THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Judge of the South Carolina Business Court

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Appellate Case No. 2021-000767

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively On Behalf Of The Wild Wing Plantation Property Owners' Association, Inc.,..... Appellants,

v.

Wild Wing Company, LLC; Sunstar, LLC; Ralph R. Teal, Jr.; SLF IV/SBI Wild Wing, LLC; SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; Stratford Land Manager, L.P. d/b/a Stratford Land; Stratford Land Fund IV, L.P.; SB Investments LLC; Realstar Management, LLC; Graeme T. Black; H. Gilford Edwards; Founders Wild Wing, LLC; Founders Group International, LLC; Dan Liu; Xian "Nick" Dou; Rick Schultz; Rick Taylor And Thomas Plankers.....Respondents,

Wild Wing Plantation Owners' Association, Inc.,..... Nominal Defendant.

APPELLANTS' PETITION FOR REHEARING AS TO AUGUST 20, 2025 ORDER

Robert T. Lyles, Jr. (SC Bar # 10299)
Lyles & Associates, LLC
2113 Middle Street, Suite 202
Sullivan's Island, SC 29482
843.577.7730
rtl@lylesfirm.com
Attorney for Appellants

Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively On Behalf Of The Wild Wing Plantation Property Owners' Association, Inc., ("Appellants") hereby files this Petition for Rehearing as to this Court's Order issued on August 20, 2025 (the "Order"). Appellants incorporate the facts and arguments from their prior briefs as well as the references to the Record on Appeal.

STANDARD OF REVIEW

The South Carolina Supreme Court held that the appellate court must apply the same standard applied by the trial court, pursuant to Rule 56(c) *SCRCP*, when reviewing the grant of summary judgment. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) Further, when a circuit court grants summary judgment on a question of law, appellate courts will review the ruling de novo. *Wright v. PRG Real Est. Mgmt., Inc*., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019). Further, since the appellate court applies a de novo review to questions of law, it need not defer to the determination of the court below. *Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016). Further, "[w]hen reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), *SCRCP*." *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). While the summary judgment standard of Rule 56, *SCRCP,* is well known, certain aspects of it bear repeating and were provided to the Circuit Court. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). Further, our court of appeals has applied the "genuine issue of material fact" standard set forth in the Rule, requiring the party opposing the motion show a "reasonable inference" to be drawn from the evidence, and we have rejected the "mere scintilla" standard. *See,*

e.g., *Vaughan v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006) *See Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 460-61, 892 S.E.2d 297, 300 (2023). Finally, "[s]ince it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. AT & T*, 306 S.C. 101, 410 S.E.2d 537 (1991).

ARGUMENT

I. The Court Erroneously Held that Appellants Failed to Bring Claims within the Applicable Statute of Limitations.

That evidence submitted by Representatives in response to Respondents' motions for summary judgment creates at least a question of fact as to whether the statute of limitations began to run in 2016, or even 2017, thus making Representatives claims fully viable without statute of limitations applies. (Either the three-year statute of limitations under South Carolina Code Ann. Section 15-3-530 (2005) or two years under S.C Code Ann. Section 33-31-830(f)(ii) (2006).

With respect to the statute of limitations, Representatives submitted the affidavit of Barry Dykes in opposition to the Respondents' motions for summary judgment. That affidavit, discussed below, must be taken as true by this court at this stage of the litigation and on this appeal.

The Court erroneously found, in its *de novo* review, that the only claims that were viable were the claims for damages accruing after June 30, 2015 (which was two years before the date of filing of the original complaint). What the Court did not do was engage in any effort to determine

when the statute of limitations began to run (other than to say the dates that the Amendments were enacted). [12]

The statute of limitations runs from the date an injured party either knows or should have known by the exercise of *reasonable diligence* that a cause of action arises from wrongful conduct. The Court of Appeals has "interpreted" the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 394-95, 593 S.E.2d 183, 187 (Ct. App. 2004).

Such a standard requires a *reasonable person of common knowledge and experience* to be put on notice. This claim does not involve issues facts and circumstances that would put people of common knowledge on notice of a claim. To the contrary, the evidence in this case establishes that this claim involves a complex accounting issue which, as the Court must note, is a matter of disagreement among CPAs and sophisticated business people. It was only when Mr. Dykes, with his education and experience with accounting and finance, reviewed the financial data, in 2014, that he became concerned about the possibility of Declarant underfunding, aka, the *Math* issue.

In Mr. Dykes' own words, (R. at pp. 1682-1688), he describes in detail what he knew about the Declarant under-funding and when he knew it, which seems to have been deemed unimportant by both the Trial Court and this Court, beginning at paragraph 5:

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[1] The Court erroneously concludes that the two-year statute of limitations I now the law of the case. (That fact is immaterial if the start time for the statute of limitations in properly applied in 2017, or even 2016.). The Court's review of the grant of a summary judgment motion is *de novo*, meaning this Court puts itself into the place of the trial court with respect to its view of all of the evidence. There cannot be any binding "law of the case" with a *de novo* review.

5. Over the course of my professional career, I have been employed at the administrative level of a number of large businesses, including hospitals. Currently I am an adjunct professor in the Department of Finance and Economics at the Wall College of Business at Coastal Carolina University, all of which is reflected on my current CV, which is attached hereto as Exhibit 2.

6. I am familiar with, apply, and teach about accounting practices, including what are referred to as Generally Accepted Accounting Principles, which are also known as "GAAP".

7. I purchased my home in Wild Wing in 2013 and moved into the community in September 2013.

8. At Wild Wing, there are numerous governing documents including the Declaration of Protective Covenants, Restrictions, Easements, Charges and Liens for Wild Wing Plantation. Portions of those documents are referred to herein and the documents will generally be referred to as the "Regime Documents."

9. Soon after moving to the community, I was asked to serve on the Finance Committee for the POA. Because of my educational and employment background, and my familiarity with finance and accounting, I agreed and began serving on the Finance Committee in 2014.

10. At the time I was put on the Finance Committee, the "Declarant" was Wild Wing Residential Development, LLC. The Board of Directors of the POA was comprised of Ralph R. Teal, Jr., Graeme T. Black and H. Gilford Edwards, who were appointed to the Board of Directors by the Declarant. Under the Regime Documents, the Declarant had the right to fully control the POA by appointing the Board of Directors and through the Declarants controlling voting rights which are referenced in Exhibit 3 attached hereto. The control continued at all times referred to in this affidavit and exists today.

11. The auditor for the POA until 2015 was Jim Corbett, who had been retained at the direction of the Declarants and who worked only with the Board of Directors and the Management Company who were controlled by the Declarant.

12. As I began my work on the Finance Committee in 2014, and after reviewing the financial data that had been given to the Finance Committee, I became concerned about the high level of delinquencies, meaning the number of property owners who were not paying their assessments to the POA. Because of that, I requested more detailed financial data from the existing Board of Directors via their Property Managers and Auditor. That Board of Directors, which was still comprised of the referenced members, provided the Finance Committee with the draft audit for 2014, which contained more detail than had been available previously.

13. In 2015, when I saw the detailed calculations of the declarant contributions from 2011 through 2014, which was included in the draft audit of 2014, which I believe to be the first time it had been provided to the Finance Committee, I was concerned because I saw that the Declarant contribution was not being properly calculated. Specifically, "bad debt" was not being treated as a POA "expense" for purposes of the Declarant contribution.

14. "Bad debt" in the context of this issue means money owed to the POA, but not paid. An example of bad debt for a POA such as Wild Wing would be assessments, fines and fees owed by a property owner or property owners, but not paid.

15. Having read the Regime Documents, I knew that the POA funding required by the Declarant was based upon the audited financials and, in part, the "expenditures incurred" by the POA. Under GAAP, that includes "bad debt".

16. In April 2015, the Finance Committee which including Bill King and I met with Mr. Corbett and asked Mr. Corbett about the treatment of bad debt in the draft audited financials of the POA. I was told by Mr. Corbett that he did not agree with my view that bad debt should be treated as a POA "expenditure incurred" for purposes of calculating the Declarant contribution. Following that meeting, Mr. Corbett and I exchanged emails about the issue and that exchange is attached hereto as Exhibit 4.

17. In his emails of April 30, 2015, Mr. Corbett expressly recognized the applicability of GAAP with respect to the POA accounting, and the treatment of bad debt as an expense, but then explained that he did not calculate it as an "expense" for purposes of determining the Declarant contributions. As reflected therein, I expressed my disagreement, and I was told by Mr. Corbett that his calculation was the result of his "interpretation" of the Regime Documents without providing me with any support for that interpretation.

18. It was in my meetings with Mr. Corbett, and our subsequent email exchange, that I first realized that the Declarant contributions for the POA had historically been made based upon inaccurate calculations. Those inaccurate calculations had always 1) been done by the auditor accountant retained by the Board of Directors, which was controlled by the Declarants; 2) had always favored the Declarant at the expense of the POA; and 3) were based on an "interpretation" of the Regime Documents driven by a belief that the Declarant should not have to include bad debt as an expense of the POA, despite the language of the Regime Documents.

19. In July 2015, Bill King and I met with Waccamaw Management and its CFO, Jane Atkinson, and its property manager, Paul Skirchak. Waccamaw Management was the property management firm hired by the Board of Directors. At that meeting, I raised my Declarant funding concerns. Ms. Atkinson and Mr. Skirchak told me at that meeting that the reserves of the POA were not being fully funded because of cash flow issues.

20. In August of 2015, having not been satisfied with the response to my concerns about the underfunding by the Declarants, I did an initial spreadsheet calculating the total underfunding at more that $300,000.00. Bill King and I requested a meeting with the Board of Directors to discuss my concerns.

21. On September 10, 2015, Bill King and I met with two members of the Board of Directors, one of whom was Rick Schultz (by this time Founders Wild Wing, LLC was the Declarant and had appointed its own Board of Directors, one of whom was Mr. Schultz). I provided them with my calculations, showing underpayments by more than $300,000.00, and explained my concerns. They told me that they would look into it, but I did not hear back from them in 2015.

22. By early 2016, the Board of Directors and Declarant had retained a new accountant/auditor, Deborah Weir. Ms. Weir met with the Finance Committee (of which I was still a member) and the Board of Directors to review the draft audit for 2015. I reviewed the audit and noted that there was no footnote about the erroneous treatment of excluding bad debt that was used for the calculations of Declarant contributions. Since I had not gotten a response from my earlier meeting with the Board of Directors and Mr. Schultz, I asked Ms. Weir if there should at least be a footnote in the audit memorializing the dispute about the bad debt issue and the Declarant underfunding. She told me that she would not include such note unless a lawsuit was pending regarding the issue. At that point I asked the members of the Board of Directors who were present including Mr. Plankers, what the Board of Directors intended to do about the Declarants historic underfunding of the POA. Mr. Plankers, who at the time was the president of the Board of Directors, told me that the Board of Directors was not going to do anything to address our concerns or remedy the underfunding of the POA by the Declarants. At that point, I knew that I must act to protect my interests and those of the non-Declarant members of the POA.

23. I have read some of the motions filed by the Bellamy Law Firm. At one point they state: Plaintiffs challenge contributions made by the Declarant as insufficient despite the fact that no other member, in the history of the POA, has ever raised the issue. When the issue was raised by Plaintiff Dykes, **the Finance Committee sought expert opinion of the POA accountant and decided to continue the calculation of the Math in accordance with his advice and recommendation**. Plaintiffs bring this action on the Math contrary to the majority vote of the POA Finance Committee acting on behalf of the same membership Plaintiffs now claim to represent.

    This assertion is simply not true. The Finance Committee did not agree with the "calculation of the Math" and did not agree to continue with it, though a vote or otherwise.

24. On January 23, 2017, I sent the letter attached as Exhibit 5, to the Board of Directors. They ignored my demands and on June 30, 2017, this lawsuit was filed.

(R. at pp. 1682-1688)

Dykes expressly notes that it was not until 2016 that he understood that he would have to pursue action on his own to protect the interests of the POA. He did that expeditiously. He was not legally entitled to filed this claim until after the Declarant controlled Board failed to act in response to his January, 2017 letter.

Dykes' affidavit, which must be taken as true, creates at least a question of fact as to whether the statute of limitations on the claims of the Representatives began to run in 2016 or 2017, in either case their claim would not be time-barred. In light of that evidence, dismissal of Representatives' claims at summary judgment, based on the statute of limitations, was in error.

II. The Court Erroneously Held that Equitable Tolling and Other Statute of Limitations Arguments Had Not Been Preserved.

As argued by Representatives before the Trial Court, because the Declarant controlled the POA, through its control of the Board and its controlling voting rights, equitable tolling of the statute of limitations should eliminate any question about the timeliness of the claims.

In *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112, (Ct. App. 2012), the Court of Appeals held as follows:

> In *Hooper v. Ebenezer Senior Services and Rehabilitation Center,* our supreme court stated:
>
> Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness. The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.
>
> *Id. at 371-372,* citing *Hooper v. Ebenezer Senior Services and Rehabilitation Center* 386 S.C. 108, 115–17, 687 S.E.2d 29, 32–33 (2009).

> The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that *relief will be granted when,* in view of all the circumstances, *to deny it would permit one party to suffer a gross wrong at the hands of the other.* Equitable tolling may be applied where it is justified under all the circumstances. *Id.* (citations and quotation marks omitted) (emphasis added).
>
> Unlike equitable estoppel, equitable tolling does not require a showing that the Defendant has made a misrepresentation to the plaintiff. *Id.* ("Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it.").
>
> (R. at pp. 1548)

The Declarant controlled Board, which also controlled appointments to the Finance Committee, retained information that, until 2015, had never been shared with the members of the POA or the Finance Committee. Dykes' affidavit makes it clear that, once he was given information, which had been previously unavailable, Dykes was thwarted in his efforts to address the underfunding through the Declarant controlled Board, or the Declarant controlled accountants. He realized, for the first time, in 2016, that he would have to act himself to protect the interests of the POA. Further, because this action had to be brought as a derivative action, pursuant to Rule 23, *SCRCP*, Dykes was required to make a demand on the Declarant controlled Board, which he did on January 23, 2017. It was only after the Declarant controlled Board failed to act to remedy the Declarant funding shortfall, that Dykes was even permitted, by law, to file this lawsuit. To allow the Declarant to avoid exposure for this claim, because of delays caused by the Declarant, is precisely the result that *Magnolia North* sought to avoid.

The Court erroneously concluded that despite Representatives' submission of affidavits, numerous and voluminous references to testimony and documentary evidence, and memoranda making arguments in response to all grounds for summary judgment made by Respondents, Representatives failed to preserve their statute of limitations arguments because they did not file a

Rule 59 motion. This is error as the Trial Court expressly considered and ruled upon Representatives' statute of limitations arguments.

"For an issue to be properly preserved it has to be raised and **ruled on** by the trial court." *State v. Stahlnecker*, 386 S.C. 609, 690 S.E.2d 565 (2010) (citing *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475 (2004)). A party must file a Rule 59(e), *SCRCP*, motion to preserve an issue the trial court fails to rule on. *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 602 S.E.2d 772 (2004). An issue not properly preserved cannot be raised for the first time on appeal. *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994). *Johnson v. Lloyd*, 407 S.C. 610, 757 S.E.2d 705 (2014)

In addition to that black letter law, the law is also very clear in South Carolina that "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018). Further guidance on that issue from the Supreme Court establishes that,

> However, appellate courts are to be [***6] "'mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner'" and thus should not apply preservation rules in a manner that "elevat[es] form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue."
>
> *Moses v. State*, 442 S.C. 263, 269, 898 S.E.2d 174, 177 (Ct. App. 2024),
>
> Finally, our supreme court has cautioned that issue preservation "is not a 'gotcha' game Our supreme court has cautioned that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved." Id. at 330, 730 S.E.2d at 285 (emphasis added).
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> *Johnson v. Roberts*, 422 S.C. 406, 411, 812 S.E.2d 207, 210 (Ct. App. 2018)

Here, the Trial Court clearly received and rejected Representatives' factual and legal responses to Respondents' statute of limitations defenses. In particular, Dykes' testimony, via his

affidavit, could not be more clear and, at the summary judgment stage, must have been taken as true by the Trial Court and this Court.

Second, Representatives expressly raised the arguments in the Trial Court including the unique nature of the claim (Rule 23, which required Dykes to work within the Declarant Controlled Board before bringing his claim) and equitable tolling, in its memorandum. Those arguments were made in the Trial Court as part of an extensive effort to establish factually the Declarants' control of the Board, Declarants voting control of the POA, the relationships between the Directors (Individuals) and the Declarants, and the factual history and effect of the Math and Amendment issues.

Third, Respondents all addressed those arguments in their reply memoranda.

Finally, there is no doubt that the Trial Court ruled on Representatives' arguments by rejecting them, because the Trial Court expressly acknowledged the receipt *and consideration* of the submissions. In fact, the Trial Court stated, at the start of the short, covid-era remote hearing:

> THE COURT: Let me say this: I'm incorporating, Phyllis, all of the briefs that were filed verbatim, so you can rely on everything you have put in there. They're now a part of the record. If it becomes necessary to review the decision, you may rely fully on that without stating it on the record. That being said, I will not -- I don't want you to feel like -- I want you to feel free to state whatever you need but just stress the points because I have read this and have read it several times, to be honest with you, and the reply briefs, I have that as well.
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> (R. at p. 0176)

Because the facts were before the Trial Court, and the arguments were made by Representatives to the Trial Court, by granting summary judgment on the statute of limitations, the Trial Court rejected Representatives' arguments, making a Rule 59 motion unnecessary.

III. The Court Erroneously Held That the Business Judgment Rule Insulates the Directors From Liability And That The Declarants Did Not Breach Their Fiduciary Obligations.

> ***Rather, we define Appellants' fiduciary duty arising from its retention of control over the HOA by the standards set forth in Island Car Wash:***
>
> ***[A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. ... [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.***
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> *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2018)

It is difficult to square this Court's analysis and conclusion in this case, in which this Court affirmed a summary disposition of this case, with its clear and unambiguous statement from *Walbeck*, in 2018, in which this Court made it clear that when fiduciaries enter transactions that advantage the fiduciary, at the expense of the inferior party (here the members of the POA), the courts will "zealously scrutinize" those transactions.

In response to the Respondents' summary judgment motions, Representatives provided not just enough evidence to create a genuine issue of material fact, but provided comprehensive and compelling evidence from a variety of sources, including expert witnesses, in support of their claims. Yet this Court, as the Trial Court had, saw fit to disregard that evidence and summarily dismiss the claim.

In its order finding that Representatives had failed to prove an absence of good faith, a key to the discrepancy between the soaring language and intent of *Walbeck* and the result in this case is apparent. In holding that the business judgment rule insulates a Declarant controlled board from liability, the Court held that, "[a]dditionally, Representatives have the burden of proving Declarants and Individuals did not act in good faith…We find Representatives have failed to meet that burden." *Dykes, v. Wild Wing Company, LLC et al*, 2025-UP-299 (S.C. Ct. App. Dated August 20, 2025).

To put it bluntly, this Court applied the wrong standard of review. At this stage, summary judgment, the Court was obligated to review the evidence presented, in the light most favorable to Representatives, and determine whether the facts presented a material question of fact for trial. That is all Representatives were required to do and they did it more than sufficiently.

Representatives offered evidence of the following to both the Trial Court and this Court, which must be taken as true for purposes of summary judgment:

1. The Declarant wholly controlled the POA at all points in this dispute though both its appointment of the Board of Directors and through superior voting rights which controlled all action, and inaction, that suited Declarants; (R. at p. 1881)

2. The Board was comprised of members of the Declarant entities or employees of those or related entities; (R. at p. 1550)

3. That the Declarants failed to comply with the funding requirements of the Regime documents they created; (R. at pp. 1683-1688, R. at p. 1718)

4. That underfunding benefitted Declarants to the direct detriment of the members of the POA; (R. at pp. 1683-1688, R. at p. 1718)

5. That as a result of that, the Declarants underfunded the POA in the principal amount of $891,241.00. (R. at pp. 1531,1539, and 1895)

6. That Dykes learned of that in 2016 and brought it to the attention of the Declarant, their Board and their hand-selected accountants; (R. at pp. 1687-1688)

7. That those people and entities refused to comply with the funding requirements of the Regime Documents and told Dykes he would have to file suit; (R. at pp. 1687-1688)

8. That Declarants, and their Declarant controlled Board, put the interests of the Declarants directly ahead of those of the members of the POA by enacting two amendments, extending the Declarant Funding Alternative for a period of many years beyond it's scheduled expiration in 2010; (R. at p. 1530)

9. Those extensions also directly benefitted the interests of Declarants at the direct expense of the members of the POA; (R. at p. 1558)

10. The POA has been underfunded a total of $3,459,337 as a direct and proximate result of the Declarants' failure to comply with the funding requirements of the Regime Documents and Declarants' two extensions of the Declarants Funding Alternative, done by the Amendments. (R. at p. 1544)

See Final Brief of Appellants Initial Brief of Appellants (filed July 26, 2022).

While *Walbeck* establishes that such conduct will be scrutinized by the courts with "most zealous vigilance," in the case this Court, as the Trial Court did before it, ignores the evidence presented by Representatives and seems to take the evidence in the light most favorable to the Declarants and Individuals in concluding that the underfunding and the amendments were done in good faith, according to the processes in place and in good faith reliance on Declarant selected and paid accountants. Not only is that improper under Rule 56, *SCRCP*, it is the polar opposite of "zealous scrutiny."

Representatives offered evidence that, through the transactions set-forth above, the Declarants secured significant financial benefits at the expense of the members of the POA, which the Court must take as true at this point. (*See* Final Brief of Appellants at p. 5) "Zealous scrutiny" requires, at a minimum, subjecting the relevant transactions to the sunshine of full examination or all of the evidence by the court at a trial. That right was wrongfully denied by the Trial Court, at a summary stage of the proceeding, and has now been wrongfully denied by this Court.

In its opinion this Court also allows itself to be convinced that the Directors and Declarants, the Finance Committee and their accountants are all independent from one another, acting at arm's length, relying on one another in good faith. *Dykes, v. Wild Wing Company, LLC et al*, 2025-UP-299 (S.C. Ct. App. Dated August 20, 2025). This ignores the fact that the Representatives' evidence establishes that the Directors are one in the same as the Declarants and they are all under the direct control of the Declarant. The accountants were retained by the Declarants and their Board. The Finance Committee was appointed by the Declarant and its Board and, like the POA as a whole, was subject to the controlling voting rights of the Declarant with respect to all actions undertaken, and not undertaken.

The Court specifically finds that the Declarant and Directors were entitled to rely on the opinion of the Declarant selected and paid accountant, Corbett, despite evidence, offered by Representatives, he was wrong, and the method of calculation of the Declarant contribution was not done in conformance with GAAP, according to Dykes and Roy Strickland, CPA. Whether Corbett was right or wrong, and whether reliance on him by the Declarant and its Board was rightful or not, should be "zealously scrutinized" with a review of the full evidence, in a trial, not simply accepted as a basis for summary disposition of the case.

The Court also finds that the Directors were entitled to rely on Finance Committee with regard to the calculation method. Further, according to Dykes' affidavit, which must be taken as true, information was withheld from the Finance Committee until he asked for it in 2015. Dykes further testified that the Finance Committee never accepted or agreed that the Declarant calculations were proper. (R. at pp., 1682-1688) It was erroneous for the Court to adopt and rely upon facts at the summary judgment stage that were directly contrary to the evidence presented by Representatives.

Not only has this Court condoned and affirmed the Trial Court's refusal to "zealously scrutinize" the transactions which led to a $3.5M dollar benefit to the Declarant, at the expense of the POA, this Court has not expressed even a hint of skepticism of the actions of the Declarants and its Board, which continually put their own interests ahead of those of the members of the POA and then, in 2017, refused to correct those actions, and literally forced Representatives to file this action.

The Court has also disregarded the ruling of the Supreme Court in *Walbeck v. I'On Co.*, 439 S.C. 568, 889 S.E.2d 537 (2023) ("*Walbeck 2023*"), which held, in part:

> More broadly, "it is [ ] well settled" that those in a fiduciary relationship with another party must not act to "make use of that relationship to benefit his own

> personal interests." *Lesesne v. Lesesne*, 307 S.C. 67, 69, 413 S.E.2d 847, 848 (Ct. App. 1991). **Conduct that violates this mandate includes self-dealing**, fraud, unconscionable conduct, misrepresentations, etc. *See Bennett v. Estate of King*, 436 S.C. 614, 633, 875 S.E.2d 46, 55 (2022) (Kittredge, J. dissenting). This makes sense because the fiduciary relationship imposes a "special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* at 633, 875 S.E.2d at 56. (Emphasis added.)

This Court knows that in *Walbeck 2023,* Justice Hearns concluded, after their review of the facts, that, "[i]nstead, there was sufficient evidence of bad faith, promises made and broken, and self-dealing presented *in addition to* the breach of contract, to warrant submission of the fiduciary claim to the jury." The same is true here, at this summary stage of the proceedings. Representatives have presented ample evidence to create a question of fact for this case to proceed to trial.

CONCLUSION

For the foregoing reasons, the Court of Appeals should grant this Petition for Rehearing.

s/Robert T. Lyles, Jr.
Robert T. Lyles, Jr. (SC Bar # 10299)
Lyles & Associates, LLC
2113 Middle Street, Suite 202
Sullivan's Island, SC 29482
843.577.7730
rtl@lylesfirm.com
Attorneys for Appellants

Sullivan's Island, South Carolina
September 4, 2025

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Sep 04 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Judge of the South Carolina Business Court

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Appellate Case Number 2021-000767

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively On Behalf Of The Wild Wing Plantation Property Owners' Association, Inc.,.....Appellants,

v.

Wild Wing Company, LLC; Sunstar, LLC; Ralph R. Teal, Jr.; SLF IV/SBI Wild Wing, LLC; SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; Stratford Land Manager, L.P. d/b/a Stratford Land; Stratford Land Fund IV, L.P.; SB Investments LLC; Realstar Management, LLC; Graeme T. Black; H. Gilford Edwards; Founders Wild Wing, LLC; Founders Group International, LLC; Dan Liu; Xian "Nick" Dou; Rick Schultz; Rick Taylor And Thomas Plankers, ...Respondents,

Wild Wing Plantation Owners' Association, Inc., ... Nominal Defendant.

PROOF OF SERVICE

I certify that I have served a copy of Appellants' Petition for Reheaing to each of the following counsel of record via electronic mail on September 4, 2025, as follows:

David B. Miller, Esquire
Zachary J. Crowl, Esquire
The Bellamy Law Firm
PO Box 357
Myrtle Beach, South Carolina 29578
Dmiller@bellamylaw.com
zcrowl@bellamylaw.com
Counsel for Wild Wing Company, LLC; Sunstar, LLC; SLF IV/SBI Wild Wing, LLC;

Douglas W. MacKelcan, Esquire
Skyler C. Wilson, Esquire
Copeland Stair Valz & Lovell, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
dmackelcan@csvl.law
swilson@csvl.law
Counsel for Ralph R. Teal, Jr.; Graeme T. Black; and H. Gilford Edwards

SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; SB Investment, LLC; Realstar Management, LLC; Founders Wild Wing, LLC; Founders Group International, LLC; and Dan Liu

Eugene H. Matthews, Esquire
C. Cliff Rollins, Esquire
Richardson Plowden & Robinson, P.A.
Post Office Drawer 7788
Columbia, South Carolina 29202
gmatthews@richardsonplowden.com
crollins@richardsonplowden.com
Counsel for Rick Schultz, Rick Taylor and Thomas Plankers

Scott F. Talley, Esquire
Talley Law Firm, PA
291 S. Pine St.
Spartanburg, South Carolina 29302
scott@talleylawfirm.com
-and-
William Douglas Smith, Esquire
Johnson Smith Hibbard & Wildman Law Firm, LLP
Post Office Drawer 5587
Spartanburg, South Carolina 29304-5587
dsmith@jshwlaw.com
Counsel for Stratford Land Manager, LP d/b/a Stratford Land and Stratford Land Fund IV, LP

s/Robert T. Lyles, Jr.
Robert T. Lyles, Jr. (SC Bar # 10299)
Lyles & Associates, LLC
2113 Middle Street, Suite 202
Sullivan's Island, SC 29482
843.577.7730
rtl@lylesfirm.com
Attorneys for Appellants

September 4, 2025

LYLES & ASSOCIATES, LLC
ATTORNEYS AT LAW
www.lylesfirm.com

Robert T. Lyles, Jr.
Member

Reply to: Main Office
E-mail: rtl@lylesfirm.com

September 4, 2025

VIA E-MAIL & U.S. MAIL
Jenny Abbott Kitchings, Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfiling@sccourts.org

Re: *C. Barry Dykes vs. Wild Wing Company, LLC*
Appellate Case No. 2021-000767

Dear Ms. Kitchings:

Regarding the above-referenced matter, enclosed please find this firm's check for $50.00 to cover the required filing fee for Appellants' Petition for Rehearing, which has been submitted for e-filing. Should you have any questions or need additional information, please let me know.

Thank you, and with kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr.

RTL/cw
Enclosures
cc: David B. Miller, Esquire
Zachary J. Crowl, Esquire
Douglas W. MacKelcan, III, Esquire
Eugene H. Matthews, Esquire
C. Cliff Rollins, Esquire
Scott F. Talley, Esquire
William D. Smith, Esquire
William J. Farley, III, Esquire
Skyler C. Wilson, Esquire