinion does not hold otherwise.

In *Brown v. Finger*, 240 S.C. 102, 111–13, 124 S.E.2d 781, 785–86 (1962), which the Court also cites in its Opinion, this Court held that the defendant was not entitled to a directed verdict based on the statute of limitations because of conflicting evidence as to when the statute of limitations began. There, plaintiff brought a claim for loss of consortium against a physician for providing narcotics to his wife which led to her addiction. This Court concluded that plaintiff's claim did not accrue until the wife became addicted to the narcotics, and concluded that “the testimony of the plaintiff

supports the inference that his wife did not become addicted to the use of drugs until 1949 or 1950, which was within the six year statutory limitation period.” *Id.* The facts of the present case are easily distinguishable for the reasons discussed above.

The other two cases cited in the Opinion likewise do not support this Court’s conclusion. *See Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (recognizing that the statute of limitations can present a jury question where conflicting testimony exists but holding that the events occurring prior to the statutory period placed the plaintiff on notice that she might have a claim against the defendant such that no jury question existed); *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) (holding, in a medical malpractice case, that the trial court erred in allowing the defendant to amend his answer during trial to assert a statute of limitations defense because the plaintiff did not consent to such amendment).

**II. The Court expanded and created ambiguity as to the law governing fiduciary duties owed by developers to homeowners associations.**

Prior to the Court’s Opinion in this case, South Carolina courts had recognized a limited fiduciary relationship between a developer and a homeowners association in only three cases: *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993); *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251 562 S.E.2d 633 (2002); and *Magnolia N. Prop. Owners’ Ass’n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). These cases demonstrated that South Carolina views the relationship between a developer and a homeowners association as fiduciary in nature in very limited circumstances and only at very specific times. Specifically, a developer has a fiduciary duty to bring about a viable homeowners association, and any further

fiduciary obligation is triggered only if the developer conveys common areas to the association. Outside these narrow parameters, South Carolina law has never held that a developer must act, not on its own behalf, but on behalf of property owners.

However, in footnote 11 to its Opinion in this case, the Court held that the I'On Defendants maintained a "fiduciary relationship" with the Assembly because the "Developers maintained consistent veto authority over the board [of the Assembly], continued construction in I'On until past the 2009 conveyance, and delayed the transfer of the disputed property." Opinion, p. 7 n.11. It is unclear from the Court's holding whether each of these three circumstances is independently sufficient to trigger a general fiduciary duty owed by a developer to a homeowners association, or if some combination or all three of the circumstances must exist to trigger such a fiduciary duty. Adding to the confusion, in an earlier portion of the Court's Opinion, the Court held that, "if the only evidence in the record of a breach of fiduciary duty was that Developers did not convey the property, that claim might well be limited to a breach of contract." Opinion, p. 8. If a failure to convey promised property is governed by the law of contract rather than the law of fiduciary duty, then it logically follows that "delay[ing] the transfer of the disputed property" could not have triggered a fiduciary duty owed by the I'On Defendants.

The other two circumstances that the Court identifies as triggering a general fiduciary duty on the part of the I'On Defendants are likewise inconsistent with South Carolina law and public policy. First, a developer's unexercised veto authority<sup>2</sup> should

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<sup>2</sup> It is undisputed that the I'On Defendants never exercised any of the limited veto rights retained pursuant to I'On's Declarations. (R. p. 641, lines 9-15; R. p. 792, lines 18-23; R. p. 1425, line 14-p. 1427, line 3; R. pp. 3472-74.)

not trigger a general fiduciary duty on the part of the developer, and certainly should not trigger duties beyond those governing the manner in which the developer exercises its veto authority. Also, the fact that a developer is continuing its construction of buildings has never triggered, and should not trigger, a general fiduciary duty on the part of the developer.

Historically, South Carolina has imposed a general fiduciary duty in only limited circumstances that are wholly unlike those described in footnote 11 of this Court’s Opinion. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) (“Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.”). The Court’s holding creates ambiguity in a consequential area of the law—namely, when and to what extent a developer owes fiduciary duties to a homeowners association. Also, the Court’s expansion of situations in which a developer owes a fiduciary duty to a homeowners association, and its injection of ambiguity into this area of the law, will stifle development generally, and will discourage developers from continuing construction of buildings or amenities after creating a homeowners association.

The Court should grant this petition for rehearing and hold that developers owe fiduciary duties only in the circumstances and to the extent that they were recognized in *Goddard*, *Concerned Dunes W. Residents, Inc.*, and *Magnolia N. Prop. Owners’*

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In the section of the Court’s Opinion addressing Plaintiffs’ derivative claims, the Court held that “a demand would have been futile since Developers had veto power on the HOA board.” Opinion, p. 9. This holding is impossible to square with the fact that the Assembly *did sue* the I’On Defendants while the I’On Defendants veto authority remained in place.

*Ass'n, Inc.* Further, the Court should hold that, as a matter of law, the I'On Defendants did not breach any of these limited fiduciary duties.

**III. The Court overlooked or misapprehended the reason amalgamation of the I'On Defendants is inconsistent with the standard created by this Court in *Pertuis*.**

The Court of Appeals correctly held that amalgamation of the I'On Defendants was improper because Plaintiffs failed to carry their burden of proving “bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of the entities’ legal distinctions.” *Walbeck*, 426 S.C. at 528, 827 S.E.2d at 366 (emphasis in original) (quoting *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 281 (2018)). In reversing this decision, this Court identifies what it concludes are examples of bad conduct by the I'On Defendants, and the Court explains why it concludes that the legal distinctions between the I'On Defendants were blurred. Opinion, pp. 11-12. Critically, however, the Court does not explain how “bad faith, abuse, fraud, wrongdoing, or injustice *result[ed] from* the blurring of the entities’ legal distinctions.” In other words, the Court ignored the “resulting from” requirement stated in its *Pertuis* decision, substantially expanding the doctrine of amalgamation without acknowledging that it was doing so.

The facts discussed in the amalgamation section of this Court’s Opinion relate to the Court’s conclusions that the I'On Defendants failed to fulfill promises to convey property to the Assembly, conveyed the property amongst themselves and to a third party, and executed the Recreational Easement which gave the Assembly mere access rights to the subject property. *See* Opinion, pp. 11-12. But all of these events affected Plaintiffs in precisely the same way that they would have affected Plaintiffs if the I'On

Defendants were comprised of a single entity, or if the distinctions between the I'On Defendants were not blurred. Any alleged injustice or harm to Plaintiffs is independent of any blurring of the distinctions between the entities. As this Court recognized, the wrongdoing alleged by Plaintiffs is based on the I'On Defendants' failure to convey the subject property to the Assembly over the course of many years. Opinion, p. 1 (“At the heart of [Plaintiffs’] claims is the allegation that [the I'On Defendants] breached their promise to convey certain real property community amenities, upon their completion, to the HOA.”). The I'On Defendants' failure to convey the subject property did not in any way “result from” any blurring of the distinctions between the entities.

The Court's amalgamation holding does not demonstrate the “substantial reflection” required by this Court in *Pertuis* and will expand the amalgamation doctrine to apply in any cases where the court finds bad behavior or injustice *and* a blurring of distinctions, regardless of whether the bad behavior or injustice *results from* the blurring of distinctions. In effect, the Opinion will erase the guidance provided by *Pertuis*.

**IV. The Court overlooked or misapprehended the law in reinstating the trial court's award of \$225,000 in attorneys' fees to Walbeck.**

ILSA authorizes the Court to award “reasonable attorneys' fees” to a plaintiff who prevails on an ILSA claim. At trial, Walbeck sought \$50,000 in damages, but the jury awarded him nominal damages of \$1 on his ILSA claim. In a footnote, this Court reinstated the trial court's award of \$225,000 in attorneys' fees to Walbeck under his ILSA claim. *See* Opinion, p. 13 n.15. The Court's footnote does not explain the basis for the decision beyond stating: “[B]ecause we agree with the trial court's analysis on this issue and we reinstate the jury's verdict as to the timeliness of Walbeck's claims,

the attorney's fees award of \$225,500 to Walbeck is likewise reinstated." *Id.*

The trial court's award of \$225,000 in attorneys' fees pursuant to a claim on which Walbeck recovered only \$1, despite asking for \$50,000, was unreasonable for the reasons explained in the I'On Defendants' Brief filed with the Court of Appeals. (*See App. pp. 172-76.*) As the United States Supreme Court held in the context of a Section 1983 claim pursuant to which the prevailing party is also entitled to reasonable attorneys' fees: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief the only reasonable fee is usually no fee at all." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992); *see also Kebe ex rel. K.J. v. Brown*, 91 F. App'x 823, 829 (4th Cir. 2004) (denying attorneys' fees because plaintiff sought compensatory damages and was awarded only nominal damages).

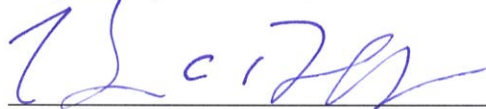
The trial court, and now this Court, improperly borrowed the success of the Assembly's claim, for which neither the Assembly nor Walbeck was entitled to recover attorneys' fees, and projected that success onto Walbeck's ILSA claim. The law does not support such a projection, which removes the link between the plaintiff's success (or lack of success) on his statutory claim and the fees awarded. Thus, the Court should grant rehearing and reverse its reinstatement of the \$225,000 award of attorneys' fees.

## **V. Conclusion**

If the Court does not grant rehearing, it will have made wholesale expansions of the law governing the statute of limitations, fiduciary duty, amalgamation, and recovery of reasonable attorney's fees pursuant to a statute. Respectfully, the I'On Defendants submit that the Court's overall view of the equities of a twelve-year

development process through a narrow lens of this dispute<sup>3</sup> should not usher in such significant expansion of the law of South Carolina.

Respectfully submitted,



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<sup>3</sup> However dissatisfied the Court may be with the way this issue was handled in the development process, the Plaintiffs would not choose to move out of the community and refused to say they would not have moved there if the I'On Defendant's version of the community dock and Creekside park had won out. In fact, Walbeck's property value at the time of trial had increased at least 400%. (R. p. 1181, lines 11-15.) As to the waterfront, Plaintiffs cite a pre-development document representing that 75% of the waterfront would be accessible to the residents. (R. p. 2026.) In fact, the I'On Defendants delivered outright ownership of roughly 98% of the waterfront property. (R. p. 1153, line 21 – R. p. 1154, line 4.)