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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Opinion No. 25-UP-299 (S.C. Ct. App. filed August 20, 2025)

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively on Behalf of the Wild Wing Plantation Property Owners' Association, Inc.,.....Appellants/Petitioners,

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.

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Introduction

C. Barry Dykes and Barbara Eisenhardt, individually and derivatively on behalf of the Wild Wing Property Owners Association, Inc. (the Wild Wing "Association" or "Petitioners") respectfully petition the Court for a writ of certiorari to review the Court of Appeals' opinion issued August 20, 2025, affirming the circuit court's summary judgment rulings in favor of various current and former developers and board members of the Association. *See Dykes v. Wild Wing Co., LLC*, Op. No. 2025-UP-299 (S.C. Ct. App. filed Aug. 20, 2025). The Court of Appeals misapplied error preservation rules to prevent review of legitimate appellate issues and resolved factually disputed issues in Respondents' favor. The Court of Appeals' decision also directly conflicts with this Court's decision in *Walbeck*, which explicitly iterated that developers in control of homeowner associations owe fiduciary duties to the association and its members. Certiorari should be granted in full for the reasons set forth below.

Certification of Counsel

The Court of Appeals ruled on Appellants' Petition for a Rehearing on October 15, 2025.

Questions Presented for Review

I. Whether the Court of Appeals erred by affirming the Circuit Court's ruling that Petitioners' claims were barred by the applicable statute of limitations?

II. Whether the Court of Appeals erred in concluding that Petitioners failed to preserve their equitable tolling and statute of limitations arguments?

III. Whether the Court of Appeals erred by affirming the Circuit Court's ruling that the Business Judgment Rule insulated the Board Member Defendants from liability and that the Declarant Defendants did not breach their fiduciary obligations?

Statement of the Case

I. Procedural History

C. Barry Dykes and Barbara Eisenhardt, individually and derivatively on behalf of the Association ("Petitioners"), commenced this derivative action on June 30, 2017, against multiple defendants. Dykes and Eisenhardt own homes in Wild Wing Plantation and are members of the Association. Petitioners allege that the Developers (Declarants) and developer-appointed board members (collectively the "Respondents") had a fiduciary relationship with the Association and its members by virtue of their capacity as developers of the Wild Wing Plantation community and by virtue of their former or current capacity as officers and controlling members of the Association's Board of Directors, and that, as such, they owed the Association the highest duties of good faith, fair dealing, due care, and loyalty. (R. 66). Further, the Respondents breached their duties by elevating their own interests over the interests of the Association. As a result, the Association was deprived of contributions and therefore damaged. Petitioners filed Amended Complaints on June 10, 2019, and March 19, 2020. The case was referred to the South Carolina Business Court by Order dated April 1, 2020.

All parties filed summary judgment motions on multiple grounds, including written memoranda in support and opposition. (R. 207-1840). All parties also filed responses or replies. (R. 1841-88).

On May 4, 2021, the Honorable R. Markley Dennis, Jr. denied all of Petitioners' motions and granted all of the Respondents' motions from the bench following a hearing and requested that Respondents prepare orders. (R. 200-01). The written orders were signed on June 17, 2021, and July 12, 2021. (R. 4-58). The trial court orders specifically state that all matters raised in the briefs and supporting documents are incorporated and preserved for review and the trial court further "also reviewed [Petitioners'] remaining arguments and in light of the foregoing, this Court [found] these arguments unpersuasive and unnecessary to address." (R. 5, 24).

The Court of Appeals affirmed the circuit court's orders by written opinion filed on August 20, 2025. Representatives timely petitioned the Court of Appeals for rehearing on September 4, 2025. (R. 2028). The Court of Appeals denied the petition for rehearing by order entered October 15, 2025. (R. 2047-48).

II. Facts

At all times relevant to the underlying facts of the case, the Developer/Declarant controlled the Association's Board of Directors because it held the right to appoint the Association's board members and held superior, and controlling, voting rights. (R. 1572-79).

It is undisputed that the Association was formed in 2006, when the owners of a large tract of property in Horry County developed the property by selling residential lots associated with an adjacent golf course. (R. 1415). The owners formed Wild Wing LLC and filed a Declaration of Protective Covenants, Restrictions, Easements, and Liens for Wild Wing Plantation ("Wild Wing

Covenants"), declaring Wild Wing LLC as the owner and developer —the "Declarant" (R. 1246) — and forming the Association. (R. 1244-84).

The Wild Wing Covenants obligate owners of the lots in Wild Wing Plantation to pay assessments to the Association. (R. 1260-61). As an exception to this general rule, the Wild Wing Covenants also include a time-limited carve out—originally about four years—to address how the Developer/Declarant would be obligated to pay the assessments on its unsold lots. For this time-limited period, the Developer/Declarant had an option for paying the assessments on its unsold lots: (1) pay the per lot assessment like the other owners; or (2) fund the shortfall between the Association's actual operating expenditures and the assessments made against all other owners during that year. This option permitted the Declarant to avoid paying the same per-lot assessments on unsold lots that individual lot owners were required to pay. This time-limited option clearly provided a benefit to the Declarant at the expense of the Association.

According to the Wild Wing Covenants, when this option expired—four years later on December 31, 2010—the Declarant was required to begin paying per-lot assessments on the unsold lots. This did not happen—instead, the declarant[1] extended the funding option from December 31, 2010, to December 31, 2016 (the "2011 Amendment"). (R. 287-89). The 2011 Amendment was signed on November 22, 2011—11 months after the option expired—by Ralph R. Teal, Jr. as President of the Association on the one hand, and by the same person—Ralph R. Teal, Jr. on behalf of the Second Declarant, Wild Wing Residential Development LLC, on the other hand.[2] (R. 289).

In 2015, a Chinese company, led by Dan Liu and Nick Dou, purchased 19 golf courses and residential developments in Horry County and surrounding areas for more than 100 million. (R. 1522-24). This group paid $19 million for the Wild Wing development, formed the final

[1] By this time, the development was transferred to a second declarant, run primarily by the same individuals.
[2] By SLF IV/SBI Properties MM, LLC By SB Investments LLC

developer/declarant, Founders Wild Wing LLC,[3] (R. 1523) and in 2016, extended the option for the Declarant contribution in lieu of a per-lot assessment on unsold lots—again—until 2019 (the "2016 Amendment") (R. 1747-49). As shown on the 2016 Amendment, Tom Plankers (a board member appointed by declarant Founders Wild Wing) executed the Amendment on behalf of the Association and Nick Dou (a member of Founders Wild Wing) executed the Amendment on its behalf. (R. 1749).

Through involvement with the Association's finance committee, Dykes began to uncover evidence that the development's owners and the Association's board members (who were effectively the same people) were making decisions that benefitted the owners at the expense of, and with no benefit to, the Association. In addition to the extension of the funding option allowing them to pay the shortfall between the actual operating expenditures and the accrued assessments, Dykes learned that the Declarant's contribution was not being calculated in accordance with Generally Accepted Accounting Principles (GAAP), as the bylaws required, which resulted in a significant decrease in the amount of funds that the Declarant contributed to the Association. This was ultimately confirmed by Petitioners' expert CPA Roy Strickland, who opined the failure to include bad debt as an operating expenditure (contrary to GAAP) resulted in a loss to the Association of $891,241. (R. 1728, 1731).

Dykes raised his concerns regarding the calculation of Declarant contributions and the exclusion of bad debt from Association expenses, but it was not until 2016—when the development was then owned by Founders—that the Association Board informed Dykes that it would not acknowledge any dispute surrounding these calculations unless a lawsuit was filed. In

[3] The members of Founders Wild Wing LLC are Jiangsu Tianrui Danfor Commerce and Industry Co. Ltd. And Xian Dou. Dan Lui refers to Jiangsu Tianrui Danfor Commerce and Industry Co. Ltd as his company. According to Mr. Lui, the money Jiangsu used to purchase the developments including Wild Wing was in cash. (R. 1522-24).

order to pursue a derivative action on behalf of the Association and its members, and in accordance with Rule 23, SCRCP, Dykes was required to make a demand on the Declarant-controlled board before filing suit. Dykes made such a demand on January 23, 2017. There was no response from the Board.

Argument

I. The Court of Appeals erred in affirming the Circuit Court's ruling that Petitioners' claims were barred by the statute of limitations.

The Court of Appeals analysis of the statute of limitations was in error. It is the Respondents' burden to establish a statute of limitations defense, and at the summary judgment stage, all inferences should be drawn in Petitioners' favor. The Association's claims were timely because they were tolled. Equitable tolling applies because at all times relevant to the underlying facts of the case, the Developer/Declarant controlled the Association's Board of Directors because it held the right to appoint and did appoint the Association's board members and held superior, and controlling, voting rights. (R. 1572-79). The decisions of the trial court and the Court of Appeals were in error because they failed to apply equitable tolling and went on to resolve factual disputes as to when the representatives were on notice in favor of the Respondents.

A. The claims brought on behalf of the Association are timely because they were tolled.

The statute of limitations could not have begun to run on the Association's claims until the Association's board was no longer run by an employee of the Developer. As a derivative action, Petitioners' claims are brought on behalf of the Association. When the Association—acting through its Board—knew or should have known of the alleged wrongdoing is typically a question of fact for the jury. However, when the Association's board is controlled by the developer, the statute of limitations on the Association's claims are tolled. *See Magnolia N. Property Owners*

Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). Under South Carolina law, "equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116, 687 S.E.2d 29, 32 (2009) (citation modified). The Declarant's complete control over the Association created precisely such circumstances, and Petitioners were ultimately required to make a demand on the Declarant-controlled board before filing suit as a derivate action, pursuant to Rule 23, SCRCP. Petitioners' causes of action cannot be subject to the three-year statute of limitations that would ordinarily apply to such claims because of Declarants' control over the Association.

In *Magnolia North*, the Court of Appeals recognized that developers would not initiate litigation against themselves while they controlled the development and agreed that the statute of limitations should be tolled during the period that the developer controlled the homeowners' association. 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). In that case, developer Heritage Communities, Inc. turned control of the homeowners' association over to residents on September 9, 2002. *Id*. at 356, 359, 725 S.E.2d at 117, 125. The developer argued that the statute began to run on March 8, 2000, the day that the association first met and that, therefore, the association's claims were time-barred. *Id*. at 371, 725 S.E.2d at 125. The Court of Appeals affirmed the trial court's decision to toll the statute of limitations for the time period during which the developer controlled the homeowners' association, stating that:

> [T]he [homeowners' association] board consisted of Appellants' officers until the date of "turnover," September 9, 2002. We find unpersuasive Appellants' claim that an organization they controlled would have initiated an action against itself during this period.

Id. at 372, 725 S.E.2d at 125; *see also Orlando Residence, Ltd. v. Hilton Head Hotel Invs*., No. 9:89-CV-0662-DCN, 2013 WL 1103027, at *11–12 (D.S.C. Mar. 15, 2013), *aff'd sub nom. Orlando Residence, Ltd. v. Nelson*, 565 F. App'x 212 (4th Cir. 2014) (quoting *Magnolia North*). Under this analysis, the Declarants effectively stood in the shoes of the Association during their respective periods of control, the statute of limitations could not begin to run against them until such a time as Declarant control ended. Applying the three-year statute of limitations to bar the claims in this case would permit the Declarants to benefit from their own control over the Association, the very entity they were legally obligated to protect, and thus equitable tolling is proper to allow the statute to run from the time the Declarants turned over control of the Association to third-parties.

This concept was argued and implicitly recognized in the briefs before this Court in *Walbec*k *v. I'On*. In *Walbeck*, a lawsuit originally filed in December 2010 was based in part on a 1998 property report stating certain property would be conveyed to the association. The statute of limitations issue was properly presented to the jury, and the jury determined the operative notice date was August 5, 2009. Before the Court of Appeals and this Court, the Developers argued the Homeowners should have discovered the claim by 2005 and in doing so, argued that the developer defendants did not control the HOA after at least 2005. The Plaintiffs conceded that the Board was turned over to the homeowners by December 2005. At that time, no developer representatives served on the board, and the finance committee had no developer representatives. Further, when a developer employee was subsequently placed on the board, *he was excluded from participating in decisions involving the developer*. In any event, the equitable tolling arguments, were not addressed (although they were essentially agreed to by the parties) because this Court held that the trial court properly submitted to the jury the "host of conflicting evidence as to when Homeowners

should have, by the exercise of reasonable diligence, discovered the facts giving rise to their claims." *Walbeck v. I'On Co., LLC*, 439 S.C. 568, 581, 889 S.E.2d 537, 544 (2023), *reh'g denied* (July 26, 2023).

The concept has also been defined as the doctrine of adverse domination: "[U]nder the doctrine of adverse domination, the statute of limitations is tolled for any period during which a corporate plaintiff was under the adverse domination and control of wrongdoers." *Cap. Inv. Funding LLC v. Field*, No. CIV.A. 6:12-3401-MGL, 2014 WL 130468, at *8 (D.S.C. Jan. 14, 2014). During that time, it would be inequitable and unjust to hold that the Association's claims against the controlling parties lapsed while those parties were in control of the Association and not willing to sue themselves.

B. The conflicting evidence regarding when the statute of limitations begins to run should be submitted to a jury.

Any conflicting evidence regarding when the statute of limitations begins to run raises a factual issue for a jury. "Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question." *Walbeck v. I'On Co., LLC*, 439 S.C. 568, 581, 889 S.E.2d 537, 543 (2023), *reh'g denied*, (July 26, 2023); *see also Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., LLC*, 435 S.C. 176, 177, 866 S.E.2d 577, 578 (2021) ("Application of both the basic three-year limitations period and the discovery rule in any given case can present factual issues for a jury to resolve."). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (citations omitted).

The burden of establishing a statute of limitations defense is on the Respondents, and at the summary judgment stage, all reasonable inferences are to be viewed in the light most favorable to the Petitioners. Setting aside the equitable tolling argument, in viewing the evidence in the light

most favorable to the individual or representatives, there is more than one reasonable inference as to when an individual or representative homeowner knew or should have known they had a claim against the Respondents. Petitioners submitted substantial evidence demonstrating factual disputes regarding when the limitations period began.

- Regarding the 2011 amendment, Eisenhardt's affidavit makes it clear that the Declarants and their agent directors misrepresented the basis for the 2011 amendment and failed to disclose the effects of the amendment on the Association. (R. 1774-78).

- Dykes began serving on the finance committee in 2014, at which point the Association Board consisted of declarant appointed members Teal, Black and Edwards. At that time, the financials he was reviewing did not include detailed calculations of the declarant contributions. Dykes requested further information out of concern about the number of delinquencies and further information was not provided until 2015.

- Members of the finance committee were asked to leave by developer appointed board members when certain financial information was discussed.

- In late 2015, Dykes discussed the issue with the Founders Wild Wing appointed board member Rick Schultz and was told he would look into it but did not hear back.

- It was not until 2016 that Dykes was told verbally by the Founders Wild Wing appointed board President that the Board would not address his concerns and he sent a demand letter in January 2017. (R. 1682-92).

- Tom Plankers and Nick Dou of Founders Wild Wing signed the 2016 Amendment on November 15, 2016. (R. 1747-49).

Rather than applying the proper summary judgment standard, both the trial court and the Court of Appeals disregarded evidence presented by Petitioners, and dismissal of Petitioners' claims based on the statute of limitations was in error.

II. The Court of Appeals erred in concluding that Petitioners failed to preserve their equitable tolling and statute of limitations arguments because the circuit court considered and rejected those arguments.

The Court of Appeals erred in rejecting Petitioners' arguments on equitable tolling and the statute of limitations as unpreserved. *Dykes v. Wild Wing Co., LLC*, No. 2021-000767, 2025 WL 2409189, at *4 (S.C. Ct. App. Aug. 20, 2025) ("Representatives' arguments that they are entitled to equitable tolling or that the derivative nature of the claims changes the statute of limitations analysis are not preserved."). The ruling elevates form over substance and prevents the appeal of a significant issue. *See State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) (noting that appellate courts are to be "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" (quoting *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011)))." Petitioners set forth the basis for the Association's claims in the Complaints. Respondents filed motions for summary judgment on several grounds including that the statute of limitations defense barred the claims as a matter of law, and Petitioners responded by arguing the defense did not bar its claims on a motion for summary judgment.

First, all parties and the trial court were aware of the nature of Petitioners' arguments. One purpose of issue preservation rules is to give the trial court a fair opportunity which necessarily involves the parties' awareness of the issues. *Morales*, 439 S.C. at 609, 889 S.E.2d at 556. In its initial memorandum in support of summary judgment, Petitioners argued to the trial court that the statute of limitations did not bar its claims and specifically should be equitably tolled as to all claims against the Declarants and directors and related entities while the Association was still controlled by the Declarants and its directors, citing *Magnolia N. Prop. Owners' Ass'n, Inc. v.*

Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112, (Ct. App. 2012). (R. 1547-1549). Further, Appellants and *Respondents* addressed these arguments in their reply memoranda. (R. 1782-1783, 1858-1859).

Second, the trial court specifically noted in the hearing and in its orders that all matters raised in the briefs and supporting documents were incorporated and preserved for review. The trial court unambiguously stated its consideration of all arguments, telling counsel: "I'm incorporating . . . 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." (R. 176).[4] In addition, the trial court orders state that all matters raised in the briefs and supporting documents are preserved for review and further that the trial court "also reviewed [Petitioners'] remaining arguments and in light of the foregoing, this Court [found] these arguments unpersuasive and unnecessary to address." (R. 5, 24).

Finally, the trial court necessarily rejected Appellants' equitable tolling argument when it granted summary judgment based on the statute of limitations. Equitable tolling is not a separate issue from the statute of limitations—it is part of the same analysis. By granting summary judgment based on Defendants' statute of limitations defense after the court's express acknowledgment, the trial court necessarily rejected Petitioners' equitable tolling arguments. The Court of Appeals' finding directly contradicts the record evidence and misapplies South Carolina preservation law.

[4] In the hearing, the trial court stated:
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.

(R. 176).

The Court of Appeals misapplied South Carolina preservation law when it held that Petitioners' claims were not preserved because they failed to file a Rule 59(e) motion. The court reasoned that Petitioners should have filed such a motion to address equitable tolling, the derivative nature of the claims changing the statute of limitations analysis, and to "clarify the circuit court's ruling as to which statute [of limitations] applied to which defendants, and they did not raise this question in their brief." Further, while also questioning if it applied against the Declarants[5], the Court of Appeals indicated that the two-year statute of limitations under the Nonprofit Corporation Act was the law of the case. The Court of Appeals' analysis is incorrect because a Rule 59(e) motion is not required when "the trial court's decision . . . [i]s clear." *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006). In *Walsh*, the trial court found certain case law determinative and granted the defendant's motion for summary judgment on that basis. *Id.* at 324, 638 S.E.2d at 87. In doing so, it declined to address defendant's alternative grounds for summary judgment or plaintiff's cross-motion for summary judgment *Id.* The plaintiff appealed the court's decision and respondent argued that the plaintiff/appellant did not file a Rule 59(e) motion to request the trial court rule on the alternative basis and thus those issues were not preserved. *Id.* at 325, 638 S.E.2d at 88. The Court of Appeals disagreed and held that in adopting the analysis put forth by the defendant, it implicitly denied the plaintiff's arguments. *Id.* Here, the trial court implicitly ruled on the very issues it incorporated into the record. Its decision made clear that it rejected all incorporated arguments except the statute of limitations arguments made by the Respondents. Accordingly, a Rule 59(e) motion was not necessary to preserve the issues

[5] The two-year statute of limitations does not apply to the Developer Declarants because S.C. Code Ann. § 33-31-830(f) is a section of the South Carolina Nonprofit Corporation Act addressing actions against directors. The Developer Declarants owed a fiduciary duty to the Association that existed beyond the voting and the separate duties that belong to the board members who also owed fiduciary duties but in their roles as directors and officers.

Petitioners challenged on appeal, and the issues of equitable tolling and the statute of limitations analysis were properly before the Court of Appeals.

III. The Court of Appeals erred in affirming the Circuit Court's ruling that the Business Judgment Rule insulated Respondents from liability because the record contains ample evidence of self-dealing and breaches of fiduciary duty by the Declarants and the Declarant-controlled Board of Directors.

The decision of the Court of Appeals directly conflicts with this Court's decision in *Walbeck*, which explicitly iterated that developers in control of homeowner associations owe fiduciary duties to its members. *Walbeck*, 439 S.C. at 585-86, 889 S.E.2d at 546 (citing *Concerned Dunes W. Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 562 S.E.2d 633, 636 (2002)). In *Walbeck*, the Supreme Court held that "anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests." *Id.* at 586, 889 S.E.2d at 546 (citing *Lesesne v. Lesesne*, 307 S.C. 67, 69, 413 S.E.2d 847, 848 (Ct. App. 1991)). Further, the Court of Appeals has recognized that "[i]t is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987) (citing 36A C.J.S. *Fiduciary* at 385 (1983)). "Conduct that violates this mandate includes ***self-dealing***, fraud, unconscionable conduct, misrepresentations, etc." *Walbeck v. I'On Co., LLC*, 439 S.C. at 586, 889 S.E.2d at 546 (emphasis added).

First, the Court of Appeals erred by applying the business judgment rule to limit the fiduciary obligations owed by the Developer/Declarants. A developer in control of a homeowners' association may not make decisions that benefit the developer's own interest at the expense of the association and its members. The business judgment rule does not negate the fiduciary obligations between a developer and a homeowner's association. The Developer Declarants in this case

exercised complete control over the Association through superior voting rights and exclusive appointment of Board members, creating precisely the type of fiduciary relationship that *Walbeck* was designed to address. (R. 1747-49). From 2006 through 2019, the Declarants maintained exclusive control of the Association through control of the Association's Board of Directors and controlling voting rights. Although the Declarants maintain that the amendments were put to a vote, the only vote that mattered belonged to the Declarants, who could pass any measure without a single non-declarant member vote. Under *Walbeck*, such control triggers a duty to act in good faith with due regard to the interests of the association members and to avoid self-dealing. 439 S.C. at 587, 889 S.E.2d at 547.

The Court of Appeals compounded its error by placing the burden on Petitioners to prove lack of good faith, stating "that Representatives have the burden of proving Declarants and Individuals did not act in good faith." This approach directly contradicts the *Walbeck* standard, which requires courts to "scrutinize with the most zealous vigilance" transactions where the dominant party secures profit or advantage at the expense of the inferior party. The *Walbeck* standard does not place the burden on the challenging party (here, Petitioners) to prove bad faith; rather, it requires judicial scrutiny of transactions to ensure the fiduciary did not benefit at the expense of those under their influence.

Further, the record contains substantial evidence that the Declarants engaged in ***self-dealing*** and used their control to benefit themselves at the expense of the Association. Conduct that is in breach of a fiduciary duty includes self-dealing. Petitioners presented evidence that the Declarants underfunded the Association by $891,241 through improper calculation methods and extended the Declarant Funding Alternative for ten years beyond its original expiration, resulting in additional underfunding of over $2 million. These amendments were for the sole benefit of

Declarants, and were at the sole expense of the Association, and it is indisputable that the amendments violated the fiduciary obligations of the Declarants. At the very least, consistent with *Walbeck,* those transactions must be "scrutinized with the most zealous vigilance" by the Court and the matter is not ripe for summary judgment as to the Declarant Defendants.

It was error for the Court of Appeals to conclude that the because the Declarants were not board members (the Declarants were shell company entities), they did not take any action in calculating the funding option. *Dykes v. Wild Wing Co., LLC*, No. 2021-000767, 2025 WL 2409189, at *7 (S.C. Ct. App. Aug. 20, 2025). The Declarants —with fiduciary obligations to the Association—were ultimately the parties that engaged in self-dealing — by choosing to extend their rights to not pay per lot assessments, by paying a decreased shortfall amount, by signing the amendments extending the option, by continuing to appoint their own directors and by not asking their appointed directors to be excluded from decisions affecting the Declarants.

In addition, the Business Judgment Rule, applicable to directors, does not apply when directors engage in self-dealing. *Dockside,* 294 S.C. at 87, 362 S.E.2d at 874; *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 270, 781 S.E.2d 903, 910 (2016). The Court of Appeals erred by treating the Declarants' reliance on their own selected accountants and property managers as sufficient to invoke Business Judgment Rule protection when the evidence showed these parties were all under Declarant control. As the Supreme Court noted in *Walbeck,* conduct that violates fiduciary duties includes "***self-dealing***, fraud, unconscionable conduct, misrepresentations, etc." 439 S.C. at 586, 889 S.E.2d at 546 (emphasis added) (internal citation omitted). And, because of such conduct, the Business Judgment Rule is not an appropriate defense to bar any claims because Petitioners put forth enough evidence to demonstrate a genuine issue of material fact as to whether the acts by the Board were within its authority and were made in good

faith. *Contra Dockside*, 294 S.C. at 87, 362 S.E.2d at 874 ("[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct." (internal citation omitted)). Because of the above-referenced acts, the Business Judgment Rule does not apply, and Petitioners' claims must be submitted to the jury.

CONCLUSION

Based upon the foregoing, Appellants/Petitioners, C. Barry Dykes and Barbara Eisenhardt, on behalf of the Wild Wing Plantation Property Owners' Association, Inc., respectfully request certiorari be granted.

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