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, individually and derivatively on behalf of I'On Assembly, Inc., and 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.

RESPONDENTS' PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure ("SCACR"), Respondents[1] respectfully file this Petition for Rehearing of this Court's decision filed August 8, 2018 (Opinion No. 5588) ("Opinion").

Respondents seek a rehearing because this Court overlooked and misapprehended points of law and fact in partially affirming and reversing the decision of the Circuit Court.

QUESTIONS TO REHEAR

1. Whether Walbeck's negligent misrepresentation and ILSA[2] claims ("Walbeck claims") are barred by the statute of limitations;

2. Whether the Circuit Court properly denied Appellants'[3] JNOV Motion as to Walbeck's claims because there are various inferences as to when Walbeck discovered these claims;

3. Whether Walbeck's receipt of the HOA's proposed budgets put him on notice that the HOA owned the Creekside Park and the Community Dock;

4. Whether Walbeck's claims accrued later than 2004 "upon the completion of" Phase II;

5. Whether there is evidence that developers misrepresented or concealed information relating to the conveyance of the Creekside Park and Community Dock between 1999-2009;

6. Whether developers are estopped from relying upon the statute of limitations;

7. Whether Walbeck's breach of contract award should be reinstated or otherwise considered on remand assuming this Court concludes Walbeck's other claims are barred;

8. Whether Walbeck is entitled to the attorney's fees awarded;

9. Whether developers owed a fiduciary duty to convey title to common property to the HOA; and

10. Whether Walbeck's negligent misrepresentation claim was equitably tolled.

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[1] The "Respondents" are: Brad Walbeck ("Walbeck"), Lee Ann Adkins ("Adkins"), and the I'On Assembly, Inc. ("HOA").

[2] "ILSA" refers to the Interstate Land Sales Full Disclosure Act, 42 U.S.C. §§1701-1720 (2010).

[3] The "Appellants" or "developers" are: 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.

STANDARD OF REVIEW

Rule 221, SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.,* 168 S.C. 163, 167 S.E.2d 234 (1933). "The purpose of such a petition is to aid the court in deciding correctly a case heard by it" and a properly drawn rehearing petition must state "the points. . .overlooked or misapprehended by the court." *Id.* at 172-73; *Kennedy v. S.C. Retirement System,* 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

ARGUMENT

I. This Court Erred in Reversing the Denial of Developers' JNOV Motion as to Walbeck's Claims Based Upon the Statute of Limitations

This Court's decision to reverse the denial of JNOV as to Walbeck's claims is erroneous because this Court judged evidentiary implications in this "convoluted case". (Opinion p. 126).[4] There is a question as to when Walbeck discovered his claims and multiple answers to this question can be inferred from the record. This Court overlooked these multiple inferences; and, the one discovery inference this Court drew from two pieces of evidence is in doubt when compared to the other evidence and testimony presented.

Because this Court missed these conflicting inferences, it committed a larger error in applying the wrong standard of review and deciding "when Walbeck's claims accrued" as a matter of law. Appellate courts cannot make this "legal" determination when, like here, "the evidence

[4] Not only did this Court err in misjudging evidentiary implications, this Court erred in relying on allegations asserted in a complaint as opposed to evidence adduced at trial. *See, e.g., Moore v. Columbia,* 284 S.C. 278, 281, 326 S.E.2d 157, 159 (Ct. App. 1985) ("In South Carolina, the complaint is sufficient if it informs the defendant of the ultimate facts supporting each element of the cause of action; there is no necessity that the complaint state all the evidence to be presented upon the trial of the case. A litigant is required to plead ultimate facts, the facts which evidence upon trial will prove, not the evidence necessary to prove these facts.") (emphasis added).

yields more than one inference or its inference is in doubt." *See Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) ("The trial court must deny [JNOV] when the evidence yields more than one inference or its inference is in doubt."); *see also Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) ("When considering [JNOV], neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.") (citations and internal quotations omitted).

Thus, the preliminary question before this Court was not "when Walbeck's claims accrued;" rather, the questions were whether there are multiple inferences as to when Walbeck's claims accrued or whether the inference as to when Walbeck's claims accrued is in doubt. *Id.* In answering these questions, it doesn't matter which inference is right or wrong – that's outside this Court's function – all that matters is the existence of multiple inferences or doubt. Here, we have both which means the Circuit Court was right in denying JNOV as to Walbeck's claims and this Court was wrong in reversing this denial.

A. This Court Erred in Finding Only One Inference Exists as to When Walbeck Discovered his Claims

This Court erred in concluding the only inference that can be drawn from the evidence is that Walbeck should have discovered his claims by "early November 2004" when he received a proposed budget listing a cost paid by the HOA for the "Creek Club Dock". (Opinion, p. 139).[5] Here's why:

1. More Than One Inference Can be Drawn Between the HOA's Proposed 2005 Budget and the 1998 Property Report

[5] This assumes the "Creek Club Dock" is the equivalent of the "Community Dock". This assumption was heavily contested by developers throughout both trials of this case.

Comparing the HOA's proposed budget to the Property Report results in at least two reasonable inferences: either (1) the HOA owned the Creek Club Dock; or, (2) the HOA did not own the Creek Club Dock. *Compare* (R. p. 3022) *with* (R. p. 3325).

On one hand, the Property Report provides that the recreational facilities listed shall be conveyed to the HOA at no cost to its members. (Opinion p. 139); (R. p. 3022). Relying upon this provision, this Court concluded because a dock "cost" was listed in the HOA's proposed budget the "only" inference is Walbeck "should have known that the HOA did not have title to the Community Dock" upon his receipt of this budget in November 2004. (Opinion p. 137).

On the other hand, however, the Property Report provides that once conveyed to the HOA, "the HOA shall assume full responsibility for the costs of ownership, operation and maintenance of the facilities conveyed." (R. p. 3022). This Court ignored this provision which, read with the same proposed budget, infers the opposite – because a dock "cost" was listed in the budget, the HOA did have title to this dock.

Thus, this evidence reasonably infers two different things. The HOA is budgeting for the Creek Club Dock because either the Dock was conveyed to the HOA or the Dock was not yet conveyed. Of these two inferences, the one favoring Walbeck is that the Dock was conveyed to the HOA and that's the reason for the dock cost listed in the HOA's budget. This is the controlling inference. *Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 (Courts are required to view the evidence and inferences reasonably drawn "in the light most favorable to the party opposing the motions.").

Applying this inference, Walbeck's claims did not accrue upon his receipt of the proposed budget because it appeared from the budget that the HOA owned the Dock. Because it appeared the HOA owned the Dock, it appeared the representation made in Walbeck's Property Report to convey the Dock had been fulfilled which means there was no claim for Walbeck to discover and

no reason for Walbeck to exercise any due diligence. The fact this Court inferred the opposite based upon the same evidence establishes that "the question of when these claims accrued" was properly submitted to the jury. (Opinion, pp. 134, 137) (finding Walbeck's claim accrued when he received the proposed budget indicating "the HOA did not own" the Dock).

2. More Than One Inference Can be Drawn from the "Upon Completion of Construction" Language Contained in the 1998 Property Report

The Property Report's "upon completion of construction" language also results in multiple inferences as to when the Community Dock and Creekside Park were to be built and conveyed. As noted by this Court:

> [The 1998 Property Report] included a chart listing recreational facilities to be built during the first two phases of the development. Among the facilities to be built in Phase II was a "Creekside Park" and "Community Dock". Under this listing was the following language:
>
> The recreational facilities in the chart above, shall upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to [the HOA] or its members. Upon conveyance of these facilities to the [HOA] it shall assume full responsibility for the costs of ownership, operation and maintenance of the facilities conveyed to it.

(Opinion p. 127) (emphasis added).

Walbeck testified that there was confusion as to what constituted "upon completion of construction," which means there is conflicting testimony that warrants the denial of JNOV:

> Q: And what was your understanding as to the Creekside Park and [C]ommunity [D]ock listed in this chart?
>
> A: They were to be conveyed in phase II. My lot was in phase II, and these amenities were also in phase II, Creekside Park [and] [C]ommunity [D]ock.

(R. p. 963:11-15) (emphasis added).

> Q: Now, what's your understanding of the obligation in the Property Report, what does the completion of construction reference mean to you? Is that

when -- those facilities are complete, or does it mean when the builders finish building everything in I'On?

A: It could be either one.

(R. p. 978:24-979:5) (emphasis added); *see also* (R. p. 880:3-16) (Lea Ann Adkins similarly testified that there was confusion as to what the Property Report meant in terms of "upon completion of construction").

The other testimony and evidence presented confirms (a) there was confusion as to what Phases were being completed when; and, (b) it was still the developers' intent to convey the Community Dock to the HOA in 2006-2009.

For example, Vince Graham admitted that he was uncertain as to when construction of each I'On Phase was completed, and which recreational facilities were contained in these phases:

Q: [Tell] us what [is being deeded] and from whom.

A: The [2000 deed to the Marshwalk] is deeding property to some of -- this is we deeded a bunch of common area that -- at that time, and phase I and phase II wraps into phase III, which confusingly was built before phase II – phase III was built before phase II -- but this is - - I think, it's -- this is the introduction to all the properties that were conveyed by the I'On Company to ultimately, the I'On Assembly.

(R. p. 1130:14-25) (emphasis added); *see also* (R. p. 3480) (April 26, 2006 HOA meeting minutes noting the developers were still improving the Marshwalk); (R. p. 3559) (January 15, 2009 HOA meeting minutes noting the developers were "working on deeding over the [M]arshwalk docks and marsh area to the [HOA].").

Additionally, LeGrand Elebash – the last developer-appointed Board member – indicated to the HOA that the developers were still in the process of "complet[ing] the turnover for phases 1-7" in 2006. (R. pp. 3475-3576) (December 7, 2005 Meeting Minutes).

Tom Graham also testified that it was still the developers' intent to turnover the Dock to the HOA at this time:

> Q: And [this July 18, 2006 email] still illustrates that your company, as of 2006, intended to turn over the boat ramp, correct?
>
> A: Well, that's what this indicates, but it's -- that e-mail.

(R. p. 698:16-20) (emphasis added); *see also* (R. p. 2922-24) (July 18, 2006 e-mail); (Opinion p. 140) (finding the Grahams promised to convey the Community Dock to the HOA in 2009).

Considering the oft-repeated confusion as to when Phase II was completed, and which facilities were conveyed in this Phase or at the end of "construction", the Court erred in overlooking that multiple inferences could be drawn as to when the Creekside Park and Community Dock would be "owned" by the HOA. Because this Court overlooked the existence of these inferences, the Court further erred in finding that Walbeck's claims accrued by November 2004, years prior to the completion of I'On's Phase II. (Opinion p. 137).

B. The Singular Inference this Court Drew is in Doubt

Not only are there multiple inferences as to when Walbeck's "Creekside Park" claim accrued, the inference that Walbeck's "Community Dock" claim accrued upon Walbeck's receipt of the HOA's proposed budget is in doubt for other reasons.

First, it is doubtful that the HOA's 2005 proposed budget "alerted" Walbeck that there was anything amiss just because it included the word "usage" as it relates to the $4,044 dock fee. (R. p. 3325). Notably, the HOA's proposed budgets preceding this budget included a "dock maintenance" fee for this same amount. (R. p. 3301) (HOA 2004 proposed budget listing $4,044 dock maintenance fee); (R. p. 3285) (HOA 2003 proposed budget listing $4,044 dock maintenance fee).

Any homeowner who "glanced" at these budgets could have easily assumed that the words "usage" and "maintenance" were interchangeable. In fact, that's what this evidence infers considering that the 2005 proposed budget described the 2004 proposed budget as containing a "usage" fee of $4,044 when, in reality, it was a "dock maintenance" fee of $4,044. *Compare* (R. p. 3332) (2005 proposed budget describing 2004 proposed budget) *with* (R. p. 3301) (listing "dock maintenance" fee of $4,044). Clearly, an ambiguity exists and this is important. The developers, who were in control of the HOA at this time, drafted these budgets which means this ambiguity must be construed against them and in favor of Walbeck. *Chan v. Thompson*, 302 S.C. 285, 290, 395 S.E.2d 731, 734 (Ct. App. 1990) (any ambiguity will be construed against author of the documents). Construed properly in favor in Walbeck, the "usage" fee is a "maintenance" fee. This did not alert Walbeck that the representations in his Property Report were false because the Report expressly provides the HOA is to pay for, among other things, dock maintenance. (R. p. 3022-3023). Regardless, the fact that an ambiguity exists means there is doubt as to what this evidence infers.

Second, it is doubtful that Walbeck knew of any dock usage fee prior to the August 5, 2009 sale of the Creek Club. When asked whether he knew that the HOA was paying usage fee, Walbeck responded: "I have since leaned that, hence the sale". (R. p. 543:14-19).

Third, it is doubtful as to how Walbeck "should have known" that the HOA did not own the Creekside Park and Community Dock because there is conflicting evidence and testimony as to "what" made up these facilities. The primary reason this case was tried before a jury was due to the fact that the developers "vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park". (Opinion p. 128) (emphasis added).

The developers testified that by the "Creekside Park" they meant a "Marshwalk" and by "Community Dock" they meant "Crabbing Docks", all of which were conveyed to the HOA in 2000. (R. p. 1130:5-25). In other words, the developers affirmatively represented that they fulfilled the representation made to Walbeck in his Property Report when they deeded the "Marshwalk" and these "crabbing docks" to the HOA in 2000. Walbeck did not know of an Amended Property report at this time.[6]

Walbeck's testimony at trial as to what "made up" the Creekside Park and Community Dock was also conflicting:

> Q: Was [civic lot six], or a map or anything in your Property Report that shows you Creekside Park as civic lot six?
>
> A: No, but it mentions Creekside Park [and] [C]ommunity [D]ock.
>
> Q: [Y]ou don't know, yourself, whether the staging dock, and the boat ramp, and the parking lot by Creek Club, is part of the [C]ommunity Dock proposed, or the Creekside Park promised; is that right?
>
> A: It's one big parcel.
>
> Q: So, really, they are the same things that are being promised, the [C]ommunity [D]ock and the Creekside Park?
>
> A: No, there are two separate things listed in the Property Report and my contract.
>
> Q: [Do] you believe the boat ramp is part of the Creekside Park, or is it part of the [C]ommunity [D]ock; and you told me you don't know.
>
> A: I believe it could be either.

(R. p. 977:20-978:15); *see also* (R. p. 435) (Lee Ann Adkins testifying that she also "never heard of CV-6" being referenced as the "Creekside Park").

[6] Prior to Walbeck's closing, the developers decided to amend the Property Report to substitute the foregoing designations; yet, they never informed Walbeck of this decision or the Amended Property Report in any of the three letters they sent him before and after he closed on his lot. (R. p. 966:1-967:14).

Fourth, it is doubtful as to when Walbeck "should have known" that the HOA did not own the Creekside Park and Community Dock because there is conflicting evidence and testimony as to this point as well. According to Walbeck, he believed the HOA "owned" the Creekside Park up and until 2009:

> Q: During the first few years you were in the neighborhood, what was your understanding as to the ownership of the Creekside Park and [C]ommunity Dock?
>
> A: Nothing had changed, that my Property Report was accurate. The homeowners were to own the Creekside Park and Community Dock just as promised.
>
> Q: When, if ever, did your understanding change?
>
> A: March 2009.
>
> Q: What happened in 2009?
>
> A: The [HOA] called a meeting, because there was a lot of talk about the Creek Club being sold. And I couldn't fathom how something that we own [could] be sold. . .
>
> ***
>
> Q: One big civic lot, right. Now you mentioned you didn't know until 2009, where you contend the [C]ommunity [D]ock and Creekside Park are; that those weren't going to be conveyed to [the HOA].
>
> A: That is correct.

(R. pp. 960:5-17; 978:18-23) (emphasis added).[7]

Further, the HOA's proposed budget mentions only the "Creek Club Dock", not the "Creekside Park", and the HOA's 2005 proposed budget did not mention a "Creek Club Rental

[7] According to this Court, the first time "HOA members" learned of a "purchase agreement for CV-6" was November 2008, only a few months prior to March 2009. (Opinion p. 140).

Fee" as suggested by Developers. (R. pp. 3332, 3441).[8] Assuming this budget did mention such a fee, there's still multiple inferences which can be drawn as to who "owned" the land upon which the Creek Club was built.

In sum, the evidence "reasonably" infers that Walbeck did not know that CV-6 was not going to be conveyed to the HOA until this lot was sold for profit to a third-party on August 5, 2009. It's doubtful that one proposed budget which references a dock "maintenance fee", does not reference either the "Creekside Park" or CV-6, and which was only perhaps "glanced" at and possibly not even adopted, alerted Walbeck that the HOA did not, or would not eventually, own CV-6. As such, the question of when Walbeck's "Creekside Park" claim accrued was properly submitted to the jury. (R. p. 1724:2-8).

These factual and legal errors regarding Walbeck's "Community Dock" claim must be corrected and the Circuit Court's denial of JNOV should be reinstated.

II. Developers are Equitably Estopped from Relying Upon the Statute of Limitations as to Walbeck's Negligent Misrepresentation and ILSA Claims

Assuming this Court had the authority to determine Walbeck's claims accrued by November 2004, the Court incorrectly decided that equitable estoppel was unavailing because it applied the wrong standard. (Opinion p. 138) (finding equitable estoppel "unavailing" because there were no developer representations to convey the Dock between 1999 when Walbeck received the Property Report and November 2004 when Walbeck received the HOA proposed budget). A party cannot claim equitable estoppel before a claim has accrued, and this Court determined Walbeck's claims accrued in November 2004.[9] As such, the equitable estoppel question before

[8] Though developers asserted they would amend the budget to add this item, they did not add this to the budget that was ultimately mailed to the homeowners. (R. p. 3332).

[9] Further, Walbeck's negligent misrepresentation claim should be equitably tolled. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) ("Where a statute

this Court is what was represented after November 2004 – not what was represented between 1999 and 2004.[10]

Not only did this Court err as to the timing of equitable estoppel, this Court erred in seemingly indicating that the developers had to make an express promise to convey the Community Dock for equitable estoppel to apply. This is also the wrong standard because the developers' failure to disclose that they were not going to convey the Dock to the HOA after they admittedly made this decision[11] amounts to the concealment of a material fact; and, this concealment satisfies the test for equitable estoppel. *See, e.g., Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 597 (4th Cir. 1976) (Under federal law, a defendant who conceals material facts is estopped from relying upon the statute of limitations as a defense.); *Maher v. Tietex Corp.*, 331 S.C. 371, 382, 500 S.E.2d 204, 210 (1998) *citing Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992) ("Certainly, silence which amounts to misrepresentation or concealment of facts can satisfy the 'conduct' element of the test for equitable estoppel.").[12]

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sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness.'") (internal citations and quotations omitted). As briefed herein, the developers controlled the HOA and concealed material information from the HOA (and Walbeck as a HOA member).

[10] *State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharm.*, 414 S.C. 33, 78, 777 S.E.2d 176, 200 (2015) (finding separate, recurring invasions of the same right can each trigger their own statute of limitations under continuous accrual, which applies whenever there is a continuing obligation or liability arising on a recurring basis, resulting in a cause of action accruing each time a wrongful act occurs, triggering a new limitations period); *see also* Rule 220(c), SCACR (This Court may affirm the Circuit Court's Order for any grounds appearing in the record).

[11] *See* (R. pp. 1201:2-18, 1209:6-17) (Vince Graham admitting that the developers "changed" their mind about conveying the Dock between November 1998 and February 2000).

[12] *See also S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33-34, 426 S.E.2d 748, 750-51 (1993) "Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. ...Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d

Here, there is no doubt developers owed a duty to disclose the truth to Walbeck because there was a fiduciary relationship existing between the two.[13] There is also no doubt that the record contains evidence that the developers concealed the truth before and after 2004 when they owed a duty to speak the truth.

For example, the 2005 Handover Agreement informed the HOA that the developers were going to convey "common areas" to the HOA. The fact that this Agreement does not reference "specific" common areas is a distinction without a difference considering this Court found it is undisputed that all parties considered the Creekside Park and Community Park to be "common areas." (Opinion, p. 151) ("In the present case all parties considered the disputed properties to be common areas..."). Either this amounts to an affirmative representation as to what developers were going to convey (a/k/a common areas including the disputed properties) or a concealment as to what "specific" common areas the developers were going to convey. Either way you cut it, the developers are not being truthful in 2005, less than one year after Walbeck's claims purportedly accrued. Additionally, June and July 2007 emails expressly indicate the developers' "desire to keep ownership of the Community Dock", a fact the developers concealed from Walbeck.

773, 774 (1981) ("The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury."); (Opinion p. 136) (agreeing that the developers owed a duty to truthfully convey all information regarding Walbeck's purchase without material omission) (emphasis added).

[13] *See* (Opinion pp. 147-48, 151-52) (applying a *de novo* standard and finding that a fiduciary relationship existed between the developers and HOA members until at least 2009); *see also Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 587, 527 S.E.2d 371, 379 (Ct. App. 2000) (nondisclosure becomes fraudulent when it is the duty of the party having knowledge of facts to uncover them to another and a duty to disclose arises from a preexisting definite fiduciary relation between the parties, where one party expressly reposes a trust and confidence in the other, or where the very transaction is intrinsically fiduciary, calling for perfect good faith and full disclosure) (internal quotations and citations omitted).

(Opinion, p. 152); *see also* (R. p. 32-33, 43) (Circuit Court citing the 2005 Handover Agreement and emails sent between 2006 and 2009 as evidence supporting its denial of JNOV).

This evidence "reasonably infers" that the only thing Walbeck understood between 2005 and 2007 was that common areas, including the "Community Dock", were to be conveyed to the HOA. The evidence also infers that Walbeck's understanding could not have changed until November 2008 when "HOA members" (including Walbeck) learned of the sale of this Dock to a third-party. (Opinion p. 140) (finding that the "HOA members" learned of a "November 2008 agreement to purchase lots CV-5 and CV-6, including the Community Dock and boat ramp.").[14] The evidence further infers that Walbeck's understanding did not change until August 1, 2009 when the sale of the Dock was finally realized because of the developers' continued mistruths. (Opinion p. 140) (finding the "the HOA's members" learned of a new contract of sale for the Dock from an "I'On Community Bulletin" posted August 1, 2009).

Based upon what the evidence "reasonably inferred", this is exactly what twelve "reasonable" people found – the developers repeatedly misrepresented and concealed their intentions relating to the conveyance of the "Community Dock" during the ten-year period spanning from 1999 to 2009. Again, the existence of this evidence is all that matters and, because this evidence exists, this Court cannot circumvent the Circuit Court's denial of JNOV as to Walbeck's claims.

Moreover, the fact the jury found the developers acted "recklessly, willfully and/or wantonly" means one of two things: the developers intentionally concealed material facts or recklessly disregarded their duty to speak the truth. Either one eliminates Walbeck's burden to

[14] This Court also found that Walbeck's initial Complaint was filed within three years of this date. (Opinion p. 131) (noting Walbeck filed his initial complaint asserting negligent misrepresentation and ILSA claims against the developers on December 22, 2010).

prove: (1) the developers' intent to deceive; (2) his reliance of the developers' representations; and, (3) his due diligence in "discovering" otherwise undiscoverable claims. *Compare* (R. p. 1860) *with* (Opinion p. 134-35) (suggesting Walbeck bore burdens he didn't have to prove).

The Circuit Court was also aware that the developers destroyed evidence when it denied their JNOV Motion. (R. p. 101- 115).[15] In fact, the developers deleted over 50,000 files, 229 of which expressly related to the "disputed property" at issue. *Id.* (finding the developers deleted over 229 files with relevant, material titles such as "Boat Ramp Response1.doc", "Community Dock Operation.doc", "Summary of Boat Ramp.doc" and "The Creekclub Description.doc"). The destruction of this evidence also amounts to concealment which further estops the developers from relying upon the statute of limitations as a defense. *See, e.g., Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990) (noting when evidence is lost or destroyed by a party, an inference may be drawn that the evidence which was lost or destroyed by that party would have been adverse to that party.).

To the extent the foregoing does not prove dispositive as to this issue, the developers also concealed material facts between 1998 and 2004 (before Walbeck's claims purportedly accrued):

- Between 1998 and 1999, the developers engaged in negotiations with the developer of Olde Park, a neighboring subdivision, for the sale of access rights to the Community Dock without informing Walbeck of these negotiations.[16]

- In April 2001, the developers amended the Property Report to remove references to the Creekside Park and Community Dock; but, again, failed to alert Walbeck of this change despite their opportunity to do so in letters sent to Walbeck before and after they decided to make this material alteration.[17]

- In two, separate 2003 HOA annual meetings, one on January 7, 2003 and another on December 3, 2003, the developers provided a "development

[15] *See* (R. p. 103, n. 1) (noting petition filed January 14, 2014).
[16] *See* (Opinion, pp. 151-152).
[17] *See* (R. pp. 966:1-967:14).

update" without mentioning they had amended the Property Report twice and were not intending to convey the Community Dock to the HOA.[18]

- In the proposed budget purportedly accompanying the January 2003 HOA meeting, the "Creek Club Dock" was categorized as a "reserve" item. [19] In later meetings, the developers never informed Walbeck, or other HOA members, that the Creek Club Dock was no longer a "reserve" item.[20]

III. This Court Erred in Ignoring Developers' Control Over the Homeowners and HOA in its Statute of Limitations Analysis

Here, the Court recognized the undisputed fact that the developers and the HOA were in a fiduciary relationship until 2005 because of the developers' control over the HOA during this time. (R. p. 1029: 21-23) (developers conceding they controlled the board until turnover in December 2005). This Court also correctly determined this fiduciary relationship continued through 2009 because of developer representations which "repose[d] a special confidence" between the developers and the HOA members, and through trial based upon developer's veto power. (Opinion, p. 152).

Despite these facts, this Court failed to consider the developers' role as the sole steward of information pertaining to I'On's common areas (which, as previously mentioned, this Court

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[18] *See* (R. pp. 3296-99, 3429) (January 7, 2003 and December 3, 2003 meeting minutes where in the developers provided community updates without indicating that they changed their mind to convey the Community Dock to the HOA).

[19] A developer creates a "reserve" to inform the HOA as to the funds that the HOA will need to set aside for addressing common areas. The inferences, then, that can be inferred from the HOA's proposed 2003 budget include that the HOA owned the "Creek Club Dock" because this Dock was included in a "reserve" category. (R. p. 3287). That is the entire reason for a "reserve" and this is why South Carolina courts have held that a developer owes a fiduciary duty to convey common elements in good repair or to properly fund a reserve so that an HOA can pay for common areas to be in good repair. *Goddard v. Fairways Dev. Gen. Partn.*, 310 S.C. 408, 415, 426 S.E.2d 828 (Ct. App. 1993); *see also Concerned Dunes W. Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 256-257, 562 S.E.2d 633, 637 (2002).

[20] Further, to the extent that this Dock was categorized differently in later budgets, only compounds the multitude of ambiguities that exist among the evidence and testimony presented in this case.

indicated included the "Community Dock"). In other words, the only people with knowledge as to the truth of the status of "Community Dock" during the 1999-2009 time frame were the developers; and, these developers were silent as to what they truthfully intended in connection with the conveyance of this Dock to the HOA. *See, e.g., S. Dev. Land & Golf.,* 311 S.C. at 33, 426 S.E.2d at 751 (1993). ("Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts.").

Walbeck's claims could not have accrued prior the end of the fiduciary relationship that this Court recognized was at minimum until 2009. (Opinion, p. 151); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) (finding a homeowner's claim cannot accrue until after the developers turned over control of the property owners association and finding the developers' claim that an organization they controlled would have initiated an action against itself during this period unpersuasive). This is exactly what the jury and the Circuit Court properly determined.

IV. This Court Should Reinstate Walbeck's Breach of Contract Award

Alternatively, this Court should reinstate the $10,000 awarded to Walbeck under his breach of contract claim for several reasons. First, if Walbeck's negligent misrepresentation and ILSA claims had been directed out (as this Court has ruled), then the only verdict remaining would have been for breach of contract, thus there would have been no election. Second, Walbeck's breach of contract award is uncontested by developers. Walbeck's contract was a sealed instrument, thus his claims related to his contract are governed by a 20-year statute of limitations. (R. p. 1725:3-4).

Third, South Carolina law supports this post-election remedy. Our state law is clear that the purpose of the election of remedies doctrine is to "prevent double recovery for a single wrong."

Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 56, 691 S.E.2d 135, 152–53 (2010); *see also Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 431 (Ct. App. 1995) ("Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts."). And, for that reason, the doctrine's application "should be confined to cases where double compensation of the plaintiff is threatened." *Save Charleston Found. v. Murray*, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985). Walbeck elected to recover on the jury's negligent misrepresentation award immediately post-trial. (R. p. 19). However, in its Opinion, this Court determined that negligent misrepresentation should not have been submitted to the jury, thus rendering the negligent misrepresentation award unrecoverable (if upheld on rehearing). (Opinion, p. 139). Further, there is no threat of double recovery here from reinstatement of Walbeck's breach of contract award because the developers have not paid any portion of the negligent misrepresentation award secured against them. When a verdict, elected by a plaintiff as his remedy, was only rendered due to the trial court's error, a plaintiff should be allowed to invoke and satisfy a different jury verdict. *See Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible."). The alternative, refusing to reinstate Walbeck's breach of contract award, would leave Walbeck without <u>any</u> remedy for the jury's findings in his favor. *Black's Law Dictionary* 1163 (5th ed. 1979) (defining "remedy" as "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated"). To ensure a just result, this Court should reinstate the contract verdict or remand this issue to the Circuit Court so that Walbeck's breach of contract award may be reinstated.

V. Because Walbeck's Claims Are Not Barred by the Statute of Limitations, Walbeck is Entitled the Attorney's Fees Awarded

In its Opinion, this Court summarily dismissed Walbeck's attorney's fee award under ILSA after it acted outside of its authority in finding Walbeck's claims were barred by the statute of limitation.[21] Because the Circuit Court neither erred in submitting the question of when Walbeck's "claims accrued" to the jury (because there is conflicting evidence and testimony as to this point) nor erred in denying JNOV as to Walbeck's claims (because equitable estoppel applied for the same reasons plus the fact the developers destroyed over 200 material documents), this Court should reinstate Walbeck's attorney fee award under ILSA. Further, Walbeck's entitlement to attorney fees as the prevailing party in his contract is an additional sustaining ground for the fees. (R. pp. 3162-3172).

VI. Developers Owed, and Breached, Their Fiduciary Duty to Convey Common Areas to the HOA[22]

While this Court correctly ruled that the developers had breached their fiduciary duty to the HOA and its members, the Court inadvertently gave a green light to current and future developers regarding abhorrent conduct. This Court inadvertently laid out a bright line rule that the failure of a developer to convey a promised amenity is *per se* not a breach of fiduciary

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[21] As discussed at length in the foregoing arguments, this Court cannot decide "legal" questions when the evidence yields more than one reasonable inference or an inference is in doubt. *See Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."); *see also Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) ("When considering [JNOV], neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.") (citations and internal quotations omitted).

[22] The only legal question before this Court was whether a fiduciary relationship exists between developers and the HOA/HOA members. Because this Court rightfully determined that a fiduciary relationship does exist, it answered this question and should not have addressed the question of whether developers breached this duty. *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004) ("Whether a fiduciary relationship exists between two people is an equitable issue for the judge to decide. However, the determination of a breach of a fiduciary relationship can be a question for the jury.") (emphasis added) (citations omitted); *see also* Rule 220(c), SCACR (holding this Court may affirm a ruling based upon any matter appearing in the record).

duty. (Opinion, pp. 148-49). This could only be a completely accidental and inadvertent holding as its repugnant to the keen analysis present in the remainder of the Opinion. While this holding does not ultimately prejudice this/these Plaintiffs, it's repugnant to the public policy of this state of protecting homeowners.

While South Carolina courts have not yet recognized the "precise duty to convey title to common areas," South Carolina Courts have recognized the existence of the developer-HOA fiduciary relationship; and, that as a function of this relationship, developers are held responsible for the condition of the common areas at the time these areas are deeded to the HOA. *Concerned Dunes W. Residents,* 349 S.C. at 259-260, 562 S.E.2d at 638 (2002); *see also Goddard,* 310 S.C. at 414, 426 S.E.2d at 832 (1993) ("A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.")

Notably, South Carolina courts have been incredibly careful to define fiduciary relationships to not exclude new cases that give rise to the relationship. *Goddard*, 310 S.C. at 414, 426 S.E.2d (*citing Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152). However, just as the courts have carefully defined not to exclude circumstances that give rise to the relationships, courts have been equally careful as to not define what "all" fiduciary duties a developer may owe an association. *Island Car Wash,* 292 S.C. at 599, 358 S.E. at 152; *see also* Elements of Civil Causes of Action § 9 (2009) ("The concept of fiduciary relationship is somewhat amorphous, and courts have purposefully retained elasticity in the definition to address new interactions.") As stated by Jean Toal, former Chief Justice of the South Carolina Supreme Court, "fiduciary duties reflect the unspoken expectations of persons entering into a relationship of trust and thus exist in every such relationship when nothing specific is said about such duties." Fiduciary Duties of Partners and

Limited Liability Company Members Under South Carolina Law: A Perspective from the Bench, 56 S.C. L. Rev. 275, 278-279 (2004).

Though this is a novel issue, the trial court did not err in determining that inherent in the duty to convey common areas in good repair is the duty to convey the common areas. The facts and law were well-explored and properly decided by the court. *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980) (a novel issue is best decided in light of the testimony adduced at trial).

For example, the facts available to the Circuit Court included the many promises the developers made in the Covenants, Purchase Contracts, Property Report, meeting minutes, e-mails, and otherwise to convey these common areas to the HOA and its members. These promises, because made in the developers' fiduciary capacity, are fiduciary obligations that run parallel with the developers' contractual obligations.[23] By failing to convey these common areas to the HOA as promised, developers breached both their fiduciary duty and contractual duty to so convey. Further, it makes sense that South Carolina law allows developer's "contractual obligations" to parallel its "fiduciary obligations" because developers are required by statute to set forth their fiduciary obligations to an HOA in a contract. *See, e.g.*, 15 U.S.C. § 1707(a) (2010); 15 U.S.C. § 1705 (2010); S.C. Code § 27-31-30 (2007); S.C. Code § 27-31-100 (2007); S.C. Code § 27-31-100 (g) (2007).[24]

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[23] This Court noted the developers did not appeal the breach of contract verdict. The status of the breach of contract verdict may be more of an issue of confusion than error.

[24] 15 U.S.C. § 1707(a) ("A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record. . ."); 15 U.S.C. § 1705 "The statement of record shall contain the [following] information. . .(1) the name and address of each person having an interest in the lots in the subdivision. . .and the extent of such interest. . . (3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto. . .(5) a statement of the. . .nature of any improvements to be installed by the developer and his estimated schedule for completion.")

CONCLUSION

Based upon the foregoing reasons, this Court should grant rehearing, vacate its denial of JNOV as to Walbeck's claims, reinstate Walbeck's attorney fee award, and hold rehearing proceedings. After rehearing proceedings, this Court should issue an opinion affirming the Circuit Court's decision with respect to all issues in this appeal; and/or alternatively, reinstate Walbeck's $10,000 breach of contract award.

Respectfully submitted,

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August 23, 2018

(emphasis added); S.C. Code § 27-31-30 (In order to establish a horizontal property regime, developers must record a master deed "which shall set forth the particulars enumerated in § 27–31–100"); S.C. Code § 27-31-100 (The master deed. . .establishing the horizontal property regime. . .shall express the following particulars. . .(c) The description of the general common elements of the property. . .(f) A description of the full legal rights and obligations, both currently existing and which may occur, of the [homeowners and the developers]. . .") (emphasis added); S.C. Code § 27-31-100 (g) ("In the event [property owner] proposes to develop the property as a single regime but in two or more stages. . .the master deed shall also contain a general description of the plan of development, including. . .(4) A chart showing the percentage interest in the common elements of each original unit owner at each stage of development if the owner submitting property to condominium ownership elected to proceed with all stages of development." (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

Case Tracking No.: 2015-001590

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

The undersigned hereby certifies that on August 23, 2018, a true copy of the attached and foregoing Respondents' Petition for Rehearing, together with this Proof of Service, has been served upon all parties by hand delivery and/or mailing a copy of the same to counsel for Appellant at Duffy & Young, LLC, 96 Broad Street Charleston, SC 29401 and Timothy W. Bouch, Esq. and Yancey Alford McLeod, III, Esq. at Leath Bouch & Seekings 92 Broad Street Charleston, SC 29401.

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August 23, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court Of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Brad Walbeck v. The I'On Company
Appellate Case No.: 2015-001590

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of *Respondent's Petition for Rehearing* in the above-referenced matter. Also enclosed is a proof of service of this document upon counsel for the Appellant and a check in the amount of $25.00 for filing this motion. Please return the additional filed copy to our courier.

Thank you for your time and attention to this matter.

Sincerely,

Faith Frink
Paralegal

/ff
Enclosures
cc: Brian C. Duffy, Esquire
Julie L. Moore, Esquire
Seth W. Whitaker, Esquire
Timothy W. Bouch, Esquire
Yancey A. McLeod, III, Esquire