THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

Brad J. Walbeck and Lea Ann Adkins, individually and derivatively on behalf of 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.

Final Brief of Respondents, Brad J. Walbeck and Lea Ann Adkins, Individually and Derivatively on Behalf of I'On Assembly, Inc.

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STATEMENT OF THE ISSUES IN THE CASE

Is there any evidence to support the jury's verdict and the Court's rulings in this matter?

STATEMENT OF THE CASE[1]

This appeal arises out of a complex case tried before a jury in the Charleston County Court of Common Pleas concerning waterfront community amenities the Appellants[2] obligated themselves to convey to the I'On Assembly, Inc.[3] (the homeowners' association) and its members (I'On homeowners). Despite Appellants' repeated representations and promises to convey the waterfront amenities free and clear of all encumbrances and to maintain a public waterfront, the Appellants entered into talks in mid-2008 to sell the waterfront amenities to an unaffiliated, third-party for profit.[4] Upon learning of the potential sale, several Assembly members, including Respondents,[5] made demands upon the Assembly to secure the rights to the waterfront amenities. Thereafter, Buyers allegedly withdrew their offer to purchase the waterfront amenities. Subsequently, Appellants expressly represented to Assembly members that they were finalizing the paperwork necessary to transfer the waterfront amenities to the Assembly.

Unbeknownst to the Assembly or its members, Appellants and Buyers immediately resumed negotiations and reached a contract to sell the waterfront amenities to an outsider.

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[1] Many of the exhibits entered in the underlying trial by Plaintiffs/Respondents and Defendants/Appellants are duplicative. In an effort to reduce the size of the Record on Appeal, counsel for Appellants and Respondents removed one of the duplicates and cite to the other exhibit which is contained in the Record on Appeal. Respondents provide a chart in "Appendix A" to this brief outlining the duplicate exhibits removed with cross-references to exhibits included in the Record on Appeal.

[2] Appellants consist of the following developers of the I'On: 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 (hereinafter collectively referred to as "Appellants").

[3] The I'On Assembly is hereinafter referred to as "Assembly".

[4] This third-party was previously a defendant in this case and is hereinafter referred to as "Buyers" or "Civitas".

[5] "Respondents" herein are Brad Walbeck ("Walbeck") and Lee Ann Adkins ("Adkins"), individually and derivatively on behalf of the Assembly. The Assembly, is also a Respondent.

Appellants' pending sale of the waterfront amenities came to light in late-July 2009, and the sale took place days later, on August 5, 2009. Following unsuccessful demands again made by Respondents and the Assembly's continued inability to secure the waterfront amenities, Respondent Walbeck initiated the underlying action against Appellants on December 22, 2010.[6] Respondents subsequently amended their Initial Complaint on March 8, 2011[7] and February 7, 2012[8], respectively. After the filing of Respondents' Amended Complaint, the Appellants moved for the dismissal of certain claims and/or parties, arguing that the statute of limitations had run; that they did not have a fiduciary duty to convey the waterfront amenities; and that Walbeck failed to satisfy the derivative requirements of Rule 23, SCRCP. (R. pp. 1763-1764). The Appellants' Motion to Dismiss was denied;[9] and, thereafter, the Appellants filed a Motion for Summary Judgment, which was also denied.[10]

Immediately prior to a date certain, February 18, 2013 trial, all parties settled in two, separate agreements. Buyers later abdicated their settlement agreement, which led to the collapse of the parallel settlement agreement involving Appellants. Therefore, the case was reinstated; Respondents filed their Third Amended Complaint on January 2, 2014; [11] and the matter was reset for trial on January 14, 2014.

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[6] In initiating the underlying action, Respondent Walbeck asserted claims both on behalf of himself, and derivatively, on behalf of the Assembly. The initial claims asserted included violation of the Interstate Land Sales Full Disclosure Act ("ILSA"), breach of contract, breach of fiduciary duty, fraud/constructive fraud, negligent misrepresentation, civil conspiracy, unfair trade practices, unjust enrichment, promissory estoppel, veil piercing/alter ego, and tortious interference with contract. (R. pp. 117-128).

[7] In the Amended Complaint, Walbeck asserted essentially the same claims as in the Initial Complaint, but I'On Real Estate, Inc. and Mike Russo (principal of Buyers) were added as additional Defendants. (R. pp. 129-140).

[8] In the Second Amended Complaint, Walbeck joined Lee Ann Adkins as a Plaintiff to the action and asserted claims on behalf of themselves and, derivatively, on behalf of the I'On Assembly. (R. pp. 151-167).

[9] (R. pp. 9-10).

[10] (R. pp. 11-12).

[11] While Respondents' Third Amended Complaint included an additional cause of action for aiding and abetting, the other claims asserted by Respondents in their previously amended complaint remained essentially the same. (R. pp. 168-185).

On January 13, 2014, after the jury was struck, Respondents reached a settlement with Buyers. (R. pp. 13-15). On January 14, 2014, the matter proceeded to trial; but, ended in a mistrial on January 17, 2014. (R. p. 479, lines 22-24). As a part of the settlement agreement, the Assembly agreed to support Respondents' claims against Appellants, and consequently, was realigned as a named plaintiff. (R. pp. 16-17). On May 12, 2014, Appellants, The I'On Company and the I'On Club, filed a declaratory judgment action against Respondents seeking a declaration that an agreement, executed in 2000, which included two easements, was valid. (R. pp. 199-312). On June 20, 2014, the Trial Court consolidated the declaratory judgment action with the original action. (R. p. 18).

On June 16, 2014, Respondents filed a Fourth Amended Complaint,[12] and the case was re-tried beginning Tuesday, July 29, 2014 and ending Friday, August 1, 2014.[13]

On August 1, 2014, the jury returned a verdict in Respondents' favor and awarded damages in favor of Walbeck on the following causes of action: (a) Violation of the ILSA; (b) Negligent Misrepresentation; and (c) Breach of Contract. (R. pp. 1855-1862). In addition, the jury returned a verdict and awarded damages in favor of the Derivative Plaintiffs on behalf of the Assembly on the following causes of action: (a) Breach of Fiduciary Duty; (b) Negligent Misrepresentation; and (c) Breach of Contract. *Id.* The jury expressly found Appellants' conduct was *reckless, willful and/or wanton. Id.* Subsequently, Walbeck elected to recover the $20,000 in actual damages awarded to him under the negligent misrepresentation claim, while

[12] (R. pp. 313-329).

[13] At the close of the Respondents' case, the Trial Court denied the Appellants' Motion for Directed Verdict. (R. p. 1063, line 16 – p. 1066, line 15). Further, at the close of the Appellants' case, the Trial Court directed a verdict in favor of the Respondents as to the Appellants' counterclaim for abuse of process. (R. p. 1466, line 22 – p. 1469:16). Finally, at the close of evidence, the Trial Court denied the Appellants' renewed Motion for Directed Verdict. (R. p. 1473, lines 9-11).

the Derivative Assembly Plaintiffs elected to recover the $1,750,000 in actual damages awarded to it under the breach of fiduciary duty claim. (R. pp. 19-20).

Following the verdict, Appellants moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. (R. pp. 1863-1868). In addition, Appellant, the I'On Company, petitioned for attorneys' fees and costs. (R. pp. 1910-1914). Respondents also filed post-trial motions as follows: Walbeck petitioned for attorneys' fees and costs; and Respondents moved for Judgment as to the validity of the 2000 recreational easement. (R. pp. 1869-1898; R. pp. 1903-1909).

On June 26, 2015, the Trial Court issued Orders: (a) denying Adkins' petition for unjust enrichment; (b) denying the Appellants' motion for judgment notwithstanding the verdict/new trial; (c) denying the I'On Company's petition for attorneys' fees; (d) declaring the 2000 recreational easement void and invalid; and (e) awarding Walbeck attorneys' fees and costs in the amount of $225,000; and (f) awarding sanctions in the amount of $23,337.26. (R. pp. 64-69; R. pp. 21-63; R. pp. 79-83; R. pp. 70-78; R. pp. 84-100; R. pp. 101-115).

On July 20, 2015, Appellants filed their Notice of Appeal.

STATEMENT OF THE FACTS

A. The Development of the I'On Community and Amenities

The I'On community in Mt. Pleasant, South Carolina was developed and operated by The I'On Company, LLC, a family owned business consisting of Tom Graham and Vince Graham. (R. p. 624, lines 14-21; R. p. 625, lines 20-23; R. p. 681, lines 1-18; R. p. 1109, line 5- p. 1111, line 5). During the initial planning phase of the I'On community, The I'On Company also established several other "I'On" entities that were involved in the various aspects of the development of the I'On community, including planning, financing, marketing, and execution, as

follows: I'On Realty, LLC was established as the listing and sales agent for the I'On home sites on behalf of the I'On Company;[14]and I'On Club, LLC was established to own and operate certain neighborhood amenities, including the pool and tennis club, as a private, members-only club.[15] (R. p. 681, line 22 - p. 682, line 2; R. p. 769, lines 1-8; R. p. 774, lines 12-18). The I'On Company, LLC served as the manager for both I'On Realty and I'On Club.[16] (R. p. 768, lines 1-5; R. p. 828, lines 12-16).

The development of the I'On community was based upon a "grand plan" to develop and market the I'On community as an upscale, residential neighborhood that featured many public, common areas as opposed to only private, individual home sites. (R. p. 2607). The I'On community was to include the waterfront amenities known as "Creekside Park" and the "Community Dock." The Community Dock included a boat ramp and associated parking, all of which are located along the deep waters of Hobcaw Creek on a specific civic lot within the I'On community known as "CV6." In addition, the waterfront amenities were to include an overflow parking facility, which is located on another civic lot within I'On known as "CV5." (The waterfront amenities, CV5 and CV6 are hereinafter collectively referred to as the "Amenity Property").

B. <u>The Creation and Administration of the I'On Homeowners Association</u>

The I'On Company created the Assembly in 1998. (R. p. 3028). The Assembly was to serve the I'On community through duties set forth in the Covenants, Conditions, and Restrictions filed on February 9, 1998. (R. pp. 3616-3674). As set forth therein, all property owners in the I'On community are members of the Assembly. (R. p. 3624; R. p. 3028).

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[14] I'On Realty was a wholly owned subsidiary of the I'On Company. (R. p. 768, lines 1-5).
[15] I'On Club was a wholly-owned subsidiary of The I'On Company, LLC. (R. p. 828, lines 12-16).
[16] Collectively referred to hereinafter as "Appellants".

The Assembly Board was not "turned over" to the I'On property owners until December 2005. (R. pp. 2216-2217; R. pp. 3475-3477). Prior to the "turnover," the Appellants, by and through the I'On Company, remained in control of the Assembly and directed all aspects of the development of the I'On community. (R. pp. 3616-3674; R. p. 639, line 13- p. 641, line 5). However, the evidence demonstrates that not only did the Appellants direct, manage, and control all aspects of the I'On community through December 2005, but they also *continued* to maintain influence and control over the day-to-day operations of the Assembly, even *after* the control of the Assembly had been "transferred" to the I'On property owners; the trial testimony of Tom Graham confirmed that: (1) the Appellants retain and exercise their power to reinstate their own agents as members of the Assembly Board; and (2) the Appellants retain the absolute power to veto any Board action. (R. p. 639, line 13- p. 643, line 5).

C. Appellants Obligated Themselves to Convey the Amenity Property to the Assembly through Representations During the Planning and Development Phases of the I'On Community

At the outset of the planning and development of the I'On community, the Appellants made it crystal clear that their intention was to convey the Amenity Property, free and clear of all encumbrances, and at no cost to the Assembly and its members. This clear intention and obligation to convey the Amenity Property has been borne out in the evidence presented at trial through the Appellants' very own documents, which they drafted and executed in conjunction with the approval process for the planning and development of the I'On Community. (R. pp. 2999-3034; R. pp. 2019-2039; R. pp. 2042-2048; R. pp. 2049-2050; R. pp. 2177-2196; R. pp. 2918-2920; R. p. 2921; R. pp. 2954-2957).

1. The Impact Assessment

For example, in January of 2007, The Graham Company[17] filed an Impact Assessment with the Town of Mt. Pleasant, as a part of the planning phase for the I'On Community. The Impact Assessment provided as follows:

> There will be no private docks in the neighborhood. Instead, I'On residents will be able to use seven community docks which will provide access to the marsh and waters of Hobcaw Creek of fishing and boating. These docks will range from small crabbing docks to a larger community dock reminiscent of the dock pavilion at Newpoint or at the Sea Island Yacht Club in Rockville.

(R. p. 2026).

Notably, the Impact Assessment included a description of the Community Dock at Newpoint, which contained a boat landing and gazebo, similar to what was to be constructed on the Amenity Property. (R. pp. 2019-2039). The Town of Mt. Pleasant subsequently approved the developmental plans for the I'On community. As the Impact Assessment was part of the approved plans, it was incorporated by the Ordinance permitting the development of the neighborhood. (R. pp. 2117-2119; R. p. 826, lines 2-9). Therefore, the Impact Assessment had the effect of law.

2. The 1998 Property Report

Similarly, as a part of the planning and early development phases of the I'On community, the Appellants were required by the Interstate Land Sales Act to draft a Property Report to inform potential purchasers of its plans for I'On. The November 3, 1998 Property Report, drafted by the Appellants, pursuant to the ILSA requirement, contained various representations regarding the I'On community amenities. (R. pp. 2999-3034).

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[17] The original development work for I'On was done in the name of The Graham Company. The Graham Company subsequently transferred the developmental aspect of the project to the I'On Company. (R. p. 1109, line 5-p. 1110, line 5).

The Property Report included a "Recreational Facilities" chart, which provided for a "Community Dock" and "Creekside Park" that would be conveyed to the Assembly at no cost during Phase II of the development process. (R. p. 3022). Further, the Property Report clearly separated the "Creekside Park" from the "sidewalks, paths, and trails" of the community. (R. p. 3022). This specific reference to "Creekside Park" indicated a distinction of the amenities that were to be transferred to the Assembly.[18] (R. p. 3022). Moreover, the Property Report described "major" characteristics of the I'On community, which included "300 feet of deep water frontage along Hobcaw Creek." (R. p. 3025). The Property Report further stated, "rather than subdividing into lots," CV6 was planned as "parks" that would serve "as an amenity for the residents." (R. p. 3011).

Further, as evidenced through Walbeck's testimony at trial, the Appellants and/or their agents represented the Community Dock and Creekside Park were located on CV6. (R. p. 956, line 15- p. 958, line 2). Moreover, the Appellants and/or their agents represented that the "300 feet of deep water frontage" on Hobcaw Creek would remain unencumbered, and thus, easily accessible to all I'On residents. (R. p. 959, lines 6-12).

3. The Dock Application and Related Submittals

Between June and October 1999, the Appellants submitted plans, applications, and letters to DHEC, through Newkirk Environmental, Inc., as a part of the planning and development phases of the I'On community. These submittals contain representations that CV6 and the Community Dock would be owned by the Assembly for the common, recreational use of its members, and that no docks in the I'On community would be private. (R. pp. 2304-2328). The Dock Application stated: "The purpose of the proposed structures (the docks) is for the common,

[18] *See,* Section F5 "The Attempted Bait and Switch by Appellants", *infra.*

recreational use of residents within the I'On community." (R. p. 2311). A letter to the Army Corps of Engineers from the Appellants, dated October 28, 1999, stated as follows:

> It is important to note that I'On's master plan does not provide for individual docks. The six docks requested by The I'On Company are for the use and enjoyment of the I'On community and are proposed in lieu of private docks along approximately 2,600 linear feet of waterfront.

(R. pp. 2049-2050) (emphasis added).

Importantly, the Dock Plan submitted by the Appellants, and later approved by DHEC, the Army Corps of Engineers, and a host of other governmental authorities, revealed the principal I'On dock as being the *only* dock with a boat ramp that sits on the *only* 300 feet of deep water frontage along Hobcaw Creek. (R. pp. 2177-2196; R. p. 2921). This principal dock and Creekside Park were clearly located on CV6. Moreover, the Dock Plan clearly sets forth the land adjacent to the dock as owned by the "HOA." (R. pp. 2177-2196).

4. The I'On Plans and Plats

Finally, the plans and plats prepared for the development of the I'On Community also clearly established the location of the "Creekside Park," "Community Dock," and boat ramp. Specifically, surveys prepared on behalf of the Appellants, by Seamon Whiteside & Associates and Palmetto Land Surveying, as well as hand-drawn plats prepared by Appellants' employee, Chad Besenfelder, clearly depict a community clubhouse (now known as the "Creek Club"), Community Dock and Boat Ramp, and "HOA Open Space" located on CV6, which, in turn, is located on Hobcaw Creek. (R. pp. 2918-2920; R. p. 2921; R. pp. 2954-2957; R. pp. 2972-2984; R. p. 2985; R. p. 2991). Additionally, the "stamped" civil plans that were prepared by Seamon Whiteside & Associates, and approved by the I'On Company, showed, from October 1998 through March 1999, that the area where the Community Dock was located was marked as

"HOA No. 1." (R. p. 2991; R. p. 947, line 22- p. 951, line 4, (discussing R. p. 2991 (Pl. Ex. 230/Def. Ex. 4))).

D. The Appellants Obligated Themselves to Convey the Amenity Property to the Assembly through Representations Made to Purchasers of Lots in the I'On Community

Not only did the Appellants clearly demonstrate their intention to convey the Amenity Property to the Assembly and its members through documents prepared for third-parties during the planning and early development phases, the evidence shows the Appellants also represented the very same promises to individuals purchasing homes in the I'On community. (*See, e.g.,* R. pp. 2120-2127; R. pp. 2128-2131; R. pp. 2202-2205; R. pp. 2218-2219; R. pp. 2221-2228; R. pp. 2293-2299). Moreover, Walbeck relied upon these representations in the decision to purchase a home in the I'On community, as the 1998 Property Report was expressly referenced in his Purchase Agreement. (R. pp. 3162-3172; R. p. 959, lines 6-20).

1. The Marketing Campaign

The Appellants launched a marketing campaign to attract potential buyers to the I'On community. The evidence reflects the marketing materials were replete with references to the community amenities, including the Creekside Park and Community Dock.

The Appellants created one such advertising/marketing document entitled, "I'On Neighborhood Plan." (R. pp. 2293-2299). The Neighborhood Plan continued to promote the representations included in the pre-amended 1998 Property Report. (R. pp. 2293-2299). Specifically, the amenity descriptions within the "Living at I'On" section of the Neighborhood Plan separately advertised "miles of waterfront paths" and "the parks," showing a distinction between the two. (R. p. 2295). In the "Recreational Facilities" section of the very same promotional document, a "boat ramp along Hobcaw Creek" that could be "enjoyed by all" was

proudly promoted. (R. p. 2295). These representations continued to be promulgated in other Neighborhood Plans that spanned through at least 2008. (R. pp. 2128-2131; R. pp. 2202-2205).

Similarly, in yet another piece of promotional material published and created by Appellants, the I'On community amenities were promoted as follows: "Community Dock and Boat Ramp," "3 Crab Docks," "12 Neighborhood Parks," and "2.5 Miles of Marsh-Front Paths." (R. pp. 2221-2228).[19]

Finally, 2005, 2006, and 2007 neighborhood fact sheets provided: "[t]he boat landing and community docks on Hobcaw Creek and Shelmore Creek are available to all I'On Residents." (R. pp. 2218-2219). Additionally, the inaugural issue of *Civitas*, the I'On Journal, represented neighborhood "parks provide access to the neighborhoods' lakes and community docks along Hobcaw Creek, [enabling] all the residents to enjoy its beauty." (R. pp. 2120-2127).

2. Representations of Real Estate Agents on Behalf of the Appellants

Potential purchasers were also given guided tours of the neighborhood by agents of the I'On Group, including Bill Orange. (R. p. 592, line 18- p. 593, line 8; R. p. 954, line 20- p. 955, line 23). Walbeck's trial testimony evidenced the representations made by Mr. Orange relating to the I'On Community amenities. (R. p. 955, line 12- p. 958, line 2). According to Walbeck, for example, Mr. Orange represented a park, a dock and boat ramp, as well as the "deepest porches in the Lowcountry," would be "located right around the bend" from his lot. (R. p. 955, line 12- p. 956, line 14). Walbeck further testified the lot "right around the bend" from his lot was, in fact, CV6. (R. p. 956, lines 15-21). Further, CV6 was the only place in I'On with a dock and boat ramp located on the *only* deep water of Hobcaw Creek. (R. p. 957, line 18- p. 958, line 2). Mr. Orange represented to Walbeck the Creek Club would be located on this same lot, CV6,

[19] The I'On Group "updated" its marketing materials. Some of these materials still referenced the 1998 Property Report, even after the Appellants had subsequently amended the report's recreational facilities listing. (R. pp. 2293-2299).

and overflow parking for the clubhouse and dock/boat ramp would be available on another, nearby lot, CV5. (R. p. 976, line 22- p. 978, line 17). Additionally, Adkins testified the Creek Club overflow parking lot was on CV5. (R. p. 862, lines 10-13). Similar representations regarding the many waterfront amenities and access to "deep water" were made to Julie Hussey, an I'On homeowner, who helped market I'On to potential purchasers. (R. p. 992, line 16- p. 993, line 19; R. p. 999, line 19- p. 1002, line 23; R. p. 1005, lines 4-16; R. p. 1007, line 15- p. 1009, line 6).

3. The 1998 Property Report was Distributed to Purchasers

Not only were potential purchasers provided a promotional campaign proudly showing off the I'On community amenities, the eventual lot purchasers were also provided with the 1998 Property Report, which, as above-described, clearly set forth the Amenity Property and the intention to convey the same to the Assembly and its members. (R. pp. 2720-2841; R. pp. 2347-2350; R. pp. 2353-2355; R. p. 958, line 6- p. 959, line 2; R. p. 995, line 5- p. 998, line 5). Walbeck was one such purchaser who relied upon the representations made in the 1998 Property Report. (R. p. 959, lines 6-20).

4. The I'On Purchase Agreements

Walbeck's Purchase Contract, dated November 27, 1999, evidences the Appellants' promise to convey the Amenity Property to the Assembly and its members. (R. pp. 3162-3172). The Walbeck Contract expressly referenced the 1998 Property Report which sets forth the following clear assertions: (a) the Community Dock and Creekside Park would be conveyed to the Assembly, at no cost, during the I'On development process; and (b) the "300 feet of deep water frontage along Hobcaw Creek" would serve "as an amenity" for I'On residents. (R. pp. 3162-3172). Additionally, the Walbeck Contract separately included a copy of the "Recreational

Chart" contained in the 1998 Property Report. (R. pp. 3162-3172). Moreover, the Walbeck Contract provided Walbeck could specifically "rely" on the representations included in both the Contract and the 1998 Property Report. (R. pp. 3162-3172).

Similarly, on February 1, 2003, Adkins, executed a purchase contract[20] with the I'On Group, and was provided the 1998 Property Report by the company's agent, who made no mention of any changes or modifications as to the common area elements described therein. (R. pp. 3113-3130).

E. The Appellants Had Full Knowledge of Their Obligation to Convey the Amenity Property to the Assembly and its Members

The record in this matter is replete with overwhelming evidence that the Appellants represented the Amenity Property was to be conveyed to the Assembly and its members. If this were not enough, the internal communications of individuals within the Appellant entities also clearly show that the Appellants were fully aware of the promises and obligations made regarding the Amenity Property. (R. pp. 2236-2237; R. pp. 2852-2854; R. pp. 2855-2856; R. pp. 2857-2861; R. p. 2928; R. pp. 2946-2948; R. p. 2949; R. p. 2953).

As evidenced by a November 15, 2006 e-mail between I'On Group employee, Chad Besenfelder, and the Grahams, the Appellants recognized they still owned "common areas" including the "Creek Club Boat Ramp and Dock," which belonged to the "HOA." (R. pp. 2852-2854). A few months later, between April and July of 2007, the Appellants outlined their options in connection with several of the I'On amenities, one of which included giving the HOA "the infamous boat ramp and docks" because "the docks [were] too controversial and taking away even part of this community amenity would cause trouble." (R. pp. 2855-2856; R. pp.

[20] The Adkins' purchase contract differed from the Walbeck purchase contract in that it did not incorporate the Property Report or amenity chart. (R. pp. 3113-3130). Nevertheless, Adkins was provided the Property Report at the time of contracting to purchase her lot. (R. p. 847, lines 5-14).

2857-2861). Similarly, in May of 2007, the Appellants provided a "list of venues being transferred to the I'On Assembly," a list which included "The Boat Ramp." (R. p. 2928). Perhaps most poignant, is the Besenfelder e-mail noting: "The docks were promised handover to the homeowners and Vince would like to honor that some day." (R. pp. 2238-2240). That same promise was repeated in 2009 when Appellants represented they were "preparing to deed the [C]ommunity [D]ock to the I'On Assembly." (R. pp. 2236-2237; R. pp. 2946-2948; R. p. 2949; R. p. 2953). The evidence clearly bears out the Appellants' knowledge of their many promises to convey the Amenity Property to the Assembly and its members.

F. The Appellants Breached Their Obligation to the Assembly and Its Members by Failing to Convey the Amenity Property

Despite their many representations regarding the Amenity Property, the evidence weaves a tale of the Appellants' nefarious, behind-the-scenes scheme to sell the promised Amenity Property to buyers in order to make money off of the valuable Amenity Property.

1. Initial Altering of Usage Rights to the Amenity Property

The very first attempt to alter the usage and access of the Amenity Property came in 1998, only one month after finalizing the Property Report, which represented the use of the Amenity Property solely by the I'On community. Unbeknownst to I'On residents until just before trial, Appellants submitted a proposal to a neighboring development, Olde Park, which allowed its residents to use "the I'On Club and I'On's community dock and boat ramp" for a usage fee of $350,000. (R. pp. 2899-2900; R. p. 2905). On February 19, 1999, Olde Park accepted the proposal. (R. pp. 2901-2904). This transaction evidences Appellants' attempt to garner a profit from the promised Amenity Property as early as 1998.

2. The 2000 Recreational Easement and Subsequent Internal Transfer

The second attempt to alter the future use of the Amenity Property occurred in 2000. On February 9, 2000, Appellant, I'On Club, LLC, recorded a Recreational Easement, which purportedly provided for "perpetual" access and usage of certain amenities located on the civic lots in the I'On community. (R. pp. 3131-3145). In the first operative paragraph of the Recreational Easement, the I'On Club, LLC purported to grant the Assembly and its members "perpetual" use and access of the Community Dock and associated boat ramp; a later paragraph included the "perpetual" right to temporarily park vehicles and boat trailers in the associated parking lot. (R. pp. 3131-3145). However, in Section 4.2, on the eighth page of the Recreational Easement, the "Term" of the agreement is limited to thirty years, thereby superseding any "perpetual" language referenced in the other provisions. (R. p. 3138).

Moreover, the Recreational Easement was invalid because the I'On Club did not actually own the subject property at the time the easement was granted. At the time the easement was granted, CV6 was still owned by The I'On Company, LLC. The I'On Club acquired title to CV6 on August 15, 2000 from the I'On Company for five dollars. (R. pp. 3146-3151). Therefore, the Recreational Easement was null and void. Nevertheless, this transaction again evidences the very early actions of the Appellants to disregard their obligations relating to the Amenity Property, while continuing to make representations to the contrary.

3. The Amendment of the 1998 Property Report

Also in 2000, the I'On Group amended the 1998 Property Report to remove the obligation to convey a "Creekside Park" and "Community Dock" to the Assembly and its members. (R. pp. 3035-3073). In fact, the amendment was made within days of Walbeck's closing, yet again, the Appellants never informed him of any changes to the amenities referenced

in his purchase contract. (R. p. 965, line 4- p. 967, line 14). Further, the Appellants sent Walbeck three letters around the time of the amendment, yet none of those letters informed him that the I'On Group was not going to fulfill its contractual obligations. (R. p. 965, line 4- p. 967, line 14; R. pp. 2845-2847).

4. Sale of the Amenity Property to Buyers

The initial, subtle efforts of the Appellants to change and limit the I'On community's access to the Amenity Property eventually morphed into the outright sale of the Amenity Property, in its entirety, to Buyers in order to make a tidy profit. (R. pp. 2065-2074).

In 2006, the Appellants entered into discussions on how to "capitalize" on the "potential value" of the Community Dock. (R. pp. 2855-2856; R. pp. 2857-2861; R. pp. 2922-2924). Internally, the Appellants' documents reference their nefarious scheme to keep their ideas "quiet for now" while outlining the options to "[sell] community facilities." *Id.* In a bold move, the Appellants first tried to sell the Creek Club to the Assembly, a sale which was contingent upon "additional lot entitlement to enable 5 or 6 lots on CV5," despite knowing the Creek Club could not be "functional without the parking lot" already located on CV5. (R. pp. 2910-2912).[21]

By mid-2007, despite repeated representations to convey the Amenity Property to the Assembly and its members, the Appellants entered into talks with Buyers to purchase both CV5 and CV6. Initially, the Buyers backed out of the sales discussions due to the "understanding [that the Appellants] were considering giving the Creek Club to the HOA." (R. p. 2932). At that time, the Buyers decided to wait and see whether "anything pan[ned] out" between the Appellants and the Assembly. (R. p. 2932).

[21] The Town of Mt. Pleasant had imposed a cap on the number of lots in I'On that the Appellants sought to circumvent. (R. pp. 2910-2912; R. p. 701, line 2- p. 702, line 21).

In mid-2008, the Appellants reinstated talks with the Buyers regarding the sale of the Amenity Property. In August 2008, the Buyers contracted to purchase CV6. (R. pp. 2417-2426). Although a contract for purchase was in place, the Appellants represented to the Assembly members that they had "not sold or initiated the sale of the Creek Club." (R. pp. 2933-2935).

In early 2009, Assembly members queried Tom Graham as to the location and existence of the "Creekside Park" and to the conveyance of the Amenity Property. Subsequently, on March 11, 2009, the Assembly Board wrote Graham and requested the docks be deeded to the Assembly. (R. pp. 2232-2233). Several times in March 2009, Appellants attempted to soothe the Assembly by reiterating their intention to transfer the Amenity Property. (R. pp. 2236-2237; R. p. 2953). Unfortunately for the Assembly and its members, the Appellants' continued representations were bold-faced lies, as they were concurrently negotiating the sale of the Amenity Property (both CV 5 and CV6) to the Buyers. Unbeknownst to the Assembly and its members, the Appellants reached a second contract with Buyers in June of 2009. (R. pp. 2053-2064).

On July 27, 2009 Bruce Kinney, Assembly Board President, called Tom Graham to discuss a phone call the Assembly's manager had fielded regarding the impending sale of the Amenity Property. (R. pp. 2916-2917). Graham testified he received the call from Kinney, but Graham did not disclose the sale of the Amenity Property; instead, Graham told Kinney the Creek Club was undergoing a "management" change. (R. pp. 2916-2917; R. p. 752, line 8- p. 753, line 9). It was not until five days later, on August 1, 2009, the Assembly learned the Amenity Property was again under contract to be sold. (R. p. 2084; R. p. 750, lines 16-20). Between August 1, 2009 and August 5, 2009, the Assembly orally demanded the docks be

excluded from the sale and/or that the modifications to the use agreement be consummated. (R. p. 720, line 20- p. 721, line 11; R. p. 728, line 10- p. 729, line 17; R. p. 751, line 23- p. 753, line 25). However, the Appellants ignored the Assembly's demands. On August 5, 2009, the Amenity Property, including the overflow parking on CV5, was officially sold to Buyers. (R. pp. 2065-2074).

As a final slap in the face to the Assembly and lot owners, the Amenity Property promised for their sole use and enjoyment was now the site of an increased number of third-party social gatherings, such as weddings, which, in turn, forced the I'On lot owners to endure repeated dock closures, increased traffic, drunken parties, and rowdy visitors – a far cry from what was promised to them. (R. p. 969, line 21- p. 972, line 11).

5. Attempted Bait and Switch by the Appellants

After the sale of the Amenity Property, the Appellants attempted to conceal their wrong-doing by claiming they conveyed *different* amenity property to the Assembly, which conveniently, Appellants now describe as the "Creekside Park" and the "Community Dock." (R. p. 1128, lines 2-4; R. p. 1131, lines 1-7). However, in actuality, this other conveyed property is a "Marshwalk" and several "crabbing docks." (R. p. 1128, lines 2-4; R. p. 1131, lines 1-7; R. pp. 3035-3073; R. pp. 3074-3112). The crabbing docks sit on a small creek and are impassable at low tide if there is a boat moored to the dock. (R. pp. 2848-2851; R. pp. 2882-2898; R. pp. 2906-2909).

The evidence demonstrates the promised Amenity Property was located on the *sole* deep water frontage of Hobcaw Creek; however, neither the Marshwalk nor the crabbing docks are located on the beautiful and prized deep waters of Hobcaw Creek. (R. p. 1004, line 21- p. 1005, line 16; R. p. 2607). In addition, there is no gazebo or boat ramp on the conveyed property, as

was originally depicted as a part of the *true* Amenity Property. (R. p. 820, line 12- p. 822, line 14; R. pp. 2999-3034; R. pp. 2019-2039; R. p. 2607).

G. The Assembly Initially Failed to Act in the Interest Best Interest of the Members, as it Continued to be Under the Control of the Appellants

This action was brought by Walbeck and Adkins on behalf of themselves, and derivatively, on behalf of the Assembly against the Appellants and the Assembly. (R. pp. 151-167). Because the Appellants maintained control and veto power over the Assembly, the Assembly was unable to act on behalf of the members to secure rights to the Amenity Property. (R. p. 640, line 9- p. 642, line 23).

In 2008, for example, several Assembly members, including Walbeck and Adkins, made demands upon the Assembly to secure the rights to the Amenity Property upon learning of the Appellants' first potential sale of the property. (R. pp. 3558-3561; R. pp. 2229-2230; R. pp. 3152-3153; R. pp. 2232-2233; R. pp. 2234-2235). Unfortunately, these demands were futile. (R. p. 961, lines 10-19). Therefore, Walbeck and Adkins had no choice but to bring this matter derivatively, as the Assembly was not, initially, a common ally.

H. The Assembly Eventually Settled with Buyers for a Portion of the Amenity Property

Ultimately, during the first trial, the Respondents and the Assembly settled with Buyers and acquired the title to CV6 in exchange for $495,000. Additionally, the settlement required the Assembly provide to Buyers a twenty-year lease at a dollar per year, with two, additional five-year options. (R. pp. 2968-2971).

Months after settlement, the Appellants filed a new, nearly identical declaratory action regarding the validity of the easement and moved to consolidate the new action with the pending matter. (Case No. 2014-CP-10-2984). In both the proposed counterclaim in the first action and the new action, the Appellants pled the transfer of title of CV6 to the Assembly in an attempt to

show that the Assembly was not damaged, as it had received the deep water Amenity Property (CV6) back. However, the Appellants objected to the admissibility of the amount of consideration paid by the Assembly for the Amenity Property, which had been initially promised to them at no cost. (R. pp. 1816-1819). The Trial Court ruled the amount of consideration was admissible; and therefore, the jury weighed this evidence in reaching its verdicts favoring Respondents at the conclusion of the second trail of this matter. (R. p. 1307, line 2- p. 1308, line 2).

I. Orders on Appeal

Appellants now appeal from nine rulings issued amongst five of the Trial Court's trial-related Orders, including the Order Denying Appellants' Motion for JNOV ("JNOV Order"), the Order Denying the I'On Company's Petition for Attorneys' Fees ("Def. Fee Order"), the Order Awarding Respondent Walbeck's Petition for Attorneys' Fees ("Pl. Fee Order"), the Order Declaring the 2000 Recreational Easement ("Easement Order"), and the Order Denying Appellants' Directed Motion on Abuse of Process ("DV Order").[22]

1. Order Denying Appellants' JNOV Motion

On July 16, 2015, the Trial Court denied the Appellants' JNOV Motion based upon the jury's verdict and the evidence presented at trial. (R. pp. 21-63). According to the Trial Court: (1) Walbeck and Adkins fairly and adequately represented the interests of the Assembly, and further, satisfied Rule 23's derivative action requirements; (2) the statute of limitations had not run on Respondents' claims; (3) Appellants owed a fiduciary duty to Respondents, and breached it; (4) Appellants were amalgamated; and (5) Walbeck actually relied on Appellants' amenity-related representations. (R. pp. 40-61).

[22] The only adverse Order not appealed is the Order awarding discovery sanctions.

a. Walbeck and Adkins' Satisfaction of Rule 23's Derivative Action Requirements

First, the Trial Court found Walbeck and Adkins fairly and adequately represented the interests of the Assembly, noting: "[I]t is clear that the representative Plaintiffs prosecuted this action in an effort to preserve *all* I'On lot purchasers' common interest in the amenity property." (R. p. 41). The Trial Court cited the testimony of the Respondents, as well as that of witnesses Julie Hussey, Tim Eble, and Deborah Bedell, as evidence of the common interests being advanced by Walbeck and Adkins' efforts. (R. p. 41). Further, the Trial Court noted the verdict, in and of itself, was evidence that the interests of all members of the neighborhood were protected by Respondents. (R. p. 40).

Additionally, the Trial Court found "any challenge by the Defendants as to the 'demands' made upon the Assembly is unavailing as demands were repeatedly made upon the Assembly, an Assembly controlled by the Defendants, thus evidencing the futility of any demand in the first place." (R. p. 41). The Trial Court cited the testimony of Deborah Bedell, who indicated Appellants, still today, exercised significant control over the neighborhood in at least three aspects: "(a) the transfer of control and community property from Defendants to the Assembly continued through the time of trial; (b) the Defendants retain and exercise their power to reinstate their own agents as members of the Assembly's Board; and (c) the Defendants retain the absolute power to veto any Board action." (R. p. 34).

b. The Statute of Limitations Did Not Bar Respondents' Claims

The Trial Court's Order denying JNOV also addressed the Appellants' claim that the Statute of Limitations was not properly considered, and had, in fact, expired. (R. pp. 42-43). The Trial Court noted the jury's verdict finding Respondents' claims arose on August 5, 2009 – the date upon which the Amenity Property was sold. (R. p. 42). The Trial Court further found

Appellants' arguments that the public notice and constructive notice doctrines triggered the statute of limitations clock at some earlier time were unavailing. (R. pp. 43-44). As the Trial Court observed, Appellants renewed their promise of a pending conveyance to the Assembly many times over in 2008 and 2009 in advance of the sale that ultimately gave rise to the litigation. (R. p. 43 (*citing* R. pp. 2216-2217, R. pp. 3558-3561 (Pl. Ex. 52/Def. Ex. 132), R. pp. 2232-2233, R. pp. 2236-2237, R. pp. 2404-2460, R. p. 2461, R. pp. 2462-2605, R. p. 2842, R. pp 2855-2861, R. pp. 2910-2920, R. pp. 2922-2932, R. pp. 2939-2940, R. pp. 2946-2957, R. pp. 2958-2967)). Moreover, "the Defendants bore the burden of demonstrating that the Plaintiffs had knowledge of the 2009 conveyance of the community property prior to 2009 – a burden the jury found Defendants failed to satisfy after considering the evidence presented by Defendants." (R. p. 44).

c. Appellants Owed a Duty to Act in the Best Interest of the Assembly and its Members

The Trial Court also found Appellants' claim that they had no duty to convey the Amenity Property unavailing. (R. pp. 46-49). "Simply stated, a developer in control of an association may not make decisions which benefit its own interest at the expense of the association and its members." (R. p. 48). Here, Appellants promised, and Respondents trusted, Appellants would construct, repair, and transfer common amenities to the Assembly. (R. p. 47). The evidence, as presented by the testimony of Vince and Tom Graham, established the Appellants managed and controlled the Assembly, as well as community property not yet conveyed to the Assembly. (R. pp. 47-48). Consequently, the Trial Court held Appellants' failure to convey the properties was a "fail[ure] to act in the best interest of the Assembly." (R. p. 49). Therefore, the Trial Court concluded Appellants "breached at least one of the fiduciary duties it owed the Assembly." (R. p. 49).

d. Any Legal Distinction among Appellants' Corporate Interests is Blurred

Prior to submitting the case to the jury, the Trial Court held Appellants were amalgamated as a matter of law. (R. p. 1480, line 12- p. 1481, line 21; R. p. 59). The Trial Court reiterated this holding in its Order denying Appellants' JNOV Motion, finding Respondents proved any distinction between the I'On Companies were blurred. (R. p. 59). As noted by the Trial Court, the evidence established the same individuals own, control, and managed all of these entities, and all collectively functioned as one in the day-to-day operations of all aspects of I'On's development. (R. p. 59). The Trial Court pointed to the 2000 Recreational Easement as evidence of such amalgamation, noting the same individual, the I'On Company's general manager, executed the agreement on behalf of all three parties subject to the agreement: the I'On Company, the I'On Club, and the I'On Assembly. (R. p. 60 (*citing*, R. pp. 3131-3145, (Pl. Ex. 10/Def. Ex. 27))). Subsequently, another general manager, Chad Besenfelder, represented to the Assembly, on behalf of the I'On Companies, that the "I'On Company [was] preparing to deed the [C]ommunity [D]ock to the I'On Assembly" in March of 2009 and the "I'On Club will continue to operate the facility." (R. p. 60 (*citing*, R. pp. 2236-2237)).

The Trial Court also pointed to the inadequate consideration paid by the I'On Companies when conveying the Amenity Property amongst its entities. (R. p. 61). For example, CV5 and CV6 were first transferred by the I'On Company to the I'On Club on August 15, 2000 for $5.00. (*See* R. pp. 3146-3151). Two years later, CV5 was conveyed by the I'On Club to the Grahams, individually, for another $5.00. *Id.* The Trial Court further noted, as evidence of amalgamation, the joint closing of the sale of CV5, CV6, and a residential lot on August 5, 2009, wherein CV5 was sold by the Grahams, CV6 was sold by the I'On Club, and the residential lot was sold by the

I'On Company. (R. p. 61 (*citing* R. pp. 2081-2083)). The Appellants, under the direction of the Grahams, executed the closing documents on behalf of both the I'On Company and the I'On Club, further evidencing the amalgamation between the entities. (R. p. 61). The Trial Court then pointed to the June 18, 2009 Purchase Agreement for the sale of the Creek Club/CV6. (R. p. 61 (*citing* R. pp. 2703-2719)). While the Purchase Agreement was entered into by the I'On Club, it was the I'On Companies that actually executed the Agreement.[23] (R. p. 61 (*citing* R. pp. 2703-2719)).

e. Walbeck's Reliance on Appellants' Amenity-Related Representations

Finally, the Trial Court found Walbeck actually relied on Appellants' amenity-related representations based on the evidence presented at trial. (R. pp. 58-59). Walbeck demonstrated: (1) Appellants made false representations to him; (2) Appellants had a pecuniary interest in making the statements; (3) Appellants owed a duty of care to communicate truthfully with Walbeck; (4) Appellants breached that duty; (5) Walbeck was justified in relying on Appellants' representations; and (6) Walbeck was directly and proximately damaged by his reliance on Appellants' representations. (R. pp. 56-57).

Specifically, the Trial Court noted Appellants repeatedly promised the pending conveyance of the Amenity Property "for one primary purpose – profit." (R. p. 57). The Trial Court observed: "[a]s the developers of the I'On Community, the Defendants' owed duties, including duties fiduciary in nature, to convey truthful information to Plaintiffs." (R. p. 57). The Trial Court concluded Appellants breached this duty, in part, "by failing to transfer the very amenities they represented would be transferred to the community" and "[selling] said amenities for profit on August 5, 2009." (R. p. 57). Given the nature of the relationship between Walbeck

[23] The Trial Court noted on the record when directing amalgamation that the Grahams didn't even know who worked for which company. (R. p. 1480, line 24- p. 1481, line 1).

and Appellants, the Trial Court determined Walbeck was entitled to rely upon Appellants' representations and Appellants were obligated to convey truthful information. (R. pp. 57-58). The Trial Court found Walbeck did, in fact, rely on Appellants' representations,[24] representations which the evidence established were inaccurate. (R. pp. 58-59).

2. Order Denying I'On Company's Petition for Attorneys' Fees

Also post-trial, the Trial Court denied the I'On Company's petition for attorneys' fees. (R. p. 83). The Trial Court found: "Defendants are not entitled to an award of attorneys' fee because Adkins did in fact prevail at trial as a derivative plaintiff on behalf of the I'On Assembly." (R. p. 80). The Trial Court indicated, "[t]here is simply 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." (R. p. 81). According to the Trial Court, "[a] plaintiff may achieve 'prevailing party' status so long as: (a) plaintiff succeeded on any significant issue raised in the action; or (b) the litigation, in its entirety, resulted in some benefit." (R. p. 81). Here, supported by the testimony of the Respondents and I'On residents, Julie Hussey, Tim Eble, and Deborah Bedell, the Trial Court concluded "the legal and public benefit achieved by Adkins and Walbeck outweighed any limited success by Defendants." (R. p. 80). The Trial Court went on to say that "[b]ut for the action of these Defendants, no attorneys would have been necessary to 'enforce obligations under this Agreement'." (R. p. 81).

[24] At trial, Walbeck testified he: (1) relied on information provided by Appellants' agent regarding the amenity "around the bend" from his lot; (2) relied on representations in his purchase contract regarding the Amenity Properties; (3) relied on the representations in the Property Report regarding the Amenity Properties; and (4) relied on the graphic representations of the Amenity Property located "around the bend" from his lot on maps provided by Appellants throughout the progression of I'On's development. (R. p. 955, line 12- p. 958, line 2; R. p. 959, lines 6-20).

3. The Invalidity of the 2000 Recreational Easement

Following cross-motions filed by Appellants and Respondents concerning the validity of the Easement, the Trial Court issued an Order declaring the Easement void as a matter of law for the simple fact that the party granting the easement did not own the property when it purported to grant it. (R. pp. 73-74) (noting at the time the Easement was granted by the I'On Club, the property was owned by the I'On Company). As additional sustaining grounds for its ruling, the Trial Court noted: (1) the Easement was also terminated by merger when the Assembly acquired the Amenity Property as part of its settlement with Buyers; and (2) equity prevented Appellants from benefiting from their misdeeds in their attempts to "ratify" the defective easement after the fact. (R. pp. 74-76). "Simply put, the Defendants cannot rely on equitable principles when the evidence, and the jury's verdict, demonstrate that Defendants acted inequitably." (R. p. 75).

4. Order Granting Walbeck's Fee Petition

Also post-trial, the Trial Court granted Walbeck's petition for attorneys' fees and costs, awarding him $225,000.[25] (R. p. 100). The Trial Court found Walbeck was entitled to an award of statutorily prescribed attorneys' fees under the provisions of ILSA, noting "[u]nder prevailing South Carolina jurisprudence, the recovery of statutorily prescribed fees and the recovery of actual damages under a separate, common law cause of action does not constitute double recovery." (R. p. 89). Despite Walbeck's nominal victory on the ILSA claim, he prevailed on a significant legal issue; thus, Appellants were legally responsible for violating Walbeck's rights under ILSA's anti-fraud provisions. (R. pp. 92-93). Additionally, the Trial Court found Walbeck's ILSA claim served an important public purpose: "Walbeck's victory signaled to developers, including the I'On Defendants, the importance of ensuring that their property-related advertisements and representations do not mislead innocent purchasers or otherwise violate

[25] Walbeck requested fees and costs of $1,070,500. (R. p. 1874).

ILSA's anti-fraud provisions." (R. p. 93). Further, the Trial Court held: "[n]ot only does Walbeck's ILSA claim serve a public purpose, the public interest is best served by shifting the burden of the expense of litigation onto the shoulders of those whose unfair and deceptive acts are responsible for the litigation in the first place." (R. p. 93). Lastly, the Trial Court determined, based upon the nature and complexity of the ISLA, as well as Respondents' Counsel's time spent prosecuting this claim, among other things, that an award of $225,000 in attorneys' fees was reasonable. (R. pp. 99-100). As noted by the Trial Court, Walbeck's counsel expended significant time and effort, having logged more than 4,000 hours of time in prosecuting this action – time that was necessary and validated by the verdict.[26] (R. p. 98).

5. Order Granting Respondents' Directed Verdict Motion

Given the lack of evidence suggesting a "scheme" promulgated by any "Gang," the Trial Court also found Respondents did not abuse the legal process. (R. p. 1466, line 22- p. 1468, line 2). The Trial Court noted an absence of any evidence tying Adkins or Walbeck to any improper act in furtherance of the process and found the evidenced presented showed Adkins and Walbeck were trying to "right a wrong." (R. p. 1466, line 22- p. 1468, line 2). The Trial Court further held that exercising a constitutional right to file an appeal with the Board of Zoning Appeals is not an abuse of the proper process. (R. p. 1466, line 22- p. 1468, line 2). "There's just not an issue of fact that there's been any abuse of the proper process by these plaintiffs." (R. p. 1466, line 22- p. 1468, line 2).

STANDARD OF REVIEW

Appellants' arguments all stem from the Trial Court's rulings on motions made during and after the trial of this case wherein the jury returned verdicts in favor of Respondents. This fact is critical to this Court's analysis because of the standard this Court must apply in reviewing

[26] The Trial Court also awarded fees and expenses for discovery sanctions; this Order has not been appealed.

a case tried before a jury and any rulings which relate to the case as tried. This standard is the abuse of discretion standard and, as even recognized by the Appellants, it applies to each and every issue presently on appeal. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006) (In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings) (emphasis added); *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 240, 616 S.E.2d 431, 434-45 (Ct. App. 2005) (noting a trial court's decision to award attorneys' fees is subject to the abuse of discretion standard of review) (emphasis added); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (noting the trial court's denial of a directed verdict or JNOV motion is within the trial court's discretion and the court's rulings will not be disturbed on appeal unless no evidence supports the ruling or the ruling is controlled by an error of law) (emphasis added); *see also,* App. Br. at. 20-21 (noting the abuse of discretion standard applies to directed verdict, new trial and JNOV motions as well as attorneys' fees awards).

Given the applicability of the abuse of discretion standard, this Court is concerned only with two things: (1) the existence or non-existence of errors of law; and (2) the existence or non-existence of evidence. *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001); *Swinton Creek Nursery v. Edisto Farm Credit. ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999) (noting the appellate court can only reverse the trial court when there is no evidence to support the trial court's rulings or the rulings are controlled by an error of law); *see also, Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 585 S.E.2d 272, 274 (2003) (noting the appellate court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the

evidence); *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993) (noting the appellate court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them). Where no errors of law exist and both the trial court's rulings and jury's factual findings are supported by at least one piece of evidence, this Court must affirm the trial court. *Id.; see also, Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004) (noting the appellate court must affirm the trial court's ruling if there is any evidence that supports it and should uphold a jury's verdict if there is any evidence to sustain it).

ARGUMENT

As an initial matter, major portions of this appeal are based upon arguments that were not raised at the Trial Court and arguments that are improperly supported. For example, Section I(3) (New claims arose following the partial settlement...); Section II(1) (easement in each homeowner claim of title)[27]; Section III (arguing that the "Term" provision in paragraph 4.2 of the Easement only applied to cost sharing); and, Section IV(4) (arguing that the Trial Court mistook a contractual duty for a fiduciary duty) were not raised at the Trial Court; and, therefore, should not be considered by this Court. Additionally, Section V and many other sections of the Appellants' brief rely on evidence that was not admitted or adduced at trial. For example, Section V egregiously relies upon Def. Ex. 106, when Appellants have not appealed the Trial Court's denial of the admission of Def. Ex. 106. (App. Br. pp. 46, 50). Many of the Appellants' arguments rely on documents and evidence not adduced at trial, *e.g.*, summary judgment deposition exhibits. (*See, e.g.*, App. Br. pp. 5 n.1, 6 n.3, 14, 20, 49).

[27] There was absolutely no evidence that the easement would show up in individual homeowner claim of title at trial. Rather, Appellants argued that general recording of the easement in public records should constitute constructive notice.

I. This Court Must Affirm the Trial Court's Rulings because the Trial Court's Findings are Supported by the Record and are not Controlled by any Error of Law.

This Court should affirm each of the nine Trial Court rulings on appeal because South Carolina law and the evidence presented at trial supports these rulings as well as the verdicts rendered by the jury in favor of Respondents. Appellants' arguments to the contrary are meritless – Appellants made these same arguments to the Trial Court, who saw the witnesses testify and reviewed the evidence entered, and the Trial Court rejected all of them. (R. pp. 40-61). Now, Appellants repeat the exact same arguments and ask this Court to find facts contrary to what the Trial Court found – this is outside the scope of this Court's function. Essentially, Appellants are asking this Court to substitute its judgment for that of the Trial Court which determined:

a. Respondents satisfied the requirements to maintain a derivative action based upon the evidence presented (R. pp. 40-41);

b. Respondents discovered their respective claims on August 5, 2009 based upon the evidence presented (R. pp. 42-44);

c. Appellants owed, and breached, its fiduciary duty to convey amenity property to The Assembly based upon the evidence presented (R. pp. 46-49);

d. The 2000 Recreational Easement granted by Appellants is *void ab nitio* based upon the evidence presented (R. pp. 73-75);

e. Respondents, Walbeck and Adkins, did not abuse the legal process based upon the evidence presented (R. p. 62);

f. Respondents - not Appellants - are the prevailing parties based upon the evidence presented (R. pp. 81-82; R. pp. 89-91, 94-97);

g. Appellants are amalgamated based upon the evidence presented (R. pp. 59-61); and

h. Respondent, Walbeck, actually relied on Appellants' amenity-related representations based upon the evidence presented (R. pp. 58-59).

Because the evidence presented during and after the trial of this case supports each of these finding reached by the Trial Court, all of the Appellants' arguments fail and warrant no further consideration by this Court. *See, e.g., Burns*, 361 S.C. at 231-33, 603 S.E.2d at 611 (noting the appellate court must affirm the trial court's ruling if there is any evidence that supports it and should uphold a jury's verdict if there is any evidence to sustain it); *see also,* Rule 220, SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). In other words, the true issue on appeal is whether the Trial Court properly denied Appellants' JNOV and new trial motions. Here, the Trial Court, acting within the very discretion afforded it under South Carolina law, did properly deny these motions, and thus, the jury's verdicts stand. Because the jury's verdicts stand and Respondents' fee award stands, Appellants' lack of a fee award stands. Therefore, any question concerning the validity of the 2000 Recreational Easement or Appellants' abuse of process claim is a moot point. Viewed in this proper context, Appellants' "issues" on appeal do not, and cannot, change the ultimate result achieved at the trial of the underlying case; and thus, this Court should affirm the Trial Court.[28]

II. The Trial Court did not Err in Finding Respondents Properly Maintained a Derivative Action on Behalf of the Assembly Because The Record Demonstrates Respondents Fulfilled the Derivative Action Requirements Set Forth in Rule 23(B), SCRCP.

Contrary to Appellants' initial contention, the Trial Court did not err in finding Respondents satisfied Rule 23(b)'s derivative action requirements,[29] and thus, properly maintained a derivative action on behalf of the Assembly. The Trial Court's finding is supported

[28] Nevertheless, Respondents address each of the nine issues raised on appeal given Appellants' singularly-stated arguments.

[29] Rule 23(b)(1), SCRCP, requires: (a) the verification of a derivative complaint; (b) particular allegations of the plaintiff's efforts to "obtain action the desires from the directors or comparable authority;" and (c) "the reason for the plaintiff's failure to obtain the action or for not making the effort." Rule 23(b)(1) further provides a plaintiff maintaining a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

by (a) the jury's verdict in favor of the Assembly (which indicates Respondents' "fairly and adequately" represented the interests of the Assembly); and (b) evidence in the record (which indicates Respondents satisfied Rule 23(b)'s verification, demand and futility requirements). (R. pp. 40-41). Accordingly, there is no reversible error, and this Court should affirm the Trial Court's derivative action ruling.

Appellants' derivative action argument boils down to three points, each of which is unpersuasive because each ignores the discretionary authority our law provides a trial court in deciding the fulfillment of Rule 23(b)'s derivative action requirements. Stated differently, Appellants cannot establish an "error of law" committed by the Trial Court when "the law" defers to the Trial Court in deciding the properness of a derivative action. Consequently, the only consideration properly before this Court is whether the Trial Court's derivative action ruling is supported by any evidence. Here, the Trial Court's ruling expressly cites corroborating evidence, explicitly acknowledges the jury's verdict entered in favor of the Assembly, and thus, is properly supported by the record. (R. pp. 40-41; R. pp. 1857-1858). Based upon this fact alone, this Court should affirm the Trial Court's derivative action ruling. Rule 220(c), SCACR – ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"). Yet, in an abundance of caution, Respondents address the merits of each of Appellants' derivative-related points below:

A. The Trial Court Did Not Err by Exercising the Discretion Afforded it in Finding Respondents Satisfied Rule 23(b)'s Demand and Futility Requirements

First, Appellants maintain the Trial Court "erred" by "casually dismissing" Rule 23(b)'s "demand" requirement. (App. Br. at 21-22). Notably, Appellants' demand argument is based entirely on this Court's decision in *Carolina First Corporation v. Whittle*, wherein this Court

recognized a trial court's discretionary authority to excuse a demand where the trial court finds sufficient facts of "futility" are pled. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000) ("[I]f the court finds sufficient facts [of futility] are pled, then it will be lenient in excusing demand – a matter within its discretion.") (citations omitted).[30] Here, the Trial Court found Respondents pled and verified sufficient facts of futility; and thus, it was within the Trial Court's discretion to excuse Rule 23(b)'s demand requirement.[31] (R. p. 41; R. pp. 184-185). However, the Trial Court did not only excuse this requirement as Appellants suggest, but rather, the Trial Court found Respondents satisfied all of the requirements necessary to maintain a derivative action under Rule 23, including sufficiently pleading, and ultimately proving, both the demand and futility requirements:

> [T]he record clearly reflects Plaintiffs' satisfied Rule 23's verification, demand and futility requirements. . . (*See,* Plaintiffs' Complaints). . . Any challenge by the Defendants as to the "demands" made upon the Assembly is unavailing – as this Court recognized, demands were repeatedly made upon the Assembly, an Assembly controlled by the Defendants, thus evidencing the futility of any demand in the first place.

(R. p. 41) (emphasis added).[32]

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[30] Recognizing the broad discretion afforded a trial court in deciding whether Rule 23(b)'s derivative action requirements are met, the *Carolina First* Court did not reverse a trial court which found the derivative plaintiffs failed to sufficiently establish the futility requirement. *Id.* at 192, 539 S.E.2d at 411. ("The trial judge found that [the Shareholders] did not meet [the sufficiently pled futility] requirement, and we will only overturn that decision for an abuse of discretion.") *citing Grant,* 266 S.C. at 375, 223 S.E.2d at 414 (noting the issue of whether the failure to seek redress within the corporation is excusable is a factual question, the resolution of which by trial court should be affirmed unless unsupported by the evidence). Here, the Trial Court found Respondents did meet the futility requirement, along with every other Rule 23(b) requirement, and this Court must acknowledge this finding by similarly affirming the Trial Court.

[31] In other words, even if the Trial Court did "dismiss" the demand requirement as Appellants' suggest, this dismissal is not an "error" because the Trial Court found Respondents' allegations and proof of futility sufficient. The Trial Court's futility finding is supported by the record as well as Appellants' own brief, which notes: (a) "Respondents pleaded and argued that demand was futile;" (b) "Respondents maintained this action by alleging and verifying that additional demands on the Assembly 'would now be futile as The Assembly has failed to protect the rights of The Assembly and its members. . .';" and (c) "Respondents have argued that the developers had a 'veto power' over Board actions which would have rendered the demand futile . . . ." (App. Br. 24-25).

[32] Upon learning of the 2008 potential sale of the amenity property, the record shows several Assembly members, including Respondents made oral demands at Assembly meetings and written demands upon the Assembly to secure the rights to the Creekside Park and Community Dock property. (*See, e.g.*, R. pp. 3558-3561; R. pp. 2229-2230; R. pp. 3152-3153; R. p. 2231; R. pp. 2232-2233; R. pp. 2234-2235). Respondents also demanded the Appellants fulfill

Consequently, Appellants' first contention is without merit – the record reflects the Trial Court considered all Rule 23(b) derivative action requirements, casually dismissing none; and, even if the Trial Court excused the futility requirement, this does not amount to an error of law under prevailing precedent.

B. The Trial Court Did Not Err by Exercising the Discretion Afforded it in Finding Respondents Satisfied Rule 23(b)'s Adequacy Considerations

Like Appellants' demand argument, Appellants' next argument concerning the adequacy of Respondents' derivative representation ignores the fact the Trial Court found Respondents satisfied Rule 23(b)'s adequacy considerations:

> [T]he record reflects Plaintiffs' satisfied . . . the aforementioned adequacy considerations. . . First, there is a common interest between the named Plaintiffs and the Assembly members, as all Assembly members suffered due to Defendants' conveyance of amenity property promised to the Assembly. Moreover, Plaintiffs testified they were not part of any "Civic Lot Gang" and had no interests adverse to other members of the I'On Assembly – in fact, Plaintiffs advanced these members' interests according to the testimony of Julie Hussey, Tim Eble and Deborah Bedell. Second, by virtue of the verdict and monetary awards rendered in favor of Plaintiffs, its clear Plaintiffs successfully, and vigorously, prosecuted this action in an effort to preserve *all* I'On lot purchasers' common interest in the amenity property.

(R. p. 41).

Appellants do not raise a single "error" purportedly committed by the Trial Court in reaching this conclusion, and thus, raise no legitimate issue on appeal. The Trial Court found the Respondents' satisfied Rule 23(b)'s adequacy considerations and cited evidence supporting Respondents' adequateness in its Order Denying Appellants' JNOV – there is no abuse of discretion here. (R. pp. 40-41); *Welch*, 342 S.C. at 300, 536 S.E.2d at 418-419 (noting the trial

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its obligations to convey the Creekside Park and Community Dock to the Assembly. (*See, e.g.*, R. pp. 2256-2257; R. p. 871, line 7-873, line 25; R. p. 960, lines 13-20; R. p. 961, lines 10-19; R. p. 984, line 15- p. 985, line 12).

court's denial of a JNOV motion is within the trial court's discretion and the court's rulings will not be disturbed on appeal unless no evidence supports the ruling).

C. The Jury Rendered its Verdict in Favor of the Assembly on the Same Claim Respondents Alleged Since the Beginning of the Underlying Action

Appellants' final argument concerning "purported" new claims arising following the partial settlement of the underlying action is equally misplaced. Again, Appellants' ignore the Trial Court's ruling finding Respondents satisfied the derivative action requirements – period. (R. pp. 40-41). Appellants' argument also ignores the fact the $1.75 Million verdict entered in favor of the Assembly was on Respondents' breach of fiduciary claim – a claim included in Plaintiffs' Initial Complaint, and since included, in every Amended Complaint. (R. p. 1857; R. pp. 122-123; R. pp. 134-135; R. pp. 159-160; R. p. 322). In other words, no "new claims arose" which in anyway prejudiced Appellants – the derivative claim the jury awarded damages on is the same derivative claim the Appellants were of aware of since the commencement of the underlying case. Appellants cite zero authority supporting its proposition that because a party's damages change via mitigation efforts, somehow its substantive claims change, and require the re-issuing of demand. Appellants' argument is unsupported by both the record and the law, and thus, must be rejected. *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]tatements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Further, it was Appellants that inserted this issue into the case via their amended counterclaim and second easement action.

D. The Properness of Respondents' Derivative Action is Irrelevant Because the Assembly was Realigned as a Named Plaintiff and the Jury Found in its Favor

Finally, although clear from the record that Respondents' case is a proper derivative action, any argument to the contrary is futile because the Assembly was a named plaintiff at the time of trial. A claim asserted by a plaintiff "in derivative suit is not her own; instead, the claim belongs to the corporation and the plaintiff is merely 'a nominal plaintiff.'" *Koster v. Lumbermens Mutual Casualty*, 330 U.S. 518, 523 (1947); *Reilly Mortgage Group, Inc. v. Mount Vernon Savings and Loan Assoc.*, 568 F. Supp. 1067, 1073 (E.D. Va. 1983). Most often, the corporation is "a defendant in a derivative action . . . to ensure the presence of an indispensable party in the litigation." *Hildebrand v. Lewis*, 281 F. Supp. 2d 837, 844-45 (E.D. Va. 2003); *see also, Liddy v. Urbanek*, 707 F.2d 1222, 1223 (11th Cir. 1983); *Reilly*, 568 F. Supp. at 1073. "Thereafter, once the corporation is properly joined in the suit, it can then be realigned as a plaintiff, if appropriate, in accordance with its true interests in the litigation." *Hildebrand*, 281 F. Supp. 2d at 844-45; *see also, Indianapolis v. Chase Nat'l Bank*, 314 U.S. at 69 (1941) (recognizing that courts must "look beyond the pleadings, and arrange the parties according to their sides in the dispute"). "[C]orporations are typically aligned as plaintiffs in stockholder derivative actions, since they stand to benefit from a successful suit." *Hildebrand*, 281 F. Supp. 2d at 844-45.

Here, the Assembly was added as a nominal defendant in February 2012 so that it would be bound by any verdict rendered. (R. p. 153); *see also, Hotz v. Minyard*, 304 S.C. 225, 231, 403 S.E.2d 634, 638 (1991). Thereafter, the Trial Court, in its discretion, realigned the Assembly as a Plaintiff. (R. pp. 16-17). The Assembly was a named Plaintiff in the Fourth Amended Complaint. (R. p. 314). The Assembly was a named Plaintiff on the verdict form. (R. p. 1855).

The Assembly was the named party on the verdict form under the breach of fiduciary duty cause of action. (R. p. 1857). The Trial Court charged the jury accordingly. (R. p. 1712, lines 13-19). As a result, whether Respondents' case is a proper derivative action is irrelevant. The Assembly was a named plaintiff, and the jury found in its favor. (R. p. 1857-1858).

III. The Trial Court Did Not Err in Denying Appellants' Motion for JNOV based upon the Statute of Limitations or Submitting the Date of Discovery Question to the Jury

The Trial Court correctly concluded Respondents' claims are not barred by the statute of limitations based upon the jury's verdict finding August 5, 2009 as the date upon which Respondents "discovered" their claims against Appellants. Neither the Trial Court, nor this Court, can disturb the factual findings of a jury, and here, the jury's finding as to the date of discovery means Plaintiffs claims were brought within the applicable statute of limitations. Accordingly, there is no error of law and this Court must affirm the Trial Court's denial of Appellants' JNOV.

A. The Statute of Limitations was Properly Submitted to the Jury Given the Question of Fact as to when the Respondents Discovered Their Claims Against Appellants

During the trial of the underlying case, the Appellants and the Respondents offered conflicting testimony and evidence as to when the Respondents "discovered" their claims against the Appellants. Appellants have reiterated the evidence and testimony that they presented during the trial, which they believe evidences the "discovery date" as occurring prior to August 5, 2009. (App. Br. at 29-30[33]). However, Respondents have presented evidence that they had assurances that the Amenity Property would be conveyed to the Assembly and they relied upon those promises, until August 5, 2009, when they discovered the Amenity Property had been sold. (*See,*

[33] (App. Br. at 29-30)(C*iting* R. pp. 3131-3145; R. pp. 3175-3189; R. p. 3190; R. pp. 3325-3373; R. pp. 3432-3435; R. pp. 3436-3440; R. pp. 3451-3453; R. pp. 3464-3467; R. pp. 3482-3502; R. pp. 3511-3544; R. pp. 3565-3568; R. p. 615, lines 8-25; R. p. 902, line 12- p. 903, line 4; R. p. 979, line 14- p. 980, line 20; R. p. 1132, lines 12-14)).

e.g., R. pp. 2019-2039; R. pp. 2999-3034; R. pp. 2042-2048; R. pp. 2128-2131; R. pp. 2177-2196; R. pp. 2202-2205; R. pp. 2236-2237; R. pp. 2293- 2299; R. pp. 2855-2861; R. pp. 2946-2949; R. p. 2953; R. p. 956, line 15- p. 959, line 20). Most notably, as late as March 25, 2009, Appellants emailed the Assembly representations that they were in the process of transferring the Community Dock and adjacent property to the Assembly. (R. pp. 2236-2237). Given the competing evidence concerning the "discovery" date, a question of fact existed as to the statute of limitations – a question of fact rightfully left for the jury to resolve. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (noting the burden of establishing a statute of limitations defense rests on the party asserting it, and when testimony conflicts upon this question, it becomes an issue for the jury to decide).

B. The Jury Determined Respondents "Discovered" Their Claims on August 5, 2009 and Evidence in the Record Supports the Jury's Conclusion

After observing the witnesses and weighing the evidence, the jury determined the Respondents did not "discover" their claims until August 5, 2009. (R. pp. 1855-1856). The jury's conclusion as to this discovery date is supported by the evidence presented at trial, which demonstrates the Appellants sold the amenity property promised to the Respondents to an unaffiliated, for-profit entity on August 5, 2009. (*See,* R. pp. 2263-2270; R. pp. 2271-2279; R. pp. 2280-2284; R. pp. 2703-2719). This evidence documenting the August 5, 2009 conveyance as well as the evidence reflecting the Appellants' repeated promise to convey this property to the Assembly, a promise Appellants reiterated on the very day they negotiated the sale of the amenity property, sustains the jury's findings. (*See,* R. pp. 2216-2217; R. pp. 3558-3561; R. pp. 2232-2233; R. pp. 2236-2237; R. pp. 2404-2460; R. p. 2461; R. pp. 2462-2605; R. p. 2842; R.

pp 2855-2861; R. pp. 2910-2920; R. pp. 2922-2932; R. pp. 2939-2940; R. pp. 2946-2957; R. pp. 2958-2967).

C. Because Evidence in the Record Supports the Jury's Conclusion, the Trial Court Did Not Err in Denying Appellants' JNOV Motion Based Upon the Statute of Limitations

According to South Carolina law, a trial court must deny a JNOV motion where the evidence yields more than one reasonable inference and that is exactly what occurred here – the evidence regarding the date Respondents' "discovered" their claims yielded more than one inference; and ultimately, the jury resolved the evidence in Respondents' favor. *Strange v. S. C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994) (noting a trial court must deny a JNOV motion where the evidence yields more than one reasonable inference or the inference is in doubt).[34] Because at least one piece of this evidence supports a discovery date of August 5, 2009, the Trial Court appropriately refused to disturb the jury's conclusion and rightfully denied Appellants' JNOV Motion based upon the statute of limitations. *See,* Section B, *supra*; *see also,* SCARC Rule 220(c) (noting the appellate court may affirm the trial court for any reason appearing in the record).

D. The Trial Court's Equitable Tolling Ruling Does Not Affect the Jury's Verdict as to the Statute of Limitations

Lastly, Appellants' contention regarding the Trial Court's alternative equitable tolling ruling has no bearing on the ultimate properness of this Court's denial on Appellants' JNOV Motion as to the Statute of Limitations. (R. p. 42, n.15). As previously noted, the Trial Court rightfully submitted the Statute of Limitations question to the jury, and the Trial Court correctly denied Appellants' Motion given the jury's answer to this question is supported by the record –

[34] In averring "[t]he trial court erred in submitting the [statute of limitation] question to the jury and in denying Appellants' JNOV Motion," the Appellants ignore South Carolina law which indicates: "[a] motion for JNOV may be granted **only** if **no** reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998) (emphasis added).

thus, any error the Trial Court purportedly committed in including an additional sustaining ground in its denial is a harmless one. *Fishburne v. Short*, 268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977). Further, the equitable tolling decision is well-supported by the evidence and precedent set forth in the JNOV Order.

E. Based Upon the Evidence Presented, the Jury Properly Determined the Purchase Contracts at Issue Were "Sealed Instruments," and thus, a 20-Year Statute of Limitations Applies to Walbeck's Breach of Contract Claim

The 20-year statute of limitation applicable to Walbeck's breach of contract claim further renders moot Appellants' temporal-based arguments. The evidence sustains the jury's findings that Walbeck's purchase contract was a "sealed instrument." (R. pp. 1855-1862).

The signature page of Walbeck's purchase agreement includes an attestation clause referencing a "seal," and in addition to the attestation clause, twice references the agreement was "signed, *sealed* and delivered" – once in connection with Walbeck's signature and once in connection Appellants' signature. (R. pp. 3162-3172). Thus, Walbeck's purchase agreement contains a minimum of three references to a "sealed" instrument, the combination of which clearly supports the jury's findings that the agreement was, in fact, sealed. (R. pp. 3162-3172).

"Testimony" from a party revealing a special intent to create a sealed instrument is simply not required; rather, one need only look at the instrument, itself, to ascertain whether there was an intent to seal the same. Indeed, Section 19-1-160 of the South Carolina Code provides:

> *Whenever it shall appear from the attestation clause or from any other part of any instrument in writing* that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

S.C. Code § 19-1-160 (1976) (emphasis added). Here, the jury properly found it "appeared" from the many "sealed" references existing within Walbeck's purchase contract that the contract was intended to be a "sealed instrument." (R. pp. 1855-1862).

IV. The Trial Court Did Not Err in Finding the Attempted 2000 Recreational Easement is Invalid and Void *Ab Initio*

Appellants' next argument concerning the validity of the Recreational Easement ("Easement") fails for a similar reason because the Trial Court's Easement ruling does not, and cannot, affect the jury's verdict. Because the jury's verdict stands irrespective of the Easements validity or invalidity, the end result remains the same, and thus, remand is unwarranted. As demonstrated below, Appellants' Easement-related arguments also fail on its merits given: (a) the Trial Court's Easement Ruling is sufficiently supported by the record; (b) the after-acquired title doctrine is not recognized in this State; and (c) Appellants' failed to preserve the "perpetual" issue for appellate consideration.

A. Evidence in the Record Supports the Invalidity of the Easement

First, the Trial Court's ruling regarding the invalidity of the Easement is clearly supported by the record which indicates the grantor of the Easement did not possess title to the land over which the Easement was granted. (R. p. 78; R. pp. 3146-3151); *see also, Kelley v. Snyder*, 396 S.C. 564, 571, 722 S.E.2d 813, 817 (Ct. App. 2012) (noting the existence of an easement is a question of fact and is subject to the any evidence standard of review.).[35]

According to South Carolina law, an easement cannot be granted by a party who does not have any interest in the land. *Moore v. Reynolds*, 285 S.C. 574, 757 (1985) (recognizing the

[35] Not only supported by the record, Appellants concede the grantor had zero interest, let alone title, in the subject property at the time it purported to grant Easement. (R. p. 1916). (Appellants concede: "At the time the 2000 Recreational Easement was executed, the I'On Company still held title to the real property encompassing the 'Club Property'...", and that the I'On Club did not become owner of the same until August 15, 2000.). S*ee also, Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392-93, 496 S.E.2d 624, 626 (1998) (Concessions made in a judicial proceeding are binding upon those who make them and the opposite may not be asserted on appeal.).

invalidity of an easement granted on property no longer owned by the grantor at the time the easement was executed). This basic tenant – one cannot convey something he does not own – is as old as property law, itself, and is recognized by virtually every jurisdiction.[36] Here, the Appellants concede (and the Trial Court found) the I'On Company was the owner of the property at the time the Easement was executed by the I'On Club and recorded. (R. p. 1916; R. p. 72). This fact, alone, made it impossible for the I'On Club to convey any interest, including an easement, in the Community Dock, boat ramp, and parking lot. (R. pp. 3139-3142) (signed February 9, 2000, six months before August 15, 2000 when the I'On Club took title to the property). Consequently, the Easement is invalid as a matter of South Carolina law and the Trial Court did not err in recognizing this invalidity. (R. p. 74).

Moreover, the Trial Court addressed Appellants' "equitable" argument—the doctrine of after-acquired title – seeking to circumvent this inevitable conclusion and determined any "ratification" of the Easement in light of Appellants' notice, knowledge, and unclean hands would be unjustified. (R. p. 76). For example, the Trial Court found the fact that the same I'On employee, Joe Barnes, executed the Easement on behalf of all parties was sufficient to give "pause" even before considering the Appellants' other inequitable behavior. (R. pp. 3139-3142) (Joe Barnes signed on behalf of all parties to the Easement); (R. p. 75). The Trial Court also found the Appellants' representations to Respondents in 2009 regarding their intent to convey the subject property to Respondents while, at the same time, negotiating to convey the same to a third-party for profit entity were made in an effort to "keep the Assembly and concerned homeowners at bay." (R. p. 75). These two facts, alone, each justify the Trial Court's

[36] Indeed, this principle, *nemo dat quod non habe (*one cannot convey what he does not own), was recognized by the United States Supreme Court. *Mitchell v. Hawley*, 83 U.S. 544, 550 (1872). Furthermore, in its Order, the trial court cited a non-exhaustive list of cases from other jurisdictions that acknowledge an easement cannot be granted by a party over land he does not own. *See, e.g. Guy v. Guy,* 2008 M.E.141, 955 A.2d 212, 215 (2008).

determination that Appellants were barred from any equitable remedy based on their own, inequitable conduct.[37] *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984).

B. The After-Acquired Title Doctrine Does Not Apply in South Carolina and Cannot be Invoked Under the Facts of this Case

The "after-acquired title doctrine," discussed *ad nausem* by Appellants, cannot operate to validate the invalid Easement for numerous reasons: (1) the doctrine has never be recognized as applying to easements in South Carolina; (2) the doctrine is intended to be utilized as a method to estop the grantor of inequitable conduct; and (3) the doctrine does not apply in favor of a grantee who has notice or knowledge that the grantor does not have the title he purports to convey.

Indeed, no case law supports Appellants' proposition that South Carolina courts apply the after-acquired title doctrine to transactions involving easements. *See,* App. Br. at 37 (citing no law to support the proposition the after-acquired title doctrine applies to easements in South Carolina). Rather, our courts regularly apply the doctrine to benefit a grantee who received title from a grantor under standard covenants of warranty to which the grantor did not possess title. *Corbin v. Carlin*, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005), *citing Richardson v. Atlantic Coat Lumber Corp.* 93 S.C. 254, 75, S.E. 371 (1912). Here, the Appellants attempt to utilize this doctrine to revive a botched, non-arm's length transaction, originally executed to benefit the grantor, I'On Club. (Easement Order at 6). Further, the doctrine cannot be applied to protect a party when it has notice or knowledge the other party does not have what they purport to convey. (Easement Order at 7); *see also, Noronha v. Stewart*, 199 Cal. App. 3d 485, 491, 245

[37] Respondents note the Trial Court also found the Appellants acted unfairly in carrying out fiduciary duties; and, the jury found the Appellants violated certain disclosure and anti-fraud provisions of the Interstate Land Sales Act and misrepresented the availability, accessibility, and future ownership of the community amenities to the Assembly and the homeowners for one reason – to make a profit. (R. p. 76).

Cal. Rptr. 94 (Cal. Ct. App. 2d Dist. 1988). Here, a single employee of the Appellants signed on behalf of all three of the entities involved in the easement transaction. (R. pp. 3139-3142). Thus, the Trial Court found all parties to the transaction were on notice and had actual knowledge that the I'On Club was granting an easement over land to which it did not hold title. (R. p. 76). Based upon the foregoing, the Trial Court's determination that the Easement cannot be ratified by the doctrine of after-acquired title is neither controlled by an error of law nor unsupported by evidence. *See, e.g., S.C.DOT v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) (The appellate court does not have to disregard the findings of the trial judge who was in a better position to gauge the evidence and the witnesses' credibility).

C. Whether the Easement is Perpetual or Subject to a 30-Year Term is Mooted by a Finding That the Easement is Void *Ab Initio*

If the Trial Court did not abuse its discretion in finding the 2000 Recreational Easement void *ab initio*, then Appellants' easement duration argument is moot. *Simmons v. Tuomey Reg'l Med. Ctr.*, 330 S.C. 115, 118 n.1, 498 S.E.2d 408, 409 n.1 (Ct. App. 1998) (holding that a court's decision on one argument may render additional arguments irrelevant and unnecessary to address). The invalidity of the easement eliminates the need for this Court to address whether the easement is perpetual or limited to 30 years and renders any such argument irrelevant.

D. The "Perpetual" Nature of the Easement for the use of the Boating Facilities is Unpreserved

Appellants' final Easement-related argument concerning the "perpetual" nature of the Easement is not properly before this Court. This issue was raised, but not ruled upon, by the Trial Court, and therefore, is not properly preserved for appeal. *Staubes v. City of Folly Beach*, 339 S.C 406, 412, 529 S.E.2d 543, 546 (2000) (In order for an issue to be preserved for appellate

review, it must have been raised to and ruled upon by the trial judge.). The Appellants did not file a Rule 59(e), SCRCP, motion following the Trial Court's Easement Order; and, in this Order, the Trial Court never addressed the perpetual or non-perpetual nature of the easement. Because the Trial Court never ruled on the Easement's "perpetual" nature, this issue is precluded from appellate consideration. *Staubes*, 339 S.C. at 412, 529 S.E.2d at 546 ("Without an initial ruling by the trial court, a reviewing court cannot evaluate whether the trial court committed error.")

E. The Intent of the Grantor was to Limit the Easement to a 30-Year Term

Should this Court determine the Trial Court abused its discretion in finding the Recreational Easement void *ab initio*, it should find the same was limited to a 30-year term. First, Tom Graham testified, at the time the Amenity Property was sold to the third-party, he was aware the easements were limited to a 30-year term. (R. p. 679, lines 4-25). Further, Vince Graham acknowledged the easement was "flawed" and, when confronted with his deposition testimony, admitted he stated the easement only had 18 years left on it, and did not know whether it would be extended, and had no "opinion one way or the other" on the matter. (R. p. 1224, line 2- p. 1226, line 15). *See*, *Millvale Plantation, LLC v. Carrison Family Ltd. Partnership*, 401 S.C. 166, 173, 736 S.E.2d 286, 290 (Ct. App. 2012) (In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law.).

It is clear from the document and testimony that the 30 year term was intended to apply to the easements. Appellants are attempting to subdivide a single document to benefit their own interests. (R. pp. 3131-3145). (The document is a single, fifteen-page document with all of the parties' signatures at the end). In evaluating the duration of the easement, this Court cannot

ignore the "General" terms section as Appellants so desire this Court to do. *Millvale Plantation, LLC*, 401 S.C. at 174 (A deed must be construed as a whole and effect given to every part). Contrary to Appellants' position, Article Four, the article containing the language limiting the "Term" to 30 years, makes multiple references to the easements, not just the cost sharing terms. (R. p. 3139) (In addition to limiting the duration to 30 years, Article Four limits the liability of the parties to the easements and contains language that attempts to make the easements binding upon all successors). When considered as a whole, and in conjunction with the testimony, it is clear it was the intent of the parties to limit the easements to 30 years; and this Court should so find.

V. The Trial Court Correctly Denied the JNOV Motion because South Carolina Law Clearly Recognizes a Fiduciary's Duty to Act in the Best Interest of its Subjects and the Jury's Findings are Reasonably Supported by the Record.

Next, Appellants maintain the Trial Court erred in denying their JNOV Motion as to breach of fiduciary duty because the Trial Court supposedly "expanded" the duties imposed on "developers" fiduciaries and erred in upholding the jury's verdict finding Appellants breached these well-established duties. Appellants' argument, again, fails for both procedural and substantive reasons.

A. Appellants' Concede the Existence of a Fiduciary Relationship and South Carolina Law Provides Anyone Acting in Such a Relationship (Including Developers) Cannot Use this Relationship to Benefit Personal Interest

First, Appellants' arguments fail because they do not challenge the existence of a fiduciary relationship between the Appellants and Respondents; rather, Appellants challenge what duties this fiduciary relationship entails, arguing the Trial Court erred by creating a "new" duty owed by "developer" fiduciaries to act in the best interest of the regimes they develop. (App. Br. p. 41). The Trial Court's ruling regarding this "general fiduciary duty" is neither

"new" nor "erroneous." A fiduciary is a fiduciary; and the general duty of a "developer" fiduciary is no different than the general duty of any other fiduciary under our jurisprudence – "anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App. 1987) ("[I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests.").

Consequently, the Trial Court's "expansion" of South Carolina law in recognizing a "general" fiduciary duty of developers to act in the best interests of property owners while controlling the development's property owners association" is no "expansion" at all – it is undisputed a that a fiduciary relationship exists here;[38] and it is clear South Carolina law

[38] Although not an issue on appeal, the evidence presented makes it clear a fiduciary relationship exists between the Appellants and the Assembly. Under our jurisprudence, "[a] fiduciary relationship exists when one 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 imposing the confidence." *Wogan v. Kunze,* 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005); *see also, Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); *O'Shea v. Lesser,* 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004); *Goddard v. Fairways Dev. Gen. P'ship,* 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); *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." *Goddard,* 310 S.C. at 414. Indeed, South Carolina courts – and courts throughout the country – have held a fiduciary relationship exists between developers and the homeowners associations which they control. See, *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 375, 725 S.E.2d 112, 127 (Ct. App. 2012); *Maercker Point Villas Condo. Assoc. v. Szymski*, 275 Ill. App. 3d 481, 655 N.E.2d 1192 (1995); *Managers of Weathersfield Condo. Assoc. v. Schaumburg Ltd. Part.*, 307 Ill. App. 3d 614, 717 N.E.2d 429 (1999). The Goddard Court found that a fiduciary relationship did, in fact, exist between a developer and homeowners. *Id.* (stating developers should be expected to use good judgment and act in utmost good faith); *Id.* at 832-833 (citing *Richard Gill Co. v. Jackson's Landing Owners' Ass'n*, 758 S.W.2d 921 (Tex. App. 1988) (fiduciary relationship established between condominium developer and condominium association because developer assumed responsibility for managing condominium until owners association could be formed). The South Carolina Supreme Court reaffirmed the existence of a fiduciary relationship between developers and homeowners associations in *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002); *see also, Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 375, 725 S.E.2d 112, 127 (Ct. App. 2012). Here, like *Goddard* and *Concerned Dunes W. Residents*, the record is clear that the Appellants were in the role of fiduciary over the Assembly and its residents. The Developer designed, planned, marketed, and developed the community. The Appellants controlled the Assembly through its veto power. The Trial Court correctly found the existence of a

recognizes fiduciaries cannot taken advantage of such "special" relationships. *Id.* Because the Trial Court's fiduciary duty ruling is properly grounded within our jurisprudence, it is not controlled by an error of law, and nothing Appellants maintain to the contrary changes the fact.[39]

B. Evidence in the Record Supports the Jury's Verdict Finding that Appellants Breached Their Fiduciary Duties

Furthermore, the record is replete with evidence Appellants used their role as fiduciary to benefit themselves to the detriment of the Assembly. *See, e.g., Small v. Springs Industries*, 300 S.C. 481, 487, 388 S.E.2d 808, 812 (1990) ("As an action at law this Court's review is limited to correcting errors of law, it may not overturn the factual findings of a jury unless there is no evidence in the record which reasonably supports the jury's findings").

The record contains evidence from which the jury could have based its verdict that the Appellants used their role as a fiduciary for financial gain to the determinant of the Assembly. In fact, the evidence has shown that as early as 1998, Appellants were attempting to make a profit from the Amenity Property by negotiating the sale of usage rights in the community amenities to a third-party without disclosing it to the Assembly or homeowners. (R. pp. 2899-2900; R. pp. 2901-2904; R. p. 644, line 12- p. 645, line 18). The Appellants transferred property to The I'On

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fiduciary relationship between the Appellants and the Assembly. Whether the Appellants breached that relationship, by using its role as fiduciary to its own advantage, and to the determinant of the Assembly was a question for the jury. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 458-59, 578 S.E.2d 711, 715-16 (2003).

[39]Contrary to Appellants' contention *Goddard* and *Concerned Dunes West Residents* do not renounce the existence of a "broad fiduciary duty." *See Concerned Dunes W. Residents*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002); *Goddard*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). Instead, those cases lay the foundation for the express responsibilities of a developer fiduciary recognized by South Carolina – the duty to properly maintain and transfer a development's common areas and to establish a fund sufficient to maintain said areas – and further solidify the assertion that the mere existence of the fiduciary relationship creates the obligation that the developer act in good faith and with the interests of the association in mind. Appellants' misstate the purpose of the Trial Court's pronouncement that "a developer in control of an association may not make decisions which benefit its own interest at the expense of the association and its members. Instead, with this pronouncement the Trial Court was simply stating the requirements any fiduciary must fulfill. Following the excerpt embellished by the Appellants the Trial Court went on to say: "[by] insert[ing] itself on the Board, whether by having a person actually on the Board or by retaining a veto power of anything the Board does" the developer has a fiduciary obligation to act in good faith and with the interests of the association in mind when a conflict of interest exists that would be detrimental to the developers own financial interests. (R. p. 1456, lines 11-14; R. p. 48).

Club without disclosing the transfer to the Respondents or the Assembly. (R. pp. 3131-3145; R. pp. 3146-3151). The evidence has shown, in 2006, the Appellants again entered into discussions as to how to "capitalize" on the "potential value of the Community Dock, while keeping the ideas "quiet for now." (R. pp. 2855-2856; R. pp. 2857-2861; R. pp. 2922-2924). Finally, The Appellants sold Creekside Park to a third party, for-profit entity, for their own benefit without disclosure to the Assembly. (R. pp. 2065-2074). The Appellants represented they were preparing to transfer Creekside Park to the Assembly to appease the homeowners while they were double-dealing to make the previously mentioned sale. (R. pp. 2236-2237). Pursuant to longstanding South Carolina law, these acts constituted breaches of the fiduciary relationship and subjected the Appellants to liability. *See,* Footnote 39, *supra.* The jury agreed, and unanimously found in favor of the Assembly on its breach of fiduciary duty claim. (R. p. 1857).

Because there is sufficient evidence in the record to support the jury's conclusion, the Trial Court's denial of the JNOV motion should be affirmed.

VI. The Trial Court Did Not Err in Granting Respondents' Motion for Directed Verdict on Abuse of Process

This Court should also affirm the Trial Court's grant of Respondents' Motion for Directed Verdict on their abuse of process claim. (R. p. 1468, line 23- p. 1469, line 16; R. p. 62). Appellants bore the burden of proving their abuse of process claim to the Trial Court and the Trial Court found Appellants failed to meet this burden. (R. p. 62). Appellants cannot circumvent the Trial Court's ruling by citing the same "evidence" the Trial Court already determined no reasonable jury would construe in Appellants' favor – this is an abuse of the appellate process.

A. The Trial Court Correctly Found the Appellants Presented No Evidence Which Legitimately Established a Claim for Abuse of Process

Appellants' contention regarding the denial of their abuse of process claim avers the Trial Court erred in "evaluating the evidence" of "a scheme" devised by a "Gang," which the record reflects did not exist. (App. Br. at 46). In other words, the "evidence" Appellants maintain the Trial Court failed to consider is Appellants' own conjecture – this is not evidence and only evidence goes to a jury. *Cf. Guider v. Churpeyes, Inc.*, 370 S.C. 424, 429, 635 S.E.2d 562, 565 (Ct. App. 2006) (A directed verdict is appropriate when the evidence to be submitted to the jury is speculative, theoretical and hypothetical.).

Appellants' abuse of process claim required Appellants establish, through sufficient and legitimate evidence, an ulterior purpose for the litigation and a willful act in the use of the process not proper in the conduct of the proceeding. *Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351 S.C. 65, 71, 567 S.E.2d 251, 253 (Ct. App. 2002). Here, Appellants failed to produce any evidence satisfying either requirement; and thus, their abuse of process claim failed as a matter of law. On appeal, Appellants maintain their argument was the "evidence" they presented to establish ulterior purpose. (App. Br. at 46-48) (Appellants argue the lawsuit was a "scheme" devised by a "Gang" of I'On opponents "to obtain the I'On Company's property for free").[40] In reality, there is no evidence of either a "scheme" or a "Gang" existing in the record. Neither Respondents nor Appellants ever testified to the actual existence of any such "Free Civic Lot Gang."[41] Moreover, Respondents indicated they had no

[40] The Appellants used this same "Gang" theory in its opening statement and closing arguments to no avail. (R. p. 575). (Appellants' counsel in opening statements stated "[Respondents] joined the Free Civic Lot Gang . . ."). Appellants also referenced the existence of this "Gang" multiple times in their closing arguments after evidence from the trial indicated no such "Gang" existed. (R. p. 1614, lines 1-2; R. p. 1621, lines 14-17; R. p. 1644 lines 18-19).

[41] At trial, when Respondents were questioned as to their involvement in any such "Gang," the response was a resounding no. (R. p. 607, lines 4-11; R. p. 859, lines 5-12; R. p. 962, lines 16-20). (When asked about their

plan to scheme or manufacture the claims asserted, and successfully prosecuted, against the Appellants. (R. p. 859, lines 2-9; R. p. 962, lines 21-23). (Both Adkins and Walbeck stated they were never a member of a gang or scheme to do anything wrong). Simply stated, the overwhelming "evidence" indicated Respondents' "motive" was nothing more than to "right a wrong – a wrong which affected not only [Respondents], but also community and public interests." (R. p. 62). The Trial Court, in its discretion, determined no reasonable jury could find that Respondents abused any process based upon the total lack of evidence presented; and ultimately, the jury did not either – it found Appellants wronged Respondents, not vice versa. *Id.* This Court may not overturn the Trial Court if there is any evidence to support the ruling below. *Swinton Creek Nursery*, 334 S.C. at 477, 514 S.E.2d at 130.[42] Further, having prevailed on the derivative claims, Respondents have proved that their use of process was legitimate.

VII. The Trial Court Properly Acted Within its Discretion in Awarding Respondent Walbeck Attorneys' Fees and the Amount Awarded is Reasonable

Additionally, Appellants' own argument indicates the Trial Court did not err in awarding Walbeck attorneys' fees on his ISLA claim. Appellants concede "ILSA affords the court the discretion to award 'reasonable' attorneys' fees to a prevailing party;"[43] and here, the record reflects both Walbeck's prevailing party status and the reasonableness of the fee awarded him. (R. p. 1856; *see also,* R. pp. 97-100) (citing evidence supporting all six of the elements

involvement in the "Free Civic Lot Gang" the witness stated they were not involved in any such "Gang" and found the term "insulting" and "contriving.").

[42] Although the foregoing proves dispositive of this issue, Appellants also produced no evidence that the use of process was improper because it was unauthorized or aimed at an illegitimate collateral objective – there was no "willful" or "malicious" act. *Food Lion, Inc*, 351 S.C. at 71 (A willful act is "some definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process required."). As such, the Trial Court's order granting Respondents' directed verdict motion should be affirmed. At minimum, Appellants claim for abuse of process is mooted by the jury's verdict. Any error made by the Trial Court regarding the abuse of process claim is harmless error. *Fishburne v. Short*, 268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977) (An error creates no prejudice and is harmless when it appears that the jury was not misled by the error.). The jury entered a significant verdict in favor of the Respondents, and further, found Appellants conduct was "reckless, willful and/or wanton." (*See,* R. pp. 1857, 1860). Appellants were not prejudiced by the Trial Court's grant of Respondents' abuse of process directed verdict motion and any error in granting the same was harmless.

[43] App Br. at. 54.

considered by our Courts in granting a "reasonable" fee award). Because the fee award is supported by the law, the record, and Appellants' admission, there is no abuse of discretion; and this Court must affirm the Trial Court's grant of $225,000 in fees to Walbeck.[44]

A. Walbeck is Entitled to Recover Attorneys' Fees on his ILSA Claim Under South Carolina Law

The Trial Court correctly concluded South Carolina law entitled Walbeck to an award of attorneys' fees, interest under the provisions of ILSA,[45] in addition to the actual damages Walbeck elected to receive under his common law, negligent misrepresentation claim. (R. pp. 88-97); *see also,* 15 U.S.C. § 1709(a)-(c) (2012) (allowing statutory recovery of attorneys' fees, interest and costs).

Under prevailing South Carolina jurisprudence, the recovery of statutorily prescribed fees and the recovery of actual damages under a separate, common law cause of action does not constitute double recovery. Similarly stated, a Plaintiff may recover attorneys' fees, costs and interest under a statutory claim, such as ILSA, in addition to actual damages under a common law claim, such as negligent misrepresentation. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 193, 750 S.E.2d 78, 81 (2013) *citing Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010) ("[A] plaintiff who elects to receive damages awarded under a common law theory may also be entitled to recover statutory costs and attorney fees to which he is entitled under a separate verdict."). "[T]he rationale for this position is that an award for [damages] does not amount to double recovery for a single wrong given attorneys' fees are intended to make such claims economically viable for private citizens . . ." *Id.*

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[44] Respondents note Appellants' arguments concerning fee awards have no bearing on the verdicts entered in the underlying case. (App. Br. at 57) (Appellants' fee-related arguments, albeit erroneous, primarily request this Court reject Walbeck's fee petition and accept their fee petition without remand to the Trial Court).

[45] The Interstate Land Sales Full Disclosure Act ("ILSA") provides for the recovery of attorneys' fees, interest and court costs when a developer violates the disclosure or anti-fraud provisions contained therein. *See,* 15 U.S.C. § 1709(b) (2012).

Here, as in *Austin*, Walbeck's recovery of interest, cost, and attorneys' fees under his statutory claim, ILSA, is not duplicative of the award of actual damages under his common law claim, negligent misrepresentation. *Id.* (finding that because an award of attorneys' fees under plaintiff's statutory claim was not duplicative of the award of damages under plaintiff's common law claim, the decision "in favor of [plaintiff] would not violate the election of remedies doctrine's prevention of double redress for a single wrong.") (internal citations omitted). Accordingly, the Trial Court correctly concluded Walbeck is entitled to a fee award on his ILSA claim under South Carolina jurisprudence.

B. Walbeck is Entitled an Award of Reasonable Attorneys' Fees Under His ILSA Claim Despite His Award of Nominal Damages

The Trial Court also correctly determined Walbeck is entitled a fee award despite his recovery of "nominal" damages on his ISLA claim. (App. Br., p. 53). The United States Supreme Court's decision in *Farrar* does not serve to automatically preclude attorneys' fees awards in nominal damages case. *See, Mercer v. Duke University (Mercer III),* 401 F.3d 199, 206-09 (4th Cir. 2005), *citing Mercer v. Duke University (Mercer II),* 50 Fed. Appx. 643, 646 (4th Cir. 2002) ("[w]e have never interpreted *Farrar* as automatically precluding attorney's fee awards in all nominal-damage cases.") (unpublished); *Clark v. Sims,* 28 F.3d 420, 425 (4th Cir. 1994) (remanding fee award in nominal-damage case for reconsideration in light of plaintiff's limited success). Rather, in *Farrar*, the Supreme Court held where a prevailing party[46] recovers nominal damages, "the only reasonable fee is usually no fee at all." *Farrar,* 506 U.S. at 115 (emphasis added); *Id.* at 121 (O'Connor, J., concurring) ("[n]ominal relief does not necessarily a

[46] "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby,* 506 U.S. 103, 111–12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). This standard is satisfied by a "judgment for damages in any amount, whether compensatory or *nominal*." *Id.* at 113 (emphasis added). Accordingly, the award of nominal damages in favor of Walbeck on his ILSA claim suffices to qualify Plaintiff as a prevailing party.

nominal victory make."); *Id.* at 124 (White, J., dissenting) (noting that the majority did not hold "that recovery of nominal damages *never* can support the award of attorneys' fees").

Because the *Farrar* Court "provides little guidance for courts considering whether an award of attorneys' fees is warranted" in nominal damage cases,[47] the Fourth Circuit follows Justice O'Connor's concurring opinion in *Farrar* wherein she identified three factors to be considered in determining how to assess attorneys' fees to a nominally prevailing party:

(1) The difference between the amount of damages sought and recovered;

(2) The significance of the legal issue on which the plaintiff has prevailed; and

(3) Whether the litigation has accomplished some public goal other occupying the time and energy of counsel, court and client.

Mercer III, 401 F.3d at 203; *Farrar,* 506 U.S. at 121, 113 S.Ct. 566 (O'Connor, J., concurring).

Relying on the "O'Connor factors," several courts of appeals, including the Fourth Circuit, often permit attorneys' fees awards despite the award of only nominal damages.[48] In

[47]The *Farrar* majority reasoned that where a plaintiff's recovery was nominal or minimal, the deciding court can "lawfully award low fees or no fees" without having to first calculate the lodestar amount or apply the twelve factors bearing on reasonableness. Thus, the majority created a limited exception for *calculating* attorneys' fees: where a prevailing plaintiff recovers only nominal damages and the victory was merely technical or de minimis, the lower court can determine the amount of fees within its discretion, dispensing with the lodestar calculation. The *Farrar* majority: (a) did not create a bright-line rule precluding fee awards in nominal damages; (b) did not define what constitutes "nominal" damages; (c) did not define what constitutes a "technical" victory; and (d) did not provide insight as to whether a fee award is warranted in a given case. Rather, the *Farrar* majority indicates the decision to award attorneys' fees, as well as the amount of fees awarded, remains within the trial court's discretion.

[48] The First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits all employ the O'Connor factors in determining whether a prevailing plaintiff who recovers only nominal damages will receive attorneys' fees. *See, e.g., Díaz-Rivera v. Rivera-Rodríguez*, 377 F.3d 119, 125 (1st Cir. 2004) (upholding district court's award of attorneys' fees to plaintiff based on three O'Connor factors); *Buss v. Quigg,* 91 F. App'x 759, 761 (3rd Cir. 2004) (citing O'Connor factors for assessing whether plaintiff with nominal damage award should recover attorneys' fees); *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1052-53 (5th Cir. 1998) (applying O'Connor factors in assessing whether plaintiff entitled fee award); *Cartwright v. Stamper*, 7 F.3d 106, 109-10 (7th Cir. 1993) (holding that three O'Connor factors should guide court in prevailing party inquiry); *Jones v. Lockhart*, 29 F.3d 422, 423-24 (8th Cir. 1994) (applying O'Connor factors to assess reasonableness of attorneys' fees award to partially successful plaintiff); *Morales v. City of San Rafael,* 96 F.3d 359, 361 (9th Cir. 1996) (overruling district court's calculation of attorneys' fees because of failure to consider second and third O'Connor factors); *Phelps v. Hamilton,* 120 F.3d 1126, 1131-32 (10th Cir. 1997) (applying three O'Connor factors to evaluate plaintiff's success and reversing district court's holding that plaintiff should not recover any fee award). Further, the Second Circuit applies the O'Connor factors

Mercer, for example, the plaintiff was awarded only "nominal" damages, however, the Fourth Circuit upheld an award of $350,000 in attorneys' fees despite the de minimis compensatory relief.[49] *Mercer III*, 401 F.3d 199 at 206-09. As noted by the *Mercer III* Court:

> Because the Court in *Farrar* held that plaintiffs recovering only nominal damages *usually* or *often* will not be entitled to an award of attorney's fees, it is clear that such plaintiffs will at least *sometimes* be entitled to a fee award. Our cases have recognized as much.
>
> Although the majority opinion in *Farrar* provides little guidance for courts considering whether an award of attorney's fees is warranted, Justice O'Connor in a separate concurring opinion addressed the question in more detail . . . She suggested that when determining whether attorney's fees are warranted in a nominal-damages case, courts should consider "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served" by the litigation . . .

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implicitly. *See, Cabrera v. Jakabovitz*, 24 F.3d 372, 393 (2nd Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public purpose).

[49]The Fourth Circuit's decision in *Mercer versus Duke University* resolved a number of issues previously tried in a number of courts, all of which originated from an initial action brought by Heather Mercer, a former kicker on Duke University's Division I-A football team, who was terminated from the team in violation of Title IX. Mercer filed suit against Duke University and Goldsmith, seeking declaratory, injunctive, and monetary relief, alleging they violated Title IX by discriminating against her on the basis of sex. The United States District Court for the Middle District of North Carolina dismissed Mercer's complaint based on an interpretation of the statutory "contact-sport exception." On appeal, the Fourth Circuit reversed the decision, holding that the contact-sport exception was inapplicable, and remanded the issue to the district court for further proceedings. On remand to the district court, a federal jury found that Goldsmith had discriminated against Mercer in violation of Title IX, awarding Mercer two million dollars in punitive damages, one dollar in compensatory damages, and approximately $389,000 in attorneys' fees and costs. On appeal, however, the Fourth Circuit in *Mercer II* vacated the punitive damages award, finding private litigants may not recover punitive damages under Title IX based upon the United States Supreme Court decision in *Barnes v. Gorman,* 536 U.S. 181 (2002). Despite vacating Mercer's award of punitive damages, leaving her with only one dollar in compensatory damages, the *Mercer II* Court rejected Duke's claim that Mercer was no longer entitled to attorneys' fees as a matter of law. Instead, the court remanded the issue to the district court to decide "in light of Mercer's now limited success at trial" whether she should recover attorney's fees and, if so, what amount. In remanding the case, the *Mercer II* Court suggested that the Supreme Court's holding in *Farrar versus Hobby* should guide the district court in deciding attorneys' fees and costs. In particular, the *Mercer II* Court referred to Justice O'Connor's concurring opinion, in which she articulated additional grounds for a court to award attorneys' fees to a nominally-recovering plaintiff. On remand, the district court held that Mercer should still recover the attorneys' fees from her Title IX claim. Notably, the district court utilized Justice O'Connor's three factor test from her concurring opinion in *Farrar*, and in applying these three factors, the court concluded that Mercer's victory was neither pyrrhic nor de minimis, and thus, she should recover reasonable attorneys' fees. The district court then calculated the amount that it deemed reasonable for recovery, resulting in a total award to Mercer of $349,243.96 for attorneys' fees. Following the district court's decision, Duke appealed to the Fourth Circuit again in *Mercer III,* arguing that the district court erred in awarding attorneys' fees and that the appropriate award "is an award of no fees at all." The *Mercer III* Court affirmed the district court's holding, concluding that Mercer was entitled to attorneys' fees as a prevailing party, and upholding the amount of fees established by the district court.

> We believe that the factors set forth by Justice O'Connor help separate the usual nominal-damage case, which warrants no fee award, *from the unusual case that does warrant an award of attorney's fees.* Accordingly, we will consider the district court's decision to award attorney's fees by way of the factors identified by Justice O'Connor.

Mercer III, 401 F.3d 199 at 203-04 (emphasis in original and added); *see also, Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1336 (4th Cir. 1996) (referring to the O'Connor factors when analyzing the question of attorneys' fees in nominal damages cases).[50]

C. The Balance of the O'Connor Factors Weighs in Favor of Walbeck, and thus, Walbeck is Entitled an Award of Attorneys' Fees, Interest, and Costs

The Fourth Circuit recently followed the majority of circuit courts in utilizing the O'Connor factors to determine whether a "nominally-recovering" plaintiff should recover attorneys' fees. The Fourth Circuit's interpretation of the O'Connor factors supports awarding attorneys' fees, interest and costs to Walbeck. Decided after *Farrar*, the Fourth Circuit in *Mercer* opined attorneys' fees are warranted in cases "which [serve] a significant public purpose" and where a plaintiff "succeed[s] on a significant legal issue," regardless of the monetary degree of such success. *Mercer III,* 401 F.3d 199 at 207-08; *see also, Diaz-Rivera,* 377 F.3d at 125) ("[T]he Supreme Court has explicitly rejected the proposition that fee awards... should necessarily be proportionate to the amount of damages . . . plaintiff actually recovers.") (internal quotations omitted); *Cabrera,* 24 F.3d at 393 (2nd Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public

[50] Similarly, in *Jama v. Esmor Correctional Services, Incorporated*, 577. F3d 169 (3rd Cir. 2009), the Third Circuit noted no case was found in which a court of appeals had interpreted *Farrar* to require the automatic denial of fees when only nominal damages are awarded. The *Jama* court agreed with their sister courts of appeals that a district court determining the degree of a plaintiff's success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose. *Id. at* 577 F.3d at 176. *See also, Diaz-Rivera*, 377 F.3d at 125 (affirming district court's award of attorneys' fees by applying second and third Justice O'Connor's factors); *Murray v. City of Onawa,* 323 F.3d 616, 619 (8th Cir. 2003) (applying the three O'Connor factors when considering whether a plaintiff who received nominal damages was entitled to an award of attorneys' fees); *Morales,* 96 F.3d at 363 (same); *Brandau v. Kansas,* 168 F.3d 1179, 1182 (10th Cir. 1999) (same).

purpose); *Jama.*, 577 F.3d at 176 (finding the degree of a plaintiff's success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose); *Morales,* 96 F.3d at 361 (overruling district court's calculation of attorneys' fees because of failure to consider second and third O'Connor factors). In other words, it is the balancing of all O'Connor factors that proves dispositive of whether a plaintiff is entitled a fee award.

Here, the Trial Court determined this balance weighed in favor of Walbeck, and thus, the Trial Court's fee award is properly supported by the law. (R. pp. 92-97) (finding (1) Walbeck succeeded on a significant legal issue because "Walbeck's case resulted in a first of its kind liability determination – the facts as found by the jury determined the [Appellants] were legally responsible for violation Walbeck's rights under ILSA's anti-fraud provisions; (2) Walbeck's ILSA claim served an important legal purpose because "Walbeck's victory signaled to developers . . . the importance of ensuring that their property-related representations do not mislead innocent purchasers or otherwise violate ILSA's anti-fraud provisions"); and (3) Walbeck's total recovery was not nominal because "[t]he crux of Walbeck's ILSA claim, and the nucleus from which it stemmed, resulted in both a substantial success for the Assembly, of which he is a member, as well as a significant success for the public at large."[51]). This Court need only review the Trial Order's granting Walbeck's fee petition to reach the same conclusion. (R. pp. 86-100)[52]

[51] Notably, the Trial Court also found "...but for the [Appellants'] destruction of ISLA evidence . . . Walbeck's ILSA verdict may well have been more than one dollar.") (R. p. 96, n. 10) *citing* (Order Finding the [Appellants] in Contempt for the Destruction of Evidence).

[52] As an additional sustaining ground, Respondents note Appellants' argument (both to the Trial Court, and again, on appeal) addresses only the first O'Connor factor, and only in the sense of a limited monetary recovery. Because Appellants failed to effectively challenge the other two O'Connor factors, it necessarily follows Appellants cannot effectively challenge the Trial Court's ruling finding the balance of all three factors weigh in favor of Walbeck on appeal. Moreover, the fact Walbeck received a limited monetary recovery does not warrant the reversal of the Trial

D. The Reasonableness of Walbeck's Fee Award is Supported by The Record

The reasonableness of the $225,000 fee award is supported by the record. In assessing the "reasonableness" of an award of attorneys' fees, the Court considers six factors: (1) nature, extent, and difficulty of legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in locality for similar services; and (6) beneficial results obtained. *See, Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E2d 659 (1993); *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992). The Court gives consideration to all six criteria in establishing the attorneys' fees awarded and none of these factors is controlling. *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989), *citing Darden v. Witham*, 263 S.C. 183, 209 S.E.2d 42 (1974). Here, the Trial Court based its award on the evidence presented through the Affidavit of Justin Lucey ("Respondents' Counsel") and supporting fee records,[53] along with its impression of the case presented by Respondents' Counsel at trial. The Trial Court considered all six criteria established by *Collins* as follows:

(1) In evaluating the nature, extent and difficulty of the legal services rendered, the Trial Court found, among other things, Respondents' Counsel "spent considerable time and effort on the prosecution of this complex and lengthy case;"[54]

(2) In evaluating the time and labor devoted to the case, the Trial Court "reviewed the time records" of Respondents' Counsel which indicated counsel "expended more than 4,000 hours of time in prosecuting this action." The Trial Court further found the "verdicts speak to both the preparation and competency of [Respondents' Counsel] as well as the amount of time, labor and expenses exhausted in the prosecution of this lawsuit;"[55]

Court's fee award – the Trial Court still retained its discretion to award what it deemed a "reasonable" attorneys' fees based upon Walbeck's prevailing party status alone. (R. p. 97, n. 14) (citations omitted).

[53] R. pp. 98-99.

[54] R. pp. 97-98.

[55] R. p. 98.

(3) In evaluating the professional standing of counsel, the Trial Court found Respondents' Counsel consisted of experienced, skilled attorneys, of high professional standing in the community and in good standing with the Bar of this State; [56]

(4) In evaluating the contingency of Respondents' Counsel's fee, the Trial Court found Respondents' Counsel "accepted this case on a contingency basis, with no assurance that is would be able to collect the attorneys' fees incurred" and "recovery remained almost completely contingent up and until a week before trial." The Trial Court also found Walbeck's fee agreement was for "38.5% of any award or the fee awarded, whichever is greater" and that "a contingency award would yield a greater sum then the fees and costs awarded by this court today;"[57]

(5) In evaluating the fee customarily charged, the Trial Court found "[Respondents' Counsel kept contemporaneous time records throughout this case and these records indicate that the hourly rates charged . . . are reasonable and commensurate with rates charged by other firms with the same or similar experience in complex litigation;"[58] and

(6) In evaluating the beneficial results obtained, the Trial Court found Respondent obtained a substantial benefit, "not only in monetary compensation," from the legal services provided by Respondents' Counsel.[59]

Exercising the discretion afforded it, the Trial Court awarded Walbeck what it deemed was a "reasonable" fee award on his ILSA claim after considering the six criteria established by our Supreme Court for determining attorneys' fees. (R. p. 100). (The Trial Court further noted "[i]n awarding a fee in an amount significantly less than that sought by [Respondent], the court attempts to reflect the proportionately in the award as to both the degree of success obtained and the hours devoted to the ILSA claim. . .").

[56] R. pp. 98-99.
[57] R. p. 99.
[58] R. p. 99.
[59] R. pp. 99-100.

VIII. The Trial Court Did Not Err in Denying I'On Company's Petition For Attorneys' Fees Because the Record Reflects Respondent Adkins Qualifies as a Prevailing Party

Contrary to Appellants' next contention, the Trial Court did not err in denying I'On Company's Fee Petition because the record demonstrates both the Trial Court and the jury found Adkins "did, in fact, prevail at trial." (R. p. 80) (noting "the jury found in favor of the Assembly on three causes of action . . . initiated by Walbeck and Adkins); *see also,* Verdict Form. Appellants' argument, at its simplest point, is one of semantics – Appellants maintain Adkins does not qualify as a "prevailing party under the terms of Adkins Lot Purchase Agreement," yet, Appellants cite no "term" of the Agreement defining "prevailing party." (R. pp. 3113-3130). In other words, the Agreement, like South Carolina law, left the question of who qualifies as a "prevailing party" to the Trial Court. Here, the jury found Adkins "prevailed" on three claims, claims which involved Appellants' "obligations" to fulfill their property-related representations.[60] Based upon the jury's verdicts as well as the evidence presented, the trial judge also considered Adkins the "prevailing party" as a matter of law:

> A plaintiff may achieve "prevailing party" status so long as: (a) plaintiff succeeded on any significant issue raised the action; or (b) the litigation, in its entirety, resulted in some benefit . . . Here, both of the foregoing factors are satisfied; Adkins succeeded on her derivative claims and the litigation of these claims directly benefitted Adkins, personally, as well as hundreds of other I'On homeowners who are a part of the Assembly by virtue of their lot ownership in I'On. Not only did the jury find the [Appellants] breached various duties owed to the I'On Assembly, into whose shoes Adkins stepped, the jury also found the [Appellants] did so recklessly, willfully and/or wantonly. Consequently, Adkins qualifies as a "prevailing party."

(R. p. 81) (citations omitted); *see also, Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990); *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612,

[60] As evidenced by the verdict form, the jury found in favor of the Assembly on the following causes of action causes initiated by Adkins and Walbeck: (1) breach of fiduciary duty, (2) breach of contract, and (3) negligent misrepresentation. (*See* R. pp. 1857-1858.)

617-618, 635 S.E.2d 922, 925 (Ct. App. 2006) (The South Carolina Supreme Court defines "prevailing party" as "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention and is the one is whose favor the decision or verdict is rendered and judgment entered.").[61]

Appellants cite no authority which suggests a party, proceeding on multiple claims based upon a single (and similar) nucleus of facts, can only "prevail" when it succeeds on all of them. Rather, the only authority Appellants cite relates to the fee award a prevailing party may be entitled to depending upon the circumstances. Appellants, thus, put the cart before the horse – one does not get to the fee issue without first being qualified as a prevailing party. Here, the Trial Court found Adkins qualified as a prevailing party, and the Trial Court's ruling is supported by both the law and the record. Accordingly, the Trial Court's denial of the I'On Company's petition for attorneys' fees and costs should be affirmed.[62]

IX. The Trial Court Did Not Err in Finding the Appellants were Amalgamated Given the Overwhelming Evidence in the Record Indicates Appellants Operated Their Companies as One in of the Same

The Trial Court correctly found the Appellants' were amalgamated. Appellants' argument to the contrary confuses the theories of amalgamation and "veil-piercing." For example, Appellants' lengthy discussion regarding the distinction between a corporation and its stockholder and officers, along with the description of the two-part test for veil piercing is irrelevant. As this Court indicated in *Magnolia North Property Owners' Ass'n versus Heritage Communities, Inc.*, the theories of amalgamation and veil-piercing are separate and distinct; here, the trial court's focus was on amalgamation which only requires a showing of "blurred"

[61]The main issue in the underlying action was whether the Appellants improperly sold the amenity property to a third-party thereby violating their obligation to convey this property to the Assembly and its members. (R. p. 1539, lines 11-17). Adkins alleged this main issue on behalf of the Assembly and its members (including herself) and prevailed on this main issue under three separate claims. (*See* R. pp. 1855-1858.)

[62]*See,* Footnotes 45-49, *supra.*

corporate distinctions. 397 S.C. 348, 359, 725 S.E.2d 112, 118 (Ct. App. 2012), *cert. dismissed as improvidently granted*, No. 27577 (Sept. 30, 2015). Given the evidence in the record clearly demonstrates the blurred distinction among the I'On Companies and this blurred distinction constitutes amalgamation under South Carolina law, this Court should affirm the Trial Court's amalgamation ruling.

Amalgamation is based on a finding that the corporate interest, entities, and activities between various corporations are so co-mingled that the legal distinction between the corporations and their activities is blurred. *Id.* As the trial court acknowledged, amalgamation does not require a showing of a parent company's "domination" of its subsidiary. *Peoples Fed. Sav. & Loan Ass'n v. Myrtle beach Golf & Yacht Club*, 310 S.C. 132, 148, 425 S.E.2d 764, 775 (Ct. App. 1992) (Total domination of the subservient corporation is a required to show liability under the instrumentality doctrine.). Here, the record reflects the I'On Company and I'On Group dictated the day-to-day operations of the other Appellants and controlled all business decisions related to the I'On development. (R. p. 59). Tom Graham testified to the degree in which both he and Vince Graham directed the managers of the I'On Companies when making business decisions and controlled the conceptual planning of the I'On neighborhood. (R. p. 681, lines 9-23). Moreover, the Trial Court found the I'On Companies all employ the same general manager, Joe Barnes, and that Mr. Barnes executed documents on behalf of all the I'On Companies in the same transaction. (R. p. 60 (Mr. Barnes signed the Recreational Easement and Agreement to Share Costs on behalf of all of the I'On Companies)). Indeed, the I'On Companies were so intermingled that even the I'On Companies own agents treated the companies as one in the same. Chad Bessenfelder, the general manager of I'On Company, used the companies' names interchangeably when he made a statement regarding the sale of the community dock to the I'On

homeowners.[63] The Trial Court noted on the record, when directing amalgamation, that the Grahams did not even know who worked for which company. (R. p. 1480, line 24- p. 1481, line 1). Due to overwhelming amount of evidence in the record supporting the Trial Court's findings, and the proper application of those findings to law, this Court should affirm the Trial Court's determination that the I'On Companies are amalgamated.

X. Walbeck's ILSA Claim Does Not Fail as a Matter of Law because Federal Law Clearly Indicates Actual Reliance is not Required, and Further, the Trial Court Found Walbeck Actually Relied

Finally, Appellants maintain Walbeck's ILSA claim fails "as matter of law" because the anti-fraud provisions of ILSA "should be interpreted" to require actual reliance. (App. Br. at 61-63). Appellants' argument is fatally flawed for two reasons. First, prevailing Fourth Circuit precedent clearly indicates a plaintiff need not prove actual reliance to prevail under ILSA's anti-fraud provisions. *Gibbes v. Rose Hill Plantation Dev't Co.,* 794 F. Supp. 1327, 1334 (D.S.C. 1992) ("In order to prevail on an ILSA claim, a plaintiff does not need to prove that a defendant intended to defraud or deceive or that the plaintiff relied on the property report.")(emphasis added). Thus, Walbeck's ILSA claim does not fail as a matter of law – the law indicates actual reliance is not required. *Id.* Second, the Trial Court found Walbeck actually relied on Appellants' property-related misrepresentation, and its finding is supported by the overwhelming evidence in the record. (R. pp. 58-59) (finding Walbeck actually relied on Appellants' negligent misrepresentations).[64] Thus, even under Appellants' interpretation, Walbeck's ILSA claim does not fail and any "error" purportedly committed by the Trial Court is harmless. *Fishburne v.*

[63] In March of 2009 Mr. Besenfelder, on behalf of the I'On Group, represented to the Assembly that the "I'On Company [was] preparing to deed the [C]ommunity [D]ock to the I'On Assembly. We plan to subdivide a parcel to be recorded and deeded." (R. pp. 2236-2237, emphasis added). However, at the time the statement was made, the I'On Club owned the dock.

[64]Appellants contend Walbeck "cannot establish actual reliance on any material misrepresentation for ILSA purposes," ignoring the Trial Court's express finding that Walbeck sufficiently proved reliance for a multitude reasons, including the fact Walbeck testified as to his "actual reliance" on the Property Report, I'On agents and other marketing materials concerning the amenity property. (R. p. 955, line 12- p. 958, line 2; R. p. 959, lines 6-20).

Short, 268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977) (An error creates no prejudice and is harmless when it appears that the jury was not misled by the error.)

XI. Appellants Other Factual Arguments and Distortions Similarly Fail

As even the increased page limit permitted for this brief does not permit Respondents to address every unsupported factual argument and/or misstatement contained within Appellants' brief. [65] Respondents set forth several additional examples below:

A) Respondents should have known Appellants had not timely transferred the Amenity Property:

No: Exhibits 47, 58, 58a, 179, 180, 181, 203, 214, 215, 217 (R. pp. 2216-2217; R. pp. 2236-2237; R. pp. 2238-2240; R. pp. 2852-2854; R. pp 2855-2856; R. pp. 2857-2861; R. p. 2928; R. pp. 2946-2948; R. p. 2949; R. p. 2953) and many others evidence that the amenity handover process essentially started in 2005 and continued at the time of trial in 2014. (R. p. 1085, lines 5-15; R. p. 1090, line 6- p. 1091, line 16; R. p. 1173, line 17- p. 1174, line 3). All the while, the homeowners enjoyed unencumbered use to the Amenity Property, just like any owner would, until the sale to Buyers; and Appellants continued to represent the turnover was in process.

B) Respondents should have known because members had to pay rent for the use of the clubhouse and dock maintenance fees (App. Br. at 16):

No: Paying rent or a fee to use the clubhouse could not give rise to the notion that the park and dock was not and would never be owned by the Assembly. Any such fee was seen as the cost for general maintenance and upkeep of the facilities. Respondents were accustomed to, and expected to, pay for the upkeep of their property, much like they did for the fountain and seasonal flowers. (R. p. 614, line 17- p. 615, line 14). In budgets

[65] Additionally, Appellants intentionally confuse issues and evidence: 1) relating to the Creek Club zoning versus the transfer of the amenities; and 2) a claim for the Creek Club versus the filed claim for the Creekside Park and adjacent Community Dock. Respondents have consistently claimed they were entitled to the Creekside Park by virtue of Appellants' promises. Whatever Appellants elected to construct or place on Creekside Park property is incidental to the promised conveyance. (R. p. 891, lines 2-15; R. p. 976, line 22- p. 977, line 2; R. p. 1321, line 24-1322, line 10). Further, the evidence demonstrates that Respondents were led to believe that a clubhouse would exist on or near the Creekside Park. (R. p. 844, lines 13-25; R. p. 861, lines 16-20; R. p. 955, line 12- p. 956, line 14). Thus, there was no surprise or cause for concern when the Creek Club was constructed at Respondents' park. Moreover, Appellants' own attorney described the Creek Club as being the "neighborhood clubhouse." (R. p. 924, line 19- p. 925, line 10). Likewise, Appellants attempt to confuse the zoning appeal with the underlying claims. The Court properly noted that pursuing a zoning challenge is a proper process. (R. p. 1466, line 22- p. 1468, line 2). Zoning, by definition, addresses the use of a property, not ownership. Here, another Assembly member complained of, and challenged, the "carnival like atmosphere" that surrounded the Creek Club, i.e., the use. (R. p. 1466, line 22- p. 1468, line 2). Her Zoning Appeal was dropped because Tom Graham threatened to sue her if she persisted with her appeal. (R. p. 725, line 16- p. 726, line 18).

prior to 2005 the line item was called "Dock Maintenance." (*See,* R. pp. 3173-3174). In 2005, Appellants changed it to "Creek Club Dock Usage." (R. pp. 3325-3333). The 2005 ownership situation did not foreclose the opportunity for Appellants to fulfill their promise to convey the property (R. p. 1090, line 21- p. 1091, line 16) whereas the 2009 sale did. Dock maintenance and/or use fees are part and parcel with ownership; it is prudent and expected to maintain that which you own, or will own in the future.

C) Respondents' Verified Complaints were false (*e.g.*, App. Br. at 46):

No: Respondents believed other homeowners had received the Property Report because of the pattern established by the developer in distributing the same. Indeed, this pattern was verified at trial by Tim Eble. (R. p. 599, line 20- p. 601, line 1). Respondents' belief was further corroborated at trial by Exhibit 150, 115(a), and 116(a) (R. pp. 2720-2841; R. pp. 2347-2350; R. pp. 2353-2355), which indicated hundreds of other homeowners had indeed received the Property Report before purchasing.

D) The Property Report required by ILSA was intentionally (and rightfully) vague because in 1998 I'On was still just a vision (App. Brief at 9):

No: This statement is simply inconceivable; the entire purpose for the creation of ILSA is to prevent fraud upon consumers who are purchasing lots in developments subject to the Act.[66] The global I'On Plat had already been approved by the Town of Mount Pleasant in 1997. (R. pp. 2117-2119; R. pp. 2120-2127; R. pp. 2347-2350; R. pp. 2353-2355; R. p. 2607; R. pp. 2720-2841).

E) By the time of the Adkins contract, ILSA no longer applied (App. Brief at 10):

No: This is contradicted by Appellants own actions; they did not withdraw the ILSA registration until December 2009. (R. p. 2606; R. p. 2333).

F) The court held Templeton's letter was not a demand (App. Br. at 16):

No. The transcript cited by Appellants does not support this assertion. (R. p. 1030, lines 4-24). If one looks at the entirety of the discussion, there is no such ruling; rather, the Court was recognizing the difference in the settlement of the zoning appeal as opposed to issues framed by the pleadings and evidence in this action. (R. p. 1031, line 19- p. 1032, line 18). The written Templeton demand, (R. pp. 2229-2230), certainly was a demand:

> Provided to you is a copy of the property report for I'On... On page 21 of the report you will find a list of recreational properties . . . The Board . . . is on

[66] The purpose of the Interstate Land Sales Act ("ILSA") is to ensure that an individual is informed of certain facts prior to purchasing a piece of property which would enable a prudent buyer to make an informed decision as to the purchase. *Gibbes v. Rose Hill Plantation Dev. Co.*, 794 F.Supp. 1327, 1333 (D.S.C. 1992).

notice that action must be taken immediately to secure any of these properties . . . That specifically applies to the Community Dock at the Creek Club . . .

(*Id).* Respondents were aware of this demand and the oral repeating of similar demands at Assembly member meetings. (R. p. 871, line 17- p. 873, line 24; R. p. 960, lines 13-20; R. p. 984, line 15- p. 985, line 12).

G) The Easement would have shown up in all purchasers' chain of title (App. Br. at 31):

No: This was neither alleged, stated, nor proven at trial. However, this Court can take judicial notice that a legal recording on an unrelated piece of property would not show up in an I'On homeowner's chain of title. Appellants' mistake this theory with that of community covenants which are recorded on all title in the neighborhood.

H) Adkins did not pursue a third party beneficiary claim (App. Brief at 51):

No: The complaint is clear that some of the contract claims were being pursued were as a third party beneficiary and Respondent Counsel was very clear in closing argument to the jury that Walbeck's claim was a direct breach of contract and the Assembly and Adkin's claims were on the basis of a third party beneficiary. (R. p. 1584, line 8- p. 1585, line 21).

Each of the foregoing assertions contained in Appellants' brief is either false or misleading, or requires this court to interpret the evidence in a manner contrary to the jury's findings.

CONCLUSION

The Trial Court correctly denied Appellants' motion for judgment notwithstanding the verdict/new trial and the I'On Companies' petition for attorneys' fees. Additionally, the Trial Court correctly declared the 2000 recreational easement void *ab inito* and awarded Walbeck attorneys' fees and costs in the amount of $225,000. The record and applicable precedent provides numerous grounds to sustain the Trial Court's Orders. Moreover, in reviewing, this Court gives great deference to the Trial Court's finding and may only reverse on a finding the Trial Court abused its discretion. Thus, for all the reasons stated herein, Respondents respectfully ask that this Court to overrule this appeal in all respects.

Respectfully Submitted,

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APPENDIX A

Deleted	Referenced Duplicate
PLT 230	DEF 4
PLT 1	DEF 22
PLT 141	DEF 23
PLT 45	DEF 25
PLT 10 and PLT 42	DEF 27
PLT 11	DEF 28
PLT 54	DEF 32
PLT 2	DEF 34
DEF 52	PLT 32
DEF 61a	PLT 150 @ 34
DEF 67	PLT 150 @ 22
DEF 69	PLT 150 @ 33
PLT 111	DEF 128
PLT 52	DEF 132
DEF 158	PLT 150
PLT 84	DEF 139
PLT 37	PLT 89
PLT 142	DEF 24

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April 18, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondents' Final Brief filed in this manner on behalf of Brad J. Walbeck and Lee Ann Adkins, individually, and derivatively on behalf of the I'On Assembly, Inc., complies with Rule 211(b), SCACR.

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