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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.

PETITION FOR REHEARING

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Appellants petition this Court for a rehearing of its opinion filed August 8, 2018, pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure. Appellants ask the Court to reconsider the decision to affirm the trial court's order denying JNOV as to the claim for breach of fiduciary duty, amalgamation, failure of Respondents' to maintain a proper derivative action, Appellants' petition for attorney's fees, and Appellants' counterclaim for abuse of process. Appellants also ask the Court to reconsider the decision to affirm the trial court's order declaring the Recreational Easement invalid.

I. THE COURT MISAPPREHENDS THE LAW OF FIDUCIARY DUTY.

Until the Court filed its opinion on August 8, 2018, South Carolina recognized a fiduciary relationship between a developer and a homeowners association in very limited circumstances and only at specific times. While rejecting the trial court's expansion of a developer's fiduciary duty, however, the Court affirmed the trial court through the promulgation of an even broader expansion of the law. Respectfully, this broad expansion of a developer's fiduciary duty is not supported by South Carolina law or the Record. Moreover, while applying this new duty, the Court overlooked or mistook facts demonstrating that the duty did not apply here and that, even if it did, no breach occurred that would support a timely claim or the jury verdict.

- a. The new fiduciary duty promulgated by the Court does not comport with South Carolina law.

Most business relationships are not fiduciary in nature. Rather, the entrustment of money by one party to another has been the hallmark of circumstances where fiduciary obligations have been recognized. *See Hendricks v. Clemson Univ.*, 353 S.C.

449, 459, 578 S.E.2d 711, 716 (2003). "As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a [fiduciary] relationship. The facts and circumstances must indicate that one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party." *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986).

After recognizing that Appellants¹ satisfied the established "promoter-like" fiduciary duty of a developer recognized in *Goddard* and that no transfer of common elements triggered the *Concerned Dunes West* fiduciary duty, the Court determined that Appellants owed a new fiduciary duty—a duty lasting more than a decade after Walbeck's 1999 lot purchase, following transfer of majority control of the Assembly Board by six years and trailing the last developer representative leaving the Board by over three years. The Court announced that this extended fiduciary duty arose for two reasons: 1) "retention of continuing control of the HOA" and 2) "representations in 2008 and 2009 that they would convey the disputed property to the HOA." (Op. at 151.)

As to the element of control, the Court relies exclusively on language in the Covenants providing The I'On Company a limited veto right, a right no Appellant ever utilized. The second element, the alleged broken promises to convey certain property in 2008 and 2009, provides a patently infirm foundation for a new fiduciary duty. In its analysis, the Court first determined that the trial court erred in declaring a fiduciary

¹ The term "Appellants" refers to the I'On entities collectively in light of the trial court's ruling on amalgamation, although only the I'On Company ever owed the Assembly a fiduciary duty. Appellants continue to challenge the ruling on the amalgamation issue. See Section III, *infra*.

duty to convey common property. (Op. at 150.) Then, over the next couple of pages of its opinion, the Court relies on a representation to convey property to give rise to the fiduciary duty. (Op. at 151-53.) Neither of these facts—separately or collectively—creates a fiduciary duty. Moreover, even if these facts create a fiduciary duty to “act in good faith” as the Court has found, the fulfillment of this duty must be evaluated with consideration to the manner in which Appellants *exercised control* and not whether Appellants said something that they did not follow through with about property they owned.

i. The existence of theoretical control over board decisions does not create a fiduciary relationship. Alternatively, if the retention of a limited veto right by a developer creates a fiduciary duty, the duty arises only when the developer exercises the right and only concerning the subject matter over which the developer exercises such control.

The Court opines: “Appellants’ retention of control over the HOA throughout the years . . . created a continuing fiduciary relationship between Appellants and the HOA.” (Op. at 149.) Then, “Appellants retained continuing control of the HOA up to and including the date they conveyed lot CV-6 to Russo.” (Op. at 150.) The sole support for the conclusion of “continuing control” is the existence of a limited veto right that was never exercised. (*Id.*) Appellants’ “control” over the Assembly is only theoretical.

Reliance on *Goddard* is misplaced. The *Goddard* court held that, *if* there was a fiduciary duty associated with the developer’s superior voting rights, the developer’s

restraint from exercising a retained right did not demonstrate a breach.² 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). Though pertinent language from *Goddard* is quoted, the Court ignores the only inference that can fairly be drawn from its holding—there is no breach if the developer exercises restraint rather than control. (Op. at 149.) Certainly, *Goddard* cannot be stretched to support the proposition that some *other* alleged conduct by a developer—unrelated to the retained limited veto right—demonstrates the breach of any fiduciary duty that may arise out of such abstract authority.

If the duty exists as the Court states, it can only be owed when the developer is acting in a matter that exerts control over the homeowners association and, according to South Carolina law to date, only when the developer is exercising control over financial matters or actions that impose financial obligations on the HOA.³ In all other circumstances, the developer is not in a position of confidence or “special relationship.” That is the best and only reconciliation between the Court’s analysis and *Goddard*.⁴

² The *only* conduct that was determined to be a breach of the developer’s fiduciary duty was the failure to satisfy the promoter-like duty to bring about a functioning, funded HOA. *Id.* at 414-15, 426 S.E.2d at 832.

³ See *Goddard*, 310 S.C. at 410-11, 426 S.E.2d at 830 (holding that it is “unfair to the villa owners for the Developer to burden them with substandard or deteriorated common areas that require an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures”); *Concerned Dunes West*, 349 S.C. at 257, 562 S.E.2d at 637 (holding that failure to turn over common areas in good repair “subjects the developer to liability for bringing the common areas up to standard”).

⁴ It is also in keeping with the manner in which our courts have categorized the relationship between a bank and a customer. If and when a bank undertakes the duty to advise a customer, the bank owes the customer a fiduciary duty in the provision of that advice. This fiduciary duty does not expand to encompass the bank’s checking or lending services simply because the bank is a fiduciary in the context of advising a customer. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct.

Moreover, the suggestion of an all-encompassing fiduciary duty would prove catastrophic for the industry. In any event, a developer taking action concerning an issue over which it exercised voting control are not the facts before this Court.

Here, the exertion of any control would have required not simply voting with superior strength but actually taking control away from the Assembly—which for years had managed its own operations and budget near or over \$1,000,000. (R. pp. 3616-3674; 1308:3-8; 1304:5-9; 1346:17-1347:5; 1426:23-1427:3.) As described below, the Record belies that conclusion. In addition, neither the newly-created duty nor the Court’s analysis of breach addresses the entrustment of money or the imposition of a financial burden on a homeowners association, which have characterized the limited developer fiduciary duty and in fact South Carolina law of fiduciary duty generally. *Goddard*, 310 S.C. at 410-11, 426 S.E.2d at 830; *Concerned Dunes West*, 349 S.C. at 257, 562 S.E.2d at 637.

The finding that Appellants retained “control” over the Assembly overlooks facts in the Record about which there is no dispute. By the end of 2003, I’On homeowners held a majority of the seats on the Assembly Board. (R. pp. 1184:13-25; 791:20-21; 3429-3431.) Moreover, Respondents concede and the trial court found that control of the Assembly was turned over to the I’On homeowners by December of 2005. (R. pp. 33; 791:20-792:8; 3429-3431, 3475-3477; Resp. Br. at 6.) Further, the very allegations of the Complaint that the Court cites bely the finding of continuing control:

App. 2003); *Burwell v. South 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); *see also* Ap. Reply Br. at 16.

72. Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of the I'On community amenities and *their former capacity controlling the Board of [the HOA]*.

(Op. at 139 (emphasis added).)

The Court's suggestion of control resulting from unused language in the lengthy Covenants was demonstrably false in practice. The Record fails to support the conclusion that Appellants ever contemplated, threatened or suggested exercising the limited rights contained in I'On's Covenants. To the contrary, the Record demonstrates that those rights were never exercised. (R. pp. 641:9-15; 792:18-23; 3472-3474; 1303:9-25; 1304:5-9; 1346:17-1347:5; 1426:23-1427:3.) As the Court acknowledges, even when the I'On Company placed Chad Besenfelder on the Board in 2014, the Assembly in fact excluded him from participating in certain decisions. (Op. at 150, n. 13.) The I'On Company not only exercised no control over the Assembly, it could not even participate in Board discussions and votes when the Assembly decided against it. (R. p. 1345:2-15.)

ii. A party's representations about real property it owns may support some causes of action, but they do not create an independent fiduciary duty.

The second source of the Court's new fiduciary duty are Appellants' representations that they intended to convey the Creek Club dock to the Assembly. (Op. at 151-52.) That holding is inconsistent with the rest of the Court's analysis. The Court properly clarified that South Carolina law does not recognize a developer's fiduciary duty to convey common areas to an HOA. (Op. at 150.) The Court also "do[es] not view the failure to honor the contractual commitment allegedly created by the 1998 Property Report as a violation of Appellants' promoter-like fiduciary duty."

(Op. at 148.) Then, however, the Court cites representations to convey common areas as a source of a fiduciary duty.

The problems with the Court's analysis are threefold. First, the Court states that there is not a fiduciary duty to convey common areas to an HOA but then determines representations to do so create a fiduciary duty. Second, the Court mistakenly generalizes the representations in 2008 and 2009 regarding the conveyance of property as addressing all of "the disputed property" while the "assurances" pertain only to the dock at CV-6 and the boat ramp.⁵ (Op. at 152.) Third, the Court's repeated statement that I'On homeowners were entitled to "exclusive" or "unfettered" access to the Creek Club amenities does not square with the Record. (Op. at 146, 151, 152.) The Recreational Easement makes clear that such promises were not made to the Assembly.

The Court should reverse the trial court on the breach of fiduciary duty claim and vacate the judgment.

- b. The Court's review of the Record to demonstrate evidence of a breach of fiduciary duty confirms that the statute of limitations bars the claim.

Even if the Court does not rehear Appellants on the creation of a new fiduciary duty, the Court must acknowledge that the statute of limitations bars the claim—even under the Court's own framework. Whatever the source of the Assembly's rights to unfettered use and enjoyment of common areas which the Court presumes the Appellants were required to preserve (and which Appellants dispute), any claim relating to the failure to preserve such rights is time-barred. The Court cites "two occasions" that the new duty was breached: 1) the agreement with Olde Park, a

⁵ See also Section I.c, *infra*.

neighboring development, during the early phases of the development of each community; and 2) the sale of Lot CV-6. (Op. at 151-52.) Neither can support a timely claim.

The Assembly had notice of Olde Park's rights to access the Creek Club amenities in 2005, nearly seven years before the derivative action was filed. The February 9, 2000 Recreational Easement and Agreement to Share Costs—which the Court acknowledges was believed by all parties to be valid—was clear that I'On homeowners would be provided “access” to the Creek Club docks and facilities along with other I'On Club members. The I'On Club's membership includes individuals who are not members of the Assembly. (R. pp. 3131-3145.) Furthermore, the March 23, 2005 Meeting Minutes of the Assembly Board state: “LeGrand Elebash stated that Olde Park bought rights to the boat ramp and docks at the Creek Club in the very beginning.” (R. p. 3457.) The August 22, 2007 Meeting Minutes note: “Chad Besenfelder advised that the boating ramp is open to all residents (members and non-members of the I'On Club) of the Assembly. The boating ramp is also open to any Olde Park resident that is a member of the I'On Club.” (R. p. 3513.) The Record simply does not support the Court's conclusion that the sale of access rights to the Creek Club amenities to Olde Park in 1998 was “unknown” to the I'On homeowners. (Op. at 152.)

In addition, the Court cites the sale of Lot CV-6 as somehow affecting the rights the Assembly had in the Recreational Easement. It did not. As the Court acknowledged, the conveyance to Russo was expressly subject to the Recreational Easement. (Op. at 131.) The I'On Club operated the Creek Club and boating facilities.

It has always been a private club.⁶ It always operated the Creek Club as a rental business, starting as early as 2001 when its certificate of occupancy was issued. (R. p. 3190.) The Assembly had the same rights then as it did following the conveyance in 2009.

The Court also discusses “assurances” the Appellants gave the HOA about conveying the dock at issue and boat ramp portion of the “disputed property.” To the extent the Court relies on these assurances as evidence of a breach of duty (as opposed to the creation of a duty which the Court also suggests), that begs the question of what duty was breached. As discussed above, the Court determined there is no duty to convey common areas. Moreover, if there were such a duty, the Court’s analysis in reversing the trial court’s rulings on the statute of limitations as to the negligent misrepresentation and ILSA claims is equally applicable to the representations made in 2007-2009. (Op. at 140, 151-53.) The Court determined that the proposed 2005 budget including a “Creek Club Dock usage fee” “should have alerted Walbeck to the fact that the HOA did not have title to the Community Dock.” (Op. at 137, 140.) The Court further explained, “there were no conflicts in the testimony or other evidence as to when Walbeck should have known Respondents might have a claim against Appellants for the representation in the 1998 Property Report.” (Op. at 138.) Moreover, for that same reason and many others of record, the Assembly itself certainly was aware that it did not own the property.

⁶ The 1998 Property Report informed lot purchasers that there may be private clubs in l’On owned and operated by persons other than the Assembly. (R. p. 3024.)

In 2008 and 2009, the Assembly learned that Russo agreed to purchase lots CV-5 and CV-6. (Op. at 140.) This follows several years of discussion by the Assembly about purchasing this property itself. The Assembly had long been on notice that they did not own this property and that Appellants would not convey it to them for free. (Ap. Br. at 28-34.)

As the Court discussed, a party ““must act with some promptness [when] the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party *might* exist.”” (Op. at 134 (quoting *Dean v. Ruscon Corp.*, 321 S.C. 360-363-64, 468 S.E.2d 645, 647 (1996)). Not only does the Record demonstrate the Court’s factual mistake, it also demonstrates that any claim for breach of the new fiduciary duty the Court promulgated arose from these facts was time-barred.

The Court, therefore, should reverse the trial court on the breach of fiduciary duty claim and vacate the judgment.

- c. In the alternative, the Court should reverse and remand the claim for breach of fiduciary duty for a new trial.

The Court determined that the trial court erred in denying Appellants’ JNOV motion because “[c]urrent South Carolina case law does not recognize the precise duty to convey title to all common areas” (Op. at 150.) Even if the Court declines to reconsider its decision as to the existence of a new fiduciary duty, the implications of this ruling require a new trial on this cause of action. The trial court instructed the jury:

The plaintiffs have asserted a claim for breach of fiduciary duty. A developer of a planned unit development owes fiduciary duties to both the property owners association, as well as the individual homeowners. The developer's fiduciary duties **include the duties to hand over common elements, which the developer has**

represented as a part of the planned development, in good condition, or with the funds to effectuate any needed repairs; and to act in the best interests of property owners while controlling the development's property owners association.

Whenever a fiduciary relationship exist between two parties, **and a business transaction occurs between them**, and the superior party obtains an advantage or a possible benefit, a presumption arises against the transactions validity, and shifts the burden of proving the good faith nature of said transaction upon the superior party.

Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. When this duty to disclose is triggered, a party's silence may constitute fraud.

Furthermore, a fiduciary relationship is one of mutual trust and confidences, imposing upon the party the requirements of loyalty, good faith, and fair dealing. One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relationship.

In a breach of fiduciary duty case, the **Plaintiff is entitled to damages for harm by the breach of fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty, are those proximately resulting from the wrongful conduct of the defendant.**

(R. pp. 1699-1701 (emphases added).)⁷

The trial court instructed that a fiduciary duty exists to hand over common elements and that a plaintiff is entitled to recover damages for breach of that duty. As discussed above, the Court determined that this duty does not exist and that submitting such a claim to the jury was an error of law. The resulting verdict of \$1,750,000 following this erroneous charge on the law is fundamentally flawed.

The jury was never instructed on the new fiduciary duty and was never given the opportunity to apply the new duty to facts presented at trial. The Court wishes this

⁷ This charge was challenged in Appellants' JNOV motion. (R. pp. 1937-38.)

fundamental flaw away. In its effort to affirm based on its newly pronounced duty, the Court mistakenly generalizes the representations in 2008 and 2009 regarding the conveyance of property as addressing all of “the disputed property,” though they pertain only to the dock at CV-6 and the boat ramp. The Court cites no representations related to most of the “disputed property,” such as the Creek Club, Lot CV-6, or Lot CV-5 because none were made. (Op. at 152.) Even under the Court’s framework, logic dictates that a fiduciary duty could only be owed with respect to the dock. Thus, even accepting this new duty, the duty and any damages resulting therefrom are drastically different from what was presented to the jury under what the court determined was a clear error of law.

As an alternative to outright reversal on the claim of breach of fiduciary duty, the Court should remand this issue for a new trial.

II. THE COURT OVERLOOKS THE PURPOSE OF RULE 23(b)(1) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

The Court’s opinion sets a dangerous precedent that will undermine the purpose of Rule 23(b)(1) and the jurisprudence demanding strict compliance with the rule. *See Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (“A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCF is properly dismissed”)⁸ Rather than holding Respondents and the trial

⁸ In footnote 8, the Court determines that *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d, 402 (Ct. App. 2000) is not binding precedent because the parties to the case settled after the supreme court granted certiorari. (Op. at 143, n. 8.) However, since that time, both the supreme court and this Court have treated *Whittle* as binding in analysis of Rule 23(b)’s pleading requirements. *See Clearwater Tr.*, 367.S.C. at 351, 626 S.E.2d at 339. Further, the Court recently relied on and discussed *Whittle* at length in *Patterson v. Witter*, 418 S.C. 66, 80-85, 791 S.E.2d 294, 300-05 (Ct. App. 2016) (affirming trial court’s motion to dismiss derivative claim because plaintiffs failed to

court accountable for the failures to adhere to the demand and pleading requirements of Rule 23(b)(1), despite Appellants' persistent challenges throughout the litigation, this Court now encourages a "wait-and-see" approach: wait and see what years of litigation show as to whether the claims being brought in a derivative capacity are proper. (Op. at 144.) With this ruling, why would a trial court grant a motion to dismiss or for summary judgment based on plain failures to meet the derivative requirements? Instead, the Court encourages unrestrained use of derivative actions by minority shareholders. Accordingly, the Court's conclusion that judicial economy is served by evaluating a futility argument after trial is misguided or at least shortsighted.

In analyzing the futility of demand here, the Court relies on the facts of *Grant v. Gosnell*, 266 S.C. 372, 375-77, 223 S.E.2d 413, 414-25 (1976). Those facts are very different from the facts of this case. Unlike in *Grant*, no I'On representative was chairman of the Assembly board of directors—or even on the board—at the time litigation commenced. Unlike in *Grant*, Appellants were not controlling stockholders and did not have a majority financial interest in the Assembly. Because of the presence of these factors, the *Grant* court determined that the defendant actually possessed and exercised control of the board of directors, such that demand would have been futile.

The Court's application of the law to the Record is flawed. The Court ignores the failure of Walbeck and Adkins to adhere to the pleading requirements of Rule 23. (Ap. Br. at 23-25.) Neither Adkins nor Walbeck made a demand on the Assembly. (R. pp. 3152-3153; R. 2234-2235; 985:19-986:3; 1307:11-24.) The pleading of futility of

allege sufficient particularized facts to demonstrate a demand on board of directors.). The Court should reconsider the application of *Whittle's* analysis here.

demand is insufficient. Moreover, even considering the evidence the Court uses in the wait-and-see approach, the only evidence that suggests futility of making a demand on the Board is the discredited testimony of a witness who was not on the Board at the time the litigation was commenced. (R. pp. 1425:14-1427:3.) The Court overlooked significant evidence in the Record of the Assembly's consideration of whether it wanted to own the Creek Club docks and facilities. (R. pp. 1081:4-25; 1301:8-1302:13; 1318:2-12; 3490-3544.)

Instead, the Court finds comfort in the fact that the Assembly ultimately was realigned as a party-plaintiff. (Op. at 146.) The Court ignores that the Assembly's settlement with a former defendant required the Assembly to support Respondents going forward at trial. (R. p. 2971.) With the success that Respondents had achieved at that time, the Assembly on the eve of the first trial was faced with an obligation to pay all of Plaintiff's legal fees and costs for the litigation. *See* S.C. Code Ann. § 33-7-400, *cmt.* I; *Cullen v. McNeal*, 390 S.C. 470, 491, 702 S.E.2d 378, 389 (Ct. App. 2010). Instead, the Assembly entered an agreement to support the Plaintiff's claims in the lawsuit. Appellants learned of this forced re-alignment during the first trial, which prompted a mistrial. Only then did Appellants insist that the Assembly be realigned as a plaintiff. (R. pp. 16-17.)

Accordingly, instead of considering the Assembly's sober evaluation with the advice of counsel not to bring claims for years before suit was filed and for several years during litigation, the Court adopts the wait-and-see approach and relies on facts and litigation dynamics that arose far after a derivative action was first alleged. This approach simply usurps the Board's right to make litigation decisions for the Assembly.

See Patterson, 418 S.C. at 80, 791 S.E.2d at 303 (“In South Carolina, the authority to direct the business and affairs of a corporation is delegated to a board of directions, not the shareholders” (citing *Whittle*, 343, S.C. at 185, 539 S.E.2d at 407.)).

The Court misapprehended the requirements of Rule 23(b) and overlooked ample evidence in the Record that demonstrates that there is no factual basis to affirm the trial court’s order. The Court should rehear this issue.

III. THE COURT MISAPPREHENDS THE SINGLE BUSINESS ENTERPRISE THEORY.

Appellants request that the Court rehear the issue of amalgamation in light of the supreme court’s recent decision in *Pertius v. Front Roe Restaurants, Inc.*, where the case law addressing the amalgamation doctrine was clarified:

the single business enterprise theory requires a showing of more than the various entities' operations are intertwined. Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice **resulting from** the blurring of the entities' legal distinctions.

Op. No. 2783 S.C. Sup. Ct. filed July 5, 2018 (Shearhouse Adv. Sh. No. 27 at 22) (emphasis added).

The Court ignores the requirement of a relationship between the two elements before multiple defendants are properly amalgamated for the jury’s consideration. It is not enough to demonstrate blurred legal distinctions and wrongdoing. Rather, the wrongdoing has to actually result from the intertwined corporate entities. *Id.* The Court does not—and cannot—point to evidence in the Record that supports the

conclusion that the allegations against the Respondents arose out of any blurring of the individual defendants' legal distinctions.

The Court states “[i]n particular, there was evidence of Appellants’ common employees, principals, and activities as well as the confusion displayed by those who dealt with Appellants as to which entity they were dealing with.” (Op. at 154.) Whatever casual confusion may have existed, the primary issue in this case is that the Respondents believe they were supposed to own certain property and that it was not conveyed to them. At no point did any I’On entity claim to be incapable of conveying any property because another entity owned it. There was never any trickery by and amongst the I’On entities to hide the actions of an individual defendant. It was never material to Respondents’ claims which I’On entity owned the property. It was always clear that the I’On Company was the developer and that the I’On Club owned the Creek Club property. The Court did not—and cannot—point to any evidence in the Record demonstrating that any alleged wrongdoing arose out of confusion about which I’On representative worked for a particular I’On entity.

The prejudice to Appellants at trial cannot be overstated and highlights the precise concern *Pertius* remedies. Respondents never had to satisfy their burden of demonstrating that each of the four individual I’On entities named as defendants actually did anything wrong. Moreover, the trial court’s instructing the jury to disregard the corporate form suggests wrongdoing and that Appellants should be held liable. The Court should rehear this issue; Appellants are entitled to a new trial.

IV. THE TWO-ISSUE RULE DOES NOT APPLY TO APPELLANTS' CHALLENGE TO THE TRIAL COURT'S RULINGS AS TO THE RECREATIONAL EASEMENT.

The Court's application of the two-issue rule is misplaced. The trial court's order makes a brief reference to a "lack of an arms-length Easement transaction" and lists it as a reason the Recreational Easement is invalid and void. (R. pp. 75-78.) The Court is correct that Appellants did not separately and expressly argue the trial court's reference to the "arms-length transaction" in its briefing. However, this should not be considered an "additional ground" for the purposes of the two-issue rule because it is simply a reiteration of the trial court's other reasons for declaring the Recreational Easement invalid—all of which were appealed. (Ap. Br. at 36-41.)

The Court goes on to state that the Recreational Easement is invalid because it was not the result of an arms-length transaction. (Op. at 141-42.) Whether the Recreational Easement transaction was arms-length does not matter to the issues in this case. The trial court included the arms-length issue as a factor in its analysis; it would make no sense to read the trial court's otherwise. Thousands of transfers of property among family members and business partners occur every year which are not arms-length deals. In almost all cases, our courts only require that some consideration actually be given in exchange for the transfer to be valid. *Albertson v. Robinson*, 371 S.C. 311, 316, 638 S.E.2d 81, 83 (Ct. App. 2006) ("South Carolina courts have held that . . . conveyances may be set aside under two conditions: first, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without valuable consideration.); *Hemingway v. Small*, 284 S.C. 42, 46, 324 S.E.2d

335, 338 (Ct. App. 1984) ("Inadequate consideration is not ground for rescission of a deed unless it is so palpably disproportionate to the real and market value of the property as to constitute an unconscionable contract.") (internal quotations omitted).

Appellants addressed the trial court's equitable concerns about the execution of the Recreational Easement at length in Appellants' discussion of the after-acquired title doctrine. (Ap. Br. at 37-39.) Appellants also highlighted the long history of all parties operating pursuant to the terms of the Recreational Easement—regardless of how and when it was originally executed. (*Id.*) The Court should rehear this issue and consider the merits of Appellants' arguments.

V. THE COURT OVERLOOKED THE PLAIN LANGUAGE OF ADKINS' LOT PURCHASE AGREEMENT IN DENYING APPELLANTS' REQUEST FOR ATTORNEY'S FEES.

The Court ignores the language of the fee-shifting provision in Adkins' Lot Purchase Agreement. It was an abuse of discretion for the trial court to deny the Appellants' petition for attorney's fees and cost and the Court should rehear this issue.

In affirming, the Court focuses analysis on *all* claims brought by *all* parties. (Op. at 155-56.) This overlooks the instructive language of the Fees and Costs provision in Adkins' Lot Purchase Agreement: 1) limiting consideration of who is a "prevailing party" to the party who won a claim to "enforce obligations under the [Lot Purchase] Agreement" and 2) providing that fees and costs "*shall* be due from the non-prevailing party." (R. p. 3119 (emphasis added).) The fee-shifting provision before the Court is plainly limited to one type of claim, breach of contract, and Appellants prevailed. (R. p. 1857.) As a result, payment of reasonable attorney's fees and costs are mandatory.

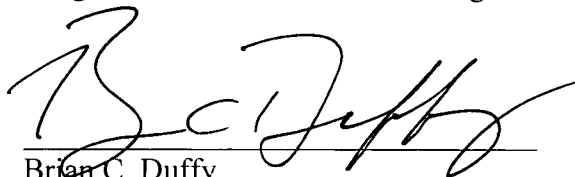
It is unnecessary for the Court to borrow the definition of “prevailing party” from a case analyzing a statutory provision for attorney’s fees. After misplacing its focus on a singular, inapplicable case, the Court entirely ignores Appellants’ discussion of case law that makes clear that it is an abuse of trial court’s discretion to deny attorney’s fees pursuant to a contract. (Ap. Br. at 51-53.) There is also no requirement in Adkins’ Purchase Contract that Appellants state that Adkins’ claim “required any significant increase in the efforts of counsel to defend the case.” (Op. at 156.) The Court references failure to include the affidavit filed in support of Appellants’ petition for fees in the Record. However, the petition states plainly the amount of fees and costs sought. (R. pp. 1910-1911.) The Court should rehear this issue.

VI. THE COURT OVERLOOKED EVIDENCE OF AN IMPROPER PURPOSE IN AFFIRMING THE TRIAL COURT’S DIRECTED VERDICT ON THE ABUSE OF PROCESS COUNTERCLAIM.

With no discussion, the Court affirmed the directed verdict on Appellants’ counterclaim for abuse of process citing cases addressing the improper purpose element of this cause of action. (Op. at 140-41.) Appellants satisfied their burden of putting forth evidence that would permit a reasonable jury to conclude Respondents abused legal process. *See McBride v. Sch. Dist. of Greenville Cnty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) (reversing directed verdict as to abuse of process claim when more than reasonable inference can be drawn from evidence). The Court should grant rehearing on this issue. Appellants are entitled to have a jury decide this claim.

CONCLUSION

Appellants request that the Court grant this Petition for Rehearing.

A handwritten signature in black ink, appearing to read "B. C. Duffy", written over a horizontal line.

Brian C. Duffy
Julie L. Moore
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044
Attorneys for Appellants

August 22, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

Brad J. Walbeck and Lea Ann Adkins, 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, Pamela Jones, Paralegal for Duffy & Young, LLC, certify that I have served the
PETITION FOR REHEARING on Respondents on August 22, 2018 by U.S. mail to their
attorneys of record as shown below:

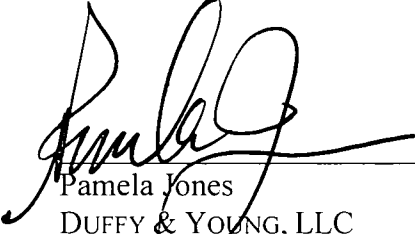
Justin O. Lucey, Esq.
Joshua F. Evans, Esq.
415 Mill Street
PO Box 806
Mount Pleasant, SC 29465
Phone: 843-849-8400

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

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August 22, 2018
Charleston, South Carolina

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ATTORNEYS AT LAW

August 22, 2018

VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
Clerk of the Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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SC Court of Appeals

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

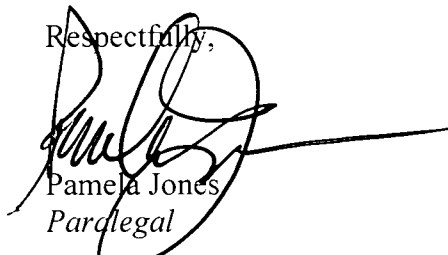
Dear Ms. Kitchings:

Enclosed for filing please find one original and seven copies of the Petition for Rehearing and the \$25.00 filing fee in the above-referenced matter. Also, enclosed for filing is the original and one copy of the Proof of Service.

Please file the originals and return a file-stamped copy of the Petition for Rehearing and Proof of Service 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,



Pamela Jones
Paralegal

Enclosures

cc: Justin O. Lucey, Esq. (*via U.S. mail*)
Joshua F. Evans, Esq. (*via U.S. mail*)
Timothy W. Bouch, Esq. (*via U.S. mail*)
Yancey A. McLeod, III, Esq. (*via U.S. mail*)

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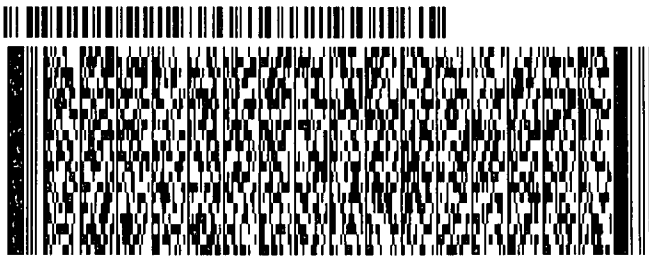
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TO HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF APPELLATE COURT
1220 SENATE ST.

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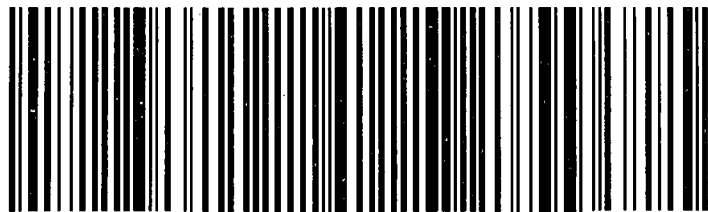
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SC Court of Appeals

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