

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

JUL 11 2019

S.C. SUPREME COURT

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

Appellate Case No.: 2015-001590

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

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
Respondents.

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioners' Counsel certifies the Petition for Rehearing was finally ruled on by the Court of Appeals ("COA") by Order dated May 22, 2019.

INTRODUCTION AND SUMMARY OF GROUNDS FOR CERTIORARI

In this case regarding common areas promised by developers to a Homeowner's Association ("HOA"), the COA originally agreed with the Circuit Court (and jury) in most respects; yet, completely reversed itself in a Substituted Opinion. Left uncorrected, the Substituted Opinion provides a safe harbor for Developers who "recklessly, willfully, or wantonly" take financial advantage of the neighborhoods that they create and control.

This Court should grant certiorari for many reasons, including to: (1) correct legal and factual errors relating to derivative claims, contract construction, fiduciary relationships, and amalgamation; (2) address the novel issues presented and policies implicated; (3) resolve existing conflicts of law; (4) negate the negative consequences the Substituted Opinion will have on South Carolina homeowners; and, (5) correct poor procedural precedent and wasteful judicial activities.

QUESTIONS PRESENTED

- I. Whether the COA's opposite opinions indicate reasonable minds did and can differ on inferences to be drawn from the evidence, and that there is a conflict as to Rule 23, fiduciary, and amalgamation legal principals, both in the abstract and as applied to the facts of this important, exemplar case, such that this Court should grant certiorari and provide the citizens and courts of this state with guidance for future conduct?
- II. Does the COA's dismissal of Walbeck's and Adkins' derivative claims violate the policy behind Rule 23, elevate form over substance, conflict with *Patterson* and *Grant*, violate issue preservation rules and the law of the case doctrine, and ignore the overwhelming evidence in the case?
- III. When a corporation (on whose behalf derivative claims are made) joins the derivative plaintiffs as a plaintiff, does it moot any purported Rule 23 defects?
- IV. Do developers violate the fiduciary duties exemplified in *Goddard* and *Dunes West* when they act against a HOA's interests, make multiple misrepresentations to the HOA, and

ultimately profit at the HOA's expense, all without adequate disclosure?

- V. Once self-dealing is shown, does the burden shift to the fiduciary to show the fairness of the transaction, per *Wilson*, or is there an exception for Developers?
- VI. Did the COA improperly weigh evidence and fail to properly distinguish and apply the following doctrines?
- A. Are Developers estopped from asserting the SOL due to their representations or failure to disclose information critical to these claims?
 - B. Is the SOL equitably tolled as to the HOA's direct claims because of, e.g., Developers' control?
 - C. Should this Court formally recognize that South Carolina has already adopted the adverse domination doctrine based upon *Magnolia North*?
- VII. Does the ample evidence of bad faith and unfairness resulting from these Developers' collective, evasive conduct satisfy the single business enterprise theory adopted by this Court in *Pertuis* and as applied in *Stoneledge*?
- VIII. Do the inferences arising from destroyed evidence support the denial of JNOV?

CONCISE STATEMENT OF THE CASE

Petitioners seek to recover damages for common areas Developers¹ failed to convey to I'On Assembly ("the HOA") and its members ("Homeowners"). These common areas are the "Creekside Park," "Community Dock," and the Dock's associated parking and boat ramp located along the deep water of Hobcaw Creek on two civic lots known as CV5 and CV6 ("Commons").²

¹ "Developers" are: I'On Company, LLC, I'On Club, LLC, I'On Group, LLC f/k/a Civitas, LLC; and, I'On Realty, LLC.

² Originally, the COA referred to these Commons as "the disputed property" and found "all parties considered the disputed property to be common areas designated by the Covenants as 'Commons' because the HOA purportedly held 'use rights' via an Easement for the 'common use [of Homeowners]'. Hence, the HOA was 'exclusively responsible for the control and management of the disputed property, and [Developers] control of the HOA undoubtedly required [Developers] to preserve the right of the HOA's members to the unfettered use of these common areas.'" (App. p. 28). In its Substituted Opinion, the COA deleted this finding and changed its terminology to "Amenities" based upon its new interpretation of the Covenants and a 1998 Property Report. (App. p. 102). Under the COA's new interpretation, neither of these documents guaranteed HOA

Developers repeatedly obligated themselves to convey the Commons, free of all encumbrances, between 1998 and 2009. However, Developers contemporaneously worked to increase their return on investment by secretly reducing the HOA’s rights to the Commons and conspiring to sell the Commons to a third-party for personal gain. Upon learning of the potential sale, Petitioners and other HOA members demanded the HOA secure its rights to the Commons – which did not occur.

A. From I’On’s Inception, Developers Promised the Commons to the HOA

Early on, Developers³ promised potential purchasers, such as Walbeck, that the HOA would own the Commons in a 1998 Property Report required by the Interstate Land Sales Act (“ILSA”). (App. pp. 3206-3327).⁴ This Report contained a chart listing the “Creekside Park” and “Community Dock” and a disclaimer guaranteeing the HOA would own the “facilities” listed in the chart. (App. p. 3518-19). Walbeck’s purchase contract, dated November 27, 1999, also expressly referenced this Report and separately included a copy of the same chart. (App. pp. 3658-68). Importantly, Walbeck’s contract provided he could specifically “rely” on the representations included in both the Contract and the Property Report. *Id.*⁵ Developers made other, similar promises about the Commons to the HOA, Homeowners, and government agencies.⁶

ownership of these areas. This is wrong. *See* Sections III and IV for the effect of this erroneous interpretation.

³ I’On was developed by a father and son team (Vince and Tom Graham) who created and controlled several I’On entities (I’On Group, I’On Company, I’On Club, and I’On Realty) through which they managed, promoted, and sold I’On. Developers used each entity to make – and break – promises to the HOA and Homeowners about the Commons. *See, e.g.*, (App. pp. 1844-45; 2736).

⁴ The Property Report was written by I’On Company, signed by I’On Group’s sole member, Vince Graham, and distributed by I’On Realty to Walbeck and other purchasers with I’On Realty-drafted sales contracts. (App. pp. 965-69; 1254-63; 1293; 1676; 3495-3528).

⁵ Walbeck’s contract is a “sealed instrument” that is subject to a twenty-year statute of limitation. Developers do not contest this point. (App. p. 10, n. 5).

⁶ Developers’ additional promises are located in: (a) meetings held prior to I’On’s approval (App. pp. 1288-91); (b) various marketing materials (App. pp. 1406:1-12; 1690:4-1691:13; 2495-2515; 2690-2704); (c) meeting minutes and communications (App. pp. 3838; 3981-83); (d) I’On purchase agreements (App. pp. 3658-68); (e) Developers’ plans and applications (App. pp. 2518-

Contradicting the Property Report and Walbeck's contract, Developers negotiated a proposal with another neighborhood, Olde Park, allowing its residents to use the Commons for a \$350,000 fee. (App. pp. 1274; 2811; 3385-91).⁷ To accommodate this change, Developers tried to modify the HOA's future ownership through a Recreational Easement signed by Developers' employee in three capacities as: (1) I'On Company Manager; (2) I'On Club Manager; and (3), HOA President. (App. pp. 1122:20-1130:10; 3627-41). This Easement purportedly provided for the HOA's perpetual use of CV6; yet, the Easement's term was discretely limited to thirty years. *Id.* I'On Club's lack of title to CV6 when the Easement was signed was fatal to its validity.

In April 2000, Developers issued a revised Property Report that removed the transfer of the Commons to the HOA. (App. pp. 1588; 3531-69; 3686). Prior purchasers were not notified of this modification; and, there is little or no evidence that anyone else was either. On August 15, 2000, Developers internally conveyed the Commons from I'On Company to I'On Club for \$5.00. (App. p. 3642). Developers failed to inform the Homeowners of these transfers. In fact, Developers wrote to Walbeck on three separate occasions after his purchase and omitted reference to the revised Property Report, the Olde Park deal, internal transfers, and the Easement. (App. pp. 1118-19; 1122; 1141; 1170; 1738-39; 1681-82; 3331-33). This is especially egregious considering one of the letters was authored by the same Developer representative who signed the Easement on behalf of three, separate Developer entities. *Compare* (App. pp. 3627-41) *with* (App. p. 3332).⁸

26; 2653-72; 2683; 2885; 4025); (f) Developers' representations (App. p. 3895); and, (g) I'On's Covenants (App. p. 4140).

⁷ Olde Park accepted this deal on February 19, 1999, nine months before Walbeck's purchase contract, yet Developers did not inform Walbeck of this material change. (App. p. 1665).

⁸ Based, in part, on this evidence, the jury awarded Walbeck \$10,000 on his breach of contract claim and the HOA \$1,000,000 on its breach of contract claim as a third-party beneficiary. The COA did not dismiss Walbeck's breach of contract claim but remanded (albeit erroneously) this claim for a new trial and dismissed all other claims (App. p. 112; 114). The dismissal of the HOA's

B. While Controlling the HOA, Developers Lied About the Commons and Otherwise Acted Against the HOA's Interest

For the next five years, Developers controlled the HOA and were the only source of HOA information.⁹ In June 2005, Developers and the Developer-Controlled HOA entered a Handover Agreement which formalized the common area turnover process. (App. pp. 2692-93). Developers never disclosed the Commons were or would be excluded from this Agreement. (App. pp. 1426:18-21; 3518-19; 3849; 3870-73; 3981-83) (showing Petitioners and Developers attended several 2004-2007 HOA meetings in which Developers never stated the Commons would not be turned over). To the contrary, in 2006, Developers' representative, Chad Besenfelder (on behalf of I'On Group), told the HOA the "boat ramp" would be turned over but may be kept in I'On Company's ownership for now to "ensure the access rights of I'On's residents". (App. pp. 3408-09); *see also* (App. pp. 1143:9-1144:20) (Tom Graham testifying it was Developers' intent to "turnover" the Community Dock to the HOA in 2006). Then, in 2007, Besenfelder told the HOA that Developers "would like to turn over the Community Dock" after "looking into repairs." (App. p. 4025). Besenfelder failed to disclose Developers were, instead, considering options to sell the Dock. (App. pp. 1689-90; 4025).

Later, developers entered talks with a third-party buyer, Russo. (App. pp. 1155:11-14; 1695-96; 1707-11; 2776). When the pending contract for the Commons came to light, several HOA members – including Petitioners – demanded the HOA secure the Commons. (App. pp. 592-93, ¶¶ 45-52; 2707; 2710-11). Developers lied and denied, describing the transaction as only a management change while contemptuously laughing amongst themselves about "toying" with the

breach of contract claim (along with its other claims) was error because it is based on, and survives along with, Walbeck's breach of contract claim.

⁹ The details regarding Developers' nefarious activities while in control of the HOA is set forth later in this Petition and is also discussed at length in Petitioners' Petitions for Rehearing.

HOA. (App. pp. 1178; 1198-99; 1736-37; 3402-03).¹⁰ Ultimately, I'On Company, I'On Club, and I'On Group worked together to close the sale on August 5, 2009. (App. p. 1273).

C. Abbreviated Procedural History

Walbeck initiated this action against Developers on December 22, 2010; and, Amended Complaints were filed on March 8, 2011 and February 7, 2012.¹¹ Between the filing of these Amended Complaints, Developers filed an Answer and Motion to Dismiss on May 27, 2011. (App. p. 577; 2229-30). On March 15, 2012, Developers' Motion to Dismiss was denied,¹² and, Developers did not file a Rule 59 Motion as to this denial. Developers later filed a Motion for Summary Judgment, which was also denied.¹³ Subsequently, the HOA was realigned as a plaintiff, adopted Petitioners' claims, and proceeded to jointly prosecute these claims. (App. pp. 452-53). A Fourth Amended Complaint including the HOA as plaintiff was filed on June 16, 2014. (App. pp. 749-65). The case was re-tried from July 29-August 1, 2014.

The jury returned verdicts in Petitioners' favor; awarded damages to Walbeck on these claims: (a) ILSA; (b) Negligent Misrepresentation; and, (c) Breach of Contract; and, awarded damages to HOA on these claims: (a) Breach of Fiduciary Duty; (b) Negligent Misrepresentation; and, (c) Breach of Contract. (App. pp. 2321-28).¹⁴ The jury also found Developers' conduct was

¹⁰ Moreover, while negotiating the Commons sale, Developers represented to the HOA that they had "not sold or initiated the sale of the Creek Club". (App. pp. 1155; 1157; 1160-62; 1165; 1696-1700; 1704; 1707-11; 1719-21; 1732-33; 1754; 3419-21); *see also* (App. p. 2554).

¹¹ In the Second Amended Complaint, the derivative allegations were expanded to include additional efforts made by Petitioners and HOA members to seek redress within the HOA. (App. pp. 587-603).

¹² (App. pp. 445-46).

¹³ (App. pp. 447-49).

¹⁴ Walbeck elected to recover the \$20,000 awarded him for negligent misrepresentation and the HOA elected to recover the \$1,750,000 awarded it for breach of fiduciary duty. (App. pp. 455-56).

reckless, willful or wanton; and, the SOL on all claims commenced on August 5, 2009. *Id*¹⁵

On June 25, 2016, the Circuit Court denied Developers' JNOV Motion in a well-reasoned Opinion.¹⁶ On July 20, 2015, Developers appealed only the Circuit Court's trial-related Orders.¹⁷

The COA originally affirmed the Circuit Court for the most part; but, later flip-flopped in a Substituted Opinion. The COA erred by overlooking the many important points addressed herein.

REASONS CERTIORARI SHOULD BE GRANTED

I. THE COA'S DISMISSAL OF DERIVATIVE CLAIMS IS AT ODDS WITH THE PUBLIC POLICY SUPPORTING RULE 23, *PATTERSON, GRANT*, ISSUE PRESERVATION AND EVIDENTIARY INFERENCE RULES AND SHOULD BE REVIEWED AND VACATED

Petitioners' derivative claims were brought for valid reasons and were properly maintained. The COA's reversal of these was in error. Not only did the COA fail to explain its reversal, it did not make clear whether it was reversing the Circuit Court's Order denying Developers' JNOV Motion or the unappealed Order denying Developers' Motion to Dismiss. The COA was supposed to consider the JNOV Order and apply a JNOV standard, but it patently engaged in a Rule 12(b)(6) analysis. Either way, the Substituted Opinion violates this Court's rulings in *Patterson* and *Grant*.

A. The Substituted Opinion Conflicts with Public Policy and Rule 23

¹⁵ Notably, the jury found the factual defenses presented by Developers at trial unavailing. See later discussion herein on completion of construction, the proposed budget, and that the promised Commons were ambiguous and generic – and had been satisfied by the transfer of a few crab docks and a “Marshwalk” path.

¹⁶ The Circuit Court also issued Orders: (a) denying I'On Company's Petition for attorneys' fees; (b) declaring the 2000 Recreational Easement void; and, (c) awarding \$225,000 for Walbeck attorneys' fees and costs. (App. pp. 457-551). The Circuit Court also awarded \$24,337.26 in sanctions against Developers due to their destruction of over 50,000 discoverable documents over the course of the case. (App. pp. 539-51).

¹⁷ Developers only appealed the Order Denying Developers' Motion for JNOV, the Order Denying I'On Company's Petition for Attorneys' Fees, the Order Awarding Walbeck's Petition for Attorneys' Fees, the Order Declaring the 2000 Recreational Easement Invalid, and the Order Denying Developers' Motion on Abuse of Process. (Developers' Notice of Appeal).

Rule 23 “was not written in order to bar derivative suits.” *Surowitz v. Hilton Head Corp.*, 383 U.S. 363, 371 (1966). Rather, the rule’s purpose was to prevent “strike suits” which are meritless claims brought by persons trying to get rich quick through a settlement they hope will be paid just to make the case go away. *Id.* This is not the case here. The United States Supreme Court makes clear that Rule 23 should not prevent the adjudication of legitimate cases such as this one:

[Rule 23’s purpose] is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice.

Surowitz, 383 U.S. at 373; 21 Harvard Law Review 195 (1907) (“It is difficult to suggest any . . . theory whereby a stockholder suing [on a corporation’s behalf], and whose litigation is successful [and] benefit[s] stockholders, should have an arbitrary limitation placed upon his right to sue.”).

The Record indicates that in the eight (8) years since Petitioners commenced this action, this dispute has been hotly contested, resulting in two trials, with the evidence and the charged law culminating in a facially reasonable verdict by the jury in favor of the HOA. The jury’s verdict shows Petitioners’ derivative claims are supported and were rightfully adjudicated.

B. The COA Reversed an Unappealed Ruling

The Substituted Opinion appears to reverse an Order denying Developers’ Motion to Dismiss that it was barred from reviewing because it is not on appeal. (App. pp. 2229-30). The COA held: “[We] reverse the Circuit Court’s ruling that Walbeck and Adkins properly filed derivative claims.” (App. p. 98). The record shows the Circuit Court’s Motion to Dismiss ruling is the only ruling where the Circuit Court found Walbeck and Adkins “properly filed derivative claims”. (App. p. 445). It further appears the COA’s derivative analysis is a re-evaluation of the

Circuit Court's Motion to Dismiss ruling because the COA: (1) applied a 12(b)(6) Motion to Dismiss standard; and, (2) considered only the Motion to Dismiss record.

Because Developers did not appeal the Rule 12(b)(6) ruling, this ruling is not reviewable on appeal. In *Davis versus Parkview Apartments*, this Court held it could not consider interlocutory orders not appealed. 409 S.C. 266, 280-81, 762 S.E.2d 535, 541-42 (2014). Thus, while a Motion to Dismiss denial may be considered on appeal with other appealable rulings in the same action, the denial must be appealed for it to be considered. *Edge vs. State Farm*, 366 S.C. 511, 520, n. 6, 523 S.E.2d 387, 392, n. 6 (2005).¹⁸ In its Substituted Opinion, the COA erred by *sua sponte* considering and reversing a ruling that is not on appeal.

This Court has long recognized that an unappealed ruling, right or wrong, is the law of the case and requires affirmance. *See, e.g., Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“[A]n unappealed ruling is the law of the case and requires affirmance.”). While this Court has held the denial of a Rule 12(b)(6) motion is interlocutory and may not establish the law of the case,¹⁹ this Court has never held the law of the case doctrine does not apply to interlocutory Orders once those Orders become appealable after final judgment.

1. The COA Did Not Apply the JNOV Standard of Review

The review of a JNOV ruling is not limited to the pleadings; rather, appellate courts must consider all the evidence. This is exactly what the COA did in its Original Opinion (at least in

¹⁸ The *Edge* Court refused to consider a ruling that was immediately appealable even though there were other appealable ruling before the Court because, like here, this ruling was not appealed.

¹⁹ *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995) (“The denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case. . .”).

reviewing demand futility);²⁰ but, did not do in its Substituted Opinion.²¹

2. Developers Did Not Obtain an Order on their Motion to Dismiss Petitioners' Negligence Misrepresentation Claims

The COA also wrongfully dismissed all derivative claims because the Circuit Court did not rule upon Petitioners' derivative (or direct) negligent misrepresentation claim in the Rule 12(b)6 context. (App. pp. 445; 2324-25). An appellate court cannot address an issue unless it was raised to and ruled upon by the trial court. *Repko v. County of Georgetown*, 424, S.C. 494, 503 818 S.E.2d 743, 748 (2018) ("An appellate court may not reverse a lower court Order based on a legal or factual premise not advanced by the party who lost at the trial court level.") *cit*ing *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("An appellate court may not, of course, reverse for any reason appearing in the record. . .The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."); *see also* (App p. 445). Should this Court choose not to restate the HOA's and Walbeck's elected awards, it should alternatively restate the HOA's and Walbeck's negligent misrepresentation awards.²²

C. The COA's Derivative Analysis Conflicts With *Patterson*

The Substituted Opinion is irreconcilable with *Patterson versus Whitter*. 425 S.C. 213, 225-26, 821 S.E.2d 677, 684-85 (2018). The COA incorrectly held the decision "of whether a plaintiff has met [Rule 23] requirements is limited to assessing the sufficiency of the allegations within the complaint." (App. pp. 96-97). *Patterson* rejected the approach taken by the COA.

²⁰ (App. pp. 20-21) ("The evidence shows that a demand on the Board to initiate litigation against [Developers] would have been futile. . .[A]n appellate court may reverse [JNOV rulings] only when there is no evidence to support the rulings. . .")

²¹ (App. pp. 96-97)("[Rule 23 decisions] are limited to assessing [complaint allegations]").

²² This is discussed in more detail in Petitioners' Petitions for Rehearing, which discussion is incorporated by reference.

1. Patterson Upheld a One Paragraph Demand Allegation and a Demand that Did Not Reference Litigation

Patterson's complaint only alleged that:

[Members], their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the [corporation], meetings with counsel for the [corporation], correspondence to [fund] and a previous lawsuit to no avail.

Patterson's demand letter was sent to the corporation attorneys and only listed five requests, none of which included a request to “initiate litigation”. Based on only these two things, this Court found Rule 23’s requirements were met and reversed the COA:

[A]lthough the [demand] was not expressly incorporated. . .into the complaint, unlike in *Whittle*, the [demand] does constitute an adequate demand in this case. Another issue here is [members] failure to include the magic phrase “which is incorporated herein by reference”. Indeed, the allegations concerning the [demand] in [members’] complaint are appreciably more detailed than those in *Whittle*. And certainly, when the [demand] is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied. The trial court [and COA] simply found that it was precluded from looking at the [demand], which was error.

Id. at 234-35, 821 S.E.2d at 688-89 (emphasis added). This Court went on to also hold that:

[W]e reject an approach that approves of a trial court’s consideration of everything except [a] demand letter that was actually sent and received. See *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (explaining a complaint may be “deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are ‘integral’ to the complaint.”). . .

Id. at 235, 821 S.E.2d at 689 (emphasis added) (some citations omitted).

2. Petitioners Satisfy Both a Rule 12(b)6 and a JNOV Review

Like *Patterson*, Walbeck’s complaints allege the many efforts made to “obtain the action desired” – securing or “recovering” the Commons. The Amended Complaint provides:

35. Several [H]omeowners made repeated demands upon the [HOA] and its Board to secure the [HOA] and its members rights to the [Commons]; and, provided the Board with the. . .information to do so. However, the Board failed to secure the rights and acquiesced to the sale of these [Commons].

Compare (App. pp. 568-9) (emphasis added) *with Patterson*, 425 S.C. at 224, 821 S.E.2d at 683 (“[Members], their agents or others on their behalf have made efforts to obtain the action they desire. . .including correspondence to counsel for the [corporation], meetings with counsel for the [corporation], correspondence to [fund] and a previous lawsuit to no avail.”) (emphasis added).

The Second Amended Complaint provides more detail and references “correspondence” and “meetings” where “[HOA] members, their agents or others on their behalf” demanded “the [HOA] Board and its counsel” “to act to secure the [Commons],” all “to no avail”:

45. On February 26, 2009, [HOA] member and I’On property owner Catherine Templeton made a demand upon the [HOA]. . .to secure the [HOA] and its members’ unencumbered title, access, and use of the [Commons]. . .
46. [Petitioners] were contemporaneously aware of the Templeton Demand [which] was made. . .by letter and. . .publicly at an [HOA] meeting.
47. [On] March 5, 2009 and March 11, 2009, Adkins made a request to the [HOA’s] attorney. . .to investigate the allegations that [Developers were obligated] to convey the [Commons] to the [HOA].
49. [On] March 10, 2009, the [HOA’s] attorney. . .informed Adkins, and copied the [HOA’s] Board President. . .that the [HOA] was working to secure title to properties represented to be the property of the [HOA]. . .
50. [On] March 11, 2009, the [HOA’s] Board President demanded that [Developers] convey the Community Dock to the [HOA] but failed to demand conveyance of the Creekside Park.
52. [In] April 2009, Adkins and Board Member. . .discussed the [Developers’] obligation to convey the [Commons] to the [HOA]. Concurrently, the [HOA Board Member] relayed Adkins demands to [Developers]. . .
53. [During] June and July 2009, Walbeck and Adkins made demands upon the [Developers] to convey the [Commons] to the [HOA]. The [HOA] was aware of the demands and subsequent refusal from the [Developers].
54. Despite repeated demands to the [Developers] and the [HOA] Board, the Board has failed to take the necessary action to secure [the Commons].
55. Additional demands upon the [HOA] would now be futile as the [HOA] has

failed to protect the rights of the [HOA] and its members, despite being provided with both the information necessary and the opportunity to do so. The [Developers'] conveyance of the Commons to a third-party evidenced the Board's failure to secure the rights to the [Commons], and the futility of further demand on the [HOA] and its Board.

(App. pp. 592-93) (emphasis added).

Like *Patterson*, Petitioners satisfy Rule 23 after considering the demands and communications referenced in their Complaints that are “integral” to the deciding the derivative issue. For example, the Templeton Demand constitutes an “adequate demand” under Rule 23:

Dear [HOA Board President],

Provided to you and the Board is copy of the property report. . .On [page 22] is the clear requirement the [Commons] be deeded to the HOA upon completion. [HOA Board] is on notice action must be taken immediately to secure these properties. . .

If the Board has taken any action that has served to limit rights of use by [Homeowners] or otherwise release. . .those rights or ownership or control. . . such actions must be unambiguously and immediately reversed. That specifically applies to the Community Dock. . .It has been reported that the Board declined to accept ownership of the [Dock]. . .If this is [accurate], the Board did not have the authority to deprive [Homeowners of ownership].

If timely property transfer has not occurred, the Board should immediately seek legal counsel. . .determine under which Board the failure occurred since it could be alleged [this Board or prior Boards], failed in their fiduciary responsibility to the [HOA]. The. . .Board must consider, not simply ownership, but pursuit of damages from the [Developers] on the presumption the [HOA] has met its obligations. . .

(App. pp. 2705-06)(emphasis added).

The letters Adkins exchanged with the HOA's then-attorney in March 2009 are also referenced in the pleadings. (App. pp. 2707; 2710-11). In responding to Adkins' first letter, the HOA's attorney stated: “it is the understanding of the Board that the sale will not include items which were intended to be or are the property of the [HOA]” and the Board was making “efforts to fulfill its responsibilities set forth in the [Covenants].” (App. p. 2707). This is important for four reasons. First, it can be inferred Adkins' first letter to the HOA's attorney demanded the Board act

to prevent the sale of these Commons or else the HOA's attorney would not have referenced it was the Board's understanding this was not happening and the Board would fulfill its responsibilities by making sure this would not happen. *Id.* Second, it shows the Board had a duty to ensure the Commons were not sold, and Adkins personally made a "good faith effort" to "induce the Board to act" to prevent such a sale. *Id.* Third, it establishes any demand made by Adkins upon the Board to "initiate litigation" about these Commons was futile because it was the Board's "understanding" these Commons were not going to be sold. Fourth, it indicates the Board had not acted on prior Homeowner demands made or else Adkins would not have had to write the HOA's attorney.

In fact, a week after he received Adkins' letter, the HOA's attorney wrote Developers and admitted the Board "would have dealt with this matter much sooner," but nevertheless, still expected "a smooth transition since discussions [with Developers] about turning over the docks have been going on for some time." (App. p. 2709). This letter from the HOA's attorney to Developers also shows the Board demanded the "turnover" of only the Community Dock but failed to demand the "turnover" of the Creekside Park. *Id.* The same day the Board wrote Developers, Adkins made another good faith effort by following up with the HOA's attorney to "provide [him] with all information currently available in determining eventual rights to [both Commons] – the [Community Dock] and Creekside Park." (App. pp. 2710-11) (emphasis added).

About one month later, Adkins and HOA Board Member, Matt Walsh, discussed the Commons via e-mails and phone calls. (App. pp. 592-93). In an April 2009 e-mail, Walsh writes:

There is no sale that we are aware of. . . [R]ight now, I am not aware of anything and have been told by [Developers] that it is going to be run by the I'On Club (aka Developers). That said, anything is possible. In response to your last e-mail, I am not sure what to tell you on the HUD. I have asked for and am waiting for the amended HUD and will share it. . . As for Creekside [P]ark, I assume you are not satisfied with Vince's definition, though I am not sure where there is [an] alternative. The docks should be deeded to the HOA soon, and we are working with [Developers] to make sure that is done properly.

A few hours later, Adkins responds:

I was astounded that not one [Board member] had a question for [Developers] in the meeting regarding the linear park explanation. . .The burden is on [Developers] to PROVE what Creekside Park is. . .Yes, you might say I don't agree with the explanation – the bigger question is why would anyone? Did you not expect [Developers] would offer objection to the contention that Creekside Park is home to the Creek Club? I can't believe the Board, collectively listened to [Developers'] explanations (about which [Developer] wants no further conversation, remember!) and just said, "Okay. Thank You." What are your thoughts?

(App. p. 2717) (emphasis added).

After Walsh received Adkin's e-mail, he sent portions to Developers so they "could clear up some confusion". (App. p. 2719). Adkins responds with a letter to Walsh, stating:

[T]he Board has shown little initiative or interest in representing the [HOA] and ensuring its best interest are protected. The [B]oard's first action back in the fall – after denying there even was a potential sale – was to begin "working with" the buyers. The Board failed to ask. . .whether the properties even *could* be sold. . .It took a small group of residents to bring attention to the fact.

Much has happened since that near-disastrous transaction. Having been presented with the [Property Report], which promised [HOA] ownership of [the Commons], the Board took no action to secure them. When told in March by [Developers] that the [Property] Report was "undone" by a 2000 amendment, the Board took no action. As late as this week, I learned the Board has not even asked its attorney for advice about the [HOA's] rights and whether they were violated by the amendment – not anything else related to this matter. Perhaps the worst offense is the Board never informing the [HOA] of this new information. There has been no communication with us regarding the Property Reports and no opportunity for input from the residents. . . .The subject has not been on the Board's meeting agenda for months. . .[F]rom all appearances, it is now a non-issue for the Board.

The questions left unanswered – indeed, even unaddressed – regarding the [Commons] effect the property rights and values of every [Homeowner]. The Board's failure to secure the [Commons] promised to the [HOA] is beyond understanding, and in my opinion, quite risky. The absence of initiative is irresponsible, and I question whether the Board has even seriously studied anything. . .I have written to you and also the [HOA] attorney, I have attended and spoken at meetings of the Board, and met with you individually. It is increasingly obvious to me that my interests, as a titleholder, are not being represented by the Board, which seems focused on the interests of the [Developers].

As I wrote to you previously, I object to the conveyance of the Community Dock

to the [HOA's] ownership with any type of easement or other agreement of any kind attached to it. I expect the Board to work actively, with diligence, to see that the [HOA] acquires any and all the properties promised to it. . . Any agreement that serves to encumber the property should come after notice of intent of the Board and a period of comment by the [HOA] prior to execution.

Further correspondence between us is now uncomfortable to me, following your admission of sharing my most recent e-mails on these same topics with [the Developers] without my prior knowledge or permission.

(App. p. 2721) (emphasis in original and added).

Clearly, the foregoing exchange establishes that: (a) demands were made and refused; (b) the then-Board was in alignment with Developers; (c) Developers effectively controlled the then-Board's decision making; (d) Adkins and other Homeowners made efforts made to "seek redress within the HOA"; (e) these efforts were futile because the Board continually failed to act; and, (f) any future efforts would serve no purpose. Moreover, by this point, Homeowners like Adkins felt "uncomfortable" communicating with the Board, to make a demand or otherwise, because of the Board's propensity to share what they considered private communications. *Id.*

Additionally, the pleadings also reference another demand made by Walbeck's and Adkins' then-attorneys on June 25, 2009. (App. pp. 592-93). This demand, made to Developers, indicated that Walbeck and Adkins intended to commence litigation on their and the HOA's behalves in order to recover the Commons:

The crux of [Petitioners'] complaint against [Developers is] they were assured by various means that [the Commons] would be conveyed to [the HOA] ... [E]nclosed ... is a copy of [a] draft Complaint. . . [Petitioners are informed] there is no room for discussion on the topic of [the Commons], which we understand amounts to a refusal to convey [the Commons]. Further, correspondence sent to the [Developers] from [Adkins] about this situation was never acknowledged. Our clients have come to believe this is the only manner left to seek a fair and promised result. . .

(App. p. 2724) (emphasis added).

On July 3, 2009, Developers responded in a letter, copied to HOA Board President, Kinney,

and Board Member, Walsh, that “attempted to clarify” the Commons were already conveyed:

I am in receipt of your letter of June 25, 2009 and draft complaint.

With regard to [Adkins]’ correspondence, Matt Walsh, a member of the [HOA], sent me an e-mail on April 1, 2009, saying he had “some neighbors who are troubled by the definition of the Creekside Park” and asking for clarification. Included with [Walsh’s] note was an excerpt from an e-mail that was sent to him by one of these neighbors. . . On April 3, 2009, I responded to [Walsh] with an email intending to clarify the issue. A copy of that e-mail [is attached]. . .

In summary, the “Creekside Park” is the +/- 2-mile linear park adjacent to the marshes of Hobcaw Creek. With regard to the “Community Dock”, [Developers] conveyed two Phase 2 community docks to the [HOA] years ago. . .

(App. p. 2726) (emphasis added); *see also* (App. pp. 2727-30) This exchange further establishes futility and provides reason for excusing demand here because it is “reasonable to infer” that Board would not act “to recover” Commons it believed were already conveyed.

In sum, the COA erred in limiting its substituted derivative analysis to just “complaint allegations”.²³ *Patterson* makes clear courts must consider the pleadings plus demands and evidence “integral” to derivative determinations. *Patterson* indicates an even broader standard applies because the derivative ruling appealed is a JNOV ruling. As such, the Court was “not precluded from looking” at any of the demands referenced above or other evidence presented at trial. Even if the derivative analysis could be limited to the pleadings, these pleadings “are more

²³ *See, e.g.*, (App. pp. 97-98). Between *Grant* and *Patterson*, the COA conducted its own demand and futility analysis in *Whittle* in which the COA applied the same flawed analysis. 343 S.C. at 188, 539 S.E.2d at 409. The COA noted that “it does not consider *Whittle* binding precedent” following this Court’s 2003 Order indicating *Whittle* “remains viable in result only.” But the COA’s substituted derivative analysis appears to be derived from *Whittle* and the *McCormick* case cited therein which did not even discuss Rule 23’s requirement. (App. pp. 96-97). Also, the COA, like *Whittle*, wrongfully limited the “lenient standard” the *Grant* Court adopted for futility determinations. Notably, *Whittle* tried to do so by relying at least, in part, on a 3rd Circuit decision which has since been abrogated for the same reasons *Whittle* should be abrogated by this Court – for ignoring state law. *Gabor v. Lego*, 11 F.3d 1197, 1206 (3d Cir. 1993) *abrogating Lewis v. Curtis*, 671 F.2d 779, 784 (3d Cir. 1982).

detailed” than *Patterson’s* paragraph which, alone, satisfied Rule 23. *Id.*²⁴

D. The Substituted Opinion Ignores Concessions in Developers’ Answer

The COA also ignored the admission in Developers’ Answer that concedes Petitioners’ allegation that demands were made upon the HOA and the HOA refused to act:

[HOA members] made demands upon the [HOA] to bring suit regarding the issue raised in the Amended Complaint and that the [HOA] refused to do so.

(App. p. 580 ¶ 35) (emphasis added). Developers are judicially bound by this admission. *See, e.g., Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) (“The allegations, statements or admissions contained in a pleading are conclusive as against the pleader ...”). More importantly, Developers cannot now “take a position contradictory of, or inconsistent with, [their] pleadings and the facts which are admitted by the pleadings are taken as true against [Developers].” *Skull Creek Club Ltd. P’ship v. Cook and Book, Inc.*, 313 S.C. 283, 437 S.E.2d 163 (Ct. App. 1993) (emphasis added).

E. The Substituted Opinion Conflicts with *Grant* and the COA’s Original Opinion as it Relates to Demand Futility

In its Original Opinion, the COA relied on this Court’s decision in *Grant* which adopted a “lenient” approach in evaluating demand futility based upon the facts of a given case. (App. pp. 19-20) *citing Grant*, 266 S.C. at 375-77, 223 S.E.2d at 414-15.²⁵ The COA found the facts

²⁴ Pre-*Patterson* decisions hold so long as there was an allegation “that a demand has been made and refused” or “an effort to have grievances redressed” or “that such effort would have been useless” or “[HOA] wrongdoing or control” then “there was enough alleged”. *See, e.g., Grant*, 266 S.C. at 373-74, 223 S.E.2d at 414; *Thompson*, 214 S.C. at 68, 51 S.E.2d at 173; *Kickbusch*, 105 S.C. at 525, 90 S.E. at 166; *Stahn*, 53 S.C. at 519, 31 S.E. at 498-99; *Latimer*, 39 S.C. at 44, 17 S.E. at 260.

²⁵ As originally described by the COA:

[*Grant*] held the question of whether [stockholder’s] failure to [make a demand] was excusable was “a factual question, the resolution of which. . .should be affirmed unless unsupported by the evidence or influenced by an error of law.” The

established demand futility, and affirmed the Circuit Court’s JNOV ruling that Petitioners “properly maintained a derivative action on the HOA’s behalf”:

[We] look at the record before the Circuit Court at trial. The [evidence and testimony] show [Developers] had veto power over [Board] decisions. . .[This] shows that a demand on the Board to initiate litigation against [Developers] would have been futile. . .[W]e affirm the Circuit Court’s ruling that [Petitioners] properly maintained a derivative action on the HOA’s behalf.

(App. pp. 20-22). The COA’s Substituted Opinion removes all references to *Grant*, applies a 12(b)(6) standard, and reverses the Circuit Court’s Motion to Dismiss ruling because:

[T]here are no allegations that a demand on the to initiate ligation to *recover* these Commons would have been futile, the non-developer members of the Board were guilty of some wrongdoing, or Developers had any veto power over the Board. . .

(App. p. 98) (emphasis in original and added).

Even if this was the test applicable to demand futility, Petitioners alleged “non-developer” Board wrongdoing and “developer” control. (App. pp. 568; 570; 592-93). The COA missed or ignored these allegations, either one of which satisfies “futility” under the COA’s disjunctive analysis. *Id.*

Grant controls here and, like *Patterson*, it does not require a plaintiff to allege the magic phrases proposed by the COA to satisfy demand futility or that these types of determinations are always limited to “complaint allegations”. In *Grant*, the defendants contended, much like the COA, “that it cannot be assumed that demand for redress within the bank would have been useless simply because Gosnell owned a majority of the bank’s stock when the other directors were not charged

court evaluated the Circuit Court’s conclusion that [stockholder’s demand was] futile because “[defendant] was [on] the board. . .and the owner of a majority of stock when [stockholder] filed [suit]. . .Possessed of this control. . .it is reasonable to infer [defendant] would not. . .permit corporate action designed to grant relief for the grievances alleged in the complaint in which he is named as a wrongdoer.

(App. pp. 19-20) (internal citations omitted) (emphasis in original).

with any wrongdoing and constituted a majority of the Board”. This Court disagreed, and citing *Stahn*, explained:

Stahn’s [complaint]. . .alleged that because [defendants] were charged with mismanagement of the corporation and either owned or controlled by proxy a majority of the corporation’s stock, the plaintiff was powerless to obtain redress within the corporation. The court held that such facts were sufficient to excuse the plaintiff from a prior pursuit of intracorporate action. . The [*Stahn*] Court attach[ed] importance to allegations of majority [control] and breach of trust, both of which factors are alleged in the present suit. . .In evaluating the ‘excuse’ allegations in a derivative suit, Courts have generally been lenient in excusing demand. . .

Grant, 266 S.C. at 374-76, 233 S.E.2d at 414-14 *citing Stahn*; *see also Stahn v. Mills*, 53 S.C. 519, 31 S.E. 48 (1898).

Like *Stahn*, *Grant’s* complaint alleged that the “bank’s Board was controlled by, and a majority of its shares were held by, the alleged wrongdoers”. *Grant*, 266 S.C. at 374 ,223 S.E.2d at 414. The same is true here – Petitioners alleged this Board was controlled by Developers; demands sent to the Board were relayed to the Developers; and, the Board failed to act despite demands made to both the HOA and Developers. (App. pp. 568; 570; 592-93).

The difference is that the *Grant* Court found the allegations of futility and wrong doing were sufficient. The *Grant* Court applied an abuse of discretion standard and adopted an approach that allows a court to consider the evidence. Reading *Patterson* and *Grant* in tandem, the reviewing Court should consider evidence of demand futility in addition to pleading allegations. The evidence presented at trial shows:

- [Developers] retained continuing control of the HOA up to and including the date they conveyed [the Commons] to Russo. (App. pp. 26; 100).
- [In 2009], Board President Kinney. . .expressed the HOA’s expectation that the Community Dock would be excluded from the sale to Russo. . .Russo advised Kinney that he was cancelling the purchase agreement, and subsequently, [Developers] advised Kinney that [they were] working out details for transferring ownership of the Community Dock to the HOA. (App. pp. 7; 93).

- [The Covenants] as well as the testimony. . .showed [Developers] had a veto power over the Board. (App. pp. 20-21; 100-01).
- [HOA Board Member], Bedell, explained that she was not a Board member when a decision on filing suit would have first presented itself to the Board. She added that even if such a decision had been an issue while she was on the Board, the Board members “would not have thought about filing a suit, because it would be so clear that it would be vetoed.” (App. p. 21, n. 9).
- [Developers] admit in 2014, [they] appointed a board member. (App. p. 26, n. 13).

F. The COA’s Futility Analysis is Inconsistent with its Prior Examinations of a Developers’ Control over HOAs.

The COA’s substituted futility analysis also warrants review because it is irreconcilable with the COA’s prior decision in *Magnolia North*. In *Magnolia North*, the COA found equitable tolling applied to the SOL applicable to an HOA’s claims against developers. As such, the HOA’s claim clock did not start to run until after the developer’s control over the HOA ended because the developers would not initiate litigation against themselves during this period. *See, e.g., Magnolia North*, 397 S.C. at 272, 725 S.E.2d at 125 (finding “unpersuasive Developers’ claim that an organization they controlled would have initiated an action against itself during [the developer control] period.”). Because our substantive law recognizes that a developer controlled HOA will not sue itself, it follows that any demand made upon a developer controlled HOA to sue itself is futile.

II. THE COA’S VERDICT REVERSAL FAILS TO CONSIDER THE HOA’S DIRECT CLAIMS AND THIS FAILURE RELATING TO THE NOVEL QUESTION OF THE EFFECT OF A REALIGNED CORPORATION ON RULE 23 REQUIREMENTS REQUIRES REVIEW

Contrary to its Original Opinion, the COA’s Substituted Opinion fails to acknowledge the HOA’s direct claims. The Circuit Court realigned the HOA as a plaintiff and the HOA adopted Walbeck’s and Adkins’ derivative claims. (App. pp. 452-53) (“[HOA is] deemed to have adopted

[Petitioners'] claims, and [Developers'] responses to [Petitioners'] Complaint should be deemed to serve as responses to the [HOA's] adopted claims.". The jury was charged accordingly. (App. pp. 2142:10-2144:12). The HOA was a plaintiff on the verdict form, and the jury returned a verdict for the HOA on its claims. (App. pp. 455; 2323-24). As a result, whether Petitioners derivative claims are properly pled is a moot point; the same claims were brought directly by the HOA; and, the jury found in the HOA's favor. (App. pp. 2323- 24). As the COA correctly concluded in its Original Opinion: "the HOA's realignment as a plaintiff allowed the jury to award damages to the HOA as if [a derivative action was] never brought." (App. p. 22).²⁶

III. THE COA'S REVERSAL OF THE FIDUCIARY DUTY VERDICT AND RULINGS RELATING THERETO ARE IN CONFLICT WITH THE POLICY OF THIS STATE OF PROTECTING HOMEOWNERS AND CONSUMERS AND THIS COURT'S DECISIONS IN *GODDARD* AND *DUNES WEST*.

The COA's two Opinions arguably employ two drastically different interpretations of Developers' fiduciary obligations under *Goddard*²⁷ and *Dunes West*²⁸. This Court should grant certiorari to decide if South Carolina will roll back legal protections and become pro-developer, or if South Carolina will continue its trend of protecting the citizens of our State.

²⁶ Other courts facing similar issues have concluded the same. In *Pikor*, for example, a shareholder of a New York corporation intervened in a derivative action the original plaintiffs lacked capacity to bring. The court held the shareholder's standing deficiency did not extinguish the corporation's direct claim because that claim belonged to the corporation:

The extinction of the status of [the] plaintiffs. . . in no way impaired or affected the corporation's [claims] or its right to continue and prosecute the action. In legal effect, it is as if the [original plaintiffs] had never appeared or instituted the action but as if the corporation alone was the plaintiff and alone had brought the suit.

Pikor v. Cinerama Prods. Corp, 25 F.R.D. 92 (S.D.N.Y. 1960). (emphasis added) (internal quotations and citations omitted).

²⁷ *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993).

²⁸ *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 562 S.E.2d 633 (2002).

A. The *Goddard* and *Dunes West* Principles

In *Dunes West*, this Court held developers responsible for conduct that fell below that required of the superior party in a fiduciary relationship. 349 S.C. at 256-59, 562 S.E.2d at 636-38. In doing so, this Court highlighted several fiduciary principles and representative developer conduct violative of those principles. *See, e.g., Goddard*, 310 S.C. at 415, 426 S.E.2d at 833 (recognizing a developer's acts, as a fiduciary, are to be carried out using "good judgment" and "utmost good faith", and referencing evidence that developer "seized the opportunity to 'unload'" deteriorated common areas on the HOA without funding); *Maercker Point Villas Condo. Ass'n v. Szymiski*, 275 Ill. App. 3d 481, 484, 655 N.E.2d 1192, 1193-94 (1995) (finding a fiduciary relationship between a developer and HOA, which gave rise to developer's duties to: (1) act with good faith and loyalty in managing the HOA, (2) act in the HOA's best interest, and (3) "not hinder or defeat the [HOA's ability] to continue the business for which it was developed"); *Orange Grove Terrace Owners Assn. v. Bryant Properties, Inc.*, 176 Cal. App. 3d 1217, 1223, 222 Cal. Rptr. 523 (Ct. App. 1986) ("a developer. . . may not make decisions for the [HOA] that benefit [its] own interest at the expense of the [HOA] and its members", and noting it was "readily foreseeable" that the HOA would be injured by developer's acts or omissions before the HOA assumed control of common areas).

B. These Principles Must Be Considered With a Fiduciary's Conduct

The COA acknowledged one of the *Goddard/Dunes West* principles, that a developer in control of an HOA may not make decisions that benefit Developers' interest at the expense of the HOA; but, ignored this principle. This error requires review for many reasons.

1. South Carolina Protects Citizens with Unequal Bargaining Power

The fiduciary principles adopted by this Court provide protection to HOAs and

Homeowners much like other common law protections this State recognizes in favor of consumers. See, e.g., *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989) (expanding traditional tort concepts to provide innocent home buyers with protection, and taking “judicial cognizance” of the inherent unequal bargaining positions of a modern homebuyer as against the seller – be it builder, developer, or the like);²⁹ *Wright v. Craft*, 372 S.C. 1, 26–29, 640 S.E.2d 486, 500-01 (Ct. App. 2006) (highlighting South Carolina precedent that a car dealer’s failure to accurately disclose a car’s history was a deceptive trade practice, and recognizing dealer’s provision of misleading information to consumers while knowing of its inaccuracy had the tendency to deceive); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 501-02, 473 S.E.2d 52, 53–54 (1996) (recognizing the tort of bad faith as an extension of South Carolina law in third-party liability claims, and noting insureds are entitled to know they “will be dealt with fairly and in good faith.”). It follows that application of these fundamental principles should serve a similar purpose here – aiding the party in the inferior bargaining position, the Homeowners, should a dispute arise. A shift in these, and like, protections should only result from this Court’s measured consideration.

2. *Our Courts Correctly Identify Good Faith as a Fiduciary Duty*

The oft-repeated adage from *Island Car Wash* provides what the party entrusted as a fiduciary is bound to do and what he is prohibited from doing:

[A] fiduciary relationship exists when one imposes 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.**

²⁹ Pre-*Kennedy* cases also aimed to protect consumers in what is likely their largest purchase: a home. See, e.g., *Roundtree Villas Ass’n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984) (holding where lender undertook to repair defects in houses to facilitate further sales, the lender could be held liable in tort for negligent repairs); *Terlinde v. Neely*, 275 S.C. 395, 398-99, 271 S.E.2d 768, 769-70 (1980) (holding a subsequent purchaser of a home may pursue a claim in contract or tort against a developer).

[I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests.

Island Car Wash v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (1987) citing 36A C.J.S. Fiduciary at 388 (1983); see also *Wogan v. Kunze*, 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005) *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008)

C. The Jury Heard Evidence of Developers' Failure Bad Faith and Were Properly Charged on Fiduciary Principles Without Objection

Here, there is evidence which showed Developers' breached their good faith duty such as:

- Developers agreed to allow Olde Park residents to use the Community Dock if Olde Park paid Developers but failed to inform the HOA of this material change (App. pp. 3385-91).
- Developers removed their obligation to convey these Commons from the Property Report without informing HOA purchasers such as Walbeck. (App. pp. 3331-33).
- Developers entered a 2005 Handover Agreement with the HOA that provided details on the transfer of these Commons to the HOA which the record shows Developers failed to adhere to. (App. pp. 2692-93).
- Developers subsequently failed to disclose to Homeowners a second, material change when they discussed how to "capitalize" on the "potential value" of the Community Dock but kept their ideas "quiet for now". (App. pp. 3341-47; 3396-98; 3408-10).
- Developers engaged in talks with Russo regarding the sale of the Commons, and even entered into a purchase contract with Russo in 2008, while simultaneously representing to the HOA they had "not sold or initiated the sale of the Creek Club". (App. pp. 3419-21).
- Developers reiterated they intended to transfer the Commons to the HOA all the while Developers resumed negotiating the sale of the Commons and reached a contract with Russo in June 2009. (App. pp. 2712; 3432-35; 3439). That contract acknowledged the existence of Homeowner claims about the Commons. (App. pp. 3189-3205).
- Despite the HOA's request to deed the Commons and many demands that these Commons be excluded from the sale, Developers sold the Commons, resulting in restrictions on use by the HOA, including repeated dock closures, increased traffic, drunken parties, and rowdy visitors on what was promised to be conveyed to the HOA.

(App. pp. 3331-33).

The jury concluded Developers violated their fiduciary obligations to the HOA. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418-19 (Ct. App. 2000) (“The jury’s verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision.”) (emphasis added). Further, the jury received a charge on the law which included the fiduciary principles recognized by our state – a charge which was unchallenged by Developers:

A developer ... owes fiduciary duties to the [HOA and [Homeowners]]. The developer’s fiduciary duties include the duties to hand over common elements ... in good condition, or with the funds to effectuate any needed repairs; and to act in the best interests of [Homeowners] while controlling the [HOA].

Whenever a fiduciary relationship exist[s] between two parties, and a transaction occurs between them, and the superior party obtains an advantage or a possible benefit, a presumption arises against the transaction’s validity, and shifts the burden of proving the good faith [of the] transaction upon the superior party.

Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. . . 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 ...

(App. p. 2165-67) (emphasis added).

D. The Novel Question of Whether Developers Who Promise to Convey Commons Have a Fiduciary Duty to so Convey Needs to be Answered

This Court should also grant certiorari to affirmatively answer the novel question of whether Developers breach the fiduciary duties they owe an HOA by failing to turnover Commons rightfully belonging to the HOA. This Court already determined developers are fiduciarily obligated to speak the truth. Inherent in developer’s obligation to speak the truth is their obligation to fulfill promises made or disclose promises broken. It follows, then, where the facts of a case, like here, show that developers repeatedly promised to convey Commons to an

HOA, developers are fiduciarily obligated to convey those Commons to the HOA (or to disclose to the HOA that there's been a change in plan so that the HOA can respond accordingly).

1. Cedar Cove is Not Controlling to any Fiduciary Analysis

The COA pointed to *Cedar Cove* to resolve whether a fiduciary duty to convey title to common areas exists in this case. (App. p. 92). Critically, there was no Developer involved in *Cedar Cove* and no fiduciary relationship between the parties, as there is here. 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2006). *Cedar Cove* concerned a dispute between a HOA and neighborhood resident regarding rights emanating solely from the covenants. 368 S.C. at 259, 628 S.E.2d at 286.³⁰ Here, the dispute does not emanate solely from the Covenants, nor was it pled or tried based on only the Covenants. It emanates from Developers' duties and conduct, including a decade of omissions and assurances made by the Developers to the Homeowners and HOA. The COA reliance on *Cedar Cove* is unfathomable.

2. The Court Misconstrued the Property Report

The COA further relied on a notification in the Property Report which does not apply to these Commons. Developers listed the Community Dock and Creekside Park in the Report's facilities chart, and expressly provided that the facilities listed in tis chart "**shall**" be conveyed to the HOA and "**will**" be available for use by HOA members and their guests:

Transfer of the Facilities

The recreational **facilities** listed **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

³⁰ The *Cedar Cove* complaint cited "no source to support its claim for relief [from the patio that encroached three feet onto the common areas] other than the [covenants]", and the HOA's charge of trespass "was pled and tried on the theory that the [resident] violated the [covenants]". *Id.* (emphasis added). As a result, the *Cedar Cove* Court stated: "resolution of this appeal ... turns ... on the application of largely undisputed facts to unambiguous [covenants]." *Id.*

the costs of ownership, operation, and maintenance of the facilities conveyed to it.

Who May Use the Facilities

The recreational facilities listed in the chart above will be available for use by [the HOA and Homeowners]. . .

(App. pp. 3518-19) (emphasis added).³¹

The COA relied upon a different “notification” provision³² which does not apply to the Commons listed in the chart. The second notification provision does not disturb the HOA and Homeowners’ rights to the Commons as granted by the Developers in the Report.³³

3. *The Substituted Opinion Fails to Recognize the Presumption of Unfairness and Burden-Shifting Set Forth in Wilson*

In *Wilson*, this Court recognized the burden rests with the superior party to prove its good faith when a fiduciary relationship exists. 117 S.C. 454, 112 S.E. 330, 331 (1920) (“[When] a fiduciary relation exists between two persons and a business transaction occurs between them, as a result of which the superior party obtains a possible benefit, equity raises a presumption against

³¹ Further contradicting *Cedar Cove*, the Covenants state HOA is to hold “title” to common areas:

§6-101 [Title to the Commons]: The [HOA] shall assume full responsibility for the control and maintenance of the Commons as conveyed to the [HOA] by the Founder unless contrary provisions are made through contract or in the instrument of conveyance. Upon a [majority] vote. . .the [HOA] may transfer title. . .of the Commons to another entity.

(App. p. 4140).

³² The purported “notification” language follows the Developers’ description of potential instances were private entities may own and operate “**additional** facilities **not** listed in the above chart”. (App. p. 3520) (emphasis added) (“[V]arious recreational facilities in [I’On] may be owned or operated by persons other than the [HOA]. There is no guarantee that any **such facilities** will be available for use. . .[S]uch facilities may be operated as a private club for members. . .There is no assurance you will be accepted for membership in any **such private club.** . .”).

³³ See *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (“Ambiguous language in a contract. . .should be construed liberally and interpreted strongly in favor of the non-drafting party..”); see also *Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) (“[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless. . .”).

its validity, throwing the burden upon him to prove his good faith.”). It was Developers’ burden to prove: (1) they acted in the HOA’s interests; (2) the sale of the Commons was fair; and, (3) they had a good faith reason to not convey the Commons to the HOA. Here, there is evidence of self-dealing and no evidence to rebut the presumption that Developers acted in bad faith. And, this burden shift was charged to the jury, without objection, making it the law of this case.³⁴ This Court needs to grant cert and clarify that Developers shown to be abusing their trust bear the burden of proof.

IV. THIS COURT SHOULD REVIEW WHETHER THE COA INVADED THE JURY’S PROVINCE BY WEIGHING SOL EVIDENCE; AND FURTHER FAILED TO PROPERLY DISTINGUISH AND APPLY ESTOPPEL, EQUITABLE TOLLING, AND *MAGNOLIA NORTH’S* ADVERSE DOMINATION.

The COA’s substituted SOL analysis requires review because it (a) weighs the competing evidence as to when all Petitioners discovered they had claims; and, (b) conflicts with recognized equitable principles.

A. The Evidence Infers Petitioners Had No Reason to Litigate Until 2009

These Commons were used and possessed by the HOA until sold by Developers in 2009. Developers never disclosed these Commons would not be conveyed. The jury agreed when it found Petitioners discovered their claims in 2009. Evidence supports this verdict:

1. 1998-2003

It is undisputed Developers promised to convey the Commons from 1998 on, and then negotiated the Olde Park deal which required a change to the plan that was implemented without disclosure to the HOA (then controlled by Developers). (App. pp. 3385-91). Developers never disclosed the amended, grand plan was a fraud because the perpetual “use” easement was limited

³⁴ See Section III(c), *supra*.

to thirty (30) years and was invalid anyway since the Grantor did not own the property. (App. pp. 3627-41). Rather, Developers continued to update their “Neighborhood Plans” to promote assurances included in pre-amended Property Reports such as “the parks” and “boat ramp” that could be “enjoyed by all”. (App. pp. 2769-75).

2. 2004-2007

Developers continued to verbalize this intention while concealing their true intentions within the 2004-2007-time frame:

First, the 2005 Handover Agreement between the Developers and the HOA formalized the process for handing over common areas to the HOA. (App. pp. 2692-93). This Agreement required Developers to notify the HOA when common areas were ready for turnover, conduct a formal review of these areas, and provide an “asset handover forecast” for the HOA’s budget. *Id.*

Developers never informed the Homeowners that the common areas referenced in this Agreement excluded these Commons. I’On Group also “updated” Developers’ marketing materials. These materials, such as the “Neighborhood Plans” continued to represent through at least 2008. (App. pp. 2604-07; 2678-81)

By 2006, Developers are discussing on how to “capitalize” on the “potential value” of the Commons and outlining their options in “selling community facilities,” all the while keeping their ideas “quiet for now”. (App. p. 3341). Not only do Developers fail to disclose their intention to keep, and later profit from, the sale of the Commons in the Board and HOA meetings happening around this time, they superficially maintain that it’s still their intention to give these Commons to the HOA. *See, e.g.*, (App. p. 1144:16-20) (Tom Graham admitting that a July 18, 2006 e-mail illustrated Developers’ intent to turn over the boat ramp); (App. pp. 3408-10) (Besenfelder indicating the “boat ramp” would eventually be conveyed as part of I’On’s Phase II turnover).

Next, in Summer 2007, Developers sent emails amongst themselves seeking clarification as to the HOA's rights "over the docks and boat ramp" and maintaining that the "conveyance of [the] Creek Club to the HOA should include the boat ramp, but exclude the dock, which we should keep [because] [w]e have not offered that dock and gazebo ..." (App. pp. 1152-54). Despite Developers' "idea to keep the dock", Developers' representative, Chad Besenfelder, eventually informs the HOA during a September 2007 meeting that "he would like to turn over the community docks" to the HOA. (App. p. 4025). At this meeting, the Board confronted Besenfelder about Developers failure to repair and turn over the Community Dock in good condition; and, in response, Besenfelder promised to "look into the needed repairs." (App. p. 3655).³⁵ Besenfelder did not disclose the Developers did not intend to convey the Community Dock to the HOA or that there was any debate concerning the HOA's rights to the Dock. Rather, he assured the HOA that "turn over" was in process and needed repairs would be investigated, letting the HOA believe that everything was okay. Even the COA acknowledged that "[t]hese [2007] assurances led the HOA's members to "repose[] a special confidence" in Developers, binding Developers to act in good faith and with due regard to the interest of the HOA's members." (App. p. 29) (emphasis added) (citation omitted). It follows that these same assurances delayed the "HOA's members" from filing suit because they "trusted" that Developers would act in their best interest.

3. 2008-2009

By August 2008, a contract was in place to sell the Commons; however, Developers

³⁵ See also *Dillon Cty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 219, 332 S.E.2d 555, 561 (Ct. App. 1985), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) ("One's assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that 'may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation.'") .

represented to the HOA and Homeowners that they had “not sold or initiated the sale of the Creek Club.” (App. pp. 2893-2902; 3419-21). Developers’ assurances continued through 2009 even though Developers were also continuing their efforts to sale the Commons. (App. pp. 2712-13; 3439) (Developers reiterating their intention to transfer the Commons to the HOA in March 2009) (App. pp. 2529-40) (Developers entering another purchase contract in June 2009).

On July 27, 2009, the HOA’s Board President called Developers to discuss a rumored sale (App. pp. 3402-03). Developer, Tom Graham, testified he received the call, but did not disclose the sale; instead, he told the Board President the Commons were undergoing a “management” change. (App. p. 3402). It was not until five days later, on August 1, 2009, the HOA learned the Commons were again under contract. (App. pp. 1196:16-20; 2560). On August 5, 2009, the Commons were officially sold. (App. pp. 1166:20-1167:11; 1174:10-1175:17; 1197:23-1199:25; 2541-50). This is the same date the jury decided Petitioners discovered their claims.

B. The COA Improperly Weighed Evidence

The COA found the only inference that can be drawn from ALL the foregoing evidence is that Walbeck should have found a needle in the haystack and discovered “that he had a claim” by late 2004 when he received one proposed budget with one ambiguous line item listing a cost paid for the “Creek Club Dock”. (App, pp. 13-14); (App. p. 106).³⁶ However, the totality of the evidence shows Developers implemented a decade-long, “hide the ball scheme” in which they told the Homeowners one thing, but secretly intended another. Even if Walbeck was able to deduce from the proposed budget that a “usage” fee was charged for the “Creek Club Dock”, Developers’ failure

³⁶ The COA originally found that “the HOA’s breach of fiduciary claim” was properly submitted to the jury. (App. p. 16) (finding “more than one reasonable inference exists” as to when Walbeck and Adkins should have known of Developers’ “failures and self-dealing”). In its Substituted Opinion, the Court declined “to reach the question of when the HOA’s breach of fiduciary claim accrued” because it wrongfully dismissed this claim on the merits. (App. p. 103).

to disclose that they were never going to convey the Community Dock or the Creekside Park, coupled with their repeated assurances that they were going to convey these Commons, induced a sense of complacency until November 2008. When that deal collapsed, Developers reiterated that transfer was in process; and, Petitioners did not learn otherwise until August 2009. *See* (App. p. 16) (“HOA’s members” learned of a new contract of sale for the Dock from an “I’On Community Bulletin” posted August 1, 2009).³⁷

C. Multiple Inferences Arose from the Evidence

The Property Report’s “upon completion of construction” language also results in multiple inferences as to when the Commons were to be conveyed. It is unclear as to whether turnover was to occur upon the completion of the Commons, Phase II, or I’On itself. (App. pp. 1424:24-1425:5) (Walbeck testifying that “upon completion of construction” meant either upon completion of the Commons or upon completion of I’On); *see also* (App. p. 1326:3-16) (Lea Ann Adkins similarly testified that there was confusion as to what the Property Report meant in terms of “upon completion of construction”); (App. p. 1586:14-25) (Developer, Vince Graham, testifying that there was confusion as to when construction of each I’On Phase was completed). The Community

³⁷ It is also 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. (App. p. 3821). The HOA’s proposed 2003 and 2004 budgets preceding the 2005 budget included a “dock maintenance” fee for this same amount; and, the 2005 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 (App. p. 3828)(2005 proposed budget describing 2004 proposed budget) with (App. p. 3797) (listing “dock maintenance” fee of \$4,044); *see also* (App. p. 3781) (2003 proposed budget listing \$4,044 dock maintenance fee). Construed properly in favor in Walbeck, the “usage” fee is a “maintenance” fee which 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. (App. pp. 3518-19). Further, the proposed budget mentions only the “Creek Club Dock”, not the “Creekside Park”, and also did not mention a “Creek Club Rental Fee” as suggested by Developers. (App. pp. 3828; 3837).

Dock and Creekside Park were among the Commons to be built in Phase II, a Phase which was not completed until several years after Walbeck received the proposed budget in 2004. (App. pp. 3981-82) (2005 meeting minutes wherein Developer-appointed Board member indicated to the HOA that Developers were in the process of “complet[ing] the turnover for phases 1-7” in 2006).

Further, it is unclear as to how Walbeck “should have known” the HOA did not own the Commons because there is conflicting evidence as to “what” made up the Commons. The primary reason this case was tried before a jury was because Developers “vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park”. (App. p. 4). Developers testified by the “Creekside Park” they meant a “Marshwalk” and by “Community Dock” they meant “Crabbing Docks”, all of which were conveyed to the HOA. (App. p. 1586:5-25). In other words, Developers affirmatively stated they fulfilled the representation made to Walbeck in his Property Report when they deeded the “Marshwalk” and these “crabbing docks” to the HOA. Walbeck did not know of an amended Property Report at this time.

D. Estoppel Precludes Developers from Relying on the SOL

This COA also erred in concluding equitable estoppel is “unavailing” to these claims.

1. Developers’ Assurances Estop Them from Relying on the SOL

The COA incorrectly determined that equitable estoppel was unavailing to Petitioners in part because the Court weighed evidence and made an unsupported determination that the 2005 Handover Agreement in which Developers affirmatively represented that these common areas and amenities would be conveyed to the HOA did not include the Commons! (App. pp. 2692-93). Contrary to the COA’s conclusion, it is clear from the September 2007 Board Meeting Minutes that these Commons were included in the “common areas” referenced by the Handover Agreement. (App. pp. 2692-93; 4025). These minutes indicate that, after Besenfelder told the HOA

“he would like to turn over the Community Dock”, HOA members responded that they had inspected the Dock and it needed repair – which is the exact “handover” process for “common areas” described by the Agreement. *Id.* Besenfelder confirmed the HOA’s belief that the Dock was a “common area” encompassed by Agreement by acknowledging he would “look into needed repairs” prior to turning over the Dock to the HOA. (App. p. 4025).

2. Developers’ Omissions Estop Them from Relying on the SOL

Equitable estoppel also applies because the evidence shows Developers failed to disclose facts material to the HOA’s and Homeowners’ claims between 2000 and 2009.³⁸ Developers never told Homeowners they changed their mind between 1998 and 2000 and no longer intended to provide the HOA the Commons promised in their Property Reports. (App. p. 1665) (Vince Graham agreeing the change from deeding the Commons to the HOA occurred between 1998 and 2000); (App. p. 1233) (Vince Graham indicating Walbeck should rely on his Property Report although Developers decided not to abide by it and failed to disclose this to Walbeck).

Developers never disclosed to these Homeowners in 2004-2007, that the Easement they unilaterally granted which allowed the Homeowners to use the Commons was “flawed” and “should be fixed”. (App. pp. 1681-82) (Vince Graham conceding the Easement is “flawed” and “should be fixed”); (App. p. 91) (“[Tom] Graham described this language as a mistake. . .”).

³⁸ Equitable estoppel does not only apply where a party can show he reasonably relied on the words or conduct of another. Rather, it also applies where, like here, Developers failed to disclose facts materials to Homeowner’s or HOA’s claims. *See, e.g., 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); *Metromont Materials Corp. v. Pennell*, 270 S.C. 9, 22, 239 S.E.2d 753, 760 (1977) (“[E]quity requires that if a party is silent when he should speak, or supine when he should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he failed to do so at the first proper and opportune moment.”) (citations and internal quotations omitted).

Developers never informed Homeowners that their plans for the Creekside Park and Community Dock “changed depending on the circumstances.” As Vince Graham testified:

I remember ... that we were going to have community docks. They were going to be made available to [I’On]. [A]t some point, we intended to deed them –at some point we intended on making them part of the I’On Club; at some point we intended to deed them again. Plans changed depending on the circumstances, depending on what the other parties wanted to and I don’t know [whether it was Developers’ plan to convey the Commons to the HOA] [b]ecause sometimes Chad would say things in his earnestness to try to keep a deal going without consulting me or my father ... [but these] two documents [in evidence] say that [is the plan].

(App. pp. 1700-04).

Developers also never informed these Homeowners that the property descriptions they provided were admittedly misleading:

Q: So, somebody, who is relying on [the Impact Assessment], to suggest the Creek Club was going to be at Creekside Park is misled?

A: Yeah, they would. . .be mistaken, and I think I have corrected that format [in the April 2009 e-mail from Vince Graham to Lee Adkins clarifying that Developers’ definition of the “Creekside Park” is the “Marshwalk”].

(App. pp. 2040-41)(emphasis added). Rather, Developers waited until trial to admit that depictions of a creekside park and community dock, such as those included in the Impact Assessment they drafted, were “misleading if relied upon;” and, they did not try to correct this misperception they created until 2009. (App. pp. 1574-75); (App. p. 2726) (Vince Graham explaining to Petitioners’ then-attorney in 2009 that the Creekside Park “is the +/- 2 mile linear park adjacent to the marshes of Hobcaw Creek” and the Community Dock is the “two Phase 2 [crabbing] docks conveyed to the [HOA] years ago.”); (App. pp. 2761-62) (Vince Graham explaining to Walbeck in 2009 that the Commons detailed in his Property Report are the “[Marshwalk] and two [crabbing] docks”).

Developers were the only persons who knew that they were going to sell these Commons instead of conveying it to the HOA. As the sole steward of information pertaining to the Commons, the real facts about the status of the Commons were exclusively within Developers’ knowledge.

Developers knew or should have known that the perpetual Easement was not perpetual and otherwise flawed; the Crabbing Docks were not the Community Dock; the Marshwalk was not the Creekside Park; and, the Community Dock and Creekside Park were not going to be conveyed to the HOA, but Developers “willfully, recklessly, or wantonly” concealed these facts. (App. p. 2321).

Developers had many opportune moments to disclose the truth to Walbeck between 2004 and 2007, including at any one of the several meetings he attended which Developers also attended during this time frame. (App. p. 3838; 3849; 3870) (Walbeck Sign-In from December 2005, 2006, and 2007 Meetings); *see also* (App. p. 1426:18-21) (Walbeck at trial confirming he attended the annual HOA meetings from 2004-2007); (App. pp. 3981-83) (December 2005 Meeting Minutes indicating Chad Besenfelder “who oversees the property owned by the [Developers]” was in attendance). Yet, Developers “kept things quiet” for their benefit at the expense of the HOA. (App. p. 1199) (Developers “ke[pt] the [sale] quiet because of all the brew ha ha. . .”).

E. Equity Requires the Tolling of the SOL as to the HOA’s Claims

The COA’s SOL analysis does not address the HOA’s claims³⁹ or the Circuit Court’s finding that any timing limitation applicable to these claims is tolled.⁴⁰ Under the equitable tolling doctrine, the HOA’s claims are not barred by the SOL because the HOA is a separate, legal entity created by the Developer that remained under the control of the Developer until 2014.

1. Equitable Tolling Applies to The HOA’s Direct Claims

³⁹ In its Substituted Opinion, the COA found that only Walbeck’s “derivative claims, other than breach of contract, were time-barred.” (App. p. 108).

⁴⁰ In its Order denying JNOV, the Circuit Court referenced both “estoppel” and “tolling” as independent grounds that defeated Developers’ SOL defense. (App. p. 478).

Our courts have found equitable tolling is justified in circumstances⁴¹ which mirror the circumstances here, e.g. (a) while a HOA and its members are controlled by a developer; (b) when a HOA and its members are prevented from commencing litigation because of events beyond their control; and, (c) where a HOA and its members cannot discover material, claim-related information.⁴² Importantly, South Carolina courts have invoked equitable tolling when confronted with any of these circumstances; and here, there is all three plus additional evidence of injustice:

a. The HOA was Controlled by the Developers

The evidence shows Developers controlled the HOA through at least 2014 due to their influence over the then-Board and I'On's Covenants that were intentionally crafted by the Developers to give them unfettered power over the HOA and its affairs. The Covenants provide Developers' powers "extend until" all lots in I'On are sold, and these powers include:

- The power to conduct all activities requires to complete [I'On] which "the [HOA] shall not take any position of opposition [to] in a public setting, nor utilize any of its material or financial resources to oppose [Developers]. . ."
- The power to control any action against Developers because "the [HOA] shall make no amendments to the [Covenants] that materially affect the [Developers'] interest, nor shall [the HOA] adopt other measures that materially affect the [Developers'] without [Developers'] concurrence."
- The power to issue invalid easements which the HOA "shall not take action seeking to alter provisions of, nor to prevent establishment of. . ."

⁴¹ See, e.g. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115-16, 687 S.E.2d 29, 33 (2009) ("[C]ourts [invoke] equitable tolling. . .to ensure fundamental practicality and fairness.") emphasis added); *Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) ("Unlike equitable estoppel, equitable tolling does not require a showing that the defendant had made a representation to the plaintiff.") (emphasis added).
⁴² *Hooper*, 386 S.C. at 115-16, 687 S.E.2d at 33 citing *Abbott v. State*, 979 P.2d 994, 998 (Alaska 1999) (federal courts equitably toll the SOL in three circumstances: (1) where plaintiff has pursued remedies by filing a timely but defective pleading; (2) where circumstances outside plaintiff's control make it impossible for plaintiff to timely assert claims; or, (3) where plaintiff could not have discovered essential information bearing on his claim); *Magnolia North*, 329 at 371-72, 725 S.E.2d at 125 (tolling an HOA's SOL until after developer's control over HOA ended).

- The power, and “full authority”, to “appoint, remove and replace” Board members until 75% of all lots are sold, twenty years after the Covenants are recorded, or when, in Developers’ discretion, the Developers relinquish control.

(App. pp. 4143-44)(emphasis added). Developers exercised their power to remove and replace and Board members in 2012, and again, in 2014. (App. p. 1088:11-23) (Developers admitting they exercised their right to appoint and remove Board members in 2012); (App. p. 101) (acknowledging Developers appointed Board members as late as 2014). This control justifies extending the tolling period through 2014 when the HOA was realigned as a plaintiff. *Magnolia*, 397 S.C. at 272, 725 S.E.2d at 125 (“[T]he POA board consisted of Appellants’ officers until the date of ‘turnover’ . . . We find unpersuasive Appellants’ claim that a [POA] they controlled would have initiated an action against itself during this period.”). At minimum, the HOA’s claims were equitably tolled until at least 2009 because there is no question Developers “retained continuing control of the HOA up to and including the day they [sold the Commons]”. (App. p. 97); *see also* (App. p. 25) (“[Developers controlled] the HOA throughout the years preceding [the sale].

b. The HOA Could Not Bring Claims Due to Developers’ Veto

Second, it was impossible for the HOA to sue Developers due to the Developers’ “Supreme Court-like” veto power which still existed at trial. (App. p. 1544:4-10) (Developers conceding their veto power). Thus, the HOA’s direct claim clock could not begin to run prior to when this lawsuit was filed; and, as such, all the HOA’s direct claims are timely.

c. The HOA Was Misled from Day One

The evidence shows Developers misled the HOA for over a decade. *See* Section III(A), above. For years, Developers “kept quiet” and, when “concerns were raised”, Developers lulled the HOA into a complacency through promises that the Commons were “in the process” of being turned over, a promise Developers reiterated on the very day they negotiated the sale of the

Commons. *See, e.g.*, (App. pp. 2692-93; 2708-09; 2712-13; 2880-2924; 3328; 3341-47; 3396-3406; 3408-18; 3425-26; 3432-63; 4064-67) (Developers' repeated promises to convey the Commons while also negotiating the sale of the Commons); *see also* (App. p. 199) (Developers deciding to "keep the transaction quiet because of all the brew ha ha and filings.").

Equitable tolling is intended to prevent this type of misconduct by defendants that makes it unfair for those defendants to hide behind the SOL defense and employ it as a weapon to defeat legitimate claims. The evidence of Developers' control, manipulation, misrepresentations, obstruction, and "willfulness, recklessness, or wantonness," coupled with the unfairness to I'On which stands to lose all relief, justifies the application of equitable tolling here. (App. p. 2321).

2. This Court Should Recognize Adverse Domination

This Court should also grant certiorari to announce its adoption of the "adverse domination" doctrine. *Magnolia, Goddard, and Dunes West* support the application of this doctrine which is a form of our equitable tolling doctrine adopted by several other states⁴³ that tolls the SOL for claims by a corporation against its directors or nondirectors as long as the corporation is controlled by those acting against its interests. Under this doctrine, like *Magnolia*, the SOL is tolled because controlling wrongdoers "are unlikely to initiate actions or investigations for fear that such actions will reveal their own wrongdoing" and because, in such circumstances, outsiders do not generally have access to facts from which they could discover the wrongdoing. Thus, adverse domination is not necessarily dependent upon the "discovery" of a wrong—it is premised upon the appropriate parties being able to assert claims against the wrongdoers. It appears this doctrine has

⁴³ *See, e.g., Resolution Trust Corp. v. Gardner*, 798 F. Supp. 790, 795 (D.D.C.1992); *Shields v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 153 B.R. 677, 683 (E.D. Pa.1993); *Wilson v. Paine*, 288 S.W.3d 284, 288–89 (Ky. 2009); *NCP Lit. Trust v. KPMG*, , 945 A.2d 132, 148 (NJ 2007); *Clark v. Milam*, 452 S.E.2d 714, 718-20 (W.Va. 1994).

been applied in South Carolina based on the COA's decision in *Magnolia*,⁴⁴ the doctrine is consistent with South Carolina law based on *Goddard's* and *Dunes West's* comparison of "developers" to "corporate promoters; and, as such, this Court should formally adopt this doctrine.

V. THIS COURT SHOULD REVIEW THE INCONSISTENT AMALGAMATION APPLICATION AS BETWEEN THE SUBSTITUTED OPINION, *PERTUIS*, AND THE FACTS OF THIS CASE.

This COA's amalgamation analysis requires review for many reasons, including to: (a) resolve inconsistencies in our courts' application of the single business enterprise theory; (b) address the novel question of whether its Developers' burden to prove their good faith in the amalgamation context; and, (c) confirm Developers induced any amalgamated verdict form error.⁴⁵

A. The COA Inconsistently Applies *Pertuis*

In *Pertuis*, this Court recognized a second prong that must be met before an amalgamation finding is warranted: there must be "evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." 423 S.C. 640, 654-655, 817 S.E.2d 273, 280 (2018).⁴⁶ Unfairness in this context is a "reference [to] the kinds of abuse. . .that [the corporate form] should not shield." *Id.* Evidence of "fraud, eva[ding] obligations, circumvention of statutes, monopolization, criminal conduct, and the like" satisfy the unfairness requirement. *Id.*

Since *Pertuis* was adopted, the COA applied it twice in different fashion. In *Stoneledge*, the COA confirmed the amalgamation of two corporations who operated together to develop and sale townhomes which they knew were defective. 425 S.C. 276, 297-99, 821 S.E.2d 509, 520-21

⁴⁴ On appeal, the HOA in *Magnolia* cited to "adverse domination" in their brief. 2010 WL 6432384 at *34 (S.C. App.) (Appellate Brief) and, *Magnolia's* holding stand for the same proposition.

⁴⁵ These points are discussed in detail in Petitioners' Petitions for Rehearing as well as the point that *Pertuis* should not apply retroactively.

⁴⁶ The COA correctly concluded that the first prong of *Pertuis'* test is satisfied here. (App. p. 112) ("[E]vidence shows [Developers'] operations are intertwined. . .").

(Ct. App. 2018), *reh'g denied* (Dec. 13, 2018). Because these developers operated together “to the detriment of the HOA members,” the COA found there was “evidence of self-dealing that resulted from a blending of business enterprises.” *Id.* at 297, 821 S.E.2d at 520.

The same evidence exists here; yet, the COA’s Substituted Opinion does not address it even though the COA originally acknowledged Developers’ bad faith and found that “the evidence shows [Developers’] common employees and principals acted in concert to profit at the expense of [the HOA].” (App. p. 31). There is no distinction between these Developers who worked together to profit at this HOA’s expense and the *Stoneledge* Developers who worked together to profit at that HOA’s expense.

B. There is More Evidence of Resulting Unfairness Here

There is ample evidence of Developers’ collective bad faith, evasiveness, and misconduct – all which “resulted in” harm to the HOA and Homeowners. For example, the evidence shows:⁴⁷

- In 1998 and 1999, Developers combined efforts to negotiate the Olde Park deal which restricted the HOA’s “sole” use of the Commons. This deal, negotiated by I’On Group, involved I’On Company obligating I’On Club to share the Commons with a different neighborhood (App. pp. 1274; 2811; 3385-91).
- In 2000, I’On Company, I’On Club, and by merger, I’On Group granted the Recreational Easement to the HOA through a three-company signature by one employee. This Easement is clear self-dealing that resulted in harm to the HOA because the Easement was limited in term and invalid. (App. pp. 1122:20-11:30:10; 3627-41).
- Between 2000 and 2002, Developers worked together to transfer the Commons among themselves so that they could carry out their secret plan to sell the Commons for their own profit. Developers never informed the HOA of these transfers. (App. p. 3642).
- Between 2005 and 2007, Developers represented through I’On Company’s manager on behalf of I’On Group that the Commons were going to be turned over but “for now” the Commons would be operated by I’On Club until certain details could be worked out. (App. pp. 2692-93; 4025).

⁴⁷ Additional evidence of unfairness resulting from Developers’ decade long scheme is described in more detail in Section C of Petitioners’ Petition for Rehearing of the Substituted Opinion.

- In March 2009, Besenfelder, for I'On Group, and Tom Graham, for I'On Company, told the HOA I'On Company would turnover the Commons to the HOA when, in fact, I'On Club owned the Commons and the principals of all three companies were working to sell the Commons. (App. pp. 2712; 3432-35; 3439).
- In June 2009, Developers collectively signed the contract selling the Commons knowing of the Homeowners' rights to the Commons.⁴⁸ In fact, Vince Graham signed for I'On Group, as manager of I'On Club. I'On Group is also the manager of I'On Company. (App. p. 2589).

The foregoing actions by Developers served a single purpose: to reduce the Homeowners' access and rights to the Commons to maximize Developers' personal gain. New buyers and existing Homeowners alike were continuously deceived by the Developers and are deprived of the open community vision and Commons they were sold. The record in this case warrants a finding that I'On Developers are liable under the new *Pertuis* amalgamation standard.

C. It Should be Developers' Burden to Prove Fairness, not the HOA's Burden to Prove Unfairness

Under *Wilson*, Developers bear the burden of proving the good faith behind their transactions because of the fiduciary relationship between Developers and an HOA. The same should be true in the amalgamation context – it should be Developers burden to prove that they acted in good faith because it is presumed that they acted in bad faith. This Court should grant certiorari to consider this unique scenario and avoid any potential conflict with existing law.

D. Developers Caused Any Prejudice Resulting from Their Request that the Circuit Court Rule on Amalgamation Pre-Verdict

This Court should grant certiorari to address the fact that Developers induced any error relating to the jury's amalgamated verdict by consenting to the Circuit Court deciding amalgamation before the verdict form was submitted to the jury. The COA missed this, and thus,

⁴⁸ This sales contract included a "disclosure" paragraph which stated: "[Developers disclosed] to Buyer that [Homeowners] have alleged certain rights and interests in the [Commons] in connection with a HUD Property Report prepared and issued by [I'On Company]." (App. p. 2586).

erred when it concluded that the Circuit Court's pre-verdict amalgamation ruling somehow prejudiced Developers. (App. p. 112). Petitioners proposed, and agreed to, a verdict form that had a finding as to each Developer. (App. p. 1916-7). However, Developers asked the Circuit Court to decide amalgamation in advance, and in lieu of, submitting amalgamation to the jury. (R. p. 1478-80). Developers knew the Circuit Court's decision could be favorable or unfavorable. If Developers were concerned about whether this decision would prejudice the jury, they should have expressed this concern to the Circuit Court – they did not. *See, e.g., Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002) (“[A] party should not be permitted to sit idly by while a verdict, erroneous in form, is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.”). Thus, Developers waived any argument that the jury's verdict was tainted because rendered post the amalgamation ruling Developers requested.

VI. THE EVIDENCE DESTROYED BY DEVELOPERS CREATES INFERENCES THAT SUPPORT THE CIRCUIT COURT'S JNOV DENIAL

The Substituted Opinion requires review because it conflicts with this Court's rule that a party is entitled to favorable presumptions about the contents of evidence destroyed by the other party. *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) (when a party destroys evidence an inference may be drawn that the evidence destroyed is adverse to that party). Here, Developers deleted over 50,000 files and folders while this case was pending, at least 117 of which expressly related to these Commons. (App. pp. 539-51).⁴⁹ This Court (and prior Courts) can reasonably infer that this destroyed evidence favors Petitioners; and, this inference dispositively decides this appeal because it automatically satisfies

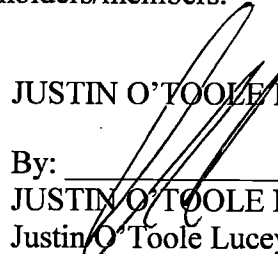
⁴⁹ The Circuit Court's Contempt Order for Destruction of Evidence provides more details about the likely value of the destroyed evidence and the result of its absence. (App. pp. 539-51).

the JNOV standard. In other words, a Court does not err in denying JNOV “when the evidence leads to more than one inference or its inferences are in doubt.” *Welch*, 342 S.C. 300, 536 S.E.2d 418. Here, the evidence destroyed by Developers creates its own adverse and casts “doubt on the inferences” that may be drawn from the evidence that was not destroyed. This necessitates that the Circuit Court’s JNOV Denial be affirmed in all respects.

CONCLUSION

This Court should grant Certiorari as to all questions presented and issues in this matter and weigh in on these very important issues that affect hundreds of thousands South Carolina homeowners,⁵⁰ victims, and corporate shareholders/members.

JUSTIN O’TOOLE LUCEY, P.A.

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July 11, 2019
Mount Pleasant, SC

⁵⁰ Petitioners believe this Court should take judicial notice that of South Carolina's estimated population of 5,084,127 residents, approximately 1,372,000 reside in planned communities and are HOA members. See Community Associations Institute, National and State Statistical Review for 2016 Community Association Data (2016), available online at <http://www.caionline.org> (last visited July 10, 2019); United States Census Bureau, Annual Estimates of Resident Population for the Unites States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018 (2018), available online at <http://www.census.gov> (last visited July 10, 2019)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

RECEIVED

JUL 11 2019

S.C. SUPREME COURT

Case No. 2010-CP-10-10490

Appellate Case No.: 2015-001590

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

Petitioners,

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

Respondents.

PROOF OF SERVICE

I, Justin O'Toole Lucey, hereby certify that on July 11, 2019 I served a copy of the *Petitioners' Petition for Writ of Certiorari* on the following counsel, via United States Mail, postage pre-paid, and addressed as follows:

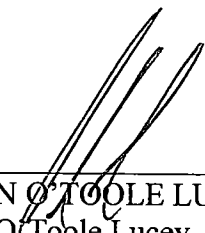
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July 11, 2019
Mt. Pleasant, South Carolina