The Supreme Court of South Carolina

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POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

July 26, 2023

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Brad Walbeck v. The I'On Company
Lower Court Case No. 2010CP1010490
Appellate Case No. 2019-000968

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

Brenda F. Shealy

CHIEF DEPUTY CLERK

cc: Justin O'Toole Lucey, Esquire
Joshua Fletcher Evans, Esquire

Timothy W. Bouch, Esquire
Yancey Alford McLeod, III, Esquire
Brian C Duffy, Esquire
Julie Lauren Moore, Esquire
Dabny Lynn, Esquire
Patrick Coleman Wooten, Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2019-000968

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Stephanie P. McDonald,
Circuit Court Judge

Opinion No. 28134
Heard December 14, 2022 – Filed February 8, 2023

AFFIRMED IN PART, REVERSED IN PART

Justin O'Toole Lucey, Joshua Fletcher Evans, and Dabny Lynn, all of Justin O'Toole Lucey, P.A., of Mt. Pleasant, for Petitioners-Respondents.

Brian Duffy, Julie Lauren Moore, and Patrick Coleman Wooten, all of Duffy & Young, L.L.C., of Charleston, for Respondents-Petitioners.

JUSTICE HEARN: This case involves promises made and broken to homeowners by a developer and its affiliated entities. Following a lengthy trial, a jury returned verdicts on several causes of action in favor of the homeowners, and the developer appealed. The court of appeals initially upheld the jury's verdict for $1.75 million on the homeowners' breach of fiduciary claim and a verdict for $10,000 on a breach of contract claim by an individual homeowner. Thereafter, upon petitions for rehearing, the court of appeals completely reversed course, dismissing all of the homeowners' claims as a matter of law and reversing and remanding the breach of contract claim by the individual homeowner. We granted certiorari and now affirm in part and reverse in part, thus reinstating the jury's verdicts.

FACTS/PROCEDURAL HISTORY

The facts of this case are complicated, and, in the words of Justice George C. James, are "not for the weary." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 114, 866 S.E.2d 542, 545 (2021). I'On is a high-density residential development that comprises public squares, restaurants, shops, and homes designed to imitate historic urban housing, including a replica of downtown Charleston's Rainbow Row. After this Court rejected a referendum effort to restrict multi-use zoning, construction of I'On Phase II began around 2000. *See I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 409, 526 S.E.2d 716, 717 (2000).

In 2010, Plaintiffs, Brad Walbeck and Lea Ann Adkins (collectively, "Homeowners"), sued the I'On Company, LLC, the I'On Club, LLC, the I'On Group, LLC, Thomas Graham, and Vince Graham, (collectively "Developers") for various causes of action related to the nonconveyance of certain real property and community amenities within the neighborhood. Thomas Graham, Vince Graham, and I'On Realty Company, LLC were dismissed from the case prior to trial, and a mistrial was ordered during the first trial in order to realign the HOA as a plaintiff. In the subsequent trial, the jury returned verdicts in favor of Walbeck and the HOA. The HOA elected its $1.75 million verdict for breach of fiduciary duty, and Walbeck elected his $20,000 negligent misrepresentation verdict.

At the heart of Homeowners' claims is the allegation that Developers breached their promise to convey certain real property community amenities, upon their completion, to the HOA. Specifically, Homeowners claim that Developers promised to convey an event facility (the Creek Club), a community dock, a boat ramp, and a

parking lot. With the exception of a portion of the parking lot, all of these amenities are located on Lot CV-6, a civic-use zoned property along Hobcaw Creek.

In 1998, in order to comply with the Interstate Land Sales Full Disclosure Act ("ILSA"), Developers filed a Property Report with the U.S. Department of Housing and Urban Development which included the following language:

> THE RECREATIONAL FACILITIES LISTED IN THE CHART ABOVE SHALL, UPON COMPLETION OF CONSTRUCTION, BE CONVEYED TO THE [HOA] BY QUITCLAIM DEED FREE AND CLEAR OF ALL MONETARY LIENS AND ENCUMBRANCES AT NO COST TO THE [HOA] OR ITS MEMBERS. UPON CONVEYANCE OF THESE FACILITIES TO THE [HOA], IT SHALL ASSUME FULL RESPONSIBILITY FOR THE COSTS OF OWNERSHIP, OPERATION, AND MAINTENANCE OF THE FACILITIES CONVEYED TO IT.

The chart that preceded this section of the 1998 Property Report[1] included nonspecific references to a "Community Dock" and a "Creekside Park." Lot CV-6 was not listed or specifically referred to by the 1998 Property Report. Thomas Graham, one of two primary developers of I'On along with his son, testified this was because Developers did not own the lot at that time. Additionally, the I'On Company submitted plans, applications, and letters to DHEC representing that the community docks were in lieu of private docks and were "for the use and enjoyment of the I'On community." DHEC, as well as the Army Corps of Engineers, subsequently approved these plans.

When Walbeck purchased his lot in November 1999, he received a copy of the 1998 Property Report and the relevant sections were included in his lot's purchase agreement. Development of I'On continued in the early 2000s, with multiple community docks, parks, and homes. On Lot CV-6, the Creek Club and

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[1] The 1998 Property Report also warned prospective buyers that "VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED AND OPERATED BY PERSONS OTHER THAN THE [HOA]. THERE IS NO GUARANTEE THAT ANY SUCH FACILITIES WILL BE AVAILABLE FOR USE BY LOT OWNERS." (all caps in original).

adjacent docks were completed in 2001.[2] Perpendicular to that lot sat Creekside Park (later named "Marshwalk Park" to avoid confusion with a nearby neighborhood). The Community Dock is distinct from the other docks built in the neighborhood during this time due to its size, deep-water access to Hobcaw Creek, and its proximity to the Creek Club.

Shortly after the 1998 Property Report was drafted, Developers began a pattern of conduct altering their initial promise to convey ownership of the disputed properties to the HOA. Beginning in December of 1998, the I'On Company sent a letter to a neighboring development, Olde Park, offering to allow residents of that neighborhood access to the community dock and boat ramp for a fee of $350,000, which was accepted. In this same letter, the I'On Company stated the community dock and boat ramp would "belong to the [HOA,]" with negligible fees to be charged for dock keys. However, at trial Vince Graham acknowledged that the plan to deed the disputed amenities to the I'On Club rather than to the HOA changed sometime between November 1998 and March 1999.

In February of 2000, the I'On Club, I'On Company, and the HOA executed a "Recreational Easement and Agreement to Share Costs." This easement granted the HOA access to the Creek Club, boat ramp, parking lot, and boat slip on Lot CV-6. Notably, when the *I'On Club* conveyed the easement to the HOA, it lacked title to the servient estate, Lot CV-6, which instead was owned by the *I'On Company*. It was not until August of 2000 that the Club acquired title, despite the fact that the amenities belonged to the HOA according to the 1998 Property Report. Developers nonetheless recorded the easement in I'On's declaration of covenants, conditions and restrictions ("I'On's Covenants"). The easement apportioned certain costs to the HOA for a term of 30 years. The HOA began making these annual payments for usage and upkeep in 2004.[3]

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[2] Over the years, Developers have equivocated on whether the dock off Lot CV-6 is the "Community Dock" referenced in the 1998 Property Report. Even at trial, Thomas Graham vacillated, initially refusing to concede that the reference to a community dock in the report referred to the main dock at the Creek Club. When Homeowners' counsel reminded him that he had testified to the contrary in his deposition, Graham replied: "I don't remember what I said two years ago." Ultimately, after being impeached with his deposition testimony, Graham admitted that the dock at the Creek Club was intended to be conveyed to the HOA.

[3] Around that time, the HOA's board, then chaired by Developers, authorized one board member, Edward Clem, to speak to a real estate attorney about the easement.

In April of 2000, the I'On Company amended the 1998 Property Report, deleting the obligation to convey a "Creekside Park" and "Community Dock" to the HOA. Later in 2000, the I'On Company conveyed two docks and a 2.86-acre tract of land, which would become Marshwalk Park, to the HOA and again amended the property report.

This vacillation continued when, in 2005, Developers entered into a "Handover Agreement" with the HOA, which stated that "the I'On Company will notify the [HOA] Board when common area property and structures are ready to be handed over to the [HOA]." This document further outlined the importance of handing all properties over in good repair and provided assurances to the HOA that the process was prepared to go forward. Nevertheless, in an email discussing the Creek Club Boat Ramp and docks, Chad Besenfelder, Developers' manager, proposed a different plan to the Grahams in November of 2006, stating "[b]oth the HOA and the Club do not want responsibility for this area .... I think the area should stay in control of the Club so not to interfere with events."

Ultimately, Developers began to negotiate an outright sale of the two lots containing the amenities to a third party rather than convey them to the HOA. In 2007, Developers discussed several proposals concerning the Creek Club and the associated community dock and boat ramp. One of the proposals by Thomas Graham was to sell the HOA another lot for a community center at a cost of $650,000 rather than to convey the Creek Club to them. This would allow Developers to sell the Creek Club as a personal residence, providing there were not any zoning issues. However, Besenfelder tabled any plan for the time being, writing, "The docks are too controversial and taking away even part of this community amenity would cause trouble."

In 2008, Mike Russo proposed to Developers that his company, 148 Civitas, purchase Lots CV-5 and CV-6. However, Besenfelder emailed Russo in August of 2008 and acknowledged the HOA's right to the property in dispute, stating: "Subject to HOA approval, the I'On Company plans to convey the docks and boat ramp to the HOA, retaining continued easement for both I'On Club and Creek Club events."

Clem had concerns that "it was signed by the same person in three different roles, as the manager of the I'On Club; as the president of the I'On homeowners association; and as the general manager of the I'On Company. Sort of shaking hands with yourself, as I could describe it." The attorney drafted a new agreement, but the HOA Board was not satisfied with the changes and did not adopt it.

Hearing rumors about this possible sale, the HOA scheduled an October 2008 meeting to discuss Russo's attempts to purchase the lots. Following this meeting, Besenfelder emailed the Grahams requesting assurance that an upcoming meeting with the Town of Mount Pleasant would lead to the continued designation of the lots as civic property. Besenfelder proposed that Developers "not separate the docks from the Creek Club at this time." He added that it was clear, based on the current use, that the lots were properly zoned as civic property and something could be worked out with Russo to ensure the HOA's continued use of the lots because Russo "want[ed] this deal to work[.]"

Notwithstanding this attempt to sell the property to Russo, in March of 2009, Besenfelder sent another email to Developers, now confirming that he was working with Thomas Graham to help prepare the "parcel for HOA dock and ramp turnover" by dividing these amenities from the Creek Club, thus contradicting his earlier recommendations. Also in March of 2009, Russo withdrew his offer to purchase the land due to pending litigation with I'On resident Catherine Templeton.[4]

After this initial sale to Russo fell through, Developers' plan for the Creek Club Dock and Boat Ramp changed again. Besenfelder emailed the I'On Club's property manager, copying all Board members, that the I'On Company "is preparing to deed the community dock to the [HOA] and discussed plans to subdivide the property to facilitate the transaction. Even Vince Graham conceded at trial that it was "entirely reasonable for the Assembly and the homeowners to rely on this representation." Yet within hours of the Besenfelder email being sent, secret negotiations resumed between Developers and Russo for the sale of the property.

Russo again made an offer to Developers, which they accepted in June of 2009. A month later, the President of the HOA, Bruce Kinney, called Thomas Graham to discuss a phone call Kinney had received about a pending sale of the amenities, but Graham informed Kinney that the Creek Club was merely undergoing a "management change." This conversation occurred during the same time that

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[4] Though not a party to this litigation, Templeton was a homeowner at the time of Russo's offer and had sought legal action to halt the sale of the disputed lots and amenities. Templeton attended HOA meetings, wrote the HOA board president, and generally alleged that the HOA had ownership of the disputed properties pursuant to the 1998 Property Report. She formed an LLC with other homeowners, communicated with the Board of Zoning Appeals and the Town of Mount Pleasant, but eventually settled with Thomas Graham after he threated a countersuit.

Kinney was in the midst of negotiations with Developers to correct the recreational easement and make it permanent, and Kinney knew nothing about the sale to Russo's company, 148 Civitas, until he was informed by Thomas Graham on August 11, 2009, that the sale had taken place on August 5, 2009.

Walbeck filed suit in December of 2010, and Adkins subsequently joined. With the parties unable to resolve their disputes, the case proceeded to trial. Following a mistrial, which was granted in order to realign the HOA as a plaintiff, a second trial ensued, and the jury awarded the following damages: breach of contract ($1,000,000 for the HOA and $10,000 for Walbeck), negligent misrepresentation ($1,000,000 for the HOA and $20,000 for Walbeck), breach of fiduciary duty ($1,750,000 for the HOA), and ILSA ($1 for Walbeck).[5, 6] Having to elect their remedies, Walbeck chose his negligent misrepresentation verdict, and the HOA elected its breach of fiduciary duty claim.

The parties appealed to the court of appeals, which initially unanimously upheld the jury's breach of fiduciary duty verdict, concluded Homeowners' derivative action on behalf of the HOA could proceed because a formal demand would have been futile, and affirmed the trial court's decision to amalgamate Developers. Thus, under the first opinion, the HOA's $1,750,000 verdict and Walbeck's $10,000 breach of contract verdict were upheld. Following both parties' petitions for rehearing, the court of appeals reversed course and unanimously substituted its opinion, this time practically nullifying the jury's verdicts. *See Walbeck v. I'On Co., LLC*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2019). The court reversed the trial court's denial of Developers' JNOV motions on derivative claims and breach of fiduciary duty—meaning that the HOA could not collect on any of the verdicts—and reversed the trial court's finding that Developers were amalgamated. As to the only remaining claim—Walbeck's individual breach of contract cause of action—the court of appeals remanded that $10,000 verdict for a new trial because it was tainted by an erroneous amalgamation ruling. The court then affirmed the trial court's rulings that the recreational easement was invalid and that Developers were

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[5] Walbeck and Adkins entered a settlement agreement with Russo prior to trial.

[6] The jury found for Developers on all of Adkins's claims, on the HOA's and Walbeck's fraud claims, and on Walbeck's claim for a violation of the South Carolina Unfair Trade Practices Act. Although the jury determined Developers' conduct was reckless, willful, and/or wanton, it declined to award punitive damages.

not entitled to attorney's fees. This Court granted the parties' cross-petitions for certiorari.

ISSUES

I. Were Homeowners' claims barred by the statute of limitations?

II. Did the court of appeals err in its ruling regarding Homeowners' claims for breach of fiduciary duty?

III. Did the court of appeals err in finding the homeowners failed to meet the requirements for filing a derivative suit?

IV. Did the court of appeals err in reversing the circuit court's amalgamation finding?

DISCUSSION

Because the myriad of evidence adduced during this lengthy trial presented quintessential jury issues, we disagree with the court of appeals' reversal of the jury verdicts. We find the trial court properly submitted Homeowners' claims and the issue of the statute of limitations to the jury, and we find its verdict was supported by the evidence. *See Burns v. Universal Health Serv., Inc.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004) ("The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict.") (citation omitted).

I. Timeliness

Both the individual Homeowners and the HOA filed four claims and each is subject to an applicable statute of limitations. Based on the conflicting evidence presented as to when Homeowners should have discovered that the property was not going to be conveyed to them as promised, together with the repeated assurances that it would be conveyed, the trial court submitted the issue of the statute of limitations to the jury. Developers have consistently argued this was error, and, in its second, substituted opinion, the court of appeals agreed, holding that a budgetary provision in a 2005 usage agreement triggered *as a matter of law* the running of the

limitations period for all the claims except Walbeck's individual breach of contract claim. This was error.[7]

Ordinarily, the question of when a statute of limitations began to run is one left to the jury. *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) ("[G]enerally, statute of limitations issues are for the jury, rather than the court, to resolve."). Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (stating in a medical malpractice action that when there is conflicting testimony regarding time of discovery of facts giving notice, the date on which discovery should have been made becomes an issue for the jury to decide). The presence of conflicting testimony regarding the time discovery should have occurred necessarily requires the jury's resolution. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it...and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.") (internal citations omitted). In the case at bar, the jury was presented with a host of conflicting evidence as to when Homeowners should have, by the exercise of reasonable diligence, discovered the facts giving rise to their claims.

The jury found the operative notice date for each claim was August 5, 2009—the date Developers conveyed the properties at issue to Russo.[8] While 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.

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[7] We do not address the timeliness of Walbeck's breach of contract claim because Developers now concede that Walbeck's contract to purchase his lot was a sealed instrument and thus has a twenty-year statute of limitations. *See* S.C. Code Ann. § 15-3-520 (2005).

[8] Interestingly, the trial judge specifically mentioned during an *in camera* colloquy with the attorneys that the date of the transfer to Russo was what triggered the statute of limitations. As she stated: "Because that's when it became very clear to the landowners in I'On that that parcel, CV-6, couldn't be given to them, regardless of any representations that the jury may find have been made, because it was gone then, and gone to a third-party."

Beginning in 1998, Developers produced a property report that promised to convey the Creek Club and the Community Dock to the HOA, upon their completion. Subsequently, Developers amended that report at least twice, changing the operative language to more vague terminology, specifically changing "Community Dock" to community docks. In February of 2000, ostensibly to pacify the Homeowners, the I'On Club entered into a recreational easement with the HOA, whereby the HOA was permitted use of the amenities and agreed to share costs of their upkeep.[9]

Substantial evidence was presented that although the initial plan—and promise—by Developers was to convey the disputed property to the HOA, Developers jettisoned that plan. In a March 2009 email, Thomas Graham's attorney, Jo Ann Stubblefield, explained that the 2000 recreational easement was granted because "in early 2000 the decision was made" to change course from the 1998 Property Report.[10] Rather than convey the properties at issue to the HOA, Developers decided they wanted the I'On Club to retain title, subject to an easement that provided for neighborhood use. Stubblefield then detailed the changes between the 1998 Property Report and subsequent iterations, including excepting the sidewalks and community dock from the properties to be conveyed to the HOA. However, rather than the I'On Club retaining title, in 2002 Lot CV-5 was conveyed to the Grahams for a nominal fee and that deed was recorded. At trial, Thomas Graham described the situation as "evolving." Another interpretation would be that Developers 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.

Following the 2005 Handover Agreement, wherein Developers promised to inform the HOA when common areas were ready to turn over to HOA control, Besenfelder instead discussed other options with the Grahams. In April of 2007, Besenfelder sent the Grahams proposals for what to do with the Creek Club and

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[9] However, as previously noted, the I'On Club did not have title to the properties when it executed the easement, instead receiving them from the I'On Company for the nominal fee of $5.00 in August of 2000. Additionally, while the easement was denominated "permanent[,]" subsequent language indicated that it would expire after thirty years.

[10] Thomas Graham forwarded this email to Bruce Kinney (then-president of the HOA), Russo, and Besenfelder with the message, "I think this explains why the community dock was not deeded to the [HOA.]"

docks, including "selling the Creek Club to the HOA[.]" Besenfelder listed the pros and cons of doing so, one pro being "[t]he HOA gets the infamous boat ramp and docks" and one con being the loss of a potentially valuable financial asset. He closed the email by suggesting the group "keep [these options] quiet for now[.]" In July, Besenfelder emailed the Grahams asking what the value of the Creek Club would be if it was repurposed and sold as a residential property, to which Thomas Graham replied, "[o]ur Creek Club is a potentially valuable asset... How can we capitalize this potential value?" Besenfelder then proposed limiting access, and Thomas Graham expressed concern that the homeowners had existing rights in the property.

Further evidence of this ever-shifting plan for the disputed properties surfaced in September of 2008 when Developers surreptitiously began the process of selling to a third party, Russo. Besenfelder, in an email titled "Creek Club, Please keep confidential[,]" informed Russo that the I'On Club had hired an accountant to perform the due diligence in advance of a sale. In this email to Russo, Besenfelder mentioned that I'On Club members get discounted use rates due to a preexisting agreement, but that he would "work with [other parties to] revise that agreement" and further informed Russo that, "the docks were promised to the homeowners and Vince [Graham] would like to honor that someday." In March of 2009 when Besenfelder seemed to express an intention not to turn over the docks, Russo inquired, "[d]oes this mean you're not going to turn over the docks???? Let me know ASAP[.]"

After the first deal with Russo fell through, an email from Besenfelder to the property manager, copying all Board members, again promised that the property would be conveyed, even mentioning that the property would be subdivided to accomplish this transfer. Nevertheless, as already noted, within hours of this email, secret negotiations began again with Russo, and the sale ultimately took place on August 5, 2009, the date on which the jury later found the statute of limitations was triggered.

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. We believe 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), where the Court implicitly acknowledged that although defendants in that case may have had a colorable argument as to the running of the statute of limitations, this Court nonetheless affirmed the jury's verdict. *See id.* ("Application

of both the basic three-year limitations period and the discovery rule in any given case can present factual issues for a jury to resolve. . . . [W]e are constrained by our standard of review and conclude that under the facts of this case, there was a jury issue as to whether the statute of limitations had expired by the time the action was commenced against [the defendant]"). In *Stoneledge*, the jury found in favor of the homeowners after the trial court denied defendants' motion for directed verdict based on the statute of limitations. As is the case here, there was a question of fact as to when Homeowners were put on notice.

Because ample evidence was presented supporting the jury's determination of when Homeowners were on notice, the jury's verdicts are reinstated. While there is an argument that the budgetary provision relied on by the court of appeals could have led to notice, the jury was cognizant of that argument but was convinced by the ample contrary evidence. That finding, because it was supported by sufficient evidence, should not have been overturned on appeal. Accordingly, we find that these claims are timely.

II. Merits of the HOA's Breach of Fiduciary Duty Claim

Homeowners argue Developers owed fiduciary duties to the HOA and that they breached these duties by not conveying the property, as well as by granting various easements over the property to third parties and in self-dealing by surreptitiously selling the property to Russo in 2009. Developers counter that their fiduciary duties to the HOA did not include a responsibility to convey the disputed property and therefore their sale to Russo did not constitute a breach. We agree with Homeowners that the court of appeals focused too narrowly on the Developers' failure to convey the disputed properties, ignoring the plethora of other evidence presented of the Developers' bad faith, broken promises, and self-dealing, all of which support the jury's verdict on Homeowners' breach of fiduciary duty cause of action.

Establishing a breach of fiduciary duty has three elements: (1) existence of the relationship, (2) breach of the duty owed to the Plaintiff, (3) damages proximately resulting from that breach. *See Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). Developers owe fiduciary duties to homeowners and homeowners' associations regarding common areas.[11] *Goddard v.*

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[11] Generally, when a Developer turns over control of the HOA to its members by relinquishing its superior voting power, the fiduciary relationship is extinguished; the developer no longer has control over that which an HOA has an interest. *See*

Fairways Dev. Gen. Partn., 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993). Specifically, common areas must be conveyed in good repair and if they are not, sufficient maintenance funds must be provided in tandem with the property conveyance. *Id.* In *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, this Court likened this duty to those present in a business relationship, holding developers owe homeowners a duty, "much like that owed by promoters of a corporation to investors." 349 S.C. 251, 256, 562 S.E.2d 633, 636 (2002). Importantly, in subdivisions with common areas that are subject to covenants, the responsibilities outlined in the covenants control. *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006).

More broadly, "it is [] well settled" that those in a fiduciary relationship with another party must not act to "make use of that relationship to benefit his own personal interests." *Lesesne v. Lesesne*, 307 S.C. 67, 69, 413 S.E.2d 847, 848 (Ct. App. 1991). Conduct that violates this mandate includes self-dealing, fraud, unconscionable conduct, misrepresentations, etc. *See Bennett v. Estate of King*, 436 S.C. 614, 633, 875 S.E.2d 46, 55 (2022) (Kittredge, J. dissenting). This makes sense because the fiduciary relationship imposes a "special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* at 633, 875 S.E.2d at 56.

The trial judge consistently questioned whether Developers' argument—that nonconveyance is only a contractual issue rather than a potential breach of fiduciary duty—was too narrow. This occurred at the directed verdict stage, as well as in the

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Goddard v. Fairways Dev. Gen. Partn., 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (finding that superior voting power by developers created a fiduciary relationship with condo-owners). However, those duties stem from developer control of the entity, the ongoing nature of construction, and the transfer of common areas. *See Concerned Dunes West Residents, Inc. v. Georgia–Pacific Corp.*, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002) ("[T]he developer has a fiduciary duty to the POA to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, *at the time of transfer*, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair.") (emphasis added). Here, Developers maintained consistent veto authority over the board, continued construction in I'On until past the 2009 conveyance, and delayed the transfer of the disputed property, thereby continuing their fiduciary relationship with the HOA. These facts counteract any concerns that the fiduciary relationship was extinguished at the time of Developers' transfer to Russo.

court's order denying JNOV, where she stated, "a developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in 'substandard condition' (if not worse), and thus, any distinction between properties which *should have been conveyed* and *properties which were actually conveyed in a substandard condition* is a distinction without a difference." However, the court decided to send this cause of action to the jury based not only on the nonconveyance but also on the evidence of bad faith and self-dealing that was presented, and the court denied Developers' motion for JNOV on that additional ground as well. In its second opinion, which reversed the jury's verdict on breach of fiduciary duty, the court of appeals pivoted and embraced the Developers' narrow approach, focusing only on the Developers' act of nonconveyance. *See Walbeck v. I'On Co., LLC*, 426 S.C. 494, 517, 827 S.E.2d 348, 360 (Ct. App. 2019) ("[T]he circuit court's denial of Appellants' JNOV motion was based on its extrapolation of a specific fiduciary duty to *convey title* to common areas from the duty pronounced in *Goddard* and *Dunes West*, i.e., the fiduciary duty to ensure common areas are in good repair before turning them over to a homeowners association.") (emphasis in original).

Homeowners argue this holding was unnecessarily and erroneously constricted, as the two relationships between Developers and the HOA—contractual and fiduciary—are inextricably intertwined. Under this analysis, the contractual duty to convey was overlaid by a fiduciary relationship, which means that while the nonconveyance was certainly a breach of contract, the subsequent self-dealing by Developers through the secret sale of the property to a third party constituted a breach of the Developers' fiduciary duties to the HOA. Stated differently, 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. While Developers urge this Court to focus only on the nonconveyance, Homeowners have never taken such a limited approach, nor did the trial court. Instead, there was sufficient evidence of bad faith, promises made and broken, and self-dealing presented *in addition to* the breach of contract, to warrant submission of the fiduciary claim to the jury. This nefarious conduct includes, but is not limited to, the secretive sale to Russo, the false representation regarding the property's rightful ownership, and the easement granted to third parties when the property had been promised to the HOA. This kind of conduct, by those in a fiduciary relationship, has clearly led to breaches in other cases and, though springing from contract in this case, constitutes breaches of fiduciary duty. *See, e.g.*, *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) ("Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.") (citation

omitted). Accordingly, we reverse the court of appeals and reinstate the jury verdict as to this cause of action.

III. Derivative claims

The court of appeals dismissed Homeowners' derivative claims, finding the claims failed the requirements of Rule 23, SCRCP. There is a strong argument that the HOA's realignment as a plaintiff renders this issue moot. Nevertheless, because it seems the parties tried this case as derivative claims—as evidenced by Homeowners' opening and closing, arguments at the directed verdict stage, and the jury charge—we address the merits.

Shareholders of an organization may bring a derivative suit pursuant to Rule 23, SCRCP, in order to compel an organization to represent its interest through litigation. *Patterson v. Witter*, 425 S.C. 213, 231, 821 S.E.2d 677, 687 (2018). Generally, this occurs when the organization's leaders and directors have chosen, for whatever reason, to not act on their own to protect the organization's legal rights. Rule 23(b)(1), SCRCP, mandates:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Id. Accordingly, Rule 23, SCRCP, requires a plaintiff to set forth particularized allegations—a departure from the more liberal pleading requirements of Rule 8, SCRCP. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000). Pursuant to Rule 23, a shareholder plaintiff must either make a demand on the entity that it pursue a claim or plead with particularity the exceptional circumstances that demonstrate why making a demand would be futile. *Id.* A demand made on a corporation must (1) identify the alleged wrongdoers, (2) describe the factual basis of the wrongful acts and the harm caused to the corporation, and (3) request remedial relief. *Patterson*, 425 S.C. at 233-34, 821 S.E.2d at 688. In

reviewing these requirements, the trial court is neither limited to considering only the allegations put forth in the complaint nor precluded from considering a pre-suit demand letter that was not expressly incorporated by reference into the complaint. *Patterson*, 425 S.C. at 234-35, 821 S.E.2d at 688-89.

Here, in denying Developers' JNOV motion, the trial court stated, "by virtue of the verdict and monetary awards rendered in favor of the [HOA], it is clear that the representative [Homeowners] prosecuted this action in an effort to preserve *all* I'On lot purchasers' common interest in the amenity property." Further, the trial court specifically found that the homeowners made repeated demands, and even if they had not, a demand would have been futile since Developers had veto power on the HOA board. *Grant v. Gosnell*, 266 S.C. 372, 376, 223 S.E.2d 413, 415 (1976) ("In evaluating the 'excuse' allegations in a derivative suit, 'Courts have generally been lenient in excusing demand.'") (quoting *DeHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970)). We find the trial court properly denied JNOV because even if no formal demand was made, any attempt to do so would have been futile in light of the Developers' remaining control of the HOA through its veto power. Indeed, Thomas Graham conceded he had previously stated in his deposition that this veto power was like being on the "Supreme Court."

Moreover, after the HOA was realigned as a plaintiff, utilizing a derivative action makes little sense. The HOA is a party to this litigation and acting on the same side as the purported interested members, regardless of their success or failure to compel suit through a derivative action. Thus, the only purpose of the derivative suit—compelling the HOA to join as a plaintiff—has been accomplished. *See Lennon v. S.C. Coastal Council*, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998) ("A threshold inquiry for any court is a determination of justiciability, *i.e.* whether the litigation presents an active case or controversy."); *see generally Smith v. Sperling* 354 U.S. 91, 95 (1957) (finding that realignment of a corporate plaintiff in a derivative action defeated subject matter jurisdiction). Accordingly, the court of appeals' dismissal of the HOA's claims is reversed.

IV. Amalgamation/Single-Business Enterprise Theory

Homeowners contend the court of appeals erred in reversing its original opinion that the trial court did not err in amalgamating the interests of the various entities. Homeowners assert the court of appeals should not have applied the single-business entity test set forth by this Court in *Pertuis*, but even if *Pertuis* applies, amalgamation is appropriate because there is ample evidence of exploitative and evasive conduct resulting in unfairness. Additionally, Homeowners argue

Developers waived the question of amalgamation by asking the trial court to decide the issue before sending the case to the jury. Homeowners also contend that even if the parties should not have been amalgamated, Developers cannot establish material prejudice, and therefore it was error for the court of appeals to remand for a new trial.

Conversely, Developers argue they did not waive any challenge to the amalgamation ruling since that is an issue for the trial court to answer in the first instance and may be appealed. As to the merits, Developers contend the court of appeals correctly recognized that amalgamation is the exception, not the rule. Accordingly, Developers argue Homeowners' failure to show a causal connection between any bad faith or improper conduct and the mixing of several different corporate entities precludes treating the various Developers as one. Developers assert the court of appeals properly concluded the trial court's erroneous amalgamation ruling prejudiced them, and therefore, the new trial remedy was correct.

In *Pertuis*, the Court formally adopted the single business enterprise theory as one method of piercing the corporate veil. *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018). There, a restaurant manager who was a minority shareholder filed suit against the majority shareholders for being "squeezed out" of the business, which actually consisted of three S-corporations. The trial court determined the three entities constituted a "de facto partnership" and amalgamated the interests. In formally adopting the single business enterprise theory, the Court acknowledged the practical reality that businesses often form different corporate structures as a means of shielding shareholders from liability—"there is nothing remotely nefarious in doing that." *Id.* at 655, 817 S.E.2d at 280-81. Accordingly, the Court required two elements before amalgamating different interests into one under the single business enterprise theory: 1) "the various entities' operations are intertwined" and 2) "further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* The Court placed the burden on the party seeking to pierce the corporate veil and also cautioned that deciding whether to amalgamate various entities should only be done upon "substantial reflection." *Id.* ("As with other methods of piercing the corporate form that have previously been recognized in South Carolina, equitable principles govern the application of the single business enterprise remedy, and this doctrine 'is not to be applied without substantial reflection.'" (citation omitted)). After formally adopting this test, the Court concluded the trial court erred in amalgamating the three entities because there was no evidence of bad faith by the majority shareholders.

While *Pertuis* involved a claim of minority shareholder oppression, this Court applied *Pertuis* in a construction defect case where a homeowner's association sought to amalgamate various entities structured as limited liability companies. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 866 S.E.2d 542 (2021). The Court reversed the trial court's "decision" to amalgamate the various LLCs that employed the investors, construction contractors, and sales team for a residential property development.[12] A principal of the construction contractor had knowledge of construction defects plaguing the project while working with another intertwined sales entity. The various LLCs shared members, and homeowners testified they were confused as to the different roles that each LLC and individual played. In declining to amalgamate the LLCs, the Court noted that it viewed the facts "with the requisite hesitancy to invade the LLC form . . . ." *Id.* at 126, 866 S.E.2d at 551. The Court reviewed the record de novo and concluded that the only evidence of "bad faith, abuse fraud, wrongdoing, or injustice" was the fact that the profits of the developer, who had constructive notice of construction defects, were "entirely dependent" on the sales entity's ability to sell units. *Id.* at 119, 126, 866 S.E.2d at 548, 551 (2021). Accordingly, amalgamation was not appropriate.

In denying Developers' JNOV motion, the trial court concluded that any distinctions between the various entities were blurred, as all were "controlled, managed, and owned by the same individuals, and all collectively functioned as one in the day-to-day operations" of the I'On development, "including promulgating deceptive and misleading representations." Additionally, although the trial court did not have the benefit of the *Pertuis* decision at the time it denied Developers' JNOV motion, some of the court's findings still demonstrate more than that the various entities were simply intertwined. For example, the trial court noted that the recreational easement, which was entered into between the I'On Company, the I'On Club, and the HOA in 2000 was executed on behalf of all three entities by the general manager of the I'On Company. Nevertheless, a subsequent general manager of the I'On company informed the HOA in 2009 that the I'On Company was preparing to deed the property containing the community dock to the HOA despite the fact that the I'On Club, not the I'On Company, owned the property. The trial court also recounted how lots CV-5 and CV-6 were transferred between the I'On Company to

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[12] As the Court noted, the trial court never reached the merits of the claim, instead simply denying a directed verdict motion on the issue but not revisiting it. Nevertheless, because the question of amalgamation lies in equity and the parties, as well as the court of appeals, all treated the issue as being decided on the merits, the Court reached the matter. *Stoneledge*, 435 S.C. at 120, 866 S.E.2d at 548.

the I'On Club in 2000 for $5, CV-5 was transferred two years later to the owners of the I'On Company for $5, although there was no evidence that consideration was actually paid to the I'On Club. In its initial opinion, the court of appeals agreed with the trial court's amalgamation ruling but reversed in its substituted opinion, concluding there was no evidence of "bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of the entities' legal distinctions."

We find the court of appeals correctly analyzed this issue initially, and erred in its second opinion by adopting Developers' limited view of the test set forth in *Pertuis*. While it is true that courts should be hesitant to invade the corporate form, here there is more than enough evidence that the creation of various entities furthered Developers' abilities to refrain from doing that which they repeatedly told the HOA and the residents they would do—turn over the disputed amenities to the HOA. As this Court stated in *Pertuis*, "the corporate structure should not shield—fraud, *evasion of existing obligations*, circumvention of statutes, monopolization, criminal conduct, and the like." 423 S.C. 640, 654-55, 817 S.E.2d 273, 280 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008)) (emphasis added).

The 1998 Property Report specifically provided that the HOA would own the dock and park once the development was completed. Then, within a year, the plan changed, as Developers decided not to convey the amenities, including the community dock, completely disregarding the 1998 Property Report. Next, Developers attempted to change from outright HOA ownership to mere HOA access by granting the HOA a recreational easement, despite not actually owning the property at the time. In an amended property report in 2000, the community dock was removed from the list of amenities owned by the HOA, thus purporting to accomplish the change from ownership to access without any input or consideration of the interests of the residents and the HOA. Between 2006 and 2007, Developers had yet to turn over the community dock or boat ramp, and openly acknowledged that "[t]he docks are too controversial and taking away even part of this community amenity would cause trouble." Shifting course again, in 2008, Besenfelder wrote, "We are ready to deed this community dock and ramp to the homeowners and wish to comply with regulations."

Ultimately, Developers reversed themselves yet again, and decided to sell the docks to Russo without informing the HOA because they wanted to "keep the transaction quiet because of all the brew ha hah (sic) and filings." Developers even went a step further when, instead of disclosing the outright sale of the properties to Russo, they told Kinney that Russo was simply taking over management of the lots

and amenities. Thus, under our de novo review of this issue, the evidence shows that not only were the various entities intertwined and acting in concert with each other, their conduct demonstrates "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 280-81. Although the jury elected not to award punitive damages in this case, its verdict did include a finding that the Developers' conduct was "willful and wanton."[13] Accordingly, we find the court of appeals erred in declining to apply the single-business enterprise theory. Because the trial court did not err in amalgamating the different entities, there is no need for a remand.[14]

CONCLUSION

Based on the forgoing, we: (1) reverse the court of appeals' ruling on the statute of limitations because the issue as to when Homeowners had adequate notice

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[13] Moreover, we note that following the verdict, the trial court issued an order—from which the Developers did not appeal—holding them in contempt for their destruction of evidence. The trial court pointed out specific examples of documents that were deleted, and noted that the forensic report revealed that "Besenfelder deleted approximately *51,527 files and folders*[.]" The trial court ultimately awarded over $23,000 in sanctions.

[14] In Developers' cross-petition for certiorari, they assert the court of appeals erred in relying on the two-issue rule in upholding the trial court's finding that the 2000 recreational easement was invalid. As to the merits, Developers contend the after-acquired title doctrine applies and that the easement was perpetual rather than limited to 30 years. While we agree the two-issue rule applies and affirm the court of appeals on this issue, we do so for a different reason. Regardless of whether the lack of an arms-length transaction constituted a separate ground in the trial court's order, the court specifically noted, "Additionally, the Doctrine of Unclean Hands precludes Developers from relying upon equitable principles such as the After-Acquired Title Doctrine because, in order to recover in equity, one must act equitably." Developers have not addressed this equitable basis supporting the trial court's decision, so it is the law of the case. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). In any event, we agree with the trial court that because Developers acted inequitably, we do not need to reach whether the after-acquired title doctrine could apply in this case.

to begin the limitations clock was properly presented to the jury and resolved by it; (2) find any procedural issues related to the derivative claims either (a) moot as the HOA was realigned as a plaintiff and the trial court explicitly found it adopted its own claims against the Developers, or (b) demand was saved by futility due to the Developer's continuing veto power; (3) hold that Developers breached the fiduciary duties owed to Homeowners; (4) reverse the court of appeals' decision that Developers could not be amalgamated, as there is more than enough evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions; and (5) affirm the court of appeals that the recreational easement was invalid.[15]

AFFIRMED IN PART; REVERSED IN PART.

KITTREDGE, Acting Chief Justice, FEW, JAMES, JJ., and Acting Justice Jan B. Bromell Holmes, concur.

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[15] Before the circuit court, Walbeck claimed attorney's fees under his statutory ILSA claim. *See* 15 U.S.C.A. § 1709(a)-(c) (2012) ("The amount recoverable . . . may include, in addition to matters specified [in this section] interest, court costs, and reasonable amounts for attorneys' fees . . . ."). The trial court found both that Walbeck could recover attorney's fees under ILSA and that his claim for more than $1 million was unreasonable, reducing the fee by over 75%. *See Farmers & Merchants Bank v. Fargnoli*, 274 S.C. 23, 26, 260 S.E.2d 185, 187 (1979) ("The law requires, however, that the award must be reasonable."). Though Developers challenged this claim before the court of appeals, its ultimate finding that the ILSA claim was barred was dispositive. Rather than remanding to the court of appeals, because 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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brad J. Walbeck and Lea Ann Adkins, individually and derivatively on behalf of The I'On Assembly, Inc., and I'On Assembly, Inc., 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, Appellants.

Appellate Case No. 2015-001590

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5588
Heard April 12, 2018 – Filed August 8, 2018
Withdrawn, Substituted and Refiled February 27, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Brian C. Duffy, Seth W. Whitaker, and Julie L. Moore, all of Duffy & Young, LLC, of Charleston, for Appellants.

Justin O'Toole Lucey and Joshua F. Evans, both of Justin O'Toole Lucey, P.A., of Mount Pleasant, for Respondents.

GEATHERS, J.: In this action alleging violation of the Interstate Land Sales Full Disclosure Act (ILSA), 42 U.S.C. §§ 1701 to -1720 (1994), Appellants, 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, seek review of the circuit court's orders (1) denying their motion for a judgment notwithstanding the verdict (JNOV) or new trial absolute and new trial nisi remittitur, (2) declaring a recreational easement invalid, (3) denying their motion for attorney's fees against Respondent Lea Ann Adkins, and (4) granting attorney's fees to Respondent Brad J. Walbeck.

Appellants argue (1) Walbeck and Adkins could not pursue this action as a derivative action; (2) Respondents' claims are barred by the statute of limitations; (3) the disputed recreational easement was valid and perpetual; (4) there was no fiduciary duty to convey certain amenities to the homeowners association, Respondent I'On Assembly, Inc.; (5) the directed verdict on Appellants' abuse of process counterclaim was improper; (6) Appellants were entitled to attorney's fees as the prevailing party on Adkins' breach of contract claim; (7) the attorney's fees award to Walbeck was unreasonable because he was awarded merely nominal damages on his ILSA claim; (8) the circuit court's ruling that Appellants were amalgamated was improper; and (9) Walbeck failed to show he relied on any representation made by Appellants and, therefore, he failed to establish a claim under ILSA.

We affirm in part, reverse in part, and remand for a new trial on Walbeck's breach of contract claim and the dismissal of all other claims.

FACTS/PROCEDURAL HISTORY

At the heart of this convoluted case is a developer's promise to convey certain amenities in a residential community to a homeowner's association. Specifically, Respondents allege that Appellants promised they would convey to Respondent I'On Assembly, Inc. (the HOA) the Community Dock and Creekside Park located on the civic lot on which the boat ramp was located (lot CV-6) in I'On Village but instead sold these amenities to a third party. Appellants, however, allege they promised to convey a "generic" community dock and creekside park to the HOA but not the specific ones located on lot CV-6. Appellants also allege they conveyed the amenities as promised.

I'On Village is located in Mount Pleasant. It was conceived by Thomas Graham and his son, Vince Graham. Thomas Graham's company, Graham Development, was the original majority owner of the I'On Company, LLC (the

I'On Company), and Vince Graham was the company's manager. The I'On Company's subsidiary, I'On Realty, LLC (I'On Realty), employed real estate agents to market the lots in I'On Village.

On November 27, 1999, Walbeck entered into a contract to purchase a lot in I'On Village. Walbeck's purchase contract incorporated a property report (the 1998 Property Report) that the I'On Company had filed with the United States Department of Housing and Urban Development (HUD) on November 3, 1998, pursuant to ILSA.[1] The report set forth information deemed necessary to protect prospective purchasers, including the amenities that would be provided to lot owners.

Specifically, the report included a chart listing amenities to be built during the first two phases of the development. Among the amenities to be built in Phase II was a "Creekside Park" and a "Community Dock." Under this listing was the following language:

> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the [HOA] or its members. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it.

The report also included the following notification:

> VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED AND OPERATED BY PERSONS OTHER THAN THE [HOA]. THERE IS NO GUARANTEE THAT ANY SUCH FACILITIES WILL BE AVAILABLE FOR USE BY LOT OWNERS. ANY, OR ALL OF SUCH FACILITIES MAY BE OPERATED AS A PRIVATE CLUB FOR MEMBERS AND THEIR GUESTS. THERE IS NO ASSURANCE THAT YOU WILL BE ACCEPTED FOR

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[1] *See* 42 U.S.C. § 1707 (setting forth requirements for the contents of a property report, relating to the lots in a subdivision, to be made available to the public).

MEMBERSHIP IN ANY SUCH PRIVATE CLUB IF YOU APPLY. IF ACCEPTED, THE COSTS OF SUCH A MEMBERSHIP MAY BE SUBSTANTIAL AND ARE IN ADDITION TO THE PURCHASE PRICE OF YOUR LOT. NO REFUND OF THE PURCHASE PRICE OF YOUR LOT WILL BE MADE IF YOU CANNOT OBTAIN A MEMBERSHIP. SINCE THE VALUE OF YOUR LOT MAY BE ADVERSELY AFFECTED BY YOUR INABILITY OR FAILURE TO OBTAIN A MEMBERSHIP, YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE OF A LOT IF IT IS BASED UPON YOUR PRESUMED ABILITY TO OBTAIN A MEMBERSHIP IN ANY PRIVATE CLUB AND TO USE ITS RECREATIONAL FACILITIES.

Throughout the years after Walbeck received the 1998 Property Report, Appellants built multiple community docks and parks in I'On Village. Nonetheless, Respondents considered and expected the Community Dock and Creekside Park listed in the 1998 Property Report to be located on lot CV-6—this lot had at least 300 feet of deep water access to Hobcaw Creek. The I'On Company also completed construction of a building on lot CV-6 that became known as the "Creek Club." The Creek Club was intended as a venue for wedding receptions and other events. It operated as a private club and hosted its first event circa 2003.

Appellants vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park. At trial, Thomas Graham admitted that the Creek Club overlooked a park. He also admitted that when the I'On Company was planning its parks in 1999, the plans included "the Creek Club Park." In his deposition, Thomas Graham testified that the "Community Dock" listed in the 1998 Property Report referred to the main dock at the Creek Club that was adjacent to the boat ramp on lot CV-6; the boat ramp was built in 1999 or 2000, and the Creek Club dock was completed in 2000 or 2001.[2] However, at trial, Thomas Graham disputed that the "Community Dock" listed in the 1998 Property Report referred to the Creek Club dock. He explained the reference to a

[2] Vince Graham testified that the dock was completed in late 2000 or early 2001, before the Certificate of Occupancy was issued for the Creek Club itself on April 10, 2001.

community dock in the 1998 Property Report "was to a generic community dock" and not to a specific property as Respondents contended. He stated, "[T]his was before we had designed anything -- got anything permitted or approved, even bought the land . . . . We didn't know whether -- at that time, . . . we thought sure we'd get one -- at least one community dock, but we didn't know how many, so that was a reference to that community dock."

On February 9, 2000, the I'On Club, LLC (the I'On Club) executed a "Recreational Easement and Agreement to Share Costs" (Recreational Easement) purporting to "provide access to the [HOA] members for them to use the docks and the boating ramp" off lot CV-6.[3] The Recreational Easement also included language purporting to grant an easement to the I'On Club for use and access to certain common areas within I'On Village. On page three of the document, the easement is described as perpetual. However, section 4.2 of the Recreational Easement states that either party can terminate the easement after thirty years upon six months' notice. Thomas Graham described this language as a mistake because the I'On Club intended for the Recreational Easement to be permanent.

Section 3.1 of the Recreational Easement required the HOA to pay assessments "to cover a share of the costs incurred by [the I'On Club] in maintaining, repairing, replacing, operating[,] and insuring the Boating Facilities." The Boating Facilities were identified as "certain recreational facilities, including a boat ramp and dock and a driveway and parking area to serve them."

On April 10, 2000, the I'On Company completed an amended property report for filing with HUD (first amended Property Report). Whereas the 1998 Property Report listed a "Creekside Park" and a "Community Dock" among the amenities to be built in Phase II, the first amended Property Report's list substituted "Marshwalk (park)" for "Creekside Park" and "Community Docks" for "Community Dock." (emphasis added). The first amended Property Report also changed the language regarding transfer of these amenities to the HOA—whereas the 1998 Property Report provided for transfer of the Creekside Park and Community Dock to the HOA, the first amended Property Report stated, "The recreational facilities listed in the chart above, other than the sidewalks and community dock, shall, upon completion of construction, be conveyed to [the HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to [the HOA] or its members." (emphasis added).

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[3] Curiously, the I'On Club did not obtain title to lot CV-6 until six months later.

Jo Anne Stubblefield, the I'On Company's attorney for ILSA compliance, explained the amendment to the Property Report this way:

> [I]n early 2000[,] the decision was made to have the I'On Club own and maintain a parking area, boat ramp[,] and dock as part of the Club Facilities and grant an easement to the [HOA] for use of all of these facilities so that property owners would have the same use rights they would have had in the "community dock" referenced in the original Property Report, but in addition would have rights to use the parking area and boat ramp (which had not been mentioned in the original Property Report and which the property owners would otherwise have had no right to use unless they joined the Club). The Recreational Easement was drafted to create that easement and to provide for the [HOA] to contribute to the costs incurred by the Club in maintaining the boat dock, boat ramp, and parking area. Once that was finalized and recorded, we amended the HUD Property Report (effective April 2000) to reflect that . . . .

Thomas Graham testified that the name of the Creekside Park was changed to Marshwalk after the 1998 Property Report was provided to Walbeck to avoid confusion with a nearby neighborhood called "Creekside Park." He also testified that the Marshwalk was not on lot CV-6 or adjacent to Hobcaw Creek but ran for over two miles along the marsh, which was adjacent to a tributary of Hobcaw Creek. Vince Graham also testified that the "Creekside Park" was actually the Marshwalk.

On August 15, 2000, the I'On Company conveyed ownership of lot CV-6, including the Creek Club and boat ramp, to the I'On Club. Appellants conveyed the Marshwalk park to the HOA on November 21, 2000. Vince Graham testified that the conveyance included "docks two and three."

In July 2008, Mike Russo with 148 Civitas, LLC (Russo) submitted a proposal to buy lot CV-6, together with overflow parking on an adjacent lot (CV-5). The proposal included a provision for transfer of the "boat docks" to the HOA. Subsequent communications between Appellants and Russo indicated an intent to ultimately convey ownership of the boat ramp and dock off lot CV-6 to the HOA. However, in November 2008, Russo and Appellants entered into an agreement that

included the boat ramp and Community Dock in the transfer of lot CV-6 to Russo, which was concerning to HOA members. The then-current president of the HOA's Board of Trustees (Board), Bruce Kinney, contacted Thomas Graham regarding modifying the Recreational Easement to protect the HOA members. One of the modifications Kinney sought was making the easement perpetual. However, on January 5, 2009, Thomas Graham notified Chad Besenfelder that Appellants would not modify the Recreational Easement while the Creek Club was under contract for sale to Russo.

On March 11, 2009, Board President Kinney sent an e-mail to Thomas Graham indicating the Board's discovery of the 1998 Property Report's representation that the Community Dock would be conveyed to the HOA. Kinney expressed the HOA's expectation that the Community Dock would be excluded from the sale to Russo. Kinney's e-mail also inquired about the 1998 Property Report's listing of the Creekside Park as an additional amenity to be conveyed to the HOA.

Later in March 2009, Russo advised Kinney that he was cancelling the purchase agreement, and subsequently, Thomas Graham advised Kinney that Besenfelder was working out details for transferring ownership of the Community Dock to the HOA. Likewise, Besenfelder advised the HOA's management company that ownership of the Community Dock would be transferred to the HOA. However, by August 1, 2009, the HOA learned that Appellants and Russo had recently entered into a new contract for the sale of CV-6 to Russo, including the Creek Club, the boat ramp, and Community Dock.

On August 5, 2009, the I'On Club conveyed ownership of lot CV-6 to Russo in consideration of $1,400,000. On this same day, Thomas Graham, Vince Graham, and Geoff Graham conveyed ownership of lot CV-5 to Russo in consideration of $225,000.00.[4] The conveyance of lot CV-6 to Russo was expressly subject to the Recreational Easement, and the I'On Club executed a written assignment of its rights and obligations under the Recreational Easement to Russo.

On December 22, 2010, Walbeck filed his Complaint against Appellants and 148 Civitas, LLC, alleging causes of action for violation of ILSA, Breach of Contract, Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, Civil Conspiracy, violation of the South Carolina Unfair Trade Practices Act, Unjust

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[4] Geoff is the son of Thomas and brother of Vince.

Enrichment, Promissory Estoppel, "Veil Piercing/Alter Ego," and Tortious Interference with Contract. The complaint also alleged that Walbeck was bringing the action on behalf of himself and derivatively on the HOA's behalf. On March 8, 2011, Walbeck filed an Amended Complaint adding Mike Russo (in his individual capacity) and I'On Realty as defendants. Appellants filed a motion to dismiss Walbeck's action on May 27, 2011 pursuant to Rule 12(b)(6), SCRCP, asserting, *inter alia*, Walbeck's claims were barred by the statute of limitations and Walbeck failed to satisfy the pleading requirements of Rule 23(b)(1), SCRCP, for a derivative action.

On February 7, 2012, Walbeck filed a Second Amended Complaint and Lea Ann Adkins joined Walbeck as a plaintiff. Walbeck and Adkins also added the HOA as a defendant and added an allegation that Appellants were amalgamated. On March 15, 2012, the circuit court issued an order denying Appellants' Rule 12(b)(6) motion to dismiss. On January 2, 2014, Respondents filed a Third Amended Complaint adding a cause of action for Aiding and Abetting against Russo. On January 13, 2014, Russo entered into a settlement agreement with Respondents. The terms of the settlement included Russo's sale of lot CV-6 to the HOA for $495,000 and the HOA's lease of the building, lawn, and three parking spaces back to Russo. The settlement terms also allowed the HOA access to the Creek Club for 13 dates per year and Russo's future conveyance of lot CV-5 to the HOA.

Subsequently, Respondents' action against Appellants proceeded to trial on January 14, 2014, but the action ended in a mistrial on January 17, 2014. On February 21, 2014, the HOA realigned its party status and adopted the other Respondents' claims set forth in the Third Amended Complaint. On May 12, 2014, Appellants filed a separate action against Respondents, seeking a declaration that the Recreational Easement was perpetual. The circuit court granted Appellants' motion to consolidate their action with the present action.

On June 16, 2014, Respondents filed their Fourth Amended Complaint reflecting the HOA's realignment as a plaintiff, Russo's dismissal from the action, and elimination of the claims for Tortious Interference and Aiding and Abetting. Exactly one year later, the circuit court issued an order declaring the Recreational Easement invalid and void ab initio because the I'On Club lacked title to lot CV-6 at the time it executed the easement. The circuit court also concluded the easement was not perpetual but was limited to a term of thirty years.

The parties re-tried the case from July 28 through August 1, 2014. The jury returned verdicts for Walbeck on his claims for violation of ILSA ($1), Negligent Misrepresentation ($20,000), and Breach of Contract ($10,000) and for the HOA on its claims for Breach of Contract ($1,000,000), Breach of Fiduciary Duty ($1,750,000), and Negligent Misrepresentation ($1,000,000). The HOA elected to recover on its Breach of Fiduciary Duty claim, and Walbeck elected to recover on his Negligent Misrepresentation claim. The circuit court denied Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. The circuit court also denied Appellants' motion for an award of attorney's fees against Adkins and awarded attorney's fees to Walbeck pursuant to ILSA. This appeal followed.

ISSUES ON APPEAL

1. Did Respondents properly file the derivative claims on the HOA's behalf?

2. Did the circuit court err by denying Appellants' JNOV motion as to the HOA's breach of fiduciary duty claim?

3. Were Respondents' claims barred by the statute of limitations?

4. Did the circuit court err by directing a verdict for Respondents on Appellants' abuse of process counterclaim?

5. Did the circuit court err by declaring the Recreational Easement invalid?

6. Did the circuit court err by concluding that Appellants were amalgamated?

7. Did the circuit court err by awarding attorney's fees to Walbeck?

8. Did the circuit court err by denying Appellants' request for attorney's fees against Adkins on her breach of contract claim?

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* The appellate court "will reverse the trial court's rulings on these

motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law." *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

"When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998), *abrogated on other grounds by Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005)). A "JNOV should not be granted unless only one reasonable inference can be drawn from the evidence." *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154.

As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

LAW/ANALYSIS

I. Derivative Action

Appellants argue the circuit court erred by concluding Walbeck and Adkins properly filed derivative claims against Appellants pursuant to Rule 23(b)(1), SCRCP. We agree.

Rule 23(b)(1) addresses the procedural requirements for individuals seeking to file a derivative action. It states,

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. *The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority* and, if necessary, from the shareholders or members, *and the*

> *reasons for his failure to obtain the action or for not making the effort.* The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

(emphases added). Further, the determination of whether a plaintiff has met the requirements of Rule 23 is limited to assessing the sufficiency of the allegations within the complaint. *See McCormick v. England*, 328 S.C. 627, 632–33, 494 S.E.2d 431, 433 (Ct. App. 1997) ("A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the complaint.").[5]

"The purpose of the demand requirement is to 'affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991)) (alteration in original) (quoting *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 533 (2009)). "Thus, the demand requirement implements 'the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.'" *Kamen*, 500 U.S. at 101 (quoting *Daily Income Fund,* 464 U.S. at 530).

Here, Respondents' pleadings fall short of alleging facts indicating either an adequate demand by Walbeck or Adkins directed to the Board or the futility of making such a demand. The pleadings allege that "[s]everal I'On homeowners" repeatedly demanded the Board "to secure [the HOA] and its members the rights to the Creekside Park and Community Dock," including "unencumbered title, access, and use of" these amenities. The pleadings also include allegations that Walbeck and Adkins directed a demand to Appellants to convey title to these amenities to the HOA. However, the pleadings do not allege that either Walbeck or Adkins

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[5] This court's opinion in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000), *certiorari granted* August 23, 2001, has been cited in all of the parties' appellate briefs. After our supreme court granted certiorari in *Whittle*, the parties settled the case and the court issued an order on January 10, 2003, stating that this court's opinion would "remain viable in result only." Therefore, we do not view *Whittle* as binding precedent.

directed a demand to the Board to initiate litigation against Appellants to enforce the HOA's alleged rights and recover the disputed amenities.

Further, the pleadings do not adequately allege facts indicating that a demand of the Board would have been futile. The pleadings allege that additional demands would be futile because the Board failed to timely act to protect the rights of the HOA and its members and Appellants' conveyance of the Creekside Park and the Community Dock to Russo "evidences the Board's failure to secure the rights to" these amenities and "the futility of further demand." However, there are no allegations that a demand on the Board to initiate litigation to *recover* these amenities would have been futile. Further, there are no allegations that the non-developer members of the Board were guilty of some wrongdoing that would give them an incentive to automatically reject such a demand or that Appellants had veto power over the Board such that they would prevent the Board from initiating litigation against them.

Based on the foregoing, we reverse the circuit court's ruling that Walbeck and Adkins properly filed derivative claims on the HOA's behalf.[6] We order the circuit court to dismiss these claims.

II. Fiduciary Duty

Even assuming the derivative claims were properly before the circuit court, we agree with Appellants that the circuit court erred in concluding Appellants had a fiduciary duty to convey title to the Creekside Park and Community Dock on lot CV-6 to the HOA.

Specifically, Appellants argue the circuit court erred in concluding that (1) a developer in control of a homeowners association may not make decisions that benefit the developer's own interest at the expense of the association and its members; and (2) a developer's failure to convey common areas to a homeowners association "is at least the equivalent of conveying them in 'substandard

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[6] As we base our holding on the failure to meet the demand requirement of Rule 23, we decline to address Appellants' argument that Walbeck and Adkins did not fairly and adequately represent the interests of other HOA members similarly situated in enforcing the HOA's rights. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

condition.'" As to the second conclusion, we agree that the circuit court erred. As both challenged conclusions concern questions of law, this court reviews them de novo. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("Whether the law recognizes a particular duty is an issue of law to be decided by the [c]ourt."); *Fesmire*, 385 S.C. at 302, 683 S.E.2d at 807 ("This [c]ourt reviews all questions of law de novo.").

Appellants maintain the circuit court confused the contractual duty to convey title allegedly created by the 1998 Property Report with a fiduciary duty to the HOA. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks*, 353 S.C. at 456, 578 S.E.2d at 714. "Ordinarily, the common law imposes no duty on a person to act. [When] an act is *voluntarily undertaken*, however, the actor assumes the duty to use due care." *Id.* at 456–57, 578 S.E.2d at 714 (emphasis added). Consistent with this proposition is this court's explanation of the foundation for a fiduciary duty: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is *bound to act in good faith and with due regard to the interests of the one imposing the confidence*." *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added) (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)). "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.*

In *Goddard,* this court compared the duty of a developer of a planned unit development (PUD) to its villa owners, prior to the formation of the villa owners association, to the duty of the promoters of a corporation: "Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations." 310 S.C. at 415, 426 S.E.2d at 832. The court found merit in the appellants' argument that the developer had a responsibility to ensure the common areas were in good repair when they were conveyed to the villa owners' association. *Id.* The court also recognized the evidence showing that the common areas were substandard when the developer turned them over to the association. *Id.*

The court highlighted evidence that the developer "seized the opportunity . . . to 'unload' the common areas on the [a]ssociation without a plan to establish a reserve or a plan to fund the [a]ssociation until such time as assessments

were adequate to cover maintenance expenses." *Id.* The court stated, "It seems unfair to the villa owners for the [d]eveloper to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id.* In *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, our supreme court adopted this court's analysis in *Goddard* and held, "The developer of a PUD owes a duty to [a homeowners association] to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." 349 S.C. 251, 256–57, 562 S.E.2d 633, 637 (2002).

Prior to recognizing the fiduciary duty a developer owes to homeowners as the development's promoter, the *Goddard* court addressed the appellants' argument that a fiduciary duty arose from the developer's control of the villa owners' association. 310 S.C. at 413, 426 S.E.2d at 831. Specifically, the villa owners asserted that the superior voting strength of the developer and its president created "a fiduciary obligation to assess the villa owners at a level necessary to maintain sufficient reserves to adequately maintain the common areas." *Id.* The court stated, "*Assuming a fiduciary relationship exists* between the appellants and respondents *because of their superior voting power*, it is clear that the respondents have refrained from exercising their superior voting strength to effectuate higher assessments in deference to the wishes of the appellants to keep the assessments low." *Id.* at 414, 426 S.E.2d at 832 (emphases added).

Thus, rather than rejecting the existence of a fiduciary relationship arising from the developer's superior voting power, the court declined to hold that the developer's assessment determinations violated a fiduciary duty to the villa owners. *Id.* The court merely invoked the business judgment rule, which implicitly recognizes the obligation of the directors of a homeowners association to act in good faith: "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of *bad faith*, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Id.* (emphasis added). This is compatible with the good faith requirement for fiduciaries: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act *in good faith* and with due regard to the interests of the one imposing the confidence." *Id.* (emphasis added) (quoting *Island Car Wash,* 292 S.C. at 599, 358 S.E.2d at 152). Therefore, we reject Appellants' argument that the business

judgment rule precludes the existence of a fiduciary relationship between a developer in control of a homeowners association and the association's members.

Here, Appellants retained continuing control of the HOA up to and including the date they conveyed lot CV-6 to Russo. The Declaration of Covenants, Conditions, and Restrictions (Covenants) provided that the I'On Company, as Founder, had the authority to "appoint, remove[,] and replace the members of [the HOA's] Board of Trustees" for a limited period of time not to exceed twenty years after the Covenants' recording. The I'On Company also had the authority to

> disapprove any action, policy[,] or program of the [HOA], the Board of Trustees, and any committee [that], *in the sole judgment of* the [I'On Company], would tend to impair rights of [the I'On Company] or Builders under [the Covenants] or the Bylaws, or interfere with development or construction of any portion of I'On, or diminish the level of services being provided by the [HOA].

(emphasis added). At trial, Thomas Graham testified that the I'On Company still retained these veto rights.

Appellants contend there were no developer-appointed directors serving on the HOA's Board after December 2005 and Appellants have never exercised any of the I'On Company's veto rights.[7] However, as in *Goddard*, Appellants' asserted restraint does not speak to the *existence* of a fiduciary relationship and the duty to act in good faith arising from their veto power but rather to the manner in which they carried out such a duty. *See id.* (assuming arguendo the existence of a fiduciary relationship and declining to find a violation of a fiduciary duty by invoking the business judgment rule). Therefore, we reject Appellants' argument that their restraint from exercising the veto power precludes the existence of a fiduciary relationship.

Rather, we define Appellants' fiduciary duty arising from its retention of control over the HOA by the standards set forth in *Island Car Wash*:

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[7] Appellants admit that in 2014, the I'On Company appointed a Board member, Chad Besenfelder, but he was excluded from participating in "Board decisions that would potentially be adverse to the I'On Company."

> [A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. . . . [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

292 S.C. at 599, 358 S.E.2d at 152.

Based on the foregoing, the circuit court did not err in concluding that a developer in control of a homeowners association may not make decisions that benefit the developer's own interest at the expense of the association and its members. This deduction logically flows from the above standards set forth in *Island Car Wash*, *Goddard*, and our supreme court's decision in *Concerned Dunes* adopting *Goddard*'s analysis.

Nonetheless, the circuit court's denial of Appellants' JNOV motion was based on its extrapolation of a specific fiduciary duty *to convey title* to common areas from the duty pronounced in *Goddard* and *Dunes West*, i.e., the fiduciary duty to ensure common areas are in good repair before turning them over to a homeowners association. South Carolina precedent does not impose on developers a generic fiduciary duty to convey title to a subdivision's common areas to the homeowners association in every conceivable case. Rather, when reference to a particular subdivision's restrictive covenants resolves issues involving the common areas, those covenants control. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006) ("Where . . . issues involving the common area of a subdivision—as raised by the pleadings—are resolved by reference to the applicable restrictive covenants, those covenants control."). Here, the Covenants' definition of "Commons" is "Real Property and interests therein [that] the [HOA] owns *or otherwise holds possessory or use rights in* for the common use and enjoyment of Titleholders."[8] (emphasis

[8] "Titleholder" is defined in the Covenants as "one or more persons who hold record title to any Real Property in I'On, other than persons who hold an interest merely as security for the performance of an obligation."

added). Therefore, the Covenants do not require the HOA to hold an ownership interest in a common area.

Further, and of critical import, the 1998 Property Report included language notifying prospective homeowners that certain amenities in I'On Village "may be owned and operated by persons other than the [HOA]." The notification emphasized that there was no guarantee a homeowner would have access to these amenities because they could be operated as a private club for its members and guests. This language placed prospective HOA members on notice that they would be buying into a community that would likely be shared with non-HOA members.

In sum, the record in this case does not support the conclusion that Appellants had a fiduciary duty to convey to the HOA those specific amenities associated with the Creek Club on lot CV-6. Therefore, the circuit court's conclusion that Appellants breached their fiduciary duty to the HOA's members by failing to convey title to the disputed amenities was controlled by an error of law. Accordingly, we reverse the denial of Appellants' JNOV motion as to this claim. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 ("[The appellate court] will reverse the [circuit] court's rulings on [directed verdict and JNOV] motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law.").

III. Statute of Limitations

Appellants assert that Walbeck's claims are time-barred because they accrued before December 22, 2007, which was exactly three years before Walbeck filed his initial complaint. With the exception of the breach of contract claim,[9] we agree. Appellants also assert that the HOA's claims, assuming they meet the standards for derivative claims, are time-barred because they accrued before February 7, 2009, which was exactly three years before Walbeck and Adkins filed the Second Amended Complaint on the HOA's behalf. Walbeck first asserted derivative claims in his initial complaint, but their derivative nature was not reflected in the case caption until Walbeck filed the Second Amended Complaint.

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[9] Appellants do not dispute the applicability of the twenty-year statute of limitations to Respondents' breach of contract claims because Walbeck's contract to purchase his lot was a sealed instrument. *See* S.C. Code Ann. § 15-3-520 (2005) (providing for a twenty-year statute of limitations for actions on a sealed instrument).

Nonetheless, the derivative claims, other than breach of contract, are time-barred even if they were first filed with Walbeck's initial complaint.

The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005),[10] applies to Respondents' negligent misrepresentation claims.[11] With the exception of medical malpractice actions, "all actions initiated under [s]ection 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence *should have known* that he [or she] had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added). The "exercise of reasonable diligence" means "the injured party must act with some promptness [when] 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." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996) (second emphasis added). In other words, the discovery rule does not "require absolute certainty [that] a cause of action exists before the statute of limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

> The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and *when the testimony is conflicting upon the question,* it becomes an issue for the jury to decide. However, when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim *becomes a matter of law to be decided by the trial court.*

Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009) (emphases added) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011).

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[10] Subsection 5 provides for a three-year limitation on "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and [medical malpractice actions]."

[11] We decline to reach the question of when the breach of fiduciary duty claim accrued as we reverse the circuit court's ruling on the merits of this claim. *See supra* section II; *Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

The statute of limitations for the ILSA claim is "three years after discovery of the violation or after discovery should have been made *by the exercise of reasonable diligence*." 15 U.S.C. § 1711(a)(2) (emphasis added). There is a dearth of published case law interpreting this provision, but the opinion in *Streambend Properties III, LLC v. Sexton Lofts, LLC*, 297 F.R.D. 349, 359 (D. Minn.), *aff'd*, 587 F. App'x 350 (8th Cir. 2014), indicates an interpretation similar to *Dean*'s interpretation of the identical standard in section 15-3-535, i.e., "three years after the person knew or *by the exercise of reasonable diligence* should have known that he [or she] had a cause of action." (emphasis added).

In the present case, the jury found the date that Respondents knew or should have known they had claims against Appellants was August 5, 2009, the date Appellants sold the disputed amenities to Russo. However, Appellants argue the initial representation on which Respondents claim they relied was that Appellants would convey the disputed amenities to the HOA free of charge upon completion of construction, and Respondents knew or should have known upon completion of construction in early 2001 that they did not receive such a conveyance.[12] Therefore, at that time, Respondents knew or should have known they might have claims against Appellants. The logical extension of this argument is that Walbeck, in his individual capacity and as a representative of the HOA, certainly should have known before December 22, 2007, approximately six years after the completion of construction, that he and the HOA had claims against Appellants.

Even viewing the evidence in the light most favorable to Respondents, we agree with Appellants that the negligent misrepresentation and ILSA claims

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[12] The 1998 Property Report stated,

> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the [HOA] or its members. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it.

It is undisputed that construction of the Community Dock and Creekside Park was completed in early 2001, no later than April 10, 2001.

accrued well before December 22, 2007. We base our determination of each claim's accrual on the particular claim's allegations concerning breach of duty.

Negligent Misrepresentation

As to the negligent misrepresentation claims, Respondents alleged:

> 88. The I'On Defendants made oral and written representations that the Community Dock and Creekside Park would be transferred to the [HOA].
>
> . . .
>
> 90. The Defendants owed a *duty* of care to the Plaintiffs *to communicate truthfully all information regarding [their] purchase in I'On*, without material omission.
>
> 91. The Defendants[] breached that duty owed *by misrepresenting facts* [that], in conjunction with other representations, *induced the Plaintiffs and other lot purchasers to enter into contracts for the purchase of lots* in I'On.
>
> 92. The Plaintiffs, the [HOA], and its members have suffered a pecuniary loss as a direct and proximate result of [their] *reliance* on the Defendants' false representations.

(emphases added). Paragraph 88 referred to the representation made in the 1998 Property Report. Paragraph 91 designates the breach of Appellants' duty of care as misrepresenting facts that induced Walbeck to purchase his lot.

Thus, as to the negligent misrepresentation claims, the question is when Walbeck, in his individual and representative capacity, knew or should have known that the representation purportedly inducing him and other HOA members to buy their lots, i.e., the statement in the 1998 Property Report indicating that title to certain amenities would be conveyed to the HOA **upon completion of construction**, was unfulfilled. By April 10, 2001, Appellants completed construction of the Community Dock and Creekside Park. By early November

2004, when Walbeck received information indicating the HOA might not own the Community Dock or Creekside Park, Walbeck should have known that the statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled. *See Dean*, 321 S.C. at 363–64, 468 S.E.2d at 647 (stating that the "exercise of reasonable diligence" means "the injured party must act with some promptness [when] 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" (second emphasis added)); *Bayle*, 344 S.C. at 126, 542 S.E.2d at 741 (stating that the discovery rule does not "require absolute certainty a cause of action exists before the statute of limitations begins to run").

Walbeck admitted receiving copies of the HOA's proposed annual budgets, which began including a "Creek Club Dock usage Fee" as early as October 10, 2004, for the 2005 budget year, if not earlier. The proposed 2005 budget was mailed to HOA members on November 1, 2004. 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. Hence, Respondents' negligent misrepresentation claims accrued no later than early November 2004 and expired no later than early November 2007.

Therefore, the only reasonable inference that can be drawn from the evidence is that Respondents' negligent misrepresentation claims accrued well before December 22, 2007. *See* § 15-3-535 (stating that with the exception of medical malpractice actions, "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or *by the exercise of reasonable diligence* should have known that he had a cause of action." (emphasis added)); *Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

In its order denying Appellants' JNOV motion, the circuit court concluded that even if the date Respondents should have discovered their claims preceded the three-year limitations period, equitable estoppel would have served to toll the statute of limitations.

> A defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct.
>
> The doctrine is, of course, most clearly applicable [when] the aggrieved party's delay in bringing suit was caused by his opponent's intentional misrepresentation; but deceit is not an essential element of estoppel. It is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire.
>
> The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue.

Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 372–73, 725 S.E.2d 112, 125–26 (Ct. App. 2012) (quoting *Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218–19, 332 S.E.2d 555, 561 (Ct.App.1985), *overruled on other grounds by Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Here, Walbeck has not presented evidence showing that he reasonably relied on the words or conduct of any representative of Appellants in allowing the limitations period for Respondents' negligent misrepresentation claims to expire in early November 2007. Therefore, the doctrine of equitable estoppel is not availing to Respondents.

The circuit court also stated that it was "concerned with the existence of any evidence supporting the jury's findings and ha[d] no authority to resolve conflicts purportedly created by the jury's disregard of other evidence," citing *Curcio* as supporting authority. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" (quoting *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154)). However, in the present case, there was only one reasonable inference from the evidence as to when Walbeck should have known Respondents might have claims against Appellants for the representation in the 1998 Property Report. Therefore, this question was one of law to be decided by the circuit court. *See Turner*, 381 S.C. at

110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

Based on the foregoing, Respondents' negligent misrepresentation claims accrued well before December 22, 2007, as a matter of law, and therefore, the circuit court erred in submitting this question to the jury. Because Walbeck failed to file the Complaint until December 22, 2010, Respondents' negligent misrepresentation claims are barred by the statute of limitations. Accordingly, we reverse the denial of Appellants' JNOV motion as to these claims.

ILSA

In the ILSA claim, Respondents alleged:

> 60. Defendants have violated [ILSA] by: (1) issuing a Property Report that made representations to prospective purchasers of lots that were false; . . . (2) continually distributing copies of the Property Report to potential purchasers, with knowledge that it contained false representations and that these representations would likely be relied upon, and were in fact relied upon by numerous lot purchasers in I'On; [or] (3) failing to honor the representations therein.

Like the negligent misrepresentation claims, the question as to the ILSA claim is when Walbeck knew or should have known that the representation in the 1998 Property Report was unfulfilled. As we previously explained, the only reasonable inference from the evidence is that Walbeck should have known well before December 22, 2007, that the statement indicating title to the Community Dock and Creekside Park would be conveyed upon completion of construction was unfulfilled. Therefore, the circuit court erred in submitting this question to the jury. Accordingly, we reverse the denial of Appellants' JNOV motion as to this claim and order the circuit court to dismiss this claim as well as the negligent misrepresentation claims.[13]

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[13] Because this holding is dispositive of Walbeck's ILSA claim, we decline to address Appellants' argument that Walbeck did not rely on any representations made in the 1998 Property Report. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598

IV. Abuse of Process

Pursuant to Rule 220(b), SCACR, and the following authorities, we affirm the denial of Appellants' JNOV motion as to their counterclaim for abuse of process: *Pallares v. Seinar*, 407 S.C. 359, 370–71, 756 S.E.2d 128, 133 (2014) (holding that the ulterior or improper purpose element of abuse of process "exists if the process is used to secure an objective that is *'not legitimate in the use of the process*'" (emphasis added) (quoting *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012))); *Swicegood v. Lott*, 379 S.C. 346, 353, 665 S.E.2d 211, 214 (Ct. App. 2008) ("The improper purpose usually takes the form of coercion to obtain a *collateral* advantage, *not properly involved in the proceeding itself*, such as the surrender of property or the payment of money, by the use of the process as a threat or club." (emphases added) (quoting *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967))).

V. Recreational Easement

Appellants maintain the circuit court erred in (1) finding that section 4.2 of the Recreational Easement limited the term of the easement to thirty years, superseding previous language stating the easement was perpetual, and (2) concluding that the Recreational Easement was invalid. However, Appellants did not appeal all of the grounds specifically listed by the circuit court to support its declaration of invalidity. Namely, they failed to challenge the circuit court's conclusion that the Recreational Easement was not an arms-length transaction. Therefore, this court will affirm the circuit court's declaration under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *id.*, 692 S.E.2d at 903–04 (noting that the two-issue rule can be applied to situations not involving a jury); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the plaintiff did not appeal all grounds for the decision); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016)

(providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

In any event, we agree with the circuit court that the I'On Club's lack of title to lot CV-6 on the date the easement was executed was fatal to the easement's validity. Although Appellants argue they may rely on the doctrine of after-acquired property to ratify the Recreational Easement,[14] they do not cite any South Carolina authority for the proposition that this doctrine applies to the grant of an easement. Because our supreme court has not spoken on this precise issue, we decline to apply this doctrine to the Recreational Easement. Therefore, we affirm the circuit court's conclusion that the Recreational Easement was invalid.

As we affirm the circuit court's declaration of invalidity, we need not address Appellants' challenge to the finding that the Recreational Easement was limited to a term of thirty years. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

VI. Amalgamation

Appellants next argue the circuit court's ruling that Appellants were amalgamated was improper because the circuit court failed to consider the factors required by *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) for "piercing the corporate veil" to hold a corporation's principals personally liable for the corporation's wrongdoing.

Our supreme court recently examined the "amalgamation of interests theory" in *Pertuis v. Front Roe Restaurants, Inc.*[15] The court recognized this court's previous applications of the theory in *Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc.*[16] and *Kincaid v. Landing Development Corp.*[17] as well as its own reference to the theory in *Kennedy v. Columbia Lumber &*

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[14] *See Richardson v. Atl. Coast Lumber Corp.*, 93 S.C. 254, 75 S.E. 371, 372 (1912) ("[I]f a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee." (*dictum*)).

[15] 423 S.C. 640, 817 S.E.2d 273 (2018).

[16] 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).

[17] 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).

Manufacturing Co.[18] In *Magnolia*, this court analyzed the relationship of the defendant corporations to their officers, directors, headquarters, employees, functions, written representations, and admissions of liability to determine whether there existed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." 397 S.C. at 358–60, 725 S.E.2d at 117–18 (quoting *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874). We concluded the evidence supported the trial court's ruling that the corporations were amalgamated. *Id.* at 360, 725 S.E.2d at 118.

In *Pertuis*, the court formally recognized the amalgamation of interests theory for the first time and indicated a preference for the term "single business enterprise theory." *Id.* at 655, 817 S.E.2d at 280. Notably, the court held, "the single business enterprise theory requires a showing of more than the various entities' operations are intertwined," as the theory had previously been applied by our courts. *Id.* Rather, "[c]ombining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 655, 817 S.E.2d at 281. In comparison, the *Sturkie* requirements for holding a corporation's principals personally liable for the corporation's wrongdoing are (1) the failure to observe corporate formalities and (2) "an element of injustice or fundamental unfairness if the" corporation's acts are "not regarded as the acts of" its principals. *See Mid-S. Mgt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597–98, 649 S.E.2d 135, 140–41 (Ct. App. 2007) (explaining *Sturkie*'s "two-prong[ed] test to determine whether a corporate veil should be pierced").

Therefore, the requirements for the single business enterprise theory as adopted by our supreme court overlap with the *Sturkie* requirements for piercing the corporate veil. The single business enterprise theory does not require a showing of the corporate defendants' failure to observe corporate formalities. However, the theory dovetails with the second prong of the *Sturkie* test, i.e., an element of injustice or fundamental unfairness, to place accountability where it belongs.

Here, even though there is evidence showing the various entities' operations are intertwined, there is no evidence of "bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of the entities' legal distinctions." *Pertuis*, 423

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[18] 299 S.C. 335, 340–41, 384 S.E.2d 730, 734 (1989).

S.C. at 655, 817 S.E.2d at 281 (emphasis added). Therefore, we reverse the circuit court's conclusion that Appellants were amalgamated.[19]

Appellants seek the remedy of a new trial because the circuit court's ruling relieved Respondents of the burden of establishing liability as to each individual Appellant and likewise relieved the jury members from their responsibility to evaluate the liability of each individual Appellant. Appellants also assert that the circuit court's instruction to the jury that Appellants were amalgamated suggested that Appellants had engaged in misconduct and the resulting prejudice requires a new trial. We agree and order the circuit court to conduct a new trial on Walbeck's breach of contract claim.

VII. Attorney's Fees for Walbeck

We need not address Appellants' challenge to the amount of fees awarded to Walbeck pursuant to 15 U.S.C. § 1709(c) because his ILSA claim is barred by the statute of limitations and, thus, he may not recover attorney's fees under § 1709(c). We reverse the circuit court's award under this statute.

VIII. Attorney's Fees against Adkins

Appellants claim they were entitled to an award of attorney's fees against Adkins on her breach of contract claim because they were the prevailing party pursuant to the fee-shifting provision in Adkins' lot purchase agreement. We affirm the circuit court's order denying attorney's fees against Adkins.

Appellants sought an award of attorney's fees against Adkins pursuant to the following provision in her lot purchase agreement: "If either party requires services of an attorney to enforce obligations under this Agreement, the prevailing party shall be due from the non-prevailing party **reasonable** attorneys' fees, costs[,] and expenses **actually incurred**." (emphases added). The circuit court based its denial of the requested award on two grounds: (1) Adkins prevailed on three of her derivative claims against Appellants and there was "no practical or legal way to separate the derivative verdicts from Adkins or to attribute them more to Walbeck[] just because he prevailed on his claim for personal damages and Adkins did not"; and (2) while Adkins did not prevail on her breach of contract claim, she prevailed as to Appellants' counterclaim for abuse of process, "resulting in a draw

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[19] We acknowledge that the circuit court did not have the benefit of the *Pertuis* decision when it ruled on this issue.

on the individual claims." In light of our holding that the derivative claims were not properly filed, the first ground no longer serves as a valid basis for the circuit court's ruling. However, the second ground remains a valid basis for declining to rule in favor of Appellants as the "prevailing party."

Moreover, this court may affirm for any ground appearing in the record. Rule 220(c), SCACR. Here, Appellants' petition for attorney's fees does not indicate that the addition of Adkins as a plaintiff required any significant increase in the efforts of counsel to defend this case. While the petition requests one-half of the total fees and expenses incurred from the date of the Second Amended Complaint's filing through the end of trial, it does not state that a corresponding amount of time and expenses were **actually generated** from Adkins' breach of contract claim or the addition of Adkins as a named plaintiff for the derivative claims. Further, counsel's attorney's fees affidavit is not in the record.

Based on the foregoing, Appellants have not shown that the amount of attorneys' fees and expenses they requested was either **reasonable** or **actually incurred**, as required by the fee-shifting provision in Adkins' lot purchase agreement. Therefore, we affirm the denial of Appellants' request for attorney's fees against Adkins.

CONCLUSION

We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. We affirm in part and reverse in part the order denying Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. We reverse the order granting attorney's fees to Walbeck. Finally, we remand for a new trial on Walbeck's breach of contract claim and the dismissal of all other claims.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.