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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., Judge of the South Carolina Business Court

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Appellate Case No. 2025-002300

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.

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Myrtle Beach, South Carolina
December 15, 2025

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The following brief is submitted on behalf of Wild Wing Company, LLC; Sunstar, LLC; 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; SB Investments, LLC; Realstar Management, LLC; Founders Wild Wing, LLC; Founders Group International, LLC; and Dan Liu (hereinafter "Declarant Respondents"). The remaining Respondents have also filed briefs in response to Petitioners' brief. The briefs of the remaining Respondents are incorporated herein by reference.

STATEMENT OF THE CASE

This is a dispute over payment of the Wild Wing Plantation Property Owners' Association (hereinafter "POA") dues. Petitioners allege the Declarants failed to pay their share based upon Petitioners' interpretation of the POA Declaration. Petitioners' interpretation would require the Declarants to pay 100% of any dues that the Lot Owner Members of the POA failed to pay themselves, irrespective of need. Ironically, Petitioners bring this action in a representative capacity, purporting to represent the very Members who defaulted on their dues. As concluded by the Circuit Court and affirmed by the Court of Appeals in its Unpublished Opinion, Petitioners' claims fail for numerous non-factual reasons.

I. Procedural History

On June 30, 2017, the Petitioners brought this action individually and in a representative capacity on behalf of the POA, a nonprofit corporation, claiming that Declarants had not paid the correct amount of dues to the POA. Petitioners initially brought causes of action for Breach of Fiduciary Duty, Unjust Enrichment, and Veil Piercing/Alter Ego/Amalgamation. An Answer and Counterclaim was filed on October 3, 2017. Petitioners filed an Answer to the Counterclaim on November 16, 2017.

On June 10, 2019, the Petitioners filed an Amended Complaint which added nine new Defendants, added unrelated allegations that Amendments to the Declaration were improper, and added an additional cause of action under the South Carolina Unfair Trade Practices Act. Petitioners later filed a revised Amended Complaint on March 19, 2020. An Answer and Counterclaim to the Amended Complaint was filed on behalf of Declarant Respondents on April 16, 2020. Appellants filed an Answer to the Counterclaim on May 19, 2020. This case was referred to the South Carolina Business Court by Order dated April 1, 2020. On August 4, 2020, an Amended Consent Scheduling Order was entered by the Honorable R. Markley Dennis, Jr. in which all parties waived trial by jury and agreed to a non-jury trial. Contrary to Petitioners' statements, the evidence in this case would not be heard by a jury at any point, but instead would be considered and ruled upon by Judge Dennis as the designated Business Court judge.

In October of 2020, the parties filed cross motions for summary judgment. On October 29, 2020, Declarant Respondents filed numerous Motions for Summary Judgment on the following grounds:

- The Business Judgment Rule;
- The Statute of Limitations;
- The Validity of the Amendments to the Declaration;
- Inadequate Derivative Capacity of the Plaintiffs;
- Lack of Standing of the POA; and
- South Carolina Unfair Trade Practices Act.

Motions for Summary Judgment were filed by all remaining Respondents as well. On October 30, 2020, Petitioners also filed several Motions for Summary Judgment. On May 4, 2021, the Honorable R. Markley Dennis, Jr. heard all Motions for Summary Judgment. At the conclusion of the hearing, the Circuit Court denied all of Petitioners' Motions and granted all Respondents' Motions for Summary Judgment. The written orders were signed on June 17, 2021 and July 12, 2021. Petitioners filed and served their Notice of Appeal on July 16, 2021.

The Court of Appeals affirmed the Circuit Court's Orders by Unpublished Opinion filed on August 20, 2025. Petitioners filed a Petition for Rehearing on September 4, 2025. The Court of Appeals denied the Petition for Rehearing by Order entered October 15, 2025.

II. Facts

Wild Wing Plantation is a residential golf community situate within the City of Conway, South Carolina. Wild Wing Company, LLC was the initial Developer and therefore served as the initial Declarant. There have since been three successor Declarants. The Declarant succession is as follows:

Declarant	Dates
Wild Wing Company, LLC	09/26/06 – 12/22/10
SLF IV/SBI Wild Wing, LLC	12/22/10 – 11/09/11
Wild Wing Residential Development, LLC	11/09/11 – 04/13/15
Founders Wild Wing, LLC	04/13/15 – Present

Declarants' rights were transferred by written Assignments. There were no assumptions of Declarant contingent liabilities.

In 2006, the POA was established as a Not-for-Profit Corporation to maintain and administer the Wild Wing community in accordance with the Declaration.[1] The Declaration provides that the affairs of the POA shall be governed by a Board of Directors which was appointed by the Declarant.[2] Once these directors are appointed to the POA Board, they assume a duty to the POA of a Nonprofit entity as Board Members.[3]

[1] Declaration. R. p. 0416.
[2] By-Laws Art. III(A) Sec. 1. R. p. 0460.
[3] Courtney 31:6-10. R. p. 0477, lines 6-10.

Duties of the Board of Directors in administering the POA include levying dues against Lot Owners to defray the Common Expenses and to establish the means and methods of collecting such dues.[4] To assist in carrying out its duties, the Board of Directors hired a property manager, an auditing accountant, and formed a Finance Committee of Members all as permitted by the Declaration. Two of the Members of the Finance Committee were Petitioners Dykes and Eisenhardt.

The Declarants were also included in funding the POA. The Declaration provides the Declarant two options. The Declarant could (1) pay regular dues for each lot it owned, or (2) pay what is referred to as "the shortfall". Making up the shortfall is a mechanism to ensure that any deficit of revenues over expenses gets funded and the POA is able to pay its bills. The Declaration provides a formula for the funding of the shortfall at Wild Wing.

> However, until such time as a Lot is conveyed by the Declarant to an Owner other than the Declarant, the Declarant shall be assessed and pay to the Association, in lieu of an assessment thereof, *a sum equal* to the *actual amount of actual operating expenditures incurred* by the Association *for that portion of the calendar year less an amount equal to the total assessments made* by the Association against Owners of Lots other than those owned by the Declarant. The actual operating expenditures for this purpose shall also include any reserve for replacements or operating reserves. (*Emphasis added)*.[5]

This formula is common in many community governing documents.[6] The "actual amount of actual operating expenditures incurred" unambiguously refers to the actual payment of an expense. These words do not include "paper expenses" such as depreciation or bad debt.[7] The Declarant Contribution has been calculated the same way since the inception of the POA.

[4] By-Laws Art. III(C) Sec. 18(b). R. p. 0464.
[5] Declaration Article VI, Section 2. R. pp. 0432-0433.
[6] Courtney 17:20 – 18:3. R. p. 0475, line 20-p. 0476, line 3.
[7] Corbett 50:4-10. R. p. 0496, lines 4-10; Atkinson 23:4-14. R. p. 0501, lines 4-14.

Prior to the start of each year, the property manager presented a proposed budget to the Finance Committee.[8] The Finance Committee and the property manager reviewed the budget line by line.[9] Once the budget was agreed upon, it was presented to the POA Board of Directors for approval.[10] The budget conspicuously includes "Developer Contribution," a specified dollar amount representing the estimated Declarant obligation for the coming year.

The "Developer Contribution" is included in the budget to help keep dues of the Members constant while lots are being developed and sold. This practice has kept Lot Owner dues consistent since 2006. Dues and Developer Contribution offset expenses to create a net zero budget, as is usual practice and consistent with all associations managed by the POA's property management company.[11] Upon POA approval of the budget, the property manager would inform the Declarant of its requested contribution and the Declarant paid in monthly or quarterly installments.[12] This practice has been in place throughout the life of Wild Wing Plantation.

At the beginning of the following year, the POA hired an accounting firm to audit the POA's prior year financial statements. In addition to the audit, the accounting firm annually prepared a Declarant Contribution Calculation worksheet as a check of the estimated budget amount.[13] In recent years, this Declarant Contribution Calculation has been completed by the in house accountant for the property management company, which was also hired by the POA.[14] This worksheet applied the audited annual financial statements to the two Declarant funding options. Beginning in 2014 and continuing to date, these Declarant Contribution Calculations reflect that

[8] Skirchak 45:14 – 46:5. R. p. 0483, line 14-p. 0484, line 5.
[9] Skirchak 40:24 – 41:2. R. p. 0480, line 24-p. 0481, line 2.
[10] Skirchak 40:24 – 41:2. R. p. 0480, line 24-p. 0481, line 2.
[11] Atkinson 35:14-21. R. p. 0502, lines 14-21.
[12] Skirchak 48:15-18. R. p. 0485, lines 15-18; Atkinson 36:18-22. R. p. 0503, lines 18-22.
[13] Corbett 20:19-21. R. p. 0491, lines 19-21; Dykes June 25, 2020 72:7-13. R. p. 0521, lines 7-13.
[14] Dykes June 25, 2020 74:12-15. R. p. 0522, lines 12-15.

rather than owing money to the POA, the POA actually owes money to the Declarants.[15] No Declarant has ever sought repayment of its overpayments.

Petitioners' Claims

The Math

At the time this action was filed, Petitioners were two lot owners within Wild Wing Plantation. Petitioner Eisenhardt purchased her lot in 2007 and was one of the initial members of the Finance Committee upon its inception in 2012.[16] Petitioner Dykes purchased his lot in 2013 and was appointed to the Finance Committee in mid-2014.[17] Petitioners' case centers on their belief that bad debt should be included in the formula as an "actual amount of actual operating expenditure incurred". The issue over bad debt originated from a dispute between Petitioner Dykes and the POA auditing accountant, Jim Corbett.

On April 28, 2015, Petitioner Dykes met with members of the POA property management company, Waccamaw Management, and the POA auditing accountant, Jim Corbett, to review the draft of the 2014 Annual Audit. During this meeting, Petitioner Dykes raised concerns about the Declarant Contribution Calculation. Petitioner Dykes took issue with the CPA's treatment of the bad debt.[18] Following deliberation and discussion, the Finance Committee commissioned Mr. Corbett to further review, investigate, and advise as to this decision. Mr. Corbett testified that he reviewed the Declaration and Generally Accepted Accounting Principles ("GAAP") along with the other CPAs in his office.[19] He also met with Jane Atkinson, the Chief Financial Officer of

[15] Corbett 37:3-17. R. p. 0495, lines 3-17; Developer Contribution Calculation. R. p. 0579.
[16] Eisenhardt Dec. 5, 2018 10:7-8. R. p. 0948, lines 7-8; January 23, 2012 POA Annual Meeting. R. pp. 1001-1002.
[17] Dykes Dec. 5, 2018 14:8-9. R. p. 0925, lines 8-9; POA Annual Members' Meeting Minutes April 29, 2014. R. pp. 1003-1004.
[18] Finance Committee Minutes May 12, 2015. R. pp. 0532-0534.
[19] Corbett 31:20 – 32:18, 36:7-25. R. p. 0492, line 20-p. 0493, line 18, p. 0494, lines 7-25.

Waccamaw Management.[20] Ms. Atkinson had never seen bad debt included as an "actual operating expenditure incurred" in her many years of Association accounting.[21] Mr. Corbett took his conclusions back to the Finance Committee explaining that the Declarant cannot be held responsible for the unpaid dues of members of the POA.[22] Despite Petitioner Dykes' objection, the Finance Committee and the Board of Directors relied on its accountant, and its property manager, and continued to calculate Declarant dues as it had since 2007.

The Amendments

The Great Recession was in full swing by 2009 which substantially slowed development in Wild Wing Plantation. Virtually no homes were being constructed upon sold lots, and many of those lot owners stopped paying dues. The predicted timelines contained within the Declaration quickly became obsolete and it was necessary for the continued viability of the community that they be reset.[23] Amendment to the timeline was necessary to stabilize and save the community.[24] The alternative was financial ruin for the Developer and, consequently, the community.[25]

The initial Declarant, Wild Wing Company, LLC held on as long as it could before The National Bank of South Carolina ("NBSC") threatened foreclosure proceedings in 2010.[26] As a result, the individuals involved in Wild Wing Company, LLC along with a group of other developers banded together with new investors to form the SLF IV/SBI entities.[27] This group bought the note from NBSC and accepted a Deed in Lieu of Foreclosure to save Wild Wing

[20] Corbett 31:20 – 32:18, 36:7-25. R. p. 0492, line 20-p. 0493, line 18, p. 0494, lines 7-25.
[21] Atkinson 23:8-20. R. p. 0501, lines 8-20.
[22] Corbett Email April 30, 2015. R. pp. 0535-0536.
[23] Black 48:9-13. R. p. 0542, lines 9-13; Black 48:14-17. R. p. 0542, lines 14-17.
[24] Teal 33:12 – 34:6. R. p. 0609 (33), line 12 – (34), line 6.
[25] Black 48:14-17. R. p. 0542, lines 14-17.
[26] Teal 13:4-12. R. p. 0607 (13), lines 4-12.
[27] Teal 13:4-12. R. p. 0607 (13), lines 4-12.

Plantation and other projects throughout the Grand Strand.[28] For each community this group bought, ownership and management entities were organized.

In 2011 and 2016, the Declaration was amended to extend the period of time for the payment option. The Amendments were passed by vote of the POA pursuant to and in strict accordance with the procedures required by the Declaration.

On November 9, 2011, the Board of Directors of the POA sent out official Notice to all Members of the POA, including Petitioner Eisenhardt, giving notice that a Special Meeting of the Members had been called for November 21, 2011 to amend the Declaration.[29] The Notice attached the proposed Amendment to the Declaration for each Member's review. Pursuant to the Notice, a special meeting was held and there was a vote of the membership.[30] Petitioner Eisenhardt was in personal attendance at the special meeting, and voted in favor of the Amendment.[31] In fact, the membership voted unanimously in favor of the Amendment.[32]

Petitioner Dykes purchased his property in Wild Wing Plantation in 2013, after the 2011 Amendment had been filed of public record.[33] Mr. Dykes' deed and title insurance policy, which he received in his closing documents, specifically provided that the property was subject to the Declaration and all amendments thereto.[34]

The Great Recession drug on far beyond anyone's expectations. On October 21, 2016, the POA again gave Notice to all Members including Petitioner Dykes and Petitoiner Eisenhardt that a Special Meeting would be held for the purpose of amending the Declaration.[35] The Notice again

[28] Teal 13:21 – 14:9. R. p. 0607 (13), line 21-p. 0607(14), line 9.
[29] Nov. 9, 2011 Notice of Special Meeting. R. p. 0756.
[30] Eisenhardt June 25, 2020 34:10, 17-18. R. p. 0737, lines 10, 17-18.
[31] Eisenhardt June 25, 2020 34:10, 19-25. R. p. 0737, lines 10, 19-25.
[32] Edwards 36:20-21. R. p. 0745, lines 20-21.
[33] 2011 Amendment to the Declaration. R. pp. 0978-0981.
[34] Plaintiff Dykes Title Insurance Policy and Warranty Deed. R. pp. 0982-0992; Dykes June 25, 2020 83:5-15, 84:22 – 85:8. R. p. 0939, lines 5-15, p. 0940, line 22-p. 0941, line 8.
[35] Oct. 21, 2016 Notice of Special Meeting. R. pp. 0779-0786.

included the proposed Amendment for review by the Members. Additionally, this Notice included a letter from the Declarant clearly stating the purpose and effect of the Amendment. On November 4, 2016, the meeting was called, Noticed, and conducted in accordance with the Declaration.[36] The votes were then tallied and the accuracy of the tallies was ensured by the property manager.[37] Once again, the vote passed with the two-thirds majority required by the Declaration.[38] Petitioners Dykes and Eisenhardt both participated in the vote and voted against the Amendment.

STANDARD OF REVIEW

This matter came before the Business Court and Court of Appeals on cross motions for summary judgment. "[C]ross motions for summary judgment do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." Mead v. Beaufort County Assessor, 419 S.C. 125, 131, 796 S.E.2d 165, 168 (Ct. App. 2016) (citing Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012)). "Where cross motions for summary judgment are filed, the parties concede the issue before [the court] should be decided as a matter of law." Id. (citing Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)).

This matter is now before the Supreme Court upon Petition for Writ of Certiorari. Rule 242, SCACR itemizes the character of reasons to be considered in ruling upon the Petition. The itemized reasons, while neither controlling nor further measuring the Supreme Court's discretion, are as follows:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

[36] Skirchak 53:11-19. R. p. 0701, lines 11-19.
[37] Skirchak 55:11-13. R. p. 0703, lines 11-13.
[38] Nov. 4, 2016 Minutes of Special Meeting. R. p. 0787.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of the itemized reasons exist here. Instead, Petitioner seeks this Court's review of the issues previously weighed and correctly ruled upon by the Circuit Court and Court of Appeals without dissent.

ARGUMENT

I. The Court of Appeals correctly affirmed the Circuit Court's ruling that Petitioners' claims were barred by the applicable statute of limitations.

Petitioners' claims on both the Math and the Amendments are barred by the Statute of Limitations.

> An action against a director asserting the director's failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) **two years** after the harm complained of is, or reasonably should have been, discovered.
> S.C. Code Ann. § 33-31-830(f). (Emphasis added).

The application of the two year statute of limitations to both the Math and Amendment claims has not been challenged at any point by Petitioners and is therefore the law of the case.

The undisputed evidence in the record is clear that Petitioners were on notice of any potential claims regarding the Math more than two years prior to filing this lawsuit and were on notice of any potential claims regarding the Amendments more than two years prior to the Amended Complaint. Therefore, Petitioners' only hope is to incorrectly assert that their claims are timely because they were tolled. They were not. As more fully discussed below, equitable tolling does not apply because Petitioners were not at any time prevented from bringing their claims and as detailed in Section II, this argument was not preserved for the record.

A. The Court correctly found that Petitioners' claims are not tolled.

In acknowledging that their claims are time barred, Petitioners seek to avoid the Statute of Limitations through equitable tolling. "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Hooper v. Ebenezer Senior Services and Rehabilitations Center, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009). "[E]quitable 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 32. "The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." Id.

The only argument Petitioners put forth for equitable tolling is that the Declarants appointed the members of the Board. The identity of the Board members in no way affected whether Petitioners could bring this action. If the fact that the Board members were appointed by the Declarant actually stood in the way of Petitioners bringing a lawsuit, Petitioners could not have filed this action when they did. The fact of the matter is that Petitioners were never prevented from bringing this action. Petitioners have always enjoyed the ability to bring a derivative action just as they have done here. At no time has any financial matter been withheld or concealed from the Petitioners or any other Lot Owner. In fact, the opposite is true. Petitioners were not misled or prevented from filing their case at any time. Petitioners have failed to establish a compelling reason to justify the use of equitable tolling.

B. There exists no genuine issue of material fact that Petitioners' claims are barred by the applicable statute of limitations.

Petitioners were required to bring their claims within two years after the harm complained of is, or reasonably should have been, discovered. S.C. Code Ann. § 33-31-830(f). Petitioners failed to do so. The discovery rule does not require absolute certainty a cause of action exists before the statute of limitations begins to run. Bayle v. South Carolina DOT, 344 S.C. 115, 126,

542 S.E.2d 736, 741 (Ct. App. 2001). The relevant inquiry is not what Appellants subjectively knew at specific points in time, but rather, at what point Appellants objectively had "enough information such that [they] should have acted promptly to determine whether a cause of action might exist against [Respondents] for the injuries claimed in this case." Ashley River Indus., Inc. v. Mobil Oil Corp., 135 F. Supp. 2d 733, 742 (D.S.C. 2000), aff'd 245 F.3d 849 (4th Cir. 2001).

The Math

Petitioners first filed their claims on the Math on June 30, 2017 seeking to recover damages dating back to 2008.

Petitioner Eisenhardt became a member of the POA in 2007. As a member of the POA, Petitioner Eisenhardt was afforded the right and opportunity to inspect all books of account at any time.[39] On January 23, 2012, the Finance Committee was established, and Petitioner Eisenhardt was appointed as one of the initial members.

Petitioner Dykes became a member of the POA in 2013. On April 29, 2014, Petitioner Dykes was appointed to the Finance Committee. One year later, on April 28, 2015, Petitioner Dykes raised his concerns regarding the Math to Waccamaw Management and the POA accountant.[40] Two days later, the POA accountant reported his findings that bad debt was properly excluded.[41] Minutes of the Finance Committee meeting are in the Record on Appeal and confirm these dates.

As Members of the POA, Petitioners and the Members they presume to represent have complete access to all books and records of the POA.[42] Moreover, Petitioners and other Members of the POA were members of the Finance Committee more than two or even three years prior to

[39] By-Laws Art. VI, Section 4(a). R. p. 0895.
[40] Finance Committee Minutes May 12, 2015. R. pp. 0952-0954.
[41] Corbett Email April 30, 2015. R. pp. 0955-0956.
[42] By-Laws Art. VI Sec. 4(a). R. p. 0895.

the initiation of this action. The Finance Committee is intimately familiar with the financials of the POA especially considering its role in setting the budget, inclusive of the requested Declarant Contribution. Furthermore, Petitioner Dykes raised the issues now complained of more than two years prior to the commencement of this action. Petitioners and the members of the POA they presume to represent knew or should have known of any alleged underfunding of the Declarants more than two or even three years prior to filing this lawsuit.

The Amendments

Petitioners first filed their claims on the Amendments on June 10, 2019 seeking to recover damages from Amendments passed in 2011 and 2016. On November 21, 2011, Petitioner Eisenhardt was in personal attendance at the special meeting for the Amendment, and voted in favor of the Amendment. The 2011 Amendment passed with a unanimous vote of the membership.

Petitioner Dykes purchased his property in Wild Wing in 2013 with record notice of the 2011 Amendment. Property Owners are charged with constructive notice of instruments recorded in their chain of title. S.C. DOT v. Horry County, 391 S.C. 76, 84, 705 S.E.2d 21, (2011) (quoting Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001)). A party has constructive notice if the party knows of "facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right… has been invaded or that some claim against another party might exist." Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (1998). Failure of the injured party to comprehend the full extent of damages is immaterial. Id. "The date on which discovery should have been made is an objective, not subjective, question." Id.

In 2016, both Petitioner Dykes and Petitioner Eisenhardt received Notice of the Special Meeting to vote on the proposed Amendment and on November 4, 2016, cast their votes against

the Amendment. At that point in time, Petitioners had knowledge of the harm complained of and their claims are barred by the two year statute of limitations in S.C. Code Ann. § 33-31-830(f).

Despite the overwhelming evidence that Petitioners were on notice of any potential claims more than two years prior to bringing such claims, Petitioners argue the Court did not view the facts in the light most favorable to them. "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" Grimsley v. S.C.L. Enf't Div., 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015) (quoting Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)).

Additionally, the parties in this matter filed cross motions for summary judgment. "[C]ross motions for summary judgment do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." Mead v. Beaufort County Assessor, 419 S.C. 125, 131, 796 S.E.2d 165, 168 (Ct. App. 2016) (citing Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012)). "Where cross motions for summary judgment are filed, the parties concede the issue before [the court] should be decided as a matter of law." Id. (citing Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)).

Furthermore, Appellants' assertion regarding jury review of the evidence mischaracterizes the nature of this case. This is a non-jury matter subject to a bench trial in the South Carolina Business Court.

II. The Court of Appeals correctly concluded that Petitioners failed to preserve their arguments to delay the Statute of Limitations.

Petitioners put forth three arguments to avoid the reality that their claims are time barred: equitable tolling, the Adverse Domination Doctrine, and that the claim is derivative. The Court of

Appeals correctly held that these arguments were not preserved for the record. Petitioners argue the Court of Appeals misapplied South Carolina preservation law and that a Rule 59(e) Motion is unnecessary to preserve issues the Circuit Court did not rule upon. Petitioners further assert that arguments raised for the first time on appeal were properly before the Court. Petitioners' arguments contradict South Carolina law.

First, Petitioners' Appellate Brief acknowledges that the Circuit Court ignored their equitable tolling argument and that it is not addressed in any of the Orders. Petitioners stated, "Having ignored Appellants equitable tolling argument, which is not mentioned in any of his orders, the Circuit Court also failed to consider or address evidence that Dykes and Eisenhardt submitted relating to the statute of limitations."[43] Petitioners now change course and argue that the Court implicitly ruled on its equitable tolling argument. Whereas it may be true that Petitioners raised the issue in its Memorandum in Opposition to Summary Judgment, the Circuit Court never specifically ruled on this issue. An issue is not preserved for appellate review when the Circuit Court did not explicitly rule on the appellant's argument, and the appellant did not raise the issue in a Rule 59(e) motion to alter or amend the judgment. Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party ***must*** file a motion to alter or amend the judgment in order to preserve the issue for appellate review." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (Emphasis added). Petitioners did not file a motion to alter or amend the judgment to preserve the equitable tolling issue for appellate review.

Second, Petitioners' argument regarding the Adverse Domination Doctrine analysis was set forth for the first time in their Appellate Brief. "It is well-settled that an issue cannot be raised

[43] App. Final Br. at 32.

for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Since this argument was raised for the first time on appeal, it is likewise not preserved for appellate review.

Finally, Petitioners raised an argument that the discovery rule is inapplicable in the derivative context. However, Petitioners cited no authority to support their argument and Declarant Respondents can find no authority to support such argument. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). Therefore, this argument is abandoned.

III. The Court of Appeals correctly affirmed the Circuit Court's ruling that Petitioners failed to offer evidence that Declarants breached fiduciary obligations and in ruling that Petitioners' claims are barred by the Business Judgment Rule and the South Carolina Nonprofit Corporation Act.

Petitioners' case relies upon the fundamental misstatement that the Declarants ARE the Board of Directors of the POA. The Declarants are not the Board of Directors of the POA and the actions of the POA are not the actions of the Declarants. Petitioners misuse these terms interchangeably. This case involves the actions of the POA, not the Declarants. As the Court of Appeals Unpublished Opinion noted, "Representatives have argued throughout the litigation that Declarants and the individuals they appointed to the Board are so enmeshed that, essentially, the actions of the individuals became the actions of the Declarants. However, in our view, there is no evidence in the record to support this contention."

Petitioners seek to use the Court's Opinion in Walbeck v. I'On Co., LLC, 439 S.C. 568, 889 S.E.2d 537 (2023) to impose a vicarious fiduciary obligation on the Declarants through the actions of appointed Board members. There exists no rule of law that an appointing Declarant is somehow

vicariously liable for the actions of its appointee Board members. The Supreme Court's opinion in Walbeck is not applicable to this case. Walbeck dealt with a developer's nefarious conduct related to its failure to convey amenities to the homeowners association. Walbeck, 889 S.E.2d at 547. Those facts do not exist here. This case has nothing to do with common areas and the analysis of Walbeck is incongruous with the facts of this case.

This case deals with the actions of the Board of the POA, the POA Finance Committee, the POA accountant, and the POA property manager. It is essentially an appeal from a POA Finance Committee meeting regarding the setting and collecting of dues. This distinction is critical in reviewing the duties among a developer and a POA. Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) is central to this review. In Goddard, the Court examined these two distinct situations separately. In the first scenario regarding the determination of dues (hereinafter "Goddard Part I"), the Court invoked the business judgment rule. Goddard, 426 S.E.2d at 831-32. In the second scenario regarding the conveyance of common areas (hereinafter "Goddard Part II"), the Court recognized the fiduciary duty of the developer to convey common areas in good condition. Id. at 832.

In Walbeck the Supreme Court only addresses the fiduciary duty of the developer in the context of Goddard Part II, which has no application to this case whatsoever. The Business Judgment Rule established in Goddard Part I and the subsequent codification thereof are controlling. In Goddard Part I, the Court considered arguments regarding the fiduciary relationship of the developer to the POA in the context of the determination of assessments imposed to maintain the POA. Goddard, 426 S.E.2d at 831-32. The Court held:

> In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule,' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action. Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993).

The very next year following Goddard, the State Legislature took up the matter and codified the standards of conduct for the directors of a nonprofit POA in S.C. Code Ann. § 33-31-830.

> In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by… legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence… or a committee of the board of which the director is not a member… S.C. Code Ann. § 33-31-830(b).
>
> **A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.** S.C. Code Ann. § 33-31-830(d). (Emphasis added).

The Official Comments to this statute state that the standards set forth in this section "are the exclusive standards that govern such conduct." Thus, the determination of the dues is subject to the Business Judgment Rule and S.C. Code Ann. § 33-31-830 of the South Carolina Nonprofit Corporation Act.

The estimation and confirmation of the Declarant contribution amount has always been a POA function.[44] The Declarants have never played any role in determining the amount to be paid. Appellants misrepresent this POA function as Declarants' work. The Declarant did not calculate the Declarant Funding Obligation. The calculation was prepared by the POA Finance Committee, the POA accountant, and the POA property manager.[45] This procedure is not in dispute in this case and there exist no facts to the contrary. When Appellant Dykes raised his concerns with the audit calculation, the POA accountant was tasked to review whether bad debt should be included and

[44] R. pp. 434, 464-65.
[45] R. pp. 485, lines 15-18; 491, lines 19-21; 503, lines 18-22; 521, lines 7-13; 530, lines 12-25; 544, lines 18-21; 1810, lines 17-18.

after reviewing the Declaration and GAAP, consulting with other CPAs in his office, and consulting with the CFO of Waccamaw Management, advised the POA bad debt was properly excluded. Despite Appellant Dykes' objection, the POA Finance Committee and the POA Board of Directors chose to rely upon their POA accountant and property manager and continued to calculate Declarant dues accordingly. The POA decisions regarding the Math fall squarely within the Business Judgment Rule and the South Carolina Nonprofit Corporation Act and are not subject to judicial review.

The same reasoning regarding the Business Judgment Rule and the South Carolina Nonprofit Corporation Act applies to the Amendments as well. Petitioners allege the Declaration was unilaterally amended by the Declarants. It was not. The Declaration sets forth a specific process for amendment to extend the period of time for the Declarant payment option. The Amendments to the Declaration were adopted by the POA, not the Declarants, by vote of the POA members in accordance with the Declaration. The provisions which were amended were included in the Declaration. The Amendments did not seek to change the substance of the provisions in the Declaration, but rather extended the time period of the Declarant's payment option so that development could continue. As a result, almost all lots in Wild Wing have now been sold. These Amendments did not produce harm, but rather led to more homeowners in the community, benefitting the Declarant, the POA, and each individual lot owner.[46]

CONCLUSION

Petitioner has demonstrated no circumstances which warrant this Court's issuance of a Writ of Certiorari. Petitioner instead seeks to challenge the Court of Appeals analysis of the issues. The

[46] Edwards 31:5-13. R. p. 0744, lines 5-13; Black 47:23 – 48:17, 50:3-24. R. p. 0747, line 23-p. 0748, line 17, p. 0749, lines 3-24; Plankers 23:1-14. R. p. 0753, lines 1-14; Teal 33:12 – 34:6. R. p. 0609 (33), line 12-p. 0609 (34), line 6.

Court of Appeals correctly affirmed that Petitioners' claims are barred by the applicable Statute of Limitations; correctly concluded that Petitioners failed to preserve their arguments to delay the Statute of Limitations; and correctly affirmed that there exists no evidence that Declarant Respondents breached fiduciary obligations and that Petitioners' claims are barred by the Business Judgment Rule and South Carolina Nonprofit Corporation Act. Declarant Respondents also note that Petitioners have not sought rehearing or petitioned for a writ of certiorari on the issue of Petitioners' Unfair Trade Practices Claims which the Court of Appeal correctly held are prohibited. Based on the foregoing, the Court of Appeals Unpublished Opinion correctly affirmed the Circuit Court's Orders granting summary judgment in favor of Respondents. As such, Declarant Respondents respectfully request that Petitioners' Petition for Writ of Certiorari be denied.

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