THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Stephanie P. McDonald, Circuit Court Judge

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SC Court of Appeals

Case No. 2010-CP-10-10490

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

Respondents,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC,

Appellants.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ... iii

ARGUMENT ... 1

I. INTRODUCTION. ... 1

II. RESPONDENTS CANNOT PURSUE THIS ACTION AS A DERIVATIVE ACTION. ... 2

III. RESPONDENTS HAD NOTICE OF POTENTIAL CLAIMS AGAINST APPELLANTS AND FAILED TO PURSUE THOSE CLAIMS WITHIN THE STATUTE OF LIMITATIONS. ... 5

1. A trial court has no discretion to commit an error of law. ... 6

2. Respondents do not dispute that they knew, or should have known, of a potential claim regarding the ownership of Lot CV-6 nearly a decade before Walbeck filed suit. ... 7

3. Respondents' arguments do not demonstrate that Appellants did not have notice prior to December 22, 2007. ... 8

i. The Impact Assessment, the DHEC-ORCM application, and the Army Corps of Engineers Notice. ... 9

ii. Marketing materials. ... 12

iii. 2008-2009 Email Communications. ... 12

4. Appellants' argument regarding the recording of the 2000 Recreational Easement is preserved for appellate review. ... 14

IV. APPELLANTS PRESERVED FOR REVIEW THE SIGNIFICANT TRIAL ISSUES OF THE VALIDITY AND PERPETUITY OF THE 2000 RECREATIONAL EASEMENT AND AGREEMENT TO SHARE COSTS. ... 14

V. A DEVELOPER HAS A FIDUCIARY DUTY TO BRING ABOUT A VIABLE HOMEOWNERS ASSOCIATION AND ANY FURTHER FIDUCIARY OBLIGATION IS TRIGGERED ONLY IF THE

DEVELOPER CONVEYS COMMON AREAS TO THE ASSOCIATION. 16

1. The circumstances in which a developer owes a fiduciary duty to a homeowners association are not at issue here. 16

2. The theoretical suggestion of control over the Assembly creates no fiduciary duty here. 17

3. The argument that what Respondents contend is a fiduciary duty is only a contractual obligation is preserved for appellate review. 19

VI. THE TRIAL COURT ERRED IN RULING THAT APPELLANTS WERE AMALGAMATED WITHOUT ANY CONSIDERATION OF THE *STURKIE* FACTORS OR ANY EQUITABLE FINDINGS COMPELLING SUCH A RESULT. 19

VII. WALBECK'S CLAIM FOR VIOLATION OF THE INTERSTATE LAND SALES ACT FAILS FOR LACK OF RELIANCE ON APPELLANTS' STATEMENTS. 21

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Bayle v. S. Carolina Dep't of Transp.,
344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). 7

Burwell v. South Carolina Nat'l Bank,
288 S.C. 34, 340 S.E.2d 786 (1986). 16-17

Carolina First Corp. v. Whittle,
343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). 2, 3

Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.,
349 S.C. 251, 562 S.E.2d 633 (2002). 16, 17

Cullen v. McNeal,
390 S.C. 470, 702 S.E.2d 378 (2010). 4

Drury Dev. Corp. v. Found. Ins. Co.,
380 S.C. 97, 668 S.E.2d 798 (2008). 20

Flexon v. PHC-Jasper, Inc.,
413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015). 6

Gibbes v. Rose Hill Plantation Dev. Co.,
794 F. Supp. 1327 (D.S.C. 1992). 21

Gibson v. Bank of Am., N.A.,
383 S.C. 399, 680 S.E.2d 778 (Ct. App. 2009). 6

Goddard v. Fairways Dev. Gen. P'ship,
310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993). 4, 16-18

Hill v. S.C. Dep't of Health and Env. Control,
389 S.C. 1, 698 S.E.2d 612 (2010). 19

Kelly v. Logan, Jolley, & Smith, L.L.P.,
383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009). 6

Malloy v. Thompson,
409 S.C. 557, 762 S.E.2d 690 (2014). 14, 15

Nat'l Loan & Exch. Bank v. New York Life Ins. Co.,
149 S.C. 378, 147 S.E. 322 (1929). 17

Regions Bank v. Schmauch,
354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003)..16

Stokes-Craven Holding Corp. v. Robinson,
No. 2013-001452, 2015 WL 5247124 (S.C. Sept. 9, 2015). 7

Sturkie v. Sifly,
280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984). 20

Statutes

S.C. Code § 33-3-102..20

S.C. Code § 33-3-200. 20

S.C. Code § 33-6-220(b). 20

S.C. Code § 33-7-400. 4

Rules

Rule 23(b), SCRCP. 2, 3, 5

ARGUMENT

I. INTRODUCTION.

Respondents fail to justify the substantial legal errors committed by the trial court. Respondents' claims should never have reached a jury—not as derivative claims or otherwise—because Respondents cannot demonstrate a demand on the Assembly nor the futility of such demand. Respondents make no substantive argument to discredit the myriad of reasons the statute of limitations began to run as early as 2001, 2003, or 2005 and, thus, expired years before any claims were brought. Respondents fail to offer any guideposts for the Court to follow in the trial court's disregard for the carefully constructed boundaries of a developer's fiduciary duty.

The term "Amenity Property"[1] was contrived by Respondents to deflect attention from their overreaching and the fact that they cannot point to anything in the Record that demonstrates that the Assembly was entitled to receive Lot CV-6, Lot CV-5, Lot 275, and all boating facilities as part of the 1998 Property Report's promise to convey a "Community Dock" and a "Creekside Park."[2] Further, to lend any credence to Respondents' contention that Appellants repeatedly promised to convey the "Amenity Property," this Court would also have to decide that the term

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[1] *See* Resp. Br. at 5. This term is used at least sixty times throughout Respondents' Brief. For example, Respondents claim the Property Report "clearly" provided that the "Amenity Property" would be conveyed to the Assembly and email communications exchanged in 2008-09 regarding the conveyance of a "community dock" are now "clear" references to "Amenity Property." (Resp. Br. at 11, 13.)

[2] Of course, the property included in Respondents' claim for "Amenity Property" has expanded over time. (Tr. 877:13-878:11; 879:10-880:5; *compare* Tr. 425:15-426:13; 454:3-455:1; 458:11-459:5; 460:1-7 *with* Jan. 13, 2014 Hear. 25:24-26:16; July 24, 2014 Hear. 12:1-13:7; Tr. 871:19-24.)

"access" actually means "ownership." For all these reasons, this Court should reverse.

II. RESPONDENTS CANNOT PURSUE THIS ACTION AS A DERIVATIVE ACTION.

Respondents make scant effort to justify the trial court's finding that their pleading and maintenance of a derivative action was proper. Rather, they would have this Court defer completely to the trial court's cursory examination of the derivative demand, futility, and adequacy issues. Such acquiescence is directly contrary to this Court's holding in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 401, 411 (Ct. App. 2000), that "[b]ecause of the important policies behind this rule, the demand requirement of [Rule 23] *should be rigorously enforced.*" *Id.* (emphasis added.)[3]

As a preliminary matter, Respondents *admitted at trial that they misrepresented facts in their verified complaints* regarding other residents' reliance on the 1998 Property Report. (Tr. 447:8-452:16; 545:13-546:8; 547:6-14.) Respondents made these misrepresentations in their pleadings in an effort to establish derivative standing and sneak around early challenges that their claims were barred by the statute of limitations. This Court should not countenance such a practice.

Respondents make no effort whatsoever to contest Appellants' argument that their only "demand" which even comes close to meeting the requirements of Rule 23, the so-called "Adkins Demand," was no demand at all because it did not request any relief from the Assembly, but merely a legal opinion from the Board's counsel. (App.

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[3] Respondents' effort to cite *Carolina First* for the proposition that a trial court has discretionary authority to excuse demand when it determines of its own volition that sufficient facts of "futility" are pled is self-evidently incorrect. (Resp. Br. at 31.)

Init. Br. at 23.) Rather, they take refuge in the trial court's conclusory finding that "demands were repeatedly made upon the Assembly." (Resp. Br. at 32.) At no stage have either Respondents or the trial court given specifics regarding any such demand which meets the requirements of Rule 23.

Respondents likewise misconstrue this Court's holding in *Carolina First* with respect to futility of demand, by contending that a trial court's determination regarding futility is subject to abuse of discretion review in all cases. In *Carolina First*, this Court held that the trial court's finding that the plaintiff shareholders had *failed* to allege facts establishing demand futility was subject to abuse of discretion review. *Id.* at 192, 539 S.E.2d at 411. The Court makes clear that the trial court's discretion to *find* futility only exists where *sufficient facts are pled and verified* to establish futility. *Id.* The holding of *Carolina First* is clear that "the demand requirement of [Rule 23] should be rigorously enforced." *Id.* In other words, this Court is to rigorously review the findings necessary to establish futility. Only after such facts are established does the trial court have discretion to find futility. Respondents would have this Court take the trial court's conclusory finding that sufficient facts were pled and verified to establish futility at face value without examining that conclusion—directly contrary to the holding of *Carolina First*.

The trial court summarily concluded that Appellants retained control over the Assembly's actions, and that such control made demand futile. They urge a purely theoretical definition of control under which Appellants' veto power—which has never been exercised, and which the Assembly Board president testified has never affected any decision the Board made—was nonetheless sufficient to render demand

futile. (Tr. 867:9-25; 868:5-9; 910:17-911:5; 990:23-991:3.) To consider a developer's purported "control" to have such significant legal ramifications for years of action or inaction by a homeowners association, however, there must be consideration of the actual effect or application of such "control," not merely a notion with meaning only in the abstract. *See Goddard v. Fairways Development General P'ship*, 310 S.C. 408, 413-14, 426 S.E.2d 828, 832 (Ct. App. 1993) (finding no fiduciary obligation because developer failed to exercise its theoretically superior voting strength). There simply is no evidence to support Respondents' position that the veto provision affected the Assembly or its Board and imposed developer control over their actions.

Respondents' contention that Appellants do not raise any errors regarding the adequacy of the derivative plaintiffs' representation is false. (App. Init. Br. 26-28.) Respondents do, however, make one substantive assertion in their argument regarding derivative standing: that because the Assembly was a plaintiff by the time of trial, all defects are somehow magically cured. They ask the Court to ignore the vital practical consideration that prompted the Assembly to settle and support their position: concern that the Assembly would be responsible for the substantial legal fees of derivative Respondents' counsel, which were estimated at $1,070,550 in counsel's post-trial motion for fees. *See* S.C. Code § 33-7-400 cmt. ("The right of successful plaintiffs in derivative suits to [attorneys' fees from the entity] is so universally recognized . . . that specific reference was thought to be unnecessary."); *Cullen v. McNeal*, 390 S.C. 470, 491, 702 S.E.2d 378, 389 (2010) (citing official comment to section 33-7-400 as source of successful derivative plaintiff's right to recover fees

from the entity). Rule 23 is meant to provide the Board the opportunity for sober analysis of the Assembly's competing interests. Here, the trial court's repeated failures to enforce the derivative demand requirement coercively influenced the Board's decision-making on the eve of the first trial, when a settlement was reached among the other parties. That settlement dictated that the Assembly Board support Respondents, and limited what Respondents' counsel could seek from the Assembly for fees. In the settlement agreement, the Board took on obligations which many members had opposed for years because of liability and maintenance concerns. (Tr. 645:4-25; 882:2-12.)

The Assembly's decision to support the derivative claims was not driven by a sudden *volte-face* realization that its members had a common interest; rather, it was driven by the practicalities of the present litigation—allowing the derivative Respondents' "tail" to wag the Assembly "dog." The enabling error was the trial court's refusal to "rigorously enforce" the derivative demand requirements. In this way, Respondents have yet again been permitted to pervert the operation of the Assembly regarding what should have been the Assembly's own decision, all because of the trial court's failure to enforce the sound policy of strict derivative pleading requirements of Rule 23.

This Court should therefore reverse the trial court's failure to dismiss Respondents' derivative claims.

III. RESPONDENTS HAD NOTICE OF POTENTIAL CLAIMS AGAINST APPELLANTS AND FAILED TO PURSUE THOSE CLAIMS WITHIN THE STATUTE OF LIMITATIONS.

The statute of limitations expired prior to the commencement of this litigation. Although Respondents would like this Court to disregard a basic principle of our

jurisprudence, "[s]tatutes of limitations are not simply technicalities." *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). Respondents mischaracterize the appropriate standard of review, cite only to evidence that is irrelevant to the question of when they discovered their claims, and offer no explanation as to how the litany of evidence in the Record is insufficient to have provided notice of a potential claim prior to December 22, 2007. (*See* App. Init. Br. at 28-36.) This Court should reverse and enter judgment in favor of Appellants.[4]

1. <u>A trial court has no discretion to commit an error of law.</u>

Respondents improperly describe the standard of review. Under no circumstances does a trial court have discretion to commit an error of law. As to legal errors, "a reviewing court is free to decide questions of law with no particular deference to the trial court." *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 569-70, 776 S.E.2d 397, 402 (Ct. App. 2015), *reh'g denied* (Sept. 16, 2015). This Court's role is not to simply conclude its review upon finding "one piece of evidence" that may support the trial court's rulings. (Resp. Br. at 27, 30.) *See Gibson v. Bank of America, N.A.*, 383 S.C. 399, 407, 680 S.E.2d 778, 783 (Ct. App. 2009) (holding the trial court committed legal error in denying motion for JNOV when there was only one reasonable inference as to when plaintiffs knew or should have known of their claims).

[4] Appellants do not challenge the application of the twenty-year limitations period to Walbeck's individual claim for breach of contract.

2. Respondents do not dispute that they knew, or should have known, of a potential claim regarding the ownership of Lot CV-6 nearly a decade before Walbeck filed suit.

The discovery rule does not permit a party to wait until there is "absolute certain[ty]" that a claim exists. *Bayle v. S. Carolina Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001). Proper consideration of what constitutes notice of a potential claim is not concerned with the most recent event or even the most obvious event. The question of when the statute of limitations begins to run is focused *only* on when a reasonable person would have known a claim "might" exist. *Stokes-Craven Holding Corp. v. Robinson*, No. 2013-001452, 2015 WL 5247124, at *4 (S.C. Sept. 9, 2015).

The Record is replete with evidence that would have led a person of common knowledge and experience to take some action to investigate or inquire further. Respondents do not dispute any of this evidence. Respondents neither address nor explain: (1) a reason that the 2001 conveyance of the Marshwalk and two community docks did not make them aware of a potential discrepancy with their interpretation of the promises contained in the 1998 Property Report; (2) why they failed to inquire further when Vince Graham told the Assembly Board in February of 2004 that the I'On Club owned the dock at the Creek Club; (3) any reason this Court should ignore the fact that Respondents obtained legal advice in 2004 regarding the terms of the 2000 Recreational Easement—a document making abundantly clear the Assembly does not and will not own Lot CV-6—and yet failed to investigate further; (4) how the Board could prepare and Respondents could receive annual budgets in 2004, 2005, 2006 and 2007 that listed budgeted payments to the I'On Club to use the docks and rent the Creek Club and still not understand they might have a claim; and (5) that

they did not understand Appellants' offer to sell Lot CV-6 to the Assembly in April of 2007 was an indication that the property would not be given to the Assembly for free.[5]

Appellants do not dispute that the sale of the subject property on August 5, 2009 was *an* event that provided notice that the Assembly would not receive the "Amenity Property" for free. However, the Record demonstrates that many events occurred prior to December 22, 2007 which indicate that Appellants did not intend to convey "Amenity Property" to the Assembly at no cost. Even when viewed in the light most favorable to Respondents, the 2009 sale was only the most recent in a series of events—spanning nearly a decade—that would have prompted a reasonable person to inquire further about the ownership of Lot CV-6 and provided noticed that a claim regarding the ownership of this property might exist. Respondents failed to take action prior to the expiration of the limitations period.

3. Respondents' arguments do not demonstrate that Appellants did not have notice prior to December 22, 2007.

Instead of supplying the Court with an analysis as to the reason the evidence cited by Appellants did *not* constitute notice, Respondents contend they "presented evidence that they had assurances that the Amenity Property would be conveyed to the Assembly and they relied upon those promises, until August 5, 2009, when they discovered the Amenity Property had been sold." (Resp. Br. at 36.) Even a cursory review of such evidence demonstrates that Appellants never promised to convey this "Amenity Property" to Respondents.

[5] For a full discussion of the events that provided Respondents with notice more than three years prior to the commencement of this action, please see Appellants' Initial Brief at 29-33.

In a strained attempt to distract the Court from this reality, Respondents cite to evidence that: (1) pre-dates the Property Report, (2) was prepared as part of the rezoning process, (3) refers only to Appellants' vision of providing I'On homeowners with "access" to recreational facilities, (4) is a communication regarding a transfer of an additional community dock after the limitations period expired, and (5) is entirely irrelevant to the question of when the limitations period was triggered.

Conveniently, Respondents would like this Court to misconstrue the terms "access," "no private docks" and references to amenities being "enjoyed by all" as binding promises by Appellants to convey the "Amenity Property" to the Assembly. On the other hand, Respondents would like the Court to ignore the vast number of events, express statements, and other occurrences that arose beginning in 2001 as insufficient to inform Respondents they might not own this property and ought to conduct further inquiry.

i. *The Impact Assessment, the DHEC-OCRM application, and the Army Corps of Engineers Notice.*

Respondents primarily rely upon the 1997 Impact Assessment. (Pl. Ex. 3.) Respondents mischaracterize this document and would like this Court to see it as something it is not. The only purpose of the Impact Assessment was to state and describe the environmental impact the proposed development would have on the surrounding areas.[6] (Tr. 673:13-675:2, Pl. Ex. 3 at 3-5.) Appellants prepared the

[6] To say that the Impact Assessment "had the effect of law" is misleading. (Resp. Br. at 6.) The Town of Mount Pleasant incorporated the document into the ordinance approving the application to rezone the property as a statement of the scope of the development's impact on the environment. It is the 1998 Property Report, and only this document, that creates the obligation to convey any amenities to the Assembly. (Def. Ex. 22 at 21-22.)

Impact Assessment as part of their submission to the Town of Mount Pleasant in efforts to rezone the property that sought to develop as I'On. (Tr. 674:16-675:2.)

The Impact Assessment does not contain promises or assurances that any property will be owned by the Assembly. (Tr. 671:25-673:4.) The Impact Assessment and other documents prepared in the planning phase of the I'On development[7] do not create legal obligations to transfer real property. Rather, this document describes Appellants' plan of developing a community that provided homeowners with access to recreational facilities, including the marshfront and waterfront:

> Rather than divide up this premium frontage among relatively few private lots, the developers believe that the value of the neighborhood as a whole is significantly enhanced if all residents have **access** to these amenities.

(Pl. Ex. 3 at 5 (emphasis added).)

> There will be no private docks in the neighborhood.[[8]] Instead, I'On residents will be able to use seven community docks which

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[7] Respondents cite to other documents created during the planning phase of I'On and prior to the commencement of development, including a 1999 DHEC application, and a public notice filed with the Army Corps of Engineers in 1999. Similar to the Impact Assessment, these documents only reference "providing community access" and "community docks" and do not suggest that the Assembly will own any particular property. (Pl. Exs. 6, 37, 86.)

[8] The Impact Assessment also states: "All parks, docks and other community facilities will be administered by the property owners association **and private clubs.** (Pl. Ex. 3 at 7 (emphasis added); *see also* Def. Ex. 22 at 23.) Appellants did not want I'On to have a few private docks built by individual homeowners. Instead, Appellants envisioned that I'On residents would have access to community docks and amenities. (Tr. 575:5-15; 742:7-25.)

> will provide **access** to the marsh and waters of Hobcaw Creek
> for fishing and boating.

(Pl. Ex. 3 at 6 (emphasis added).)

Respondents insist these statements prove Appellants promised to convey ownership of "Amenity Property" to the Assembly. Access does not mean ownership. As Vince Graham explained, providing an amenity for the community to enjoy does not mean the amenity is intended to be *owned* by the community. (Tr. 856:14-16.) Appellants' goal of providing I'On homeowners with access to recreational facilities has materialized handsomely—I'On homeowners enjoy linear parks that line the perimeters of 98% of the lakes, marshes and waters of the Hobcaw Creek in I'On. (Tr. 717:21-718:6.)

Respondents also contend that they relied on the Impact Assessment and other similar permitting materials in persisting with their understanding that Appellants would convey "Amenity Property" to the Assembly. This contradicts the facts and misconstrues the applicable law. Respondents admittedly did not rely on these documents. (Def. Ex. 32; Tr. 442:24-443:3; 538:22-540:7.) Further, Walbeck's purchase contract expressly incorporated the 1998 Property Report and also contained a merger clause that provided that he entered into his contract "without reliance on any warranties, statements or representations, either written or oral, express or implied, by Seller, or by an agent of Seller . . . ." (Pl. Ex. 2 at 3-4.)

ii. *Marketing materials.*

The undated marketing brochures cited by Respondents do not state that any amenities will be owned by the Assembly. (Pl. Exs. 31, 32, 41, 48, 51 and 77.) For example, the "I'On Ponsbury Plan" describes the recreational facilities as follows:

> RECREATIONAL FACILITIES
> The I'ON Club will offer swimming, tennis, and the use of the Shelmore Creek Club. Membership is optional. Playgrounds, marshfront paths, community docks, and a boat ramp along Hobcaw Creek will also be available to I'ON residents upon completion.

(Pl. Ex. 32 at 2.)

Another brochure provides this description:

> RECREATIONAL FACILITIES
> The I'On Club offers swimming, tennis, fitness, and the use of the Creek Club. Memberships are optional and are available to non-residents. Playgrounds, ball fields, marshfront paths, community docks, and a boat ramp along Hobcaw Creek are enjoyed by all and make up about 40% of the total land area in the neighborhood.

(Pl. Ex. 77 at 3.)

These marketing materials are not assurances that the Assembly will be conveyed any "Amenity Property" for free and lend no support to the argument that Respondents did not know, and could not have known, that they might have a claim against Appellants.

iii. 2008 – 2009 Email Communications.

The majority of the email communications cited by Respondents are irrelevant to the analysis of the limitations period because Respondents never received these communications and, thus, could not have relied on them. These emails include

several internal emails exchanged between Tom Graham, Vince Graham, and I'On Company employee, Chad Besenfelder. (Pl. Exs. 180-81, 193, 195, 202, 204, 205, 212, 214-216, 218, 220.) The other emails include exchanges between these individuals and Mike Russo, the eventual purchaser of the Creek Club. (Pl. Ex. 119-137, 139, 140, 154, 223.) It is undisputed that these emails were not seen by Respondents until discovery commenced in this litigation and accordingly could not have induced reliance on any of the representations contained therein. As a result, these communications are irrelevant to the question of when Respondents knew or should have known they might have claims against Appellants.

In late March of 2009, Chad Besenfelder informed the Assembly Board that that the I'On Company was preparing to deed a community dock to the Assembly but that the I'On Club would continue to operate the Creek Club because the potential sale fell through. (Pl. Exs. 58, 196, 217.) This communication only mentions conveyance of a community dock and does not reference any intention on the part of Appellants to convey "Amenity Property." (Pl. Ex. 58.) Significantly, by the time this email was sent, the statute of limitations had long since expired—almost eight years had passed since the Marshwalk and two community docks were conveyed the Assembly, approximately four years had passed since Vince Graham reminded the Assembly that the I'On Club owned the Creek Club dock and the Assembly received legal advice regarding the terms of the 2000 Easement, and, by this time, Respondents had received at least five proposed Assembly budgets with line items for renting the Creek Club and maintaining the community docks. (App. Init. Br. at 29-33.)

4. Appellants' argument regarding the recording of the 2000 Recreational Easement is preserved for appellate review.

The issue of whether Respondents had constructive notice of the existence of the 2000 Recreational Easement is preserved for this Court's review. (Resp. Br. at 28). The rules of issue preservation require that an issue be raised to and ruled upon by the trial judge in order to preserve it for appellate review. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.").

Appellants presented evidence that the Recreational Easement was recorded (Def. Ex. 27 at 1; Def. Ex. 139), raised the issue of whether evidence of constructive notice had been presented at trial (Tr. 1064:3-1065:5), and the trial court ruled on the issue. (JNOV Order at 23-24). The issue is preserved for the Court's review.

IV. APPELLANTS PRESERVED FOR REVIEW THE SIGNIFICANT TRIAL ISSUES OF THE VALIDITY AND PERPETUITY OF THE 2000 RECREATIONAL EASEMENT AND AGREEMENT TO SHARE COSTS.

Respondents' contentions regarding the validity and perpetuity of the 2000 Recreational Easement and Agreement to Share Costs are largely inapposite and readily refuted by Appellants' Initial Brief. (App. Init. Br. at 36-41.)

Respondents' argument that Appellants failed to preserve the issue of whether the Recreational Easement is perpetual warrants brief discussion. Respondents contend that Appellants raised this issue in the trial court, but that it was not ruled

on.[9] During the first trial, the trial court denied Appellants' motion for summary judgment on this precise issue. (Def. January 8, 2014 Motion for Summary Judgment; Jan. 2014 Tr. 123:3-131:23.) After the second trial, the trial court ruled that the document was void *ab initio*, and, at that point, the trial court need not have reached issues requiring construction of its terms. Nonetheless, the trial court did also find that Section 4.2 of the Easement limited it to a 30 year term, that an ambiguity therefore existed between this provision and the perpetual language, and that Section 4.2 superseded the perpetual language. (Easement Order at 3, 6.) This is precisely the holding Appellants seek to reverse on appeal. The trial court therefore did rule on the perpetuity of the Easement, and the issue is preserved for review. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014).

The validity and perpetuity of the easement were significant issues for both sides at trial. Both parties asked the trial court via cross-motions to rule on the easement issues on directed verdict before submitting the case to the jury, and both motions were denied. (Tr. 1035:11-1037:11.) In closing argument, Respondents' counsel made reference after reference to the invalidity and 30-year term of the Easement. (Tr. 1114:18; 1115:12; 1116:1-4; 1128:1-1129:8; 1135:8-11; 1137:9-13.) If the Easement had been determined to be valid and perpetual, this would have significantly affected Respondents' measure of damages. (App. Init. Br. at 39.) This Court should therefore hold that the Easement was valid and perpetual as a matter of law and remand for a new trial based on that ruling.

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[9] On May 12, 2014, Appellants filed a separate suit against Respondents seeking a declaration that the Easement was perpetual. (Complaint – DJ Action.) The trial court consolidated that action with the present action. (June 20, 2014 Order.)

V. A DEVELOPER HAS A FIDUCIARY DUTY TO BRING ABOUT A VIABLE HOMEOWNERS ASSOCIATION AND ANY FURTHER FIDUCIARY OBLIGATION IS TRIGGERED ONLY IF THE DEVELOPER CONVEYS COMMON AREAS TO THE ASSOCIATION.

The fiduciary duty a developer may owe a homeowners association was not triggered by the facts of this case. Respondents suggest that Appellants' concession of any scenario in which a developer owes a fiduciary duty to a homeowners association necessarily means Appellants' arguments fail. Respondents' semantic argument misses the point entirely. The trial court erred in pronouncing that "a developer in control of an association may not make decisions which benefit its own interest at the expense of the association and its members." (JNOV Order at 28.) This Court should reverse.

1. The circumstances in which a developer owes a fiduciary duty to a homeowners association are not at issue here.

Respondents' argument can easily be summarized: "[a] fiduciary is a fiduciary." (Resp. Br. at 45.) This tautology inaccurately depicts this Court's decision in *Goddard v. Fairways Development General Partnership*[10] and the Supreme Court's decision in *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corporation.*[11]

In keeping with the limited recognition of a developer fiduciary duty, our courts have also applied this analysis to the relationship between a bank and a customer. If a bank undertakes to advise a customer as part of its services, the bank may be held to a fiduciary duty in the provision of such advice. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Burwell v. South*

[10] 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993).
[11] 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002).

Carolina Nat'l Bank, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Nat'l Loan & Exch. Bank v. New York Life Ins. Co.*, 149 S.C. 378, 147 S.E. 322, 323 (1929). Outside of that limited and specific circumstance, a bank and a customer have an arm's length creditor-debtor relationship that is not fiduciary in nature. This limited duty, even after it has been triggered, has not been held to mean that the bank can no longer raise fees it charges the customer for checking services or that the bank must provide loans on terms that are in the best interest of that customer. Even once a bank takes on a fiduciary role with respect to providing investment advice, the bank is not always a fiduciary.

Here, Appellants satisfied all fiduciary duties South Carolina has held a developer owes to a homeowners association. Appellants satisfied their fiduciary duty as a promoter of the Assembly in bringing about a self-governing, sophisticated homeowners association that had available reserves totaling $1.3 million by 2014. (Def. Ex. 139; Tr. 872:3-8; 867:9-25; 868:5-9; 910:17-911:5; 990:23-991:3.) There was never any contention that Appellants conveyed amenities to the Assembly in a state of disrepair or at a time when the Assembly did not have the financial resources to maintain them. Outside of these two specific contexts, a developer is not in a fiduciary relationship with a homeowners association. *Goddard*, 310 S.C. at 415, 426 S.E.2d at 832 (discussing the developer's duty as a promoter of the homeowners association); *Concerned Dunes West*, 349 S.C. at 257, 562 S.E.2d at 637 (discussing the developer's duty to convey amenities in good repair).

2. <u>The theoretical suggestion of control over the Assembly creates no fiduciary duty here.</u>

Even assuming South Carolina embraced the trial court's recognition of a broad fiduciary duty, no evidence demonstrates that Appellants actually exercised any control over the Assembly that would justify imposition of some constant, boundless fiduciary duty. By December of 2003, the Assembly Board was comprised of a majority of I'On homeowners with no association with the I'On Company. (Tr. 355:20-21; Def. Ex. 107.) No developer-appointed directors served on the Assembly Board after December of 2005.[12] (Tr. 355:22-356:8; Def. Ex. 121.) The Assembly's Finance Committee, which had primary responsibility for creating and circulating the Assembly's budget each year, never contained any developer appointees. (Tr. 749:6-17; Def. Ex. 107.)

No evidence in the Record establishes that Appellants "continued to maintain influence and control of the day-to-day operations of the Assembly" after control of the Assembly was transferred to the I'On homeowners. (Resp. Br. 5-6.) Appellants have never exercised any of the limited veto rights the developer retained pursuant to I'On's covenants. (Tr. 205:9-15; 356:18-23.) *See Goddard*, 310 S.C. at 413, 426 S.E.2d at 832 (rejecting the argument that a developer had a fiduciary duty based on its control over the homeowners' association board because the developer refrained from exercising such control). Further, Deborah Bedell, the President of the Assembly Board, did not believe that Appellants controlled the Assembly Board.[13]

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[12] Both the trial court and Respondents conclude that the Assembly Board was "turned over" to the I'On homeowners in December of 2005. (JNOV Order at 13; Resp. Br. at 5).

[13] Respondents cite the 2014 appointment of Chad Besenfelder to the Assembly Board as evidence of Appellants' exercise of control. Bedell concedes, however, that the Board excludes Besenfelder from participating in Board decisions that would

(Tr. 910:17-911:5.) Bedell further conceded that *no* decision of the Assembly Board has been impacted by Appellants' veto power since her involvement with the Board. (Tr. 990:23-991:3.)

3. The argument that what Respondents contend is a fiduciary duty is only a contractual obligation is preserved for appellate review.

Respondents' suggestion that Appellants failed to preserve the issue of whether Respondents' arguments supported only a contractual theory of liability as opposed to a claim for fiduciary duty is without merit. (Resp. Br. at 28.) Appellants pursued this argument throughout the trial as the trial court continued to consider whether to recognize a fiduciary duty based on the facts presented. (Tr. 599:8-600:9; 627:22-630:29; 1009:23-25; Brief in Support of Motion for Directed Verdict.) Appellants renewed the argument in their JNOV motion. (Def. JNOV Memo at 18.) The trial court ultimately ruled that "by failing to convey the community properties *as promised* to the Assembly, the Developers failed to act in the best interest of the Assembly, and therefore, breached at least one of the fiduciary duties it owed the Assembly." (JNOV Order at 29 (emphasis in original).) This issue was raised to and ruled upon by the trial court. *See Hill v. S.C. Dep't of Health and Env. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court.").

VI. THE TRIAL COURT ERRED IN RULING THAT APPELLANTS WERE AMALGAMATED WITHOUT ANY CONSIDERATION OF THE *STURKIE* FACTORS OR ANY EQUITABLE FINDINGS COMPELLING SUCH A RESULT.

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potentially be adverse to the I'On Company and that Besenfelder has not affected any decisions that relate to dealings with the I'On Company. (Tr. 909:2-15.)

South Carolina corporations have specific statutory rights, including the right organize and limit liability. *See* S.C. Code §§ 33-3-102, 33-3-200, 33-6-220(b). A South Carolina court cannot simply disregard the corporate form without, at the very least, a finding of some unfairness or reliance on misrepresentations concerning the "blurring of identity" to justify stripping parties of the corporate form before a jury. A party's confusion about whether he is dealing with one corporate entity or another, without more, is insufficient to find that corporate entities are amalgamated.

Respondents discuss the close affiliation Appellants had in the development of I'On as support for the trial court's ruling. There is nothing improper about dividing businesses into multiple corporations for the purpose of limiting liability. Regardless of whether I'On was developed by a group of affiliated corporate entities that shared similar names, principals and employees, Respondents failed to demonstrate, and the trial court did not require, any showing that any unfairness would result if Appellants' corporate form was not disregarded.

It is well-established South Carolina law that courts will disregard the corporate form only upon the showing of some equitable justification. *See Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) ("[A] corporation will be looked upon as a legal entity until sufficient reason to the contrary appears."); *see also Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984) (requiring an element of injustice or fundamental unfairness before the corporate form is disregarded). The trial court failed to require the demonstration of any such equitable justification before Appellants were found to be amalgamated. (JNOV Order at 39.) This Court should grant Appellants a new trial.

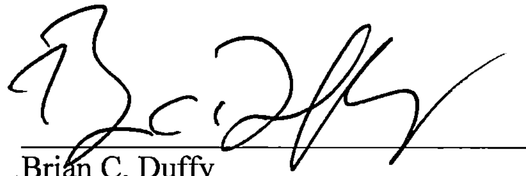
VII. WALBECK'S CLAIM FOR VIOLATION OF THE INTERSTATE LAND SALES ACT FAILS FOR LACK OF RELIANCE ON APPELLANTS' STATEMENTS.

Appellants' Initial Brief argues at some length that the greater weight of authority supports the proposition that the anti-fraud provisions of ILSA require proof of actual reliance, and that the "fraud-on-the-market" theory justifying a presumption of reliance only applies in the securities law context. (App. Init. Br. at 61-63.) Respondents cite a single, twenty-four-year-old federal district court case, *Gibbes v. Rose Hill Plantation Dev't. Co.*, 794 F. Supp. 1327, 1334 (D.S.C. 1992), which Appellants distinguish in their brief, as "prevailing Fourth Circuit precedent" opposing this argument. (Resp. Br. at 62.) This Court should therefore reverse on the ground that actual reliance under ILSA was required for Walbeck to prevail.

Respondents further argue that the trial court found that Walbeck actually relied on Appellants' misrepresentations. Critically, the trial court did *not* make such a finding with respect to the ILSA claim, which calls for a different analysis. The trial court found that Walbeck's common-law negligent misrepresentation claim was supported by actual reliance on certain documents and statements. (JNOV Order at 38-39.) ILSA requires a different analysis, focused on the actual language of the property report, and under that analysis, no actual reliance was shown. (*See* App. Init. Br. at 63-65.) This Court should therefore reverse the trial court and enter judgment for Appellants on Walbeck's ILSA claim.

CONCLUSION

Appellants respectfully pray this Court to reverse the trial court on the matters described herein and enter judgment in their favor.



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February 1, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

The I'On Company, LLC; The I'On Club, LLC; The I'On Group, LLC f/k/a Civitas, LLC; and I'On Realty, LLC,

Appellants.

PROOF OF SERVICE

I, Liane Marcotulli, paralegal for Duffy & Young, LLC, certify that I have served the **REPLY BRIEF OF APPELLANTS** on Respondents by U.S. mail on February 1, 2016 by depositing a copy of it to their attorneys of record as shown below:

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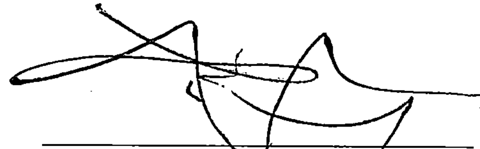

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SC Court of Appeals

February 1, 2016

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: I'On Assembly, Inc., et al. v. The I'On Company, LLC, et al.
Civil Action No.: 2010-CP-10-10490
Appellate Case No.: 2015-001590

Dear Ms. Kitchings:

Enclosed for filing please find one original and one copy of Appellants' Reply Brief and Designation of Matter in the above-referenced appeal, as well as one original and one copy of the Proofs of Service for same.

I would appreciate it if you would please file the original Reply Brief, Designation of Matter, and Proofs of Service and return a file-stamped copy of each document to our office in the enclosed self-addressed stamped envelope. I appreciate your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

Liane Marcotulli
Paralegal

Enclosures
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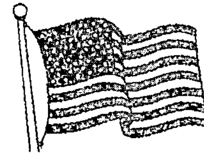

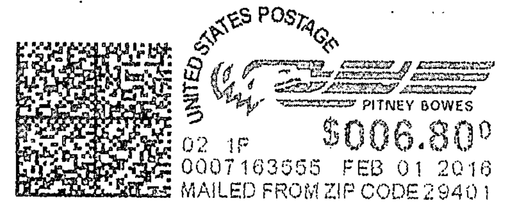

The Honorable **Jenny Abbott Kitchings**
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